

# Up In Smoke? What Marijuana Legalization Means for You

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# ***THE FUTURE IS HAZY***



# Potential Employer Issues:



- Can we still refuse to hire marijuana users?
- Can we fire if we discover marijuana is being used by a current employee outside of work?
  - Does it make a difference if it is off duty use?
  - What about safety sensitive positions?
  - Or post-accident drug testing?
  - DOT Motor Carrier Regulations?

# Potential Employer Issues:



- Do we need to change our drug free workplace policy?
- How do the marijuana laws impact my government contracts?
- Do we have a duty to accommodate medical marijuana?
- What can we expect the Trump Administration to do about marijuana?

# Agenda:

- History of the Law
- Status of the Law
- Drug Free Workplace Laws
- Anti-Discrimination Provisions in State Medical Marijuana Laws
- Disability Accommodation
- Recreational Marijuana Use
- Drug Testing
- Recommendations

# A Look Back in Time...

**1970:** The Controlled Substance Act places “Marijuana” as a Schedule 1 controlled substance which is illegal without any exceptions. 21 U.S.C. § 812(b)

**1996:** California voters approve Prop 215, The Compassionate Use Act, legalizing the use of medicinal marijuana. (Health & Safety Code § 11362.5)



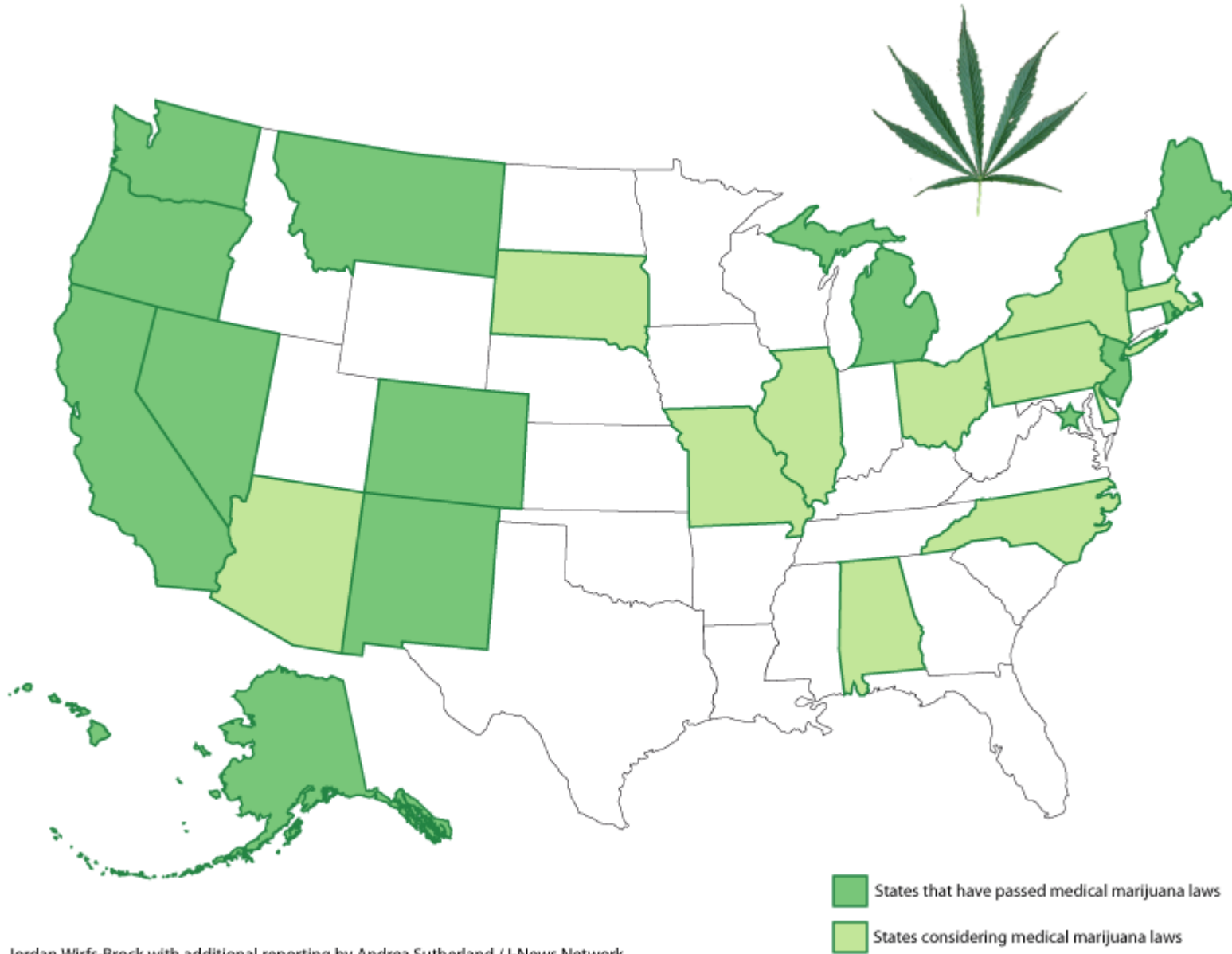


# A Look Back in Time...

**Compassionate Use Act:** Protects patients and primary care givers from prosecution for the possession or cultivation of cannabis for personal medical purposes with the approval of a physician.

**2003:** California Legislature enacts Senate Bill **420**, The Medical Marijuana Program Act.

- Establishes voluntary identification card program for qualified medical cannabis patients and caregivers.
- Provides immunity to qualified patients and holders of cards from criminal prosecution for cultivation.



# Status of the Law

Jordan Wirfs-Brock with additional reporting by Andrea Sutherland / I-News Network



# Status of the Law – the States:

- Legal Recreational Marijuana – 8 + the District of Columbia
- Legal Medicinal Marijuana – 28 states
- Legal CBD for Medical Use – 44 states
- 65 million Americans live in states allowing some form of marijuana use
- \$6.7 billion dollar industry, with \$21.8 billion projected by 2020
- 758,607 medical marijuana patients are registered in CA, but registration is voluntary so this is a low-end estimate.

