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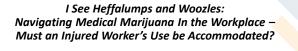
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PRESENTED BY: TROY W. SLATEN, ESQ., PARTNER AT FLOYD SKEREN MANUKIAN LANGEVIN, LLP DANIELLE HULTENIUS MOORE, ESQ., PARTNER AT FISHER & PHILLIPS, LLP.

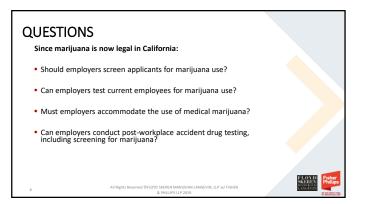
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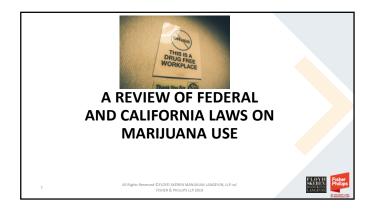


#### **OVERVIEW OF THE PRESENTATION** • California versus federal laws covering marijuana use; • The impact of these laws on workplace policies in California; • Trends regarding drug testing for marijuana in the workplace; • Employer substance abuse policies; • Employer best practices. FLOYD SKEREN

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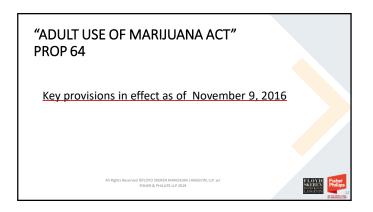
## MARIJUANA AND THE CONTROLLED SUBSTANCE ACT Marijuana remains a "Schedule I" drug under the CSA. What does and severe safety concerns; for example, narcotics such as Heroin, 20, and cocaine." BotTot MINE: marijuana use is still illegal federally. However, that could change.

#### CALIFORNIA MARIJUANA LAWS AND ROSS v. RAGING WIRE

- California Control, Regulate and Tax Adult Use of Marijuana Initiative ("Adult Use of Marijuana Act"-Proposition 64)-November 8, 2016.
- Compassionate Use Act (Proposition 215) 1996;
- Ross v. Raging Wire Telecommunications, Inc. (2008) 42 Cal.4th 920.

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#### "ADULT USE OF MARIJUANA ACT" KEY PROVISIONS

 Adults may possess, process, transport, purchase, obtain or give away to adults age 21 or over up to one ounce (28.5 grams) of marijuana or up to 8 grams of concentrated cannabis.

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#### "ADULT USE OF MARIJUANA ACT" KEY PROVISIONS

 Adults may possess, plant, cultivate, harvest, dry or process up to six living marijuana plants for recreational use.

#### "ADULT USE OF MARIJUANA ACT" KEY PROVISIONS

#### The Act shall not be construed or interpreted to:

- restrict the rights and obligations of public and private employers to
- maintain a drug and alcohol-free workplace;
  require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or
- growth of marijuana in the workplace;affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees; or
- prevent employees from computing with state or federal law (i.e. the "Controlled Substances Act".

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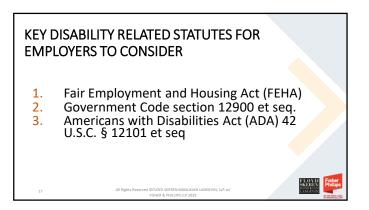
#### COMPASSIONATE USE ACT OF 1996 PROP 215

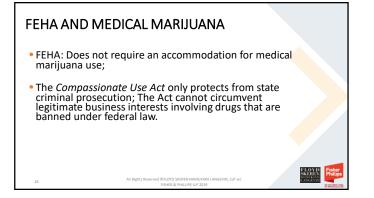
Provides a person who uses marijuana for medical purposes on a physician's recommendation a defense to certain state criminal charges involving the drug, including possession. Therefore, marijuana is legal in California for medicinal purposes provided:

Recommendation from licensed physician;
Dispensary/Collective;
Limited quantity.

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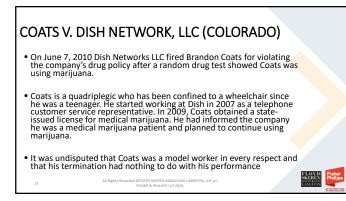




### WHAT DID THE CALIFORNIA SUPREME COURT SAY IN ROSS V. RAGINGWIRE?

- "Plaintiff's position might have merit if the Compassionate Use Act gave marijuana the same status as any legal prescription drug. But the act's effect is not so broad.
- No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law (21 U.S.C. §§ 812, 844(a)), even for medical users."

