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PROP 64

LAW ENFORCEMENT AGENCIES CAN PROHIBIT USE OF RECREATIONAL MARIJUANA

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In November 2016, California voters approved California Proposition 64, the Adult Use of Marijuana Act (Prop 64). Prop 64 created Health and Safety Code §11362.45, which provides that legalization of medical marijuana shall not be "construed or interpreted to amend, repeal, affect, restrict or preempt ... the rights and obligations of public and private employers to maintain a drug and alcohol free workplace ... or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees ..." (§11362.45[f]).

The intent of Prop 64 is to "establish a comprehensive system to legalize, control and regulate the cultivation, processing, manufacture, distribution, testing and sale of nonmedical marijuana, including marijuana products, for use by adults 21 years and older ..." (Prop 64, §3; Business and Professions Code §26000). Since Prop 64 has made recreational marijuana use legal under California law, law enforcement associations and many of their individual members have raised questions regarding whether their agencies can continue to prohibit marijuana use by their employees.

Similar questions arose after California passed the Compassionate Use Act of 1996, which created a legal defense to California laws prohibiting the possession and use of mar juana for medical purposes under a physician's recommendati *(United States v. Oakland Cannabis Buyers' Cooperative* [200 532 U.S. 483, 486). Specifically, in the case of *Ross v. Raging W Telecommunications, Inc.* ([2008] 42 Cal.4th 920), the court co sidered whether an employer could terminate an employee af he failed a pre-employment marijuana test, even though he v permitted to use medical marijuana under the Compassion Use Act. In that case, there was no showing that the emplo was under the influence while at work or on duty. The co found that the termination was lawful because the purpos the Compassionate Use Act was limited to decriminalizatio medical marijuana use and, therefore, could not be interpre to alter an employer's existing authority to establish drug tes policies and imposing discipline for violations of a drug po (*Id.* at p. 931).

With this legislative history and case law in mind, we interpret the provisions of Prop 64 to determine whe employers can continue to prohibit marijuana use off duty away from the workplace.

This new statutory language of §11362.45 suggests that courts are likely to uphold the employer's right to prohibit m juana use, just as it did in *Ross*. As a result, the rule in allowing employers to prohibit the use of marijuana away work is likely to apply with respect to the use of recreat marijuana, despite the legalization under California law.

To avoid such a conclusion, marijuana advocates will likely assert that engaging in the "legal" activity of using marijuana off duty cannot be the basis for discipline. However, California courts have held that "a public employee may not be disciplined for what he does in his private life so long as such conduct does not impair public service or cause discredit to his agency" *(Blake v. State Personnel Board* [1972] 25 Cal.App.3d 541, 552; citing to *Morrison v. State Board of Education* [1969] 1 Cal.3d 214). Also, California Labor Code §96(k) similarly protects employees by allowing the labor commissioner to pursue a claim against an employer that disciplines an employee for engaging in lawful conduct during nonworking hours away from the employer's premises.

In essence, the *Blake* decision and cases following its reasoning require a nexus between an employee's private conduct and the employer's interests in prohibiting said conduct. To regulate or prohibit the use of recreational marijuana, the employer will need to offer a compelling argument that the off-duty marijuana use will impair the public service or cause discredit to the agency. Whether this nexus is established is likely to be determinative in such a case and will depend on the agency in question, the nature of the services provided by that agency and the duties of the particular employee.

In determining whether an employer's policy restricting off-duty use of marijuana is enforceable regarding a particular employee, the court will consider, among other things, whether that employee holds a position that has duties and responsibilities involving public safety or is involved in drug interdiction *(Loder v. City of Glendale* [1997] 14 Cal.4th 846, 906).

Under the rulings in *Blake* and *Loder*, it is likely that a public employer could prohibit all marijuana use by law enforcement personnel, primarily because the use is still illegal under federal law and law enforcement inherently involves public safety and drug interdiction. However, the case for completely prohibiting all marijuana use by employees in positions that do not involve law enforcement, public safety or drug interdiction is weaker.

Law enforcement agencies are charged with enforcing laws and, therefore, their employees are generally held to a higher standard of conduct and subject to more scrutiny than other individual employees. It is likely that a court will find that a peace officer engaging in activities that are illegal under federal law violates that officer's duty to adhere to both state and federal law, necessarily causing discredit to his or her agency, and also impairs the public service even if it does not directly impair that employee's specific performance of his/her duties.

Agencies will also likely take the position that the nexus between the on-duty and off-duty conduct exists by virtue of the federal prohibition against the use and possession of controlled substances, including marijuana, and the resulting prohibition of possessing a firearm or ammunition (18 U.S.C. §922[g]).

A challenge facing all employers and impacted employees is the fact that there is not currently a reliable or objective test for determining the extent to which an employee is under the influence of marijuana. Most current testing methods can only determine the amount of residual chemicals in someone's system, which can remain for up to a month or more depending on the type of test.

Employers will argue that the mere fact that a drug test turns up positive for any amount of marijuana may be enough to warrant discipline. They may argue that the use of marijuana will expose the agency to greater liability, especially with respect to public safety positions. For example, if an officer is involved in a shooting or vehicle accident and a subsequent drug test is positive for marijuana, there will be questions as to the whether the officer was impaired at the time of the incident.

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Finally, there is no clear answer with respect to whether public employers as a whole can prohibit the use of marijuana by off-duty employees. However, the language in Prop 64 stating that it is not meant to interfere with an employer's right to drug test and discipline employees is likely to be determinative.

Agencies likely will update or already have updated their drug policies to make clear that marijuana use is still prohibited. Drug testing is a mandatory subject of bargaining (see *Holiday v. City of Modesto* [1991] 229 Cal.App.3d. 528). However, each law enforcement association should ensure that agencies are not using Prop 64 as an opportunity to expand the policy without bargaining over any material changes.

About the Author

Vance Piggott is an associate with Rains Lucia Stern St. Phalle & Silver and is based out of the firm's Sacramento office. Vance is a member of the firm's Collective Bargaining and Legal Defense of Peace Officers practice groups. He performs traditional labor relations work, as well as assisting with labor litigation and various legal defense matters. ✪