October 25 - November 7, 2010

SAN FERNANDO VALLEY BUSINESS JOURNAL

LOS ANGELES • GLENDALE • SANTA CLARITA VALLEY • BURBANK • CONEJO VALLEY • SIMI VALLEY • SAN FERNANDO • CALABASAS • AGOURA HILLS • ANTELOPE VALLEY

Proposition 19 Presents Many Challenges For Employers

WORKPLACE: Deciding whether to follow marijuana law just one hurdle awaiting firms.

EMPLOYMENT LAW

Richard Rosenberg

When Californian's go to the polls on November 2nd, one of the measures on the ballot will be Proposi-tion 19. Officially known as "The Regulate, Control and Tax Cannabis Act of 2010", the ballot measure seeks to legalize the recreational use of marijuana in a private residence (or other non-public place) by anyone over the age of 21. If passed, the initiative will create a host of very serious problems for California employers.

Even if the ballot measure passes, its' enforceability is seriously in question. All of the activities which Proposition 19 purports to legalize under state law remain illegal under federal drug laws. Constitutional law experts expect an immediate court challenge to California's right to enact a law at odds with prevailing federal law. The litigation over this claim of so-called federal law "pre-emption" could take years to conclude. Meanwhile, employers will have to decide whether to follow the new law. Those who opt to wait for the legal dust to settle before complying, could face lawsuits of their own by aggrieved employees and job applicants.

Backers of the initiative liken marijuana to alcohol and claim that the public will benefit from legalization, much in the way the public supposedly benefited from the end of Prohibition. Legalization advocates point to potential new tax revenue from cannabis (like cigarettes and liquor). They also assert that public safety will be enhanced because cannabis production will be overseen by the state instead of foreign drug cartels. Finally, the measure's supporters claim that redirecting scarce resources away from these cannabis crimes will free up budget dollars for higher priority items like education, senior care, mass transit, health care and the prosecution of more serious crimes. Notably, all of the candidates running for Governor, Attorney General and U.S. Senate oppose the measure.

While it remains to be seen how far a court would go in interpreting the measure, or even whether the measure will survive a constitutional challenge, the new law is a potenial bonanza for the contingency lawyers who will sue businesses under Proposition 19's controversial employment- related provisions.

Background

Federal laws classify marijuana as an illegal substance and provide criminal penalties for the use, possession and cultivation of the drug. Proposition 19 will not have any effect on these laws or the right of federal authorities to arrest and prosecute marijuana users.

California law also outlaws marijuana use, except in the case of medicinal use under a health care directive. Proposition 19 will legalize the cultivation, possession and use of marijuana by any person over the age of 21.

In November 1996, voters approved Proposition 215, which legalized the cultivation, possession and consumption of marijuana in California for medical purposes. However, the U.S. Supreme Court ruled that federal authorities may continue to prosecute Californian's medical marijuana users.

When President Obama came into office, his appointment to the position of U.S. Attorney General announced that the Justice Department would not spend its limited resources on the prosecution of marijuana patients. But U.S. Attorney General Eric Holder said he will vigorously prosecute under federal anti-drug laws if the measure passes. Currently, no other state permits commercial marijuana-related activities for non-medical purposes.

Employer concerns

Under the measure, persons age 21 or older generally may: (1) possess, process, share or transport up to one ounce of marijuana; (2) cultivate marijuana on private property in an area up to 25 square feet per private residence or parcel; (3) possess harvested and living marijuana plants cultivated in such an area; and (4) possess any items or equipment (so-called paraphernalia) associated with these activities.

To be legal, the possession and cultivation of marijuana must be solely for an individual's personal consumption and not for sale to others. Moreover, the consumption of marijuana would only be permitted in a residence or other "non-public place." (One exception is that marijuana could be sold and consumed in licensed establishments).

The bolded language about imbibing in non-public places has recently attracted attention and concern among employers. The California Chamber of Commerce is warning its members that this language could be interpreted to grant marijuana smokers the legal right to smoke pot at work because most work settings are non-public places.

Though this is an extreme view, there is at least one labor law case defining "non-public" place in a way which lends credence to this position. The California Supreme Court just to hear that case and a decision is expected in about a year. Meanwhile, proponents of the measure are expected to latch onto this case when arguing in support of an employee's right to possess and use cannabis at work. Until the issue is finally decided, legalization proponents will be looking for test cases to help define the legal boundaries of at-work cannabis possession and consumption.

