

Seeing Through The Smoke: Marijuana's Increasing Impact On The Workplace

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Overview

- Federal and state laws
- Drug testing and implications of positive tests
- Duty to accommodate
 - Americans With Disabilities Act (“ADA”)
 - California Fair Employment and Housing Act (“FEHA”)
- Disciplining employees for medical marijuana use
 - Off-duty vs. on-the-job conduct

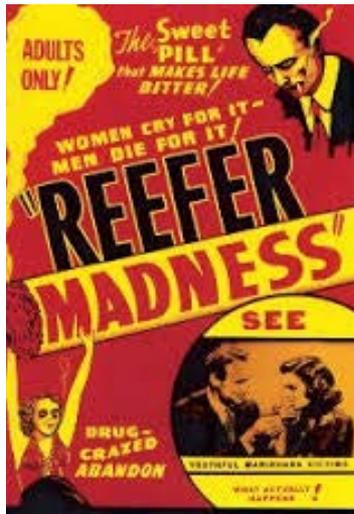


Why Marijuana Was Prohibited

- Marijuana originally prohibition began in Southern and Western states
- Prohibition intensified after the Mexican Revolution of 1910, when many Mexicans immigrated to the United States
- Harry J. Anslinger and the Federal Bureau of Narcotics
 - “If the hideous monster Frankenstein came face to face with the monster marihuana, he would drop dead of fright”

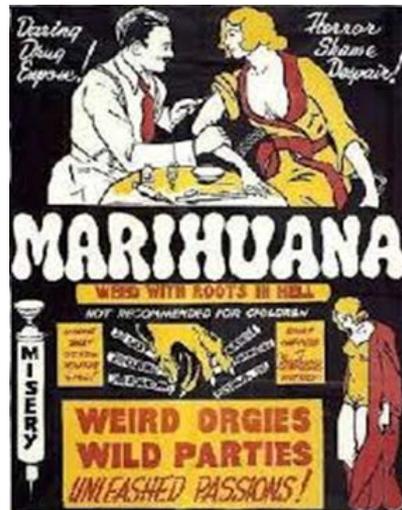
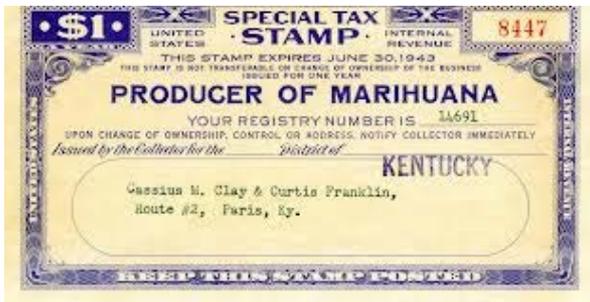
Reefer Madness

- Reefer Madness film (1936)
 - Portrayed the dangers of marijuana use
 - Used to support anti-marijuana message



Criminalization of Marijuana

- The Marihuana Tax Act of 1937
 - Required growers, buyers and users of marijuana to register and file certain reports
 - Imposed a \$100-an-ounce tax on the sale of marijuana
 - Included penalty and enforcement provisions
 - Effectively criminalized marijuana



Marijuana and Federal Law

- Controlled Substances Act, 21 U.S.C. §812(b)-(c) (1970) (“CSA”)



- *Gonzales v. Raich*, 545 U.S. 1 (2005)
 - Possession is illegal even for medical purposes
- Drug-Free Workplace Act of 1988, 41 U.S.C. §81
 - Applies to federal contractors and grant recipients
 - Use or possession prohibited
 - Requires good faith effort to maintain a drug-free workplace

Marijuana and Federal Law

- Department of Justice
 - 2009, 2011 and 2013 guidelines to federal prosecutors
 - Prevent distribution
 - Prevent revenue going to criminal enterprises
 - Prevent distribution to states where medical marijuana is still illegal
 - Prevent “drugged driving”
- “Cromnibus” spending bill passed in December 2014
 - Prohibits use of federal funds by the Department of Justice to interfere with state medical marijuana laws

Marijuana and Federal Law

- Department of Transportation
 - Rejects the Department of Justice's non-enforcement provisions
 - Issued notice regarding "recreational" marijuana
 - "We want to make it perfectly clear that the state initiatives will have no bearing on the Department of Transportation's regulated drug testing program."
- Drug Enforcement Administration
 - 2013 guidelines
 - Smoked marijuana is not medicine
 - Marijuana is dangerous to user and non-users



“You don’t need a weatherman
to know which way the wind
blows.”