# Status of the Law – the Starting Point

**Employers may require a drug free workplace!**



# Status of the Law – the Current Legal Landscape

## **Federal Law:**

- Controlled Substances Act
- Drug-Free Workplace Act
- Occupational Safety and Health Act
- DOT Regulations

## **California Law:**

- Compassionate Use Act
- Medical Marijuana Program Act
- Adult Use of Marijuana Act
- *\*AB 2069*

# Status of the Law - Federal

Still a Schedule I illegal drug under the federal Controlled Substances Act, which means according to the Feds:

- (1) high potential for abuse,
- (2) no currently accepted medical use in treatment in the US,
- and
- (3) lack of accepted safety for use of it.



# Status of the Law

## - FEDERAL



- August 2013 – DOJ issues the Cole Memo (former Attorney General James Cole) - “US Attorneys, don’t go out of your way to prosecute marijuana cases”
- Instead, focus their efforts on several priorities, including:
  - Prevent distribution of marijuana to minors;
  - Prevent marijuana revenue from funding criminal enterprises, gangs or cartels;
  - Prevent marijuana from moving out of states where it is legal.

# Status of the Law - Federal

- August 2016 – DEA refuses to de-schedule marijuana from Class 1 to Class 2 or Class 3, but broader research is allowed.
  - Class 1 - Heroin
  - Class 2 - Cocaine





# Status of the Law - Federal

- Safety standards imposed by federal agencies, including the Department of Transportation, do not permit the use of medical marijuana by regulated employees, such as those in safety-sensitive positions.





# Status of the Law - Federal



## Drug-Free Workplace Act

- Applies to certain federal contractors and all federal grantees.
- To maintain eligibility for federal contracts or grants, employers must certify that they will meet specified requirements to ensure a workplace free of illegal drugs.
- Establish a drug-free awareness program.
- Require employees to report criminal convictions for drug-related offenses in the workplace within 5 days of conviction.
- Failure to comply can jeopardize contract or grant.

# Status of the Law - Federal

- This means that, under federal law, employer drug testing programs can rest on the premise that marijuana use is unlawful, and may insist on a drug-free workplace.



# Status of the Law - Federal

- Decriminalization of medical marijuana has not altered this premise.
- More than half of the 24 existing medical marijuana laws explicitly prohibit marijuana use at work and/or provide that employers need not accommodate any form of marijuana use in the workplace.