There is also language in the measure prohibiting employers from "discriminating" against marijuana users, or denying them "any right or privilege". This language could have a direct effect on hiring practices if the statute survives constitutional challenge. A court could interpret this language to mean that employers are precluded from considering (lawful) marijuana use when deciding whether to hire an applicant, much in the way it is illegal to consider an applicant's race or age. If so, then it follows that pre-employment drug screening tests to ferret out cannabis users likely would be illegal as well. A legal mandate to hire admitted pot smokers raises a host of potential concerns about workplace safety, third party liability and efficiency.

Testing

The issue of pre-employment testing for cannabis use was addressed two years ago by the California Supreme Court in a case where a medical cannabis user failed a pre-employment drug test. The employee claimed that he was entitled to special treatment at work because of his medicinal use of the drug. The Court disagreed, ruling that the medical cannabis law (Proposition 215) did not give users any rights on the job. The Court went on to say that under existing law, employers are free to refuse employment to cannabis users, even those who use cannabis under a doctor's orders.

The same cannot be said about Proposition 19. Proponents of the ballot measure point out that the measure's specific mention of employer rights makes it far different from Proposition 215. That is a matter that will be resolved in the courts as well.

The ballot measure provides an exception for situations where the employer is under a legal mandate to maintain a drug- free workplace (mostly federal contractors) or the applicant is being considered for a "dangerous position" where pre-employment drug testing is mandated. The measure does not elaborate upon this exception, but there are very few jobs that actually mandate applicant drug testing. Thus, if the law survives a constitutional challenge, most businesses would have to follow it.

The measure also creates new legal protections by stating that no individual may be punished, fined, or discriminated against for engaging in any conduct permitted by the measure. The measure throws a bone to employers by stating that employers retain existing rights to address consumption of marijuana. However, the measure goes on to say that employers may only do so where the marijuana consumption actually impairs an employee's job performance.

Although backers of the initiative liken the drug to alcohol, there are no established standards to determine precisely when a person is "impaired" by cannabis use. The use of the term actual impairment suggests that anything less is not a basis for employer action. This, in turn, raises a host of employer concerns.

For example, does the initiative permit an employee to work after having consumed marijuana at home? Proponents of the measure blithely say "yes", unless of course there is a determination that the employee's legal use of the drug actually impairs job performance. Hence the question: how much consumption is permissible before it can be said that the drug actually impairs an employee's job performance? Will this be different for certain jobs (say, the operator of a motor vehicle or dangerous equipment, as compared to an office worker)? The absence of clear standards is an invitation for legal challenges.

When to intercede

Does this also mean that an employer must observe a degradation of performance before interceding? Or, is the mere suspicion of impairment (e.g., the employee has bloodshot eyes or smells from marijuana smoke) enough to mandate drug testing, or at least the removal of the employee from the job? The California Chamber of Commerce warns that the ambiguous wording of the measure might very well mean that an employer cannot take action until after there has been a noticeable decline in performance.

What about existing employer policies barring the possession of cannabis or drug paraphernalia on the employer's premises. Since the ballot measure purports to legalize the possession of marijuana and "equipment" associated with its use (e.g., rolling papers, pipes and the like), it is an open question whether employers may continue such policies.

Proposition 19 will not become the law unless the measure receives a majority approval on November 2. There is still time for the "NO on Prop 19" forces to galvanize. If the measure does pass (pollsters say the vote is very close at this juncture), employers will face some tough choices. Few employers desire to be the "test case", but some company or companies will assume that role. There is simply too much at stake financially for contingency lawyers and legalization advocates to ignore the measure's impact on employment.

Federal contractors who must comply with federal mandates for a drug free workplace likely will have to continue current practices. For those that are not under a federal mandate, the choices will be tougher. How a particular employer chooses to respond in the face of so much legal uncertainty will depend upon risk tolerance, the perceived need for job safety and efficiency, and the company's culture. Since marijuana consumption remains a federal crime, maintaining the status quo until the legal dust settles seems like an intuitively sound position. However, since that is a position which carries a certain amount of risk, this is a very good time to review the company's options with expert labor counsel and the company's employment practice liability insurance broker.

Richard S. Rosenberg is a founding partner of Ballard Rosenberg Golper & Savitt LLP, a management side labor law firm in Glendale. Rosenberg was recently selected as one of the 25 best lawyers in the San Fernando Valley. He may be reached at (818) 508-3700 or rrosenberg@brgslaw.com.