

# Medical Marijuana

## Concerns About Keeping a Safe Workplace Compounded by Testing Limitations

In California and in many states across the country, marijuana is now legal for medical and adult recreational purposes, and several states have legalized marijuana for medical use. This changing legal landscape has left employers wondering about their rights and responsibilities regarding drug testing for marijuana. While employers in California maintain the right to drug test employees for marijuana and other drugs in certain circumstances — including pre-employment — medical marijuana patient advocates are working hard to change that. Efforts have been afoot to prohibit employers from conducting pre-employment testing or from declining to hire or terminate medical marijuana users, as well as to mandate workplace policies that allow the use of medical marijuana on an employee's own time.

### RIGHT TO A DRUG-FREE WORKPLACE

- Under current law, generally an employer has the right to maintain a drug-free workplace through policies and by drug testing for pre-employment, suspicion of impairment and post-accident.
- Federal law requires that California's employers who work with the federal government comply with the federal Drug-Free Workplace Act, which requires employers to maintain drug-free workplace policies.
- California's new laws regulating medical use and recreational use — including particularly Proposition 64 of 2016 — explicitly maintain employer rights to maintain a drug-free workplace.

- The California Chamber of Commerce did not oppose legislation or regulations establishing the legal framework for medical marijuana. The CalChamber also did not oppose the 2016 initiative (Proposition 64) legalizing adult recreational use specifically because of the inclusion of language to protect employers' rights.

- Prohibiting testing or requiring employers to hire medical marijuana users undermines employers' ability to provide a safe and drug-free workplace. An impaired employee puts everyone at risk of injury.

- Federally, marijuana remains illegal as a Schedule 1 drug under the Controlled Substances Act.

### DRUG TESTING

**Impaired workers undermine workplace safety, quality and productivity.** Employers are focused on safety in the workplace and are concerned that medical marijuana users could be impaired workers. This impairment puts the safety of the impaired employee, other employees, and potentially members of the public at risk.

In addition, employers know that an uptick in on-the-job injuries and vehicle accidents will result in increased workers' compensation and vehicle insurance premiums for their business.

Employers and employees across diverse industries express concerns regarding the ability of coworkers to fulfill their duties if they are impaired. In many instances, employees working alongside impaired employees are concerned for their own safety. Employers that decline to employ applicants who test positive for drugs lower the odds of workers being impaired at work.

### *Drug-Testing Technology Limitations*

Employers' safety concerns are compounded by the limitations of present drug-testing technology:

- There currently is no objective and legally recognized test an employer can administer or have administered by a testing company that can detect marijuana and determine exactly when marijuana was consumed. Generally speaking, this relates to marijuana's active ingredient, Tetrahydrocannabinol (THC) being fat-soluble, meaning THC and its metabolites are stored in the body's fatty tissues, and can be released periodically as the body

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taps fat for energy. In contrast, alcohol is water-soluble, so it resides in the body's bloodstream (which is mostly water) and diminishes relatively predictably as it is filtered out of the bloodstream.

- There is no method to determine if an individual is being impaired by the marijuana when the drug is found in their system or, conversely, if the individual is no longer impaired.

Therefore, employers do not have precise tools to investigate marijuana impairment in the workplace. In light of this imperfect information, many employers adopt a zero-tolerance policy to protect their workplace and workers.

### LEGISLATION

There have been several legislative attempts to protect the use of marijuana by employees.

- For example, AB 882 (McCarty; D-Sacramento) (2019) would have included employees completing drug rehabilitation programs as a protected class under the Fair Employment and Housing Act. This meant that AB 882 would have forbid employers from terminating any employee for a positive drug test result if the drug identified was being used as part of a “medication-assisted treatment, under the care of a physician” (MAT) or a “licensed narcotics treatment program” (NTP), even if the employee cannot perform the essential functions of the job and no accommodations are available.

- Similarly, AB 2069 (Bonta; D-Oakland) (2018) would have required employers to provide reasonable accommodations under

the Fair Employment and Housing Act to employees who use medical marijuana. While technically an employer would have had the right to discipline employees impaired at work, the lack of available clinical testing and the duty to accommodate those employees would have made it nearly impossible for employers to exercise that right.

Both bills would have forced employers to weigh keeping a safe, drug-free working environment (with the cost of litigation exposure) against the cost of allowing potentially impaired employees in the work environment. For context, an average single-plaintiff lawsuit can cost approximately \$160,000 to defend.

Neither bill made it to the Assembly Floor thanks to the CalChamber and employer community raising concerns to the Legislature.

### CALCHAMBER POSITION

The CalChamber continues to support the right of an employer to maintain a safe workplace by enforcing zero-tolerance drug use policies through drug testing, including pre-employment testing. Conversely, the CalChamber opposes legislation that undermines employers' ability to maintain a drug-free workplace.

In addition, the CalChamber opposes legislation that incentivizes or creates new employment litigation, or adds new protected classes or activities (such as marijuana use) to the Labor Code, Fair Employment and Housing Act, or Civil Code.



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