PROPOSITION 64 – ADULT USE OF MARIJUANA ACT
AND CALIFORNIA POST SELECTION STANDARDS

Although the passage of Proposition 64 (the Adult Use of Marijuana Act) has made the recreational personal use of marijuana legal in California under state law, the possession and/or sale of marijuana remains prohibited by federal law under the Controlled Substances Act (CSA) (21 U.S.C. §§ 841-846.) The CSA designates marijuana as a schedule I drug that has a high potential for abuse; has no currently accepted medical use in treatment in the United States; and lacks accepted safety for use of the drug under medical supervision. (21 U.S.C. § 812(c)(Schedule 1)(c)(10).)[1]

Since POST standards adhere to both state and federal laws, the legalization of marijuana in California under state law will have little effect on POST selection requirements. Following is a brief discussion regarding POST selection standards as they relate to marijuana usage.

BACKGROUND INVESTIGATION

Commission Regulation 1953 (Peace Officer Background Investigation) requires a thorough investigation of a candidate's personal history taking into consideration the ten Background Investigation Dimensions, including Substance Abuse and Other Risk-Taking Behaviors (drug abuse; sale of drugs) and Integrity/Ethics (abiding by laws, regulations, and procedures). Chapter 2 of the POST Background Investigation Manual provides definitions and descriptions of the dimensions along with indicators that can be used to assess the candidate against the specific attributes.

The POST Personal History Statement (PHS) addresses marijuana use in Section 8 (Legal) under Illegal Use of Drugs as it is still prohibited under federal law. Questions regarding recent and recreational drug use will remain unchanged, in compliance with acceptable pre-employment inquiries of the federal Americans with Disabilities Act (ADA).

The POST Background Investigation Manual and Personal History Statements are under review and will be revised in early 2017. Consistent with past practices, the updated resources will not address nor offer recommendations for specific workplace policies.

[1] While marijuana use remains unlawful under federal law in jurisdictions that have enacted state laws permitting marijuana use, there have been some circumstances in which federal prosecutions have been barred in such states. For example, the 9th Circuit Court of Appeals recently barred the federal government from prosecuting individuals who use state-legal marijuana based upon a rider attached to a federal appropriations bill specifying that none of the appropriated funds could be used to prevent States from implementing their own medical marijuana laws. (*United States v. McIntosh* (2016) 833 F.3d 1163.)

WORKPLACE DRUG POLICIES

Since POST does not provide guidance with regard to workplace drug policies, agencies will continue to develop their own based on local needs, in compliance with state and federal laws. With the passage of Proposition 64, there is no requirement that agencies change their policies to accommodate state-legal marijuana use.

In fact, the text of Proposition 64 itself allows for the continuation and enforcement of current workplace policies. Health and Safety Code section 11362.45 reads:

> Nothing in Section 11362.1 shall be construed or interpreted to amend, repeal, affect, restrict, or preempt:
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> *(f) The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace, or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law.*
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> (Health and Safety Code § 11362.45.)

Moreover, in a preamble to Proposition 64, the initiative drafters provided that the purpose and intent of the initiative included permitting employers to enact workplace policies pertaining to marijuana.

> **PROPOSITION 64**
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> **SEC. 3. Purpose and Intent**. The purpose of the Adult Use of Marijuana Act is to establish a comprehensive system to legalize, control and regulate the cultivation, processing, manufacture, distribution, testing, and sale of nonmedical marijuana, including marijuana products, for use by adults 21 years and older, and to tax the commercial growth and retail sale of marijuana. It is the intent of the people in enacting this act to accomplish the following:
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> *(r) Allow public and private employers to enact and enforce workplace policies pertaining to marijuana*.

Further, existing case law confirms that employers are not required to accommodate employees or potential employees who use marijuana under California's Compassionate Use Act (Health & Safety Code, § 11362.5) and can refuse to hire them, or terminate their employment, because of their use of marijuana, without fear of violating the California Fair Employment and Housing Act (FEHA) (*Ross v RagingWire Telecommunications*, (2008) 42 Cal. 4th 920).