Subterranean Homesick Blues (1965)

-Bob Dylan

Marijuana and State Law



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- Currently 23 states and the District of Columbia have passed different laws dealing with marijuana:
 - Decriminalization of medical use (i.e., California)
 - Recreational use (Alaska, California, Colorado, Oregon, Nevada and Washington)
 - Prohibition of employment discrimination for medical use (Arizona, Connecticut, Delaware, Illinois, Maine and Rhode Island)
- In May of 2015, Puerto Rico's governor signed an executive order legalizing medical marijuana

Marijuana and California

- Proposition 215, or the California Compassionate Use Act of 1996, Health and Safety Code §11362.5 (“CUA”)
 - Allows the use of medical marijuana for qualified patients
- California Marijuana Control, Legalization and Revenue Initiative (2016)
 - Proposed for California ballot on November 8, 2016
 - If passed would legalize recreational use for adults 21 and older



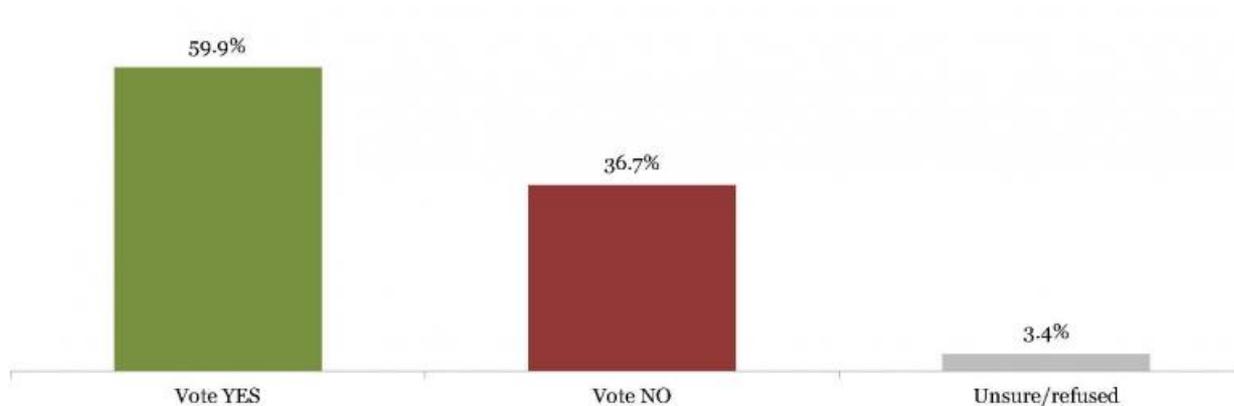
Marijuana and California

Poll conducted by Probolsky Research on February 24, 2016

CALIFORNIA VOTERS SUPPORT LEGALIZING RECREATIONAL MARIJUANA

Newport Beach, California - California's likely November, 2016 General Election voters demonstrate majority support for legalizing marijuana for recreational use in the state.

59.9% Would Vote YES, in Favor of Legalizing Marijuana for Recreational Use



Question: "On the November 2016 ballot you may see an initiative that would legalize marijuana for recreational use under California law and allow government to tax it, likely bringing in millions in new revenues for government programs. If the election was held today, would you vote Yes to approve or No to reject this initiative?"



As of November 9, 2016, it became legal for any adult 21 years or older to:

- Possess, transport, obtain or give away to other adults 21 or older no more than one ounce of marijuana or eight grams of concentrated cannabis
- Cultivate up to six plants per residence and possess the marijuana produced by these plants. All plants and harvest in excess of one ounce must be kept in a locked space not in public view at one's residence. Local governments may still forbid cultivation outdoors, but must allow it inside a private residence or accessory structure that is "fully enclosed and secure"



- Medical marijuana patients keep their existing rights under Prop. 215 to possess and cultivate as much as they need for personal medical use so long as they have a doctor's recommendation, regardless of the Prop. 64 limits for adult users
- The law only allows non-medical marijuana to be sold by state licensed businesses, and it gives the state until January 1, 2018 to begin issuing sales licenses for recreational retailers



Under Prop. 64, you may NOT:

- Consume marijuana in any public place (\$100 infraction)
- Smoke or vaporize marijuana in any non-smoking area or within 1,000 feet of a school, day care or youth center while children are present, except privately at a residence. (\$250 fine)
- Consume marijuana or possess an “open container” of marijuana while driving or riding as a passenger in any motor vehicle, boat, or airplane (\$250 fine)



- Possess or use marijuana on the grounds of a school, day care or youth center while children are present. (\$100 fine).
- Minors under 21 may not possess, use, transport, or cultivate marijuana, subject to a \$100 fine for those 18 and older. Minors under 18 are subject to drug counseling or community service.
- Possession of more than one ounce remains a misdemeanor punishable by \$500 and/or six months in jail as at present.