# Status of the Law - Federal

- As a result, federal appellate courts for the 6<sup>th</sup> and 9<sup>th</sup> Circuits have held that medical marijuana laws do not require employers to accommodate medical marijuana use in the workplace.



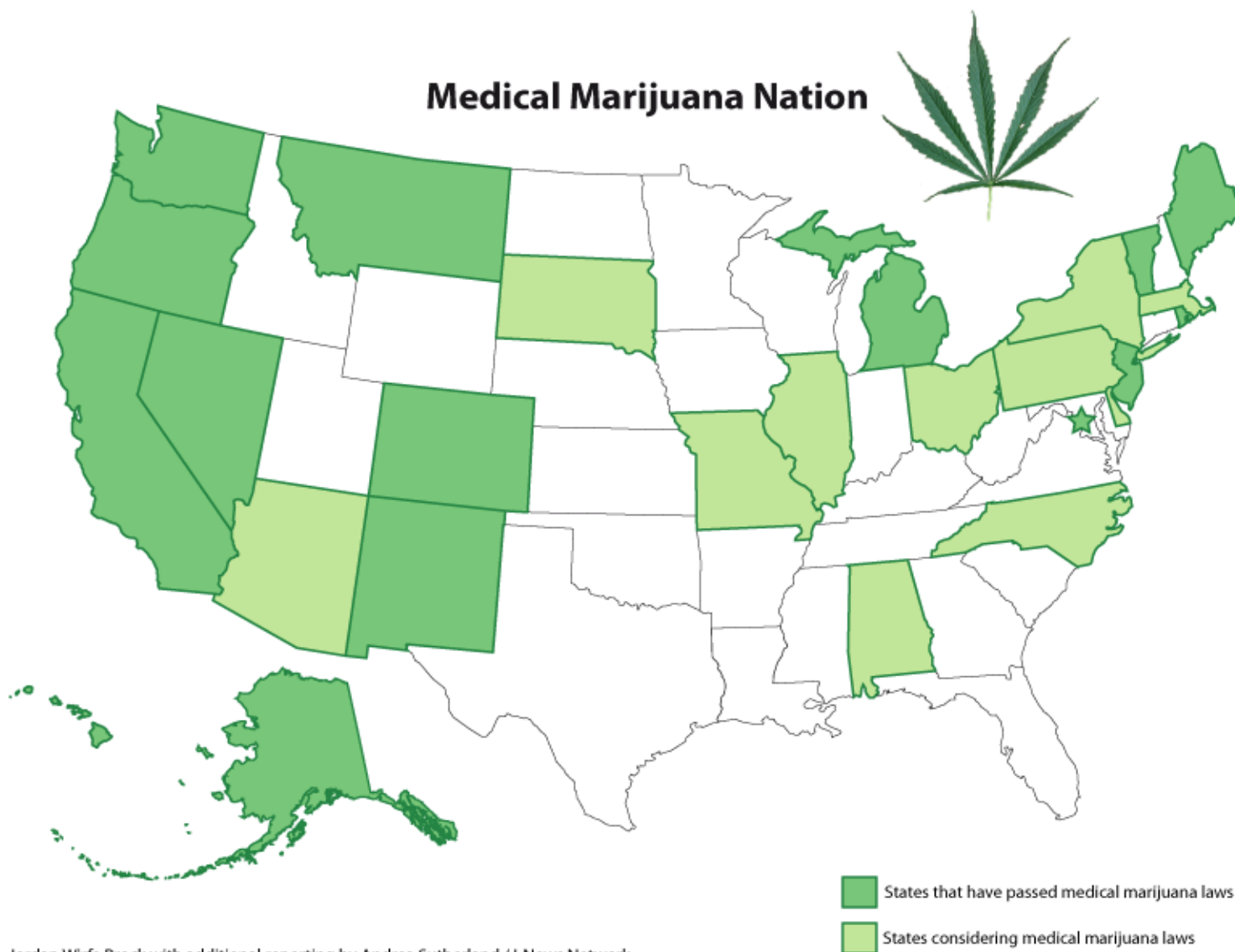
# But ...

What about state marijuana laws?

