



THE BLUNT FACTS – CLEARING THE HAZE OF MARIJUANA FOR PUBLIC SCHOOLS

Summary of CA Proposition 64: Adult Use of Marijuana Act

In California, it is now legal for individuals over the age of 21 to possess, transport, obtain or give away to other adults 21 or older no more than one ounce of marijuana or eight grams of concentrated cannabis. Individuals over the age of 21 may also cultivate up to six plants per residence and possess the marijuana produced by these plants. Local governments may forbid cultivation outdoors, but must allow it inside a private residence or accessory structure that is “fully enclosed and secure.” In many respects, the impact of Proposition 64 on school districts mirrors the rules, policies and procedures with respect to alcohol possession and use.

It is also important to note that medical marijuana patients keep their existing rights under Proposition 215 to possess and cultivate as much as they need for personal medical use so long as they have a doctor’s recommendation, regardless of the Proposition 64 limits for adult users. Be aware, though, that local governments may still restrict cultivation via nuisance ordinances (except for the six indoor plant minimum allowed for personal use).

Testing abilities are still uncertain and fluid, which may create difficulties in certain situations.

Governance and Policies

Q. How should existing policies that address alcohol be modified to include recreational use of marijuana?

A. Any policies that address alcohol or tobacco on or around campus, and utilization of same (i.e., BP 3513(a), 4020, etc.) should be revised to also include marijuana. There are also employee notification requirements, discussed in further detail below.

Q. Can districts refuse donations/sponsorships by cannabis retailers?

A. This would appear to be a political decision by each school board. Districts could consider establishing a policy, but if they do so it may need to be revisited with changes in the composition of the board.

Employees

Q. What type of training/communication should be directed to employees, walk-on coaches, parent chaperones, volunteers, etc. regarding recreational use of marijuana at off-site competitions, field trips, events?

A. The typical training provided regarding use of alcohol or tobacco at such events should be revised to include marijuana as well. Government Code 8355 and 41 USC 701 require that the superintendent or designee notify employees on prohibitions against drug use while on duty (including instructional and non-instructional time in the classroom or workplace, at extracurricular or co-curricular activities or while transporting students or otherwise supervising them).

Q. What is allowed/recommended with respect to drug testing?

A. This is a broad area and requires careful analysis of the facts and applicable law. In general, however, pre-employment drug testing is permissible for safety-sensitive positions. On the other hand, pre-employment drug testing for non-safety-sensitive positions is permissible only if the district can make a showing of a “special need.” Additionally, the U.S. Supreme Court held that because drug testing constitutes a search of persons, individualized reasonable suspicion is generally required, stating, “(we) have usually required ‘some quantum of individual suspicion’ before concluding that a search is reasonable.”

The California Supreme Court ruled that testing current employees without reasonable suspicion violates the Fourth Amendment.

Employees (Cont'd)

Q. What can administrators do if an employee or student smells of marijuana?

A. As discussed previously, if there is a reasonable suspicion that an employee is under the influence of marijuana at work, you may be able to test him/her. Also, if an odor is such that it rises to the level of being noticeable, the employee should either be sent home for the day, or, at a minimum, sent home to change clothing.

Similarly, students are subject to drug testing if reasonable suspicion exists.

Q. What about discipline?

A. If warranted, a district should follow the progressive discipline process set forth in its policies, procedures and collective bargaining agreements.

It is also important to note that if an employee's use constitutes a criminal violation in the workplace, districts may risk losing federal funding for failure to discipline. State and federal law require employees to notify the district, within five days, of a conviction for violation in the workplace of any criminal drug statute. The superintendent or designee shall notify the appropriate federal granting or contracting agency within 10 days after receiving notice of a violation occurring in the workplace.

Q. Can districts adopt policies regarding employees' recreational use of marijuana outside of the workday?

A. In general, districts cannot regulate employees' lawful activity outside of the workplace. Legal recreational use (while not on duty), would appear to be allowed, similar to the use of alcohol or tobacco. However, if lawful use affects the workplace (odor, impairment, etc.) appropriate steps may be taken, including discipline as discussed above. The interplay between state laws (recreational use is legal) and federal law (not legal) is unclear at this point.

Q. What kind of training should administrators receive to address recreational use by employees?

A. Among other things, they should be trained regarding testing and reporting requirements, as discussed in detail previously. Testing requirements are still fluid and equipment is being developed that may assist in creating a temporal determination of when use occurred.

Facilities

Q. Can marijuana be cultivated and/or used at homes that are in proximity to a school?

A. Cultivation is legal if six plants or less. Local governments can prohibit cultivation outdoors, so if districts have concerns regarding plants being in view, they may want to work with their local municipality. Use in private residences/on private property appears to be legal, unless the smoke migrates onto public property, including district property. Community outreach to parents about what is/is not allowed may be helpful.

Q. Can districts put any restrictions on use of facilities by cannabis businesses, e.g., rental of meeting space at district office?

A. This may depend on district policy and past practice. For example, if alcohol or tobacco businesses have used facilities in the past, it might be difficult to prevent the same for the use of cannabis businesses. The Civic Center Act likely comes in to play as well.

Each scenario is fact-specific and should be analyzed by your legal counsel.

Q. Can districts prohibit advertising (banners, signs, etc.) by cannabis retailers on their fields, e.g., sponsoring youth and/or adult sports teams, distributing promotional materials at weekend sports events?

A. We are unaware of any legal prohibitions. Whether to allow sponsorship or advertising would appear to be left to each individual district, and is more of a political decision. Distribution of materials would be subject to a constitutional legal analysis regarding reasonable time/place/manner restrictions, which would depend in part on past practice.

Q. Can districts accept developer fees from marijuana cultivation centers or dispensaries?

A. Unclear, but failure to do so may be an unconstitutional forfeiture of public funds, and could have potentially damaging precedential effect. As dispensaries are cash businesses, method of payment of developer fees, if collected, should potentially be considered and addressed in policy (i.e., must be paid via check).