

## Cheech & Chong Need Not Apply

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**W**ell, yes, I did test positive for marijuana during the application pre-screening process...but I have a 'California Compassionate Use' marijuana card, and you have to hire me."

Maybe the use of marijuana for pain management is legitimate—and maybe it's not. But it doesn't matter. California employers still don't have to hire someone—or keep existing employees—if they use marijuana. It doesn't matter why they are using it; the law does not protect their jobs.

In *Ross v. Ragingwire Telecommunications Systems, Inc.* (2008), the California Supreme Court weighed in on the issue. To employers' relief, the Court held that holding a Compassionate Use card did not entitle Mr. Ross to a job after he failed a pre-employment drug screen. Mr. Ross's marijuana use appeared legitimate for pain management, but the Court held that there is nothing in the Compassionate Use Act (passed as a result of Proposition 215 in 1996) that addresses the respective rights of employers and employees. The Court also held that there was no violation of the California Fair Employment and Housing Act (FEHA), which protects disabled applicants and employees.

There is nothing in the opinion to suggest that existing employees would be treated differently. An

employee can be terminated if a drug screen comes up positive. It apparently doesn't matter whether the test is a result of random testing, reasonable suspicion testing, or post-accident testing.

Significantly, however, the employee may be subject to the FEHA regulations that would require the employer to explore reasonable accommodation for the pain management for which the medical marijuana is being used. For example, if the employee can demonstrate, presumably with a doctor's note, that an alternative pain management drug or other regimen is available, then the employer may be required to hire the applicant or retain the employee. The employer should suggest this alternative as a reasonable accommodation and document this "interactive dialogue." In connection with that action, it seems reasonable that the employer could impose ongoing random testing on the employee to ensure that marijuana was not being used.

Note that random testing generally cannot be performed unless the employee is in a "safety-sensitive" position or is subject to federal Department of Transportation testing protocols. Most employees cannot be randomly tested, and employers should take care to train their supervisors on the criteria for identifying "reasonable suspicion"

of drug or alcohol use or "under the influence" while on the job before requiring an employee to undergo a drug or alcohol screen.

Some employees who are caught may be given a second chance, at the employer's discretion. In such a situation, the employer can make random testing a part of a "Last Chance" agreement that requires an otherwise non-safety sensitive position employee to submit to random testing for a reasonable period of time after testing positive (e.g., six months to one year) and being given a "last chance" to remain clean.

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