

# California Haze: Confusion Around Employee Use of Legalized Marijuana



By **Karina B. Sterman, Esq.**

## What is the Law?

California legalized medical use of marijuana in 1996. California then legalized the recreational use of marijuana in 2016.

California disability related laws, the Fair Employment Housing Act and CA Family Rights Act, require employers to reasonably accommodate employee disability, including employees' need to rely on prescription medication.

Many employees and employers alike are therefore surprised to learn that, in light of this legal context, employees who legally use either recreational or medical marijuana at work (or test positive for it during work) are *not* protected from discipline or termination. In fact, both the CA Supreme Court and legislature, ten years apart, having had an opportunity to protect employees' legal use of marijuana did not do so. To the contrary, the most recent CA statute in effect expressly states that even though personal use of marijuana is legal, employers are still free to test for and discipline employees who use it. The California Chamber of Commerce has lobbied for this to stay in effect and there is currently no pending legislation to change the current state of the law.

## What's an Employer to Do?

Employers have a choice to make. While the law permits employers to discipline employees who use marijuana, it does not require it. The choice, therefore, can actually be based on legitimate needs. Employer needs range from recruitment of qualified talent in a very tight hiring market, on the one hand, to ensuring highest safety protocols and physical protections, on the other, and many other business considerations in between. In other words, what may be appropriate for one employer, or even a division within one employer, may not be so for another.

Employers who decide to penalize employee marijuana use have to declare it expressly in clearly communicated written policies, because that is not what many new applicants expect anymore, and simply prohibiting "illegal" drugs may not be clear enough as marijuana is not illegal in California. These employers also have to decide whether they will drug test for marijuana, which is known for staying in a person's system for over 30 days and is notoriously unreliable in establishing relevant recent drug use.

Employers who decide not to penalize employee marijuana use need to consider whether they will simply ignore its use or actually support it. This can have a significant impact on a company's brand as well as workplace morale. While there is currently no data supporting the myth that marijuana users are less focused and less productive, many employees continue to believe that to be the case and a permissive culture can cause fracturing resentment.

As with drug use generally, there is no easy answer. Employers have a thoughtful decision to make. At least until the legislature removes that choice from them.



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