



Joint Commentary

September 22, 2010

The Adverse Effects in the Workplace of Possible Marijuana Legalization

When ballot measures addressing compassionate use of “medical marijuana” began appearing throughout the United States in the 1990’s, many conjectured that these measures would ultimately lead to political efforts to legalize the use and sale of marijuana. The initiative to legalize marijuana has come in California through the Regulate, Control and Tax Cannabis Act of 2010, also known as Proposition 19, which appears on California’s November ballot. The workplace repercussions of this initiative, if passed, while sure to be negative, have yet to be fully identified.

The following summarizes Proposition 19 and the position taken by the California Chamber of Commerce Board of Directors against it.¹

This proposed initiative would allow individuals 21 years or older to possess, cultivate, or transport marijuana for personal use. The measure would permit local governments to regulate marijuana and, proponents believe, to tax its commercial production and sale. If passed, this initiative would create a different, higher standard for employers to be able to discipline employees who use marijuana while at work than for those employees who use alcohol. Current law allows employers to discipline employees who are “under the influence” of drugs or alcohol.

This proposal would create a separate and higher standard for marijuana use to a level that requires the employer to prove that the employee is “actually impaired” from performing his or her job duties as a result of drug use. This change in the law would undercut the ability of California employers to enforce drug free workplaces... it would drive up costs, and significantly undermine the ability of employers to protect the safety of all employees in the workplace. If this measure were approved, employers, including the State of California, would be faced with the burden of proving that an employee who tests positive for marijuana is “actually impaired” from performing the job before taking any adverse action against the employee. This process would delay disciplinary actions used to protect workplace safety and drive up costs due to increased litigation.

[The Cannabis Act also] *threatens state and federal contracts and grants. If passed, this initiative could result in employers losing public contracts and grants because they could no longer effectively enforce the drug-free workplace requirements outlined by the federal government.*

“This initiative has dangerous implications and puts the safety of workers in jeopardy,” said Allan Zaremborg, President and CEO of the California Chamber of Commerce. “If this measure passes, California’s employers would not only face higher costs but they would be put in the difficult position of having to protect the rights of some employees while allowing other employees to be put in harm’s way.”

We applaud the response to Proposition 19 from the California Chamber of Commerce. The following commentary supports the Chamber’s position to Proposition 19 and calls for employers to take an active stance against the marijuana legalization initiative for the health and safety of their employees and the public.

Many employers currently conduct drug tests of their employees including random, scheduled, and pre-employment tests. The Omnibus Transportation Employee Testing Act of 1991 mandates drug and alcohol testing of federal employees in safety-sensitive transportation industry positions. The United States Department of Transportation (DOT) regulates this testing of about 10 million people using a zero tolerance *per se* standard, where the detection of an illegal drug (marijuana, cocaine, phencyclidine (PCP), amphetamine/methamphetamine, opiates) is a violation. On October 1, 2010 the DOT will add testing for MDMA (Ecstasy) to this limited drug test panel. These tests, which include marijuana, are important to protect American workers and the public.

While the federal employee drug testing programs are cut and dry, and exclude medical marijuana as a legitimate excuse for a positive test result, medical marijuana laws are causing significant problems for private employers who conduct drug testing. Marijuana, though legal for “medicinal” uses in 14 states and the District of Columbia, remains a Schedule I illegal drug. Legalizing marijuana in California will only add to the growing problems surrounding employee drug testing.

Currently, employers in “medical marijuana” states are being forced to defend their drug testing policies which contain language stating that a test result reporting the presence of a prohibited drug’s metabolite will result in disciplinary action. Private employers must set and hold strong to their own standards for their unregulated drug testing. We recommend the zero-tolerance standard be used by employers to protect both their employees and the public. In addition, many employers in medical marijuana states have included policy language stating the following: “Under no circumstances will a physician’s statement authorizing the compassionate use of marijuana be accepted as a valid medical explanation for a positive test result for marijuana.” If Proposition 19 is passed in California, employers will have to again adjust policy language to handle marijuana used recreationally by employees.

When considering an employment or continuation of employment decision based on a positive drug test, private employers, much like federal employers, generally do not make the distinction of impairment, i.e., the ability to perform job functions safely but rather is the prohibited substance per company policy present in the test result. As the California Chamber of Commerce accurately points out, Proposition 19, if passed, would require employers to prove impairment, placing an unnecessary burden on employers.

It is a violation of federal regulations for driving a truck, bus, train, operating a fuel pipeline, commercial watercraft or flying an airplane for a test result of marijuana exceeding 50 g/mL, the

federally recognized level for marijuana detection in urine tests. However, unlike studies performed for alcohol where impairment has been fairly defined and accepted based on Blood Alcohol Concentration (BAC) (i.e., .02 g/dL BAC equals the onset of impairment to .08 g/dL BAC equals intoxication associated with impaired driving skills), there are no similar testing levels for marijuana or other illegal drugs. The effects of drugs are variable among individuals and over the course of drug use.

Generally speaking, if an employer has a zero tolerance policy for illegal drugs, including marijuana, the employee who tests positive for drugs is terminated or the applicant is not hired. Some employers allow for Employee Assistance Program (EAP) intervention and when the program recommended by the EAP is completed in accordance with federal or company guidelines and following a passed return to duty drug test, the employee is allowed to return to duty and be placed on a follow-up drug testing program. This system is efficient and provides employers with the support needed to provide safe working environments.

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ⁱ CalChamber. (2010, June 3). CalChamber takes positions on initiatives: Regulate, Control and Tax Cannabis Act of 2010 – Oppose. Retrieved September 8, 2010 from <http://www.calchamber.com/Headlines/Pages/CCCTakesPositionsonInitiatives.aspx>