Keeping You Compliant & In the Know!

ACA REPEAL AND REPLACE:

What the Health Reform is Going On Out There?

THE ACTION:

- Senate and House have passed a budget resolution, directing various committees in the Congress to draft proposed legislative language to "reconcile" the resolution with current law. Those committees will report out their suggested language in late January or in February (or later) and the Congress will then begin to mark up one or more bills related to the ACA.
- Timetable for repeal of portions of the ACA depend on how wedded the Congress is to *replacing* those portions at the same time they repeal them. Repeal is easy; replace is complicated.
- What happens to the employer mandate and the reporting obligation? When?

THE THEMES:

- Rollback of the income tax exclusion for employer-provided health insurance
  - Complete rollback?
  - Partial rollback? Based on income? Based on plan values?
  - Effect on plan costs to the employer?
- Tax credits or flat deductions to offset health insurance costs
  - Conditional on no offer of employment-based coverage, or unconditional?
  - Refundable credits
  - Flat deduction convertible into cash?
  - Effect on employer group risk pools
- HSA overhauls
  - Contribution limits increased
  - Disqualifying coverages narrowed (concierge fees, telemedicine, onsite clinics)
  - Others (OTC meds, child HSAs, etc.)

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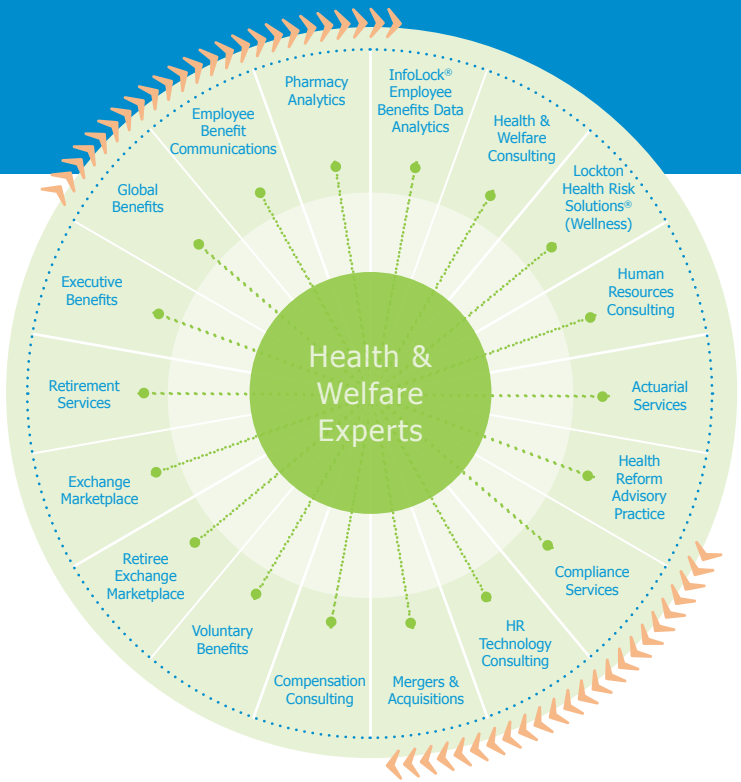
LOCKTON®

AN INTRODUCTION TO EMPLOYEE BENEFITS

Our **integrated consulting** approach pulls together specialists from Compliance, Actuarial, Communications, Compensation, Lockton Health Risk Solutions (Wellness), and HR Technology Consultants. This collaboration **drives results** and **thought leadership**… making **Your Business Better**!



WHO WE ARE.

Health & Welfare Strategy Gurus!

Masters of Employee Benefit Communications

Attorneys with 90+ Years of Combined Compliance Experience

HR Technology Experts

Wellness Planners

Number Crunchers

WHAT WE KNOW.

Complex Health Plan Strategy

HR Technology Consulting *(Ben Admin, Learning Talent Management, Payroll, Onboarding, COBRA, ACA, etc.)*

ACA, ERISA, COBRA, HIPAA, IRS Code, State Insurance Laws, etc.