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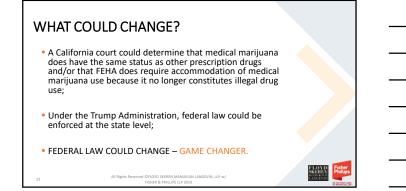


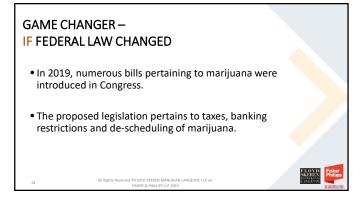
#### COATS V. DISH NETWORK, LLC

- The Colorado Supreme Court reviewed the question of whether medical marijuana use prohibited by federal law was a "lawful activity" for purposes of the statute. The court determined that the definition of "lawful" was not confined just to what was lawful under state law.
- The court then stated that marijuana use was unequivocally illegal under federal law and there was no recognized exception for medical marijuana under federal law. The court held that because Coats' medical marijuana use was unlawful under federal law, it was not a "lawful activity."
- The Colorado Supreme Court affirmed the court of appeals and found that Coats was not wrongfully terminated as a result of his medical marijuana use.

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#### PROPOSED LEGISLATION

- The Marijuana Revenue and Regulation Act would remove marijuana from its federal classification as a "Schedule 1" drug and end federal prohibition in the Controlled Substances Act.
- The bill permits states to establish their own marijuana regulatory policies free from federal interference. In addition to removing marijuana from the United States Controlled Substances Act, this legislation also removes enforcement power from the US Drug Enforcement Administration in matters concerning marijuana possession, production, and sales — thus permitting state governments to regulate these activities as they see fit.

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#### **NEW CA LEGISLATION:**

FALED 2018- There was a bill before the CA legislature during the 2018 term that would have required accommodation and made medical marijuana users a protected class. The bill failed, but there are several similar bills in the works and we will likely see it again in the near future.

NOVEMBER VOTE - On 2/20/19 a bill was proposed which adds the following provision to the CA Labor Code: "No private employee, regardless of the number of employees, shall terminate the employment of an employee if the sole reason for termination is that the employee tested positive on a drug test for a drug that is being used as a medication-assisted treatment under the care of a physician or pursuant to a licensed narcotics treatment program."

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#### CONNECTICUT

In 2012, the Connecticut legislature passed the Palliative Use of Marijuana Act (PUMA). PUMA permits the use of medical marijuana by "qualifying patients" with certain debilitating medical conditions. PUMA is one of the few state statutes (there are 9-California is not one of themy that contains an express non-discrimination provision, which protects employees from adverse employment actions taken based upon the employee's status as a "qualifying patient" of medical marijuana.

In Noffsinger v. SSC Niantic Operating Company, LLC, No. 3:16-cv-01938 (August 8, 2017), a Connecticut nursing home rescinded a job offer to a prospective employee, Katelin Noffsinger, after she tested positive for marijuana in a routine pre-employment drug screening. Noffsinger was legally prescribed marijuana to treat PTSD. Noffsinger sued, alleging that the nursing home violated the non-discrimination protections of PUMA. The nursing home moved to dismiss the suit, arguing that the anti-discrimination provision of PUMA was preempted from enforcement by the federal Controlled Substances Act (CSA).

Federal district court in Connecticut held that there is no conflict between federal and Connecticut marijuana regulation and held that *federal law does not preempt* Connecticut law.



#### RHODE ISLAND AND DELAWARE

The Rhode Island Superior Court held that the CSA does not preempt the antidiscrimination-in-employment provision of Rhode Island's medical marijuana statute. The court held that refusing to hire someone because she could not pass a drug test, due to medical marijuana use outside the workplace, violated RI state law. Callaghan v. Darlington Fabrics Corp., 2017 WL 2321184

Chance v. Kraft Heinz Foods Co., (Del. Super. Ct. Dec. 17, 2018). A Delaware state court allowed a medical marijuana user to proceed with a lawsuit against his former employer after his employment was terminated due to a positive drug test result for marijuana. The court held that the Delaware Medical Marijuana Act ("DMMA") *includes an implied private right of action*.

The court also held that the DMMA is **not preempted by federal law** because the Controlled Substances Act "does not make it illegal to employ someone who uses marijuana, nor does it purport to regulate employment matters within this context." This case is ongoing.

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#### ARIZONA AND MASSACHUSETTS

Whitmore v. Wal-Mart Stores Inc., in February 2019, an Arizona federal judge ruled that Walmart was ilable for damages after it suspended and fired an employee for testing positive for marijuana, even though she was a legal user of medical marijuana. The judge noted in his ruling awarding partial summary judgment to the former employee, that the AMMA protects medical marijuana users who test positive for marijuana as long as they didn't use or possess the drug at work and weren't impaired by it while on duty. In this case, Walmart failed to meet its burden in showing that the former employee was impaired while at work.

Barbuto v. Advantage Sales & Marketing, LLC (MASS, July 17, 2017) – Court held that a sales and marketing firm discriminated against an employee who used marijuana to treat Crohn's disease when it fired her for failing a drug test. "Employers can't use blanket anti-marijuana policies to dismiss workers whose doctors have prescribed the drug to treat their illnesses." An employer may still refuse to accommodate if use "would cause an undue hardship to the employer's business."

