

# Marijuana Use in the California Workplace

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San Diego ISAC Counterintelligence Sub-Committee – February 2017



## **Recreational Marijuana Is Legal in California – How Can It Impact My Job?**

The Adult Use of Marijuana Act (AUMA), commonly referred to as Proposition 64, was the ballot initiative to legalize and regulate recreational marijuana use in California. It coasted to approval during the November 2016 election by a margin of 56 to 44%. Core provisions of the law include:

- Adults, aged 21 and over, can possess, transport, and purchase up to 28.5 grams of marijuana for recreational use (an expansion of the previous law limiting use for medical purposes);
- Adults can grow up to six marijuana plants;
- Imposition of a 15% excise tax on marijuana sales;
- The reduction or elimination of criminal penalties for marijuana offenses; and
- Smoking marijuana in public or driving while impaired by marijuana remains against the law.

But what does this mean for employees and employers, and specifically how does it impact those with security clearances? The bottom line is national policies and company policies trump an employee's rights to personal marijuana use in spite of local state laws.

## **A Little History**

In 2010, California Proposition 19, also known as the Regulate, Control, & Tax Cannabis Act, was on the ballot to legalize recreational marijuana. The initiative did not pass with voters defeating the ballot 53.5 to 46.5%. One of the reasons California Proposition 19 failed to pass was general public and workplace safety concern due to a clause that prohibited employers from disciplining employees for marijuana use unless their performance was impaired. 2016's Proposition 64 preserves and protects an employer's freedom to screen personnel for cannabis.

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*If you have any questions or concerns regarding the topic discussed above, or if you'd like to recommend a future article topic, please send an email to [sdisac@viasat.com](mailto:sdisac@viasat.com).*

### **How Can I Be Fired for Something That Is Legal?**

Federal law protects employees from discrimination based on gender, race, age, religion, or disabilities. An employee cannot be hired or fired based on their sexual orientation, military status, or health conditions. Marijuana users are not a protected class under the law.

Individuals may mistakenly believe to have protections which in fact they do not. Employers can refuse to hire candidates who smoke cigarettes or consume alcohol. So what is the worker's remedy? Simply put: an employee can either quit the job or comply with employer policies related to workplace expectations and employee conduct. Even those employees who are using marijuana for legitimate medical conditions are not protected from employment termination if doing so violates company policy. Case law in California Supreme Courts has sided with businesses that terminated employees for medical marijuana use.

### **Marijuana Use and My Security Clearance**

In October 2014, the Director of National Intelligence (DNI) issued a memorandum on marijuana use, ES 2014-00674 Adherence to Federal Laws Prohibiting Marijuana Use. The memorandum was issued in response to inquiries from numerous government agencies with questions regarding security clearances and the decriminalization of marijuana in several states and the District of Columbia, allowing both medicinal and recreational use of the drug.

While marijuana has been legalized in select states, it is still a Schedule I drug under the federal Controlled Substances Act (CSA)-meaning any use of marijuana is illegal under federal law, regardless of state law. Federal agencies are specifically prohibited from granting or renewing a security clearance to an unlawful user of a controlled substance or an addict, and under federal law the use of marijuana remains unlawful. Executive Order 12564 expressly states the use of illegal drugs by those in positions with access to sensitive information may pose a serious risk to national security and is inconsistent with the trust placed in such employees.

The Facility Security Officer (FSO) is reminded of the National Industrial Security Program Operating Manual (NISPOM) citation for Section 3. Reporting Requirements, wherein all contractors have a continuing responsibility to report adverse information. Adverse does include any cleared employee's involvement with drugs or criminal conduct.

### **But I Don't Have a Security Clearance**

Proposition 64 will push businesses in California to decide whether to continue with their current drug testing and drug use policies or update them. Each employer has the liberty to determine their own policies on the subject. The type of industry may affect their policies, and it is likely technology and cleared defense contractors will keep drug-free workplace policies intact, or even tighten policies to enhance a conservative posture in a

marijuana-friendly climate. Some sectors like transportation workers do not have a choice, as federal laws require regular drug testing.

### **Conclusion**

In light of the recent passage of Proposition 64 and the legalization of marijuana, many individuals may believe they can use marijuana without adverse impact on their employment. Recent case studies have already appeared wherein employees wanted to feign ignorance of company requirements believing to be protected by state law. It is imperative that employees are cognizant of the potential consequences marijuana use can bring. Marijuana use by cleared employees can adversely impact their ability to get or maintain a security clearance. Employees without security clearances risk termination if they violate company drug use policy. Review your own company's policy regarding marijuana. Remember, legalized marijuana under state law does not afford employee protection for use if doing so violates company policy.