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# CALIFORNIA STATE ASSOCIATION OF COUNTIES ANNUAL MEETING

## Recreational Marijuana: Prop. 64 and the Workplace

12/1/2016

*PRESENTED BY:*

Mark Meyerhoff



# Recreational Marijuana: Prop. 64 and the Workplace

California State Association of Counties (CSAC) Annual Conference | December 1, 2016

Presented by: Mark Meyerhoff

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**Recreational Marijuana:  
Prop. 64 and the  
Workplace**

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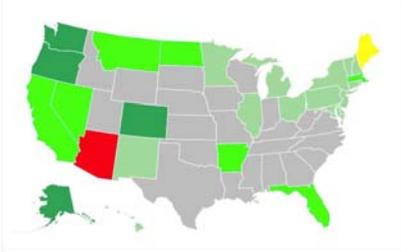
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**Marijuana Legal Status Map**

Recreational marijuana states  
2016 ballot measure passed

Medical marijuana states  
2016 ballot measure failed

Marijuana prohibition states  
2016 ballot measure undecided



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**Current Laws on Marijuana Use  
in the Workplace**

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# Recreational Marijuana: Prop. 64 and the Workplace

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### Legal Context

- Federal Law:
  - Controlled Substances Act (CSA)  
Designates Marijuana as a Schedule I Substance
  - U.S. Supreme Court has Upheld Federal Regulation of Marijuana
- California Law:
  - Marijuana Use/Possession Prohibited under Health and Safety Code with Some Exceptions



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### Federal Drug-Free Workplace Act

- Employers Who Receive Federal Grants Must:
  - Establish a Drug Free Awareness Program
  - Publish a Statement
  - Distribute a Statement
  - Notify Employees Under Grant of Requirement to Report Workplace Drug Convictions Within 5 Days of Conviction
  - Impose Sanctions on Convicted Employees
  - Inform Granting Agency of Convictions
  - Make Good Faith Effort to Maintain Drug Free Workplace

**DOES NOT REQUIRE DRUG TESTING!**

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### California Drug-Free Workplace Act

Employers Who Receive a State Grant or Contract Must:

- Establish Drug Free Awareness Program
- Provide Employees with Written Statement
- Describe Penalties for Violations
- Inform Employees About Dangers of Drug Abuse in Workplace
- Identify Available EAP's

**ALSO DOES NOT REQUIRE DRUG TESTING!**

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### DOT Drug and Alcohol Testing

Marijuana Use is Prohibited for DOT-Covered Employees and is Tested For in DOT Drug Tests:

- Pre-Employment
- Post-Accident
- Reasonable Suspicion
- Random
- Return To Duty/Follow-Up



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### Is Drug Use a Protected Disability?

- Protected Disability:
  - Alcoholism
  - Former Drug Users May Be Protected
- Not a Protected Disability:
  - Current Drug Use, Including Marijuana



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### How About Medical Marijuana?

**TRUE or FALSE**

*An Employer is Required to Accommodate an Employee's Use of Medical Marijuana in the Workplace if the Employee is Using the Marijuana Pursuant to a Physician's Recommendation.*



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**Accommodate Medical Marijuana Use in the Workplace?**

**FALSE**

*Ross v. RagingWire Telecommunications*  
(2008) 42 Cal. 4th 920.

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**Prohibiting Drug and Alcohol Use in the Workplace**

- Despite Privacy Rights and Possible Disability Protections Under the ADA and FEHA, an Employer May:
  - Prohibit Illegal Use of Drugs and Alcohol in the Workplace
  - Require Employees Not Be Under the Influence of Illegal Drugs or Alcohol in the Workplace
  - Require Compliance with Drug-free Workplace Acts
  - Hold Drug User or Alcoholic to Same Qualification, Performance and Behavioral Standards

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**Workplace Preventive Measures**

- Workplace Drug & Alcohol Policy
- Pre-Employment Drug Screening of Safety-Sensitive Employees
- Drug and Alcohol Testing of Current Employees



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**Labor Code section 432.8**

Labor Code Section 432.8 Prohibits Employers From Asking About Certain Marijuana Convictions More Than Two Years Old

- \* Except Peace Officers



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**Impact of Recreational Marijuana Initiative of 2016 (Prop. 64)**

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**What Happens Now That Marijuana Is Legalized In California?**



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# Recreational Marijuana: Prop. 64 and the Workplace

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**Proposition 64**

- Initiative Designed to Legalize Marijuana and Hemp
- Provide Taxation
- Prohibits Marketing and Advertising to Minors
- Resentencing and Destruction of Prior Marijuana Convictions

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**Proposed Health & Safety Code Section 11362.45(f)**

*Nothing in section 11362.1 shall be construed or interpreted to amend, repeal, affect, restrict, or preempt:*

*(f) The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or 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.*

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**Off-Duty Marijuana Use?**

- Employees of public agencies have a constitutional right to privacy with respect to their off-duty conduct unless such conduct has a nexus to their employment.
- Courts have usually upheld random drug testing of employees in safety-sensitive positions.
- Pre-employment testing?

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**Legal Context**

Coats v. Dish Network (2015) 350 P.3d 849.

- Mr. Coats Sued for Wrongful Termination After He Tested Positive for Marijuana. Mr. Coats is a Quadriplegic Who Used Medical Marijuana Outside of Working Hours. Mr. Coats Was a Registered Medical Marijuana User, Accessing the Product in a Manner Consistent With State Constitutional Guarantees and State Statute.
- Colorado Supreme Court Held That Dish Network Could Legally Terminate Mr. Coats for Use of Legalized Marijuana.

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**Key Points to Remember**

- Employers Can Continue to Enforce Drug Use Workplace Policies and Testing
  - Medical Marijuana Does Not Need to Be Accommodated in the Workplace
  - If Approved, Recreational Marijuana Use Does Not Need to Be Accommodated in the Workplace
- Do Not Do Drug Testing Without a Policy in Place and Know Legal Limitations

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**Thank You**

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