State antidiscrimination laws?

State accommodation laws?

# State Antidiscrimination Laws



Jordan Wirfs-Brock with additional reporting by Andrea Sutherland / I-News Network

# State Antidiscrimination Laws

Medical marijuana laws for the following 8 states contain anti-discrimination or reasonable accommodation provisions addressed at employers:

1. Arizona (addresses workplace drug testing)
2. Connecticut
3. Delaware (addresses workplace drug testing)
4. Illinois
5. Maine
6. Nevada
7. New York
8. Minnesota (addresses workplace drug testing)

*\*No California...yet...*



# State Antidiscrimination Laws

**None of these laws requires employers to tolerate on-duty drug use.**

**None of these laws prohibit workplace drug testing.**

**But some raise questions about the validity of adverse employment actions based on positive drug tests.**

# State Antidiscrimination Laws



# State Antidiscrimination Laws - California

Many medical marijuana states still allow employers to “discriminate” against medical marijuana users, including California.

**But ...**

**are we getting closer to a  
California antidiscrimination  
statute?**

# State Antidiscrimination Laws - California

***Ross v. Ragingwire*** – California Supreme Court ruled that the law does not protect patients from firing for testing positive for metabolites. **But, it noted that the legislature could enact such protections.**

# State Antidiscrimination Laws - California

**In 2015, Governor Brown signed into law a bill to prevent organ transplants from being denied based solely on a person's status as a medical marijuana patient or a patient's positive test for medical marijuana, "except to the extent that the qualified patient's use of medical marijuana has been found by a physician and surgeon, following a case-by-case evaluation of the potential recipient, to be medically significant to the provision of the anatomical gift."**

# State Antidiscrimination Laws - California

**CA Health & Safety Code section 11362.785(a) provides “Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment...”**

# State Antidiscrimination Laws - California

**Assemblymember Rob Bonta (D-Oakland) has introduced AB 2069, which prohibits employers from discriminating against workers on the basis of their status as a medical cannabis patient or on the basis of a patient's positive drug test for cannabis.**

**AB 2069 provides worker protections to patients using cannabis outside of the workplace and not during work hours. This bill exempts employers whose workers are in safety-sensitive positions that are subject to federal drug-testing mandates.**

**This law would add status as, or positive drug test for cannabis, as protected category under FEHA!**



# Accommodating Disabilities



# Accommodating Medical Marijuana:

- I have a prescription!
- Employers are generally not required to accommodate an employee's need to use medical marijuana.



# Accommodating Medical Marijuana:

- *Ross v. Ragingwire Telecom, Inc. (2008)*
- *Shepherd v. Kohl's Dep't Stores, Inc. (2016)*
- *Wilson v. California Dept. of Corrections and Rehab. (2012)*



## How are states handling whether or not to accommodate medical marijuana usage as it relates to an underlying disability?

### *Ross v. Ragingwire*

- Plaintiff suffered from strain and muscle spasms in his back. He began using marijuana on his doctor's recommendation pursuant to the Compassionate Use Act.
- Defendant offered Plaintiff a lead systems administrator job, but required a drug test. He tested positive for THC. Plaintiff gave Defendant a copy of his doctor's recommendations.
- Plaintiff was ultimately fired for his marijuana use.

## How are states handling whether or not to accommodate medical marijuana usage as it relates to an underlying disability?

### ***Ross v. Ragingwire* - holding**

- FEHA did not require employer to accommodate employee who used medical marijuana because it does not require accommodation of “illegal drugs.” (focused on it being illegal federally)

## How are states handling whether or not to accommodate medical marijuana usage as it relates to an underlying disability?

### *Shepherd v. Kohl's*

- Plaintiff hired as a material handler at distribution center. Later diagnosed with anxiety and received recommendation for medical marijuana. Plaintiff did not disclose.
- Plaintiff strained his back at work. He signed a consent form to be drug tested, and tested positive for marijuana.
- Plaintiff met with HR and was suspended, then terminated.

## How are states handling whether or not to accommodate medical marijuana usage as it relates to an underlying disability?