Corporate Wellness Program Compliance

How to Effectively Communicate Benefits Across Multiple Mediums

WHAT WE DO.

Provide Thought Leadership to Fully Optimize Your Benefits Spend

Project Oversight & Project Management with Lockton's *(Vendor Neutral)* HR Tech Team

Integrate the Response to Health Reform with Overall Compensation and Benefits Strategy

Interpret Legislative Guidance to Ensure Your Company is Compliant

Communicate Your Benefits to Maximize Attraction & Retention and Employee Education

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Retirement Guidance

LOCKTON RETIREMENT SERVICES

THINK ONLY LARGE PLANS GET SUED? THINK AGAIN.

Litigation trends tell us that, for billion dollar 401(k) plans, it is a matter of when, not if, they will face a participant lawsuit. So when the LaMettry's 401(k) Profit Sharing Plan, a plan with only 114 active participants and just over $9 million in plan assets, was sued on the same grounds as the biggest plans in America, the retirement industry and small employers everywhere were taken by surprise. But should they have been?

A Small Target Is Still a Target

The complaint alleges that the LaMettry Plan fiduciaries did not have or follow an established process to evaluate service providers and the reasonableness of participant fees. We have seen the same allegations for years:

AUTHOR

SAMUEL A. HENSON, JD
Vice President,
Director of Legislative & Regulatory Affairs

INSIDE

Plaintiff's attorneys are finding new lawsuit opportunities with smaller employers who lack the expertise to monitor their retirement plans and the resources to defend themselves in legal battles.

- **INVESTMENT BUYING POWER**
  Fiduciaries should have negotiated for institutional share class mutual funds instead of retail mutual funds as plan investments. They should have considered low-cost equivalent funds (e.g., Vanguard funds), and the pooled separate accounts in the plan should have considered institutional share class options with much lower expense ratios.
- **COMMISSIONS ON PLAN ASSETS**
  The plan used Voya as its bundled broker and recordkeeper. In addition to several Voya retail mutual funds, the plan's investment lineup also included Voya pooled separate accounts and a Voya guaranteed investment contract. The resulting revenue sharing arrangements provided uncapped, excess compensation to Voya as plan assets increased.
- **RECORDKEEPING FEES**
  Voya billed a *Daily Asset Charge* and the *Voya Admin Fee* against participant accounts. These fees were assessed as a percentage of plan assets daily and deducted from accounts monthly, resulting in total fees up to 0.90 percent, considered excessive by common benchmarking standards.

Indication of Things to Come

There are only so many billion dollar plans and many of those who have not been sued yet have taken defensive steps to insulate themselves. With nearly a decade of successful litigation examples, more plaintiffs' firms now understand the ERISA issues and are entering the fray. With fewer big fish left in the sea, it may only be a matter of time until the sharks begin eating smaller prey. What is worse, smaller plans generally lack the in-house or independent advisor expertise to address the issues targeted by the lawsuits.

Most small plans still work under bundled recordkeeping and broker arrangements with proprietary fund lineups. To be clear, this approach is not in itself grounds for a lawsuit. However, if steps are not taken to look beyond sticker prices and negotiate on behalf of participants, risks can be high. Combined with the smaller employers' lack of defense resources, aggressive plaintiffs' firms may see them as easy pickings.

It's Time for All Employers to Play Defense

Employers, regardless of size, should take a proactive risk management approach. However, many small employers simply do not know what questions to ask or where to begin. Because ERISA is so complex and foreign, when they do seek advice, it can be difficult to discern if that advice is reliable. As a simple guiding principle for all employers, any advice should be fiduciary advice and in the participants' best interest. That advice should also be unconflicted and always lead to:

- Negotiating reasonable plan and investment related fees.
- Understanding how advisors and service providers are compensated.
- Having a prudent and documented process showing the actions taken on the above two items.

