

WACA ALERT

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PROPOSITION 64: Control, Regulate and Tax Adult Use of Marijuana Act

This past election, California voters passed Proposition 64 the ["Control, Regulate and Tax Adult Use of Marijuana Act" \(the Act\)](#), which makes recreational marijuana legal under certain limits in the State of California.

Contractors have expressed concerns regarding the passage of Prop 64 and its impact on the jobsite relating to workplace and worker safety.

Please note that the Act does not preclude an employer from adopting and enforcing its own rules around testing and use of marijuana for its employees. In fact, the Act contains a provision which preserves employers' sovereignty in setting drug-screening policies:

"Nothing in section 11362.1 shall be construed or interpreted to amend, repeal, affect, restrict or pre-empt ... 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 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."

Currently, California law permits employers to conduct drug testing under five circumstances: (1) pre-employment, (2) as part of physicals examinations, (3) under reasonable suspicion, (4) post-accident, and (5) random testing. Even with the passage of Prop 64, the current legal precedent in the State of California is still that an employer who maintains work rules prohibiting use of marijuana may test and discipline, or even terminate an employee for having marijuana in his/her system, even if marijuana use is permitted by law. Consequently, employers may still adopt and enforce policies that prohibit employees from using marijuana at any time during their employment.

Even though Prop 64 was designed in part to protect drug-free workplaces, the issue of whether an employer may discipline, or even terminate for marijuana use, may still be open to interpretation by the courts in the future. While it is difficult to forecast whether the courts of California would ever change current legal precedents, courts in states like Colorado and Oregon, which have already legalized recreational use of marijuana, have upheld employer decisions to terminate employees for marijuana use where drug-free work rules were in place. These courts' decisions have been based at least in part on the fact that marijuana is still considered an illicit, controlled substance under federal laws.

In summary, the regulations ushered in by the passage of Prop 64 do not impair an employer's ability to maintain rules prohibiting the use of marijuana as conditions of hire or continued employment. Since legal recreational use may still have an effect on usage of marijuana, it is important that contractors reiterate its rules regarding drug and alcohol use, including marijuana, to job candidates and employees. If you have concerns about your company's rules regarding testing or use of marijuana, we encourage you to reach out to your legal counsel to address those questions.