ARE YOU HIGH?! DO CALIFORNIA EMPLOYEES HAVE A RIGHT TO USE MEDICAL MARIJUANA IN THE WORKPLACE?

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Although the California law on the right to obtain and use marijuana for medical purposes dates back to 1996, there are a growing number of persons who have recently obtained access to the drug for medical use. The National Organization for the Reform of Marijuana Laws (NORML) currently estimates the number of medical marijuana users in California at between 750,000 to 1,250,000 people, roughly 2 to 3 percent of the population. Moreover, MSNBC has reported that since President Obama took office and initially signaled that he would not use federal marijuana laws to override state laws as the Bush administration did, marijuana dispensaries in the states that allow medical marijuana (currently 16 states, plus the District of Columbia) have noted a sharp increase in demand of between 50 and 300 percent.

While some of this increase can be attributed to a tendency for existing users to "go medical", there can be little doubt that the view that marijuana offers a viable treatment option to expensive prescription medication is becoming more widely accepted. Indeed, in May of 2004, the Medical Board of California released a statement acknowledging that marijuana is "an emerging treatment modality", and stating that physicians who choose to recommend medical marijuana to their patients need only adhere to accepted medical standards in making such a recommendation. In so doing, the Medical Board of California all but encouraged physicians to consider recommending medical marijuana for treatment of a variety of ailments. Since that time, access to medical marijuana has become increasingly easy and the number of medical marijuana patients has proliferated. A brief visit to a medical marijuana dispensary typically results in prescription of medical marijuana for complaints ranging from pain to depression and nearly everything in between.

Does the increase in the number of medical marijuana patients mean that California employers should adapt accordingly, providing chips and other snacks to munch on following smoking/treatment breaks, while expecting employees to address each other as "dude"? Not quite. While the movement

to legalize marijuana continues to gain momentum, at least for the time being, California employers may continue to treat marijuana in a manner not merely consistent with the use of any prescribed medication, but that of any *illegal* narcotic.

The Compassionate Use Act of 1996 added Section 11362.5 to the California Health and Safety Code. The Act effectively decriminalized the use of marijuana under state law, insuring that "seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief" and specifically provides that neither patients who use marijuana for medical purposes on the recommendation of a physician, nor the recommending physician, shall be punished or subject to prosecution. In 2003, Senate Bill 420 was passed which amended the Compassionate Use Act to clarify that the Act does not require any accommodation of the use of medical marijuana on the property or premises of any place of employment or during the hours of employment.

The impact of the Compassionate Use Act of 1996 on the workplace was examined in 2008 by the California Supreme Court in the case of *Ross v. RagingWire Telecommunications, Inc.* Gary Ross was a former Air Force mechanic who severely injured his back in a fall from an airplane wing in 1983. He eventually received a prescription for medical marijuana from his physician to help manage the pain associated with his injury. Although Ross provided a doctor's note explaining that he was prescribed marijuana to alleviate back pains, his employer terminated him based on a positive test for marijuana.

The California Supreme Court held that the employer's decision to terminate Ross was not illegal, explaining that the Compassionate Use Act did not give marijuana the same status as any legal prescription drug. Indeed, no state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law. Nor did the Act attempt to address the respective rights and obligations of employers and employees in the workplace. Accordingly, the Act merely exempted medical users and their primary caregivers from criminal liability under specifically designated state statutes. Therefore, under California law, an employer may require post-offer, pre-employment drug tests, and take illegal drug use into consideration in making employment decisions.

The *Ross* Court further clarified that California's Fair Employment and Housing Act does not require employers to consider a reasonable accommodation in the context of the use of illegal drugs. The Court noted that an employer's legitimate interest in avoiding the "well documented problems" that are associated with the abuse of drugs and alcohol by employees, such as increased absenteeism, diminished productivity, greater health costs, increased safety problems, potential liability to third parties and more frequent turnover, were a sufficient basis for testing and the denial of employment to persons who test positive for illegal drugs. Further, the employer's legitimate concern about the use of illegal drugs outweighed a job applicant's state constitutional right to privacy.

While the holding in *Ross* is clear, employers should be aware that the laws relating to the use of medical marijuana are subject to change. Indeed, last November, California voters were presented with Proposition 19, the Regulate, Control & Tax Cannabis Act, which stated, in part, that no person could be punished, discriminated against or denied any right or privilege by lawfully engaging in the use of medical marijuana "provided, however, that the existing right of an employer to address consumption that actually impairs job performance by an employee shall not be affected". While proponents of the Act asserted that it maintained an employer's right to address the consumption of marijuana, opponents argued that the requirement that an employer determine if an employee was "actually impaired" would have created a level of ambiguity which would have resulted in litigation. Proposition 19 was defeated in the statewide election by a margin of 7%.

So what does this all mean for California employers? It means essentially that marijuana may be treated the same as any illegal drug. If a company has a zero tolerance drug use policy, and an applicant's pre-employment test comes back positive, the company can withdraw the conditional job offer even if the applicant reveals that they are a medical marijuana user. Further, a company policy may require employees to undergo a drug test following an on-the-job accident and the employees involved may not hide behind California's Compassionate Use Act in the event they test positive for medical marijuana. Finally, if any employee reveals that they have an impairment for which their doctor has prescribed the use of medical marijuana and requests additional break time so that he/she may medicate with marijuana, an employer is not required to grant this accommodation. So employers can put away the chips and dip, and go back to using first names in the workplace… for the time being.