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DRUGC TESTING
Imployers may not administer a drug test before making an offer of employment;
However, once a job offer is made, employers may administer a drug test, when passing a drug test is a condition of employment, it:

Candidates are given notice that drug and alcohol testing will be part of the application process;
Testing will be minimally intrusive;
There are safeguards to restrict access to testing results.

Ouestion- In light of Prop 64, will there be difficulty finding qualified workers?

### PROP 64 AND DRUG TESTING JOB APPLICANTS

- Prop 64 does not prohibit employers from conducting preemployment drug testing of job applicants.
- However, employers should advise job applicants prior to a preemployment drug test that marijuana will be tested and whether employment will be denied if the test is positive.
- Employers should also consider whether marijuana will be part of the pre-employment drug testing of job applicants, and if so whether an exception should be made for medical marijuana use due to disability.

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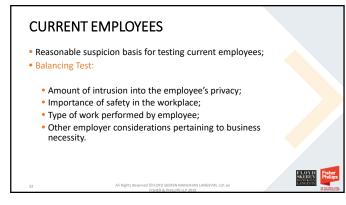


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#### CURRENT EMPLOYEES

- A higher standard exists for conducting a drug test for current employees;
- Constitutional rights to privacy;
  - Employer's interests must outweigh employee's reasonable expectation of privacy.

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# CURRENT EMPLOYEES Reasonable suspicion and marijuana: Unique challenge for marijuana; No uniformity of effect; Looking "high"- what does that mean? training management on "reasonable suspicion" is paramount. consider a "reasonable suspicion" checklist for managers and supervisors to complete documenting their observations.

#### MAY AN EMPLOYER CONDUCT RANDOM DRUG TESTING OF CURRENT EMPLOYEES?

- In general-no. Random drug testing may only be conducted for employees in safety sensitive positions, where public safety or the protection of life, property or national security is at issue;
- For example, truck drivers, airline pilots, and certain correctional officers;
- Employers must still comply with DOT standards.

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## WORKPLACE SUBSTANCE ABUSE POLICIES Employers must uniformly and consistently apply substance abuse policies to all employees; Substance abuse policies should be in writing, and include notice to all employees of drug testing policies and consequences for violations of the policy.

#### WORKPLACE SUBSTANCE ABUSE POLICIES

- Clear, written policy that no use, possession, or sale of marijuana, or marijuana derivative products, is allowed; OR, clear, written policy that treats the use of marijuana or marijuana derivative products the same as the use of alcohol; OR, written policy that address drug use and abuse, but is silent as to marijuana?
- May not report to work under the influence of marijuana (even medical marijuana) or marijuana derivative products
- Policy violations can lead to disciplinary measures including termination.

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## • CARCENT CARCENS AND SUPERVISORS • Complexer's policies and procedures; • Casonable suspicion versus random testing; • Signs of intoxication/substance abuse; • Steps to take if suspicion of on duty alcohol/illegal substance; • Obsignate managers/supervisors to receive specialized training in detection and response.



#### REASONABLE SUSPICION BASED DRUG TESTING

- Use "reasonable suspicion based" drug testing; this is particularly important for marijuana as the employee may claim, if there is a positive result on a post-hire drug test, that although they used marijuana, it was "weeks ago."
- No random testing unless applicable exception for public safety positions;
- Supervisors and managers:
   Must have reasonable suspicion prior to testing;
  - Must have reasonable suspicion prior to testing;
     Clearly document neutral observations (forms);
  - Must be trained on reasonable suspicion criteria.
- The courts have upheld testing after a serious accident.

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#### CONCLUSION

- Create and enforce appropriate workplace policies- consider-what will your company's policy be on medical marijuana use?
- Consider your accommodation process even if you can't accommodate, include it in the discussion;
- Consider treating marijuana like alcohol in company substance abuse policies;
- Train managers and supervisors, especially on reasonable suspicion criteria;

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- Educate employees on the required policies;
- Incorporate EAP services;
- Document observations and facts when drug testing;

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Stay up to date!



#### TROY W. SLATEN, ESQ.

Troy Slaten is a Partner with the Law Offices of Floyd Skeren Manukian Langevin, LLP.

Mr. Slaten earned his bachelor's degree, with honors, in English Literature from the University of California, Los Angeles (UCLA). He went on to earn his Juris Doctor degree at Pepperdine University School of Law. While in law school, Mr. Slaten actively participated on the honors Trial Team, winning awards at various trial competitions.

Licensed to practice law in all courts in California and the District of Columbia, Mr. Slaten is also a sought-after legal analyst for major media outlets including CNN, Fox News and HLN. After a succesful 25-year career as an actor in television, feature films and radio, he smoothly segued from teen star to fearless legal counsel. For the last 12 years, Mr. Slaten has conducted dozens of jury trials and represented individuals, celebrities, major businesses and insurance companies in employment defense and criminal defense, workers' compensation defense, risk & crisis management, media relations and internal investigations, drug-testing, and risk management best practices.

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