STATE-LEGAL MARIJUANA USE AND FIREARMS POSSESSION

Since marijuana is a Schedule 1 controlled substance under federal law, any "unlawful user" of marijuana is also prohibited, under federal law, from possessing firearms or ammunition, regardless of whether the individual has obtained medical marijuana authorization under California law. (18 U.S.C. § 922(g)(3).) In fact, the 9th Circuit Court of Appeals recently rejected a challenge from an individual denied the right to buy a firearm based upon her possession of a marijuana medical registry card – even when she claimed she did not use marijuana and obtained the card merely as an expression of her free speech rights - finding that her constitutional rights were not violated by denial of the right to purchase a firearm when the firearms dealer refused to sell her a gun after learning that she was a registry cardholder. (*Wilson v Lynch* (2016) 835 F.3d 1083.)

The Wilson ruling is consistent with the September 2011 Bureau of Alcohol, Tobacco, and Firearms (ATF) Open Letter to All Federal Firearms Licensees which specifies that any individual who uses marijuana, even under a state law permitting medical use of marijuana, cannot possess firearms or ammunition under federal law (U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, Open Letter To All Federal Firearms Licensees, September 21, 2011; see 18 U.S. Code § 922(g)(3). ["Therefore, any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user or is addicted to a controlled substance and is prohibited by federal law from possessing firearms or ammunition"].) As a result, any individual who uses marijuana but is required to possess a weapon by virtue of employment, as a peace officer would be in violation of federal firearms law.

Departments should work closely with their legal counsel to determine if Proposition 64 will impact their current workplace policies and to ensure that their policies continue to meet both state and federal laws.

MEDICAL SCREENING

Commission Regulation 1954 (Peace Officer Medical Evaluation) requires peace officer candidates to undergo a medical evaluation and be found suitable prior to appointment. Agencies must establish their own medical screening procedures and evaluation criteria based on the job duties, demands, powers, and working conditions of the position. POST offers guidance in the Medical Screening Manual for California Law Enforcement, which focuses on body systems and common physical conditions that may affect the performance of essential job functions. It does not, however, provide information on or recommendations for specific drug policies.

PSYCHOLOGICAL EVALUATION

Commission Regulation 1955 (Peace Officer Psychological Evaluation) requires peace officer candidates to undergo a psychological evaluation and be found suitable prior to appointment. POST requires that the evaluation be conducted based on job information; the candidate's background information; assessments of normal behavior and patterns of abnormal behavior; a psychological interview; and information from psychological records. The candidate must be evaluated against job-related psychological constructs, as defined in the ten POST Psychological Screening Dimensions, including Avoiding Substance Abuse and Other Risk-Taking Behavior and Integrity/Ethics, contained in Chapter 4 of the POST Peace Officer Psychological Screening Manual. Marijuana use is addressed in various tables, however; in general, there is no distinction between medical or recreational, legal or illegal. Thus the data will not be affected by the passage of Proposition 64.

Additionally, the Manual currently addresses state-legal medical marijuana, thus any changes to the content of the Manual will be minimal and will have no effect on POST-specific requirements for the psychological evaluation. That said, hiring departments should work closely with their screening psychologists to determine if any changes should be made to departmental policies with regard to this issue.

Additional Resources:

Below are links from the AELE Law Enforcement Legal Center that offer information on marijuana use and public safety employment. Although both discuss state-legal medical marijuana, the information would remain relevant to state-legal recreational marijuana.

Disciplining Police Officers Re: Medical Marijuana
http://www.aele.org/LOS_Medical_Marijuana_Use.pdf

Medical Marijuana and Public Safety Personnel
http://www.aele.org/law/2011all11/2011-11MLJ201.pdf