### *Shepherd v. Kohl's* – holding

- Plaintiff was fired for testing positive, not for his anxiety
- “Defendant cannot be compelled to accommodate plaintiff’s medical marijuana use”
- Not a FEHA violation to terminate an employee based on their use of medical marijuana



## How are states handling whether or not to accommodate medical marijuana usage as it relates to an underlying disability?

### ***Wilson v. California Department of Corrections and Rehabilitation***

- Plaintiff was a correctional officer who tested positive for marijuana in a random drug test. She was terminated. She claims she used marijuana at the recommendation of her doctor to treat her asthma.

## How are states handling whether or not to accommodate medical marijuana usage as it relates to an underlying disability?

### ***Wilson v. California Department of Corrections and Rehabilitation*** – holding

- Not super helpful – administrative law case (plaintiff found to not have willfully violated drug policy), and unpublished/nonciteable

## How are states handling whether or not to accommodate medical marijuana usage as it relates to an underlying disability?

***New York*** – a “certified patient” under New York’s medical marijuana law is deemed to have a disability and employers must reasonably accommodate the underlying disability associated with the legal marijuana use. N.Y. Pub. Health Law § 3369.

***Nevada*** – requires employers to reasonably accommodate the medical needs of an employee who uses medical marijuana, provided that such accommodation would not pose a threat of harm or danger to persons or property, impose an undue hardship, or prohibit the employee from fulfilling his job responsibilities.

## How are states handling whether or not to accommodate medical marijuana usage as it relates to an underlying disability?

***Rhode Island*** - “No employer may refuse to employ or penalize, a person ***solely for being a cardholder***” R.I. GEN. LAWS § 21-28.6-4(c)

*Current Case: Graduate student* represented by the ACLU suing company for not being hired for paid internship after disclosing medical marijuana use in job interview.

## How are states handling whether or not to accommodate medical marijuana usage as it relates to an underlying disability?

### ***Barbuto v. Advantage Sales & Marketing, LLC* (Mass. July 17, 2017)**

Court held that a California sales and marketing firm discriminated against an employee of its Massachusetts operation who used marijuana to treat Crohn's disease when it fired her for failing a drug test.

"Employers can't use blanket anti-marijuana policies to dismiss workers whose doctors have prescribed the drug to treat their illnesses."

An employer may still refuse to accommodate if use "would cause an undue hardship."

# Recreational Use



– Proposition 64 –  
Adult Use of Marijuana  
Act

# Proposition 64 – In a Nutshell:

- Approved by voters on November 8, 2016.
- Allows adults age 21 or older to smoke or ingest marijuana for recreational use.
- Enables adults to possess, process, transport, purchase or give away to other adults up to 28.5 grams of marijuana.
- Permits adults to grow up to 6 living plants for personal use.
- Imposes various taxation, licensing requirements and regulations pertaining to the commercial growth and sale of marijuana, which will commence in 2018.

# Proposition 64 – In a Nutshell:

- Cities and counties can completely ban personal medical marijuana cultivation activities in outdoor areas
- Cities and counties are precluded from completely prohibiting cultivation inside a private residence.
- City of El Monte Example
  - Prohibited outdoor personal adult non-medical marijuana cultivation; and
  - Established regulations and a permitting process for indoor personal non-medical cultivation.



# Proposition 64 – In a Nutshell:

Under Prop 64, individuals 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).
- **Possess more than one ounce** - misdemeanor, punishable by \$500 and/or six months in jail as at present.

# Proposition 64 – In a Nutshell:

Under Prop 64, individuals may **NOT**:

- **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 school grounds, day care or youth center while children are present (\$100 fine).**

**So, what does  
all of this  
mean for  
employers?**



# Proposition 64 – For Employers:

- Employers still entitled to enact and enforce policies related to marijuana. You do not need to tolerate marijuana use.
- Prop 64 expressly states, that the statute does not:
  - Affect/restrict employers rights to maintain a drug and alcohol free workplace;
  - Require employers to permit or accommodate marijuana use/consumption/possession in the workplace; or
  - Affect the ability of employers to have policies prohibiting use by employees and applicants, or prevent employers from complying with state or federal law.

# The Simple Answer:



1. Marijuana is still federally an illegal drug
2. Employers can still enforce drug policies and drug test employees;
3. So far, courts have not treated marijuana the same as traditional prescription drugs (although it is anticipated that courts may go this route); and,
4. So far, employers do not need to accommodate marijuana.