Prop. 64 and the Workplace



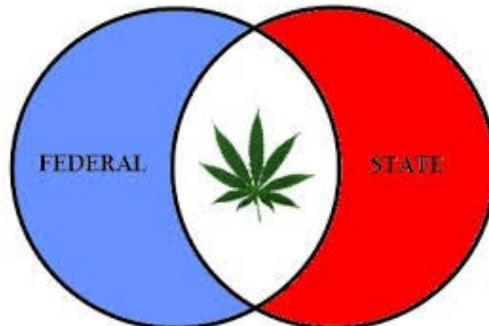
- The law provides that nothing in its language shall be construed or interpreted to:
 - Amend, repeal, affect, restrict, or preempt the rights and obligations of public and private employers to maintain a drug- and alcohol-free workplace;
 - Require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace; or
 - Affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law

Marijuana and State Law



Tension Between Federal and State Law

- CSA vs. state marijuana laws, like the CUA
- Definition of “illegal drug use” under state law vs. federal law
- Explicit prohibition on employment discrimination in state medical marijuana laws





Drug Testing



- Many employers maintain drug testing policies for job applicants and employees
 - Pre-employment “suspicionless” drug testing after a job offer is tendered
 - Reasonable suspicion drug testing during employment
 - Random drug testing during employment for safety sensitive positions only
- Concern arises when an applicant or employee tests positive based on legal use of medical marijuana
 - When is a person “under the influence”?
 - What if an employee has a disability?
- **Can an applicant be denied employment or an employee be terminated under California law for failing a drug test?**

Accommodation Under the ADA and FEHA

- Interactive process and reasonable accommodation
- Use of medical marijuana raises potential concerns
- Medical marijuana is intended to alleviate the symptoms of some underlying medical conditions or disabilities (i.e., glaucoma, cancer and AIDS).



Accommodation Under the ADA and FEHA

- Under the ADA, an individual who is “currently engaging” in illegal drug use is not protected
- Federal law still considers the use of marijuana illegal and the ADA authorizes the prohibition of illegal drug use in the workplace
- No need to accommodate if accommodation causes a direct threat to the health or safety of other employees in the workplace
- **Are employers in California required to accommodate medical marijuana use?**



State “Lawful Conduct” Rules

- Laws protecting lawful use of “consumable products”
 - Early laws focused on tobacco use (i.e., Kentucky)
- California Labor Code §96(k)
 - Covers claims for reinstatement and lost wages resulting from discipline or termination for lawful off-site, off-duty conduct
 - Does it apply to marijuana use off-site and off-duty?
- *Coats v. Dish Network*, 350 P.3d 849 (2015)
 - Employers in Colorado can lawfully terminate employees for off duty use of medical marijuana

Recent California Cases



- *Ross v. RagingWire Telecommunications*, 42 Cal. 4th 920 (2008)
 - The CUA does not apply to employment relationship
 - No duty to accommodate medical marijuana use, even at home and even if no impact on job duties or performance
 - No violation of California law for terminating employee who used medical marijuana
- *James v. City of Costa Mesa*, 684 F.3d 825 (9th Cir. 2012)
 - The ADA does not protect an employee using medical marijuana
 - “Individual with a disability” does not include an individual who is currently engaging in illegal drug use

Recent Non-California Cases



- *Coats v. Dish Network*, 350 P.3d 849 (2015)
 - The Lawful Activities Statute applies only to activities off the job and lawful under both Colorado and federal law
 - Because marijuana is illegal under federal law, its use is unlawful and can remain a valid basis for termination
- *Garcia v. Tractor Supply Company*, D. New Mexico (2015)
 - New Mexico's medical marijuana statute and the New Mexico Human Rights Act do not require employers to accommodate medical marijuana use



Take-Away Points For CA Employers

- Employers have the right to enforce employment-related drug testing
- No duty to accommodate use of medical marijuana, but there may be a duty to accommodate underlying disability or medical condition
- Employers can still prevent employees from working under the influence of medical marijuana
 - But what does “under the influence” mean?
- Have a clear policy that specifically prohibits use of medical marijuana while at work or working under the influence

Thank you.
Questions?

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