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Not Up In Smoke: Employers Can Still Enforce Drug Policies

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***Seyfarth Synopsis**: California employers can still enforce their drug-free workplace policies and discharge employees who test positive for marijuana, despite the recreational marijuana laws that go into effect in January 2018.*

On November 8, 2016, California voters enacted the Adult Use of Marijuana Act. Effective January 1, 2018, adults over the age of 21 can smoke marijuana recreationally. Health & Safety Code § 11362.1(a)(4). Marijuana, meanwhile, will remain legal for medical use by patients who have a physician's recommendation, under California's Compassionate Use Act of 1996. Health & Safety Code § 11362.5. So how will the new law affect employers?

As the Golden State goes green in 2018, California employers can be thankful that the new law leaves undisturbed an employer's ability to maintain drug-free workplaces. The Adult Use of Marijuana Act, Health & Safety Code § 11362.45(f), explicitly allows "public and private employers to maintain a drug and alcohol free workplace." Thus, employers can still drug-test employees for marijuana and discharge them for testing positive, even though marijuana is legal for recreational use in the State.

And employers likewise can still deny employment to job applicants who test positive for marijuana. Section 11362.45(f) provides that an employer need not "permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of cannabis in the workplace." The new law therefore does not disturb the California Supreme Court's 2008 holding in *Ross v. RagingWire Telecommunications Inc.* that an employer may enforce a policy of refusing to hire an applicant who tests positive for marijuana—even if the applicant was using the marijuana for medical purposes under the protection of the Compassionate Use Act.

In *Ross*, the plaintiff tested positive for marijuana that he was using on his physician's recommendation, to ease chronic pain. When his employer fired him, he sued for disability discrimination under California's Fair Employment and Housing Act (FEHA). The Supreme Court held that (1) FEHA does not require employers to accommodate the use of drugs that are illegal under federal law, and (2) firing the plaintiff for using marijuana did not violate a fundamental state public policy.

California employers can remain grateful that the Ross court was more solicitous to employers than some other courts might be. In *Barbuto v. Advantage Sales & Marketing*, a 2017 case, Massachusetts's highest court differed with *Ross*, permitting an employee who was fired for using medical marijuana (to treat Crohn's disease) to sue under Massachusetts law for a failure to provide a reasonable accommodation. *Barbuto* rejected the employer's argument that it would be unreasonable to

require an employer to accommodate the use of medical marijuana that is illegal to use under federal law. *Barbuto* held that employers must engage in an interactive process with employees to see if there are equally effective medical alternatives to the prescribed medication that would not violate the employer's anti-drug policy.

While California employers are currently afforded protection from permitting employee marijuana use (due to marijuana's federal status), employers should review their handbooks and written policies to ensure that their drug policies are broad enough to invoke this available protection. Employers should also communicate their anti-drug policies clearly to employees to weed out any confusion caused by the legalization of marijuana.

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