Courts Agree!

# The Courts:

***Several courts have held that employers may prohibit marijuana use in their workforces:***

- In 2008, **California's** highest Court found the state's medical marijuana law only protects individuals from criminal prosecution, ruling in favor of an employer who refused to hire an injured vet using marijuana to treat chronic back pain after he failed his pre-employment drug test.
- However, it said the legislature could enact such protections.

*Ross v. RagingWire Telecommunications, Inc.*, 42 Cal.4th 920

# The Courts:



- In 2010, the [Oregon](#) Supreme Court ruled that medical marijuana's status as an illegal drug under federal law means that no employer should be forced to accommodate its use.
- In 2011, the [Washington](#) Supreme Court decided that employers need not accommodate an employee's use of medical marijuana, and that employees terminated for medical marijuana use – even offsite use – have no basis to sue their employers.



# The Courts:



- In 2012, the [Montana](#) Supreme Court ruled that medical marijuana users and providers have no special right to their employment, despite the state's new law.
- This was followed by a unanimous 2015 [Colorado](#) Supreme Court decision holding that employers were still free to prohibit employee marijuana use in their workforces, and could still discipline and terminate employees who test positive for the drug, despite state law permitting its medicinal (and recreational) use.

# The Courts:



- Most recently, in January 2016, a federal court judge in [New Mexico](#) dismissed a lawsuit brought by an employee who was terminated after testing positive for marijuana, finding that state law does not require employers to accommodate medical marijuana use.

***BUT, we all know, it's never quite that simple ...***

# Cannabis & Drug Testing



# Drug Testing – Pre-Employment:

- Generally, employers may require applicants to undergo drug tests.
- However, the law is evolving – The District of Columbia temporarily passed the Prohibition of Pre-Employment Marijuana Testing Act of 2015, which prohibits employers from testing employees for marijuana use until after an offer for employment has been made.
- CO Example - Employers may also experience difficulty hiring.

# Drug Testing – During Employment:

- Generally, employers remain free to implement and utilize drug-free, workplace programs and policies in spite of Prop 64 and the legal use of marijuana.
- But, should you change your policy language??



Drug-Free Workplace Act of 1986

# Drug Testing – During Employment:

Also, remember CA drug testing requirements:

- Pre-Employment
- Random Testing
- Post-Accident Testing
- Reasonable Suspicion
- DOT Covered Positions



***Don't forget the  
basics . . .***



# Drug Testing – During Employment:

Also, remember CA drug testing requirements:

- **Pre-Employment generally permissible if consistently applied**



***Don't forget the  
basics . . .***

# Drug Testing – During Employment:

Also, remember CA drug testing requirements:

- **Current employees**
  - Reasonable suspicion
  - Unless safety sensitive position

*\*No CA case law that addressed drug testing upon return from leave*



***Don't forget the  
basics . . .***



# Drug Testing – During Employment:

Also, remember CA drug testing requirements:

- **Current employees**
  - Post-accident – blanket policies that provide for testing after an accident violates anti-retaliation provisions of OSHA.



***Don't forget the  
basics . . .***

# Drug Testing – During Employment:



## WATCH OUT FOR PRIVACY - LEGAL OFF-DUTY ACTIVITY LAWS:

- While you may prohibit use in the workplace, current technology does not match the law. Most drug tests detect THC in the system for several days and cannot detect current inebriation. However, clinical trials are underway.
- TO WATCH - Many states (including CA) have Legal Off Duty Conduct Laws protecting legal off duty conduct

# Drug Testing – During Employment:

WATCH OUT FOR PRIVACY - LEGAL OFF-DUTY ACTIVITY LAWS:

## ***Coats v. Dish Network, (June 15, 2015)***

- Colorado paraplegic employee terminated after positive random drug test result.
- No safety sensitive position; did not impact job performance.
- Used while off-duty legally, to lessen symptoms of his condition.
- Argued a violation of CO's "Lawful Activities Statute."
- ***Court held that behavior was not protected by the statute; the conduct is not "lawful" federally.***

# What About OSHA?



# What About Fed-OSHA?

## *New Changes Effective December 1:*

- 1) Penalties: 78% increase
- 2) Recordkeeping
- 3) Drug Testing Policies:

Final rule does not specifically mention drug testing policies, but OSHA's commentary implies they will be scrutinized because blanket post-injury/accident testing has the potential to deter reporting.



# What About Fed - OSHA?



October 19, 2016, OSHA published new guidance:

- 1) It will not issue citations for post-incident drug testing conducted in accordance with state workers comp laws.
- 2) OSHA will consider:
  - Whether employer had a reasonable basis for concluding drug use could have contributed to the injury or illness.
  - Whether other employees involved were also tested.
  - Whether employer has a heightened interest in determining if drug use contributed due to the hazardousness nature of the work being performed.

# What About Fed - OSHA?



What does this mean?

- 1) Be careful of blanket policies
- 2) Consider switching to reasonable suspicion testing
- 3) Have a process in place
- 4) Consider safety sensitive positions

*\*Also, consider what it means for CAL-OSHA?*



# What About Federal Requirements & Insurance?

If your company is required by federal law or government contracts to maintain a drug-free workplace (Drug-Free Workplace Act), you are obligated to follow federal law and cannot employ an individual who tests positive.

Also, if the employee performs a job that concerns public safety or operates heavy machinery, you will likely still be permitted to test for THC or any other drugs.



# What Does the Future Hold?



# What can we expect from Trump?

- 1990 – War on drugs “is a joke,” “all drugs should be legalized”
- June 2015 – “Medical marijuana 100%,” recreational “is bad”
- Oct 2015 – It should be “a state issue, state-by-state”



# What can we expect from Trump?

- Boulder D.A. Stan Garnett selected to join a group of prosecutors from across the country who will help advise Trump administration on policies regarding marijuana.
- The National District Attorney's Association created a policy group featuring 14 District Attorneys who will issue advisements on possible law or policy changes regarding marijuana as more and more states legalize.

# What about Jeff Sessions?

- April 2016 – “Good people don’t smoke marijuana,” marijuana is a “real danger” and is “not the kind of thing that should be legalized”
- “I won't commit to never enforcing federal law”
- Marijuana is no better than heroin.



# What about Jeff Sessions?



- We have not yet seen prosecutions, forfeitures, or even threatening letters to cannabusinesses.
- Currently, DOJ subcommittee completed an unpublished advisory memo saying that there was no need to advance new drug enforcement against marijuana.

# What about Jeff Sessions?



- The economic impact and polling tells us that marijuana is likely here to stay
- Polling:
  - Support for legalization reached an all-time high in 2016.
  - 60% of Americans surveyed by the Gallup Poll last year said they favor outright legalization, up from 35% in 2005.

# The Sessions Marijuana Memo Sends The Cole Memo Up In Smoke



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Earlier this year, Attorney General Jeff Sessions issued a 1 page memorandum rescinding Obama-era guidance that allowed states to legalize medical and recreational marijuana with marginal federal interference.

Sessions' memo eliminates any doubt as to his position against the trend towards marijuana legalization.



# The Sessions Marijuana Memo Sends The Cole Memo Up In Smoke



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The Sessions Memo allows U.S. attorneys to use “well-established prosecutorial principles” and “investigative and prosecutorial discretion” to decide whether to enforce federal marijuana law, regardless of state legalization laws.

Reaffirms the Controlled Substances Act.



# The Sessions Marijuana Memo – the Good News



**Sessions' memo does not seem to have an impact on your approach to this issue from a workplace law perspective.**

**Where state law had permitted you to take a zero tolerant approach to those testing positive for marijuana, you can continue to do so.**

**And if you took a more relaxed approach, you can likely carry on.**

# What Do We Do?

1. Decide your position based on your business needs and business culture.
2. Consider a proactive memo to employees
3. Update handbook and policy if needed, but ...
  - \*BE CAREFUL and think expansively
4. Apply policies uniformly.



# What Do We Do?

5. Make Sure You're Not the "Test Case".
6. Publicize your policy and train supervisors and managers.
7. Consider eliminating strict post-accident/post-injury testing and replacing it with reasonable-suspicion testing.
8. Keep an eye on new developments in the law.





# Final Questions?

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