These are matters that a Lockton fiduciary advisor can help employers navigate. Through a robust fiduciary governance process, a Lockton advisor can help employers navigate these issues on a regular basis, provide unconflicted and independent advice, and assist with negotiating reasonable plan and investment fees.
If you have questions surrounding the issues of this case or have any questions, please contact your Lockton Retirement Services Team.

The communication is offered solely for discussion purposes. Lockton does not provide legal or tax advice. The services referenced are not a comprehensive list of all necessary components for consideration. You are encouraged to seek qualified legal and tax counsel to assist in considering all the unique facts and circumstances. Additionally, this communication is not intended to constitute US federal tax advice, and is not intended or written to be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code or promoting, marketing, or recommending any transaction or matter addressed herein to another party.

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Ogletree Deakins

Twice in Two Years: California Expands the Fair Pay Act

By: Christopher W. Olmsted, Ogletree Deakins

Starting January 1, 2017, companies of all sizes doing business in California will need to take extra care to ensure they are not paying employees differently based on their race or ethnicity or basing new employees' compensation solely on their prior salary. California Governor Jerry Brown recently signed two pieces of legislation that significantly expand the state's recently revamped Fair Pay Act (FPA). Employers seeking to reduce legal risk amid the growing pay equity movement should take note.

Race and Ethnicity Now Included

Senate Bill 1063 extends FPA protections to prevent race- and ethnicity-based disparities in pay. Specifically, the law—known as the Wage Equality Act of 2016—adds language to California Labor Code Section 1197.5 prohibiting an employer from paying "wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work." Previously, the law only contained such protections based on gender.

In amending the bill, the legislature inserted findings that "[i]n 2015, the gender wage gap in California stood at 16 cents on the dollar. For women of color, wage inequality is much worse. African American women in California make just 63 cents and Hispanic women less than 43 cents for every dollar white non-Hispanic men make." Although the pay gap has slightly narrowed in recent years, the law is aimed at accelerating the closure of the gap. The nonprofit Institute for Women's Policy Research found that Hispanic women would not obtain equal pay for 232 years without policy changes, based on trends from the past 30 years.

No Justifying Pay Differences on "Prior Salary, By Itself"

The second amendment, Assembly Bill 1676, prevents employers from using "prior salary … by itself" to justify any pay disparities between workers. The law, which also amends California Labor Code Section 1197.5 is designed to stop employers from unintentionally perpetuating wage inequities by relying on earlier (and usually lower) salaries to set wages. As the legislature wrote in its findings and declarations, the act is designed to help parties "negotiate and set salaries based on the requirements, expectations, and qualifications of the person and the job in question, rather than on an individual's prior earnings, which may reflect widespread, longstanding, gender-based wage disparities in the labor market."

To be clear, the law does not ban questions about prior salary; however, such questions cannot be the sole reason an employer pays one employee less than

another for substantially similar work. The law does not go as far as the pay equity law in Massachusetts, which will prohibit employers from asking about prior compensation altogether starting in July of 2018. That's not for trying, however. An earlier version of the California bill contained an outright ban that was removed via a compromise. Governor Brown vetoed a separate bill last year that made such questions illegal.

Although Massachusetts and California are the first states tackling historic pay gaps by making it unlawful to peg current compensation to past wages, they may not be the last. Pay equity is a hot topic across the country. New York, Maryland, and Nebraska have recently passed legislation outlawing certain inequities. Although those new laws do not prohibit questions about past pay, Washington, D.C. is currently considering legislation that would do so.

Justifications for Pay Differences

The revisions to the law do not mean California employers must pay employees equally across the board in all instances. Employers can still pay employees differently if they can establish one of several factors: (1) a seniority system; (2) a merit system; or (3) a system measuring earnings by quality or quantity of production (such as paying more to an employee who makes more widgets or has higher sales than the lower-paid employee). Employers can also base different pay rates on a bona fide factor other than sex, race, or ethnicity. In doing so, the employer must establish that the factor is not based on gender, race, or ethnicity; is consistent with business necessity; and is job-related to the position in question.

Practical Tips

The area of pay equity is expected to spawn significant litigation on both an individual and class basis in the coming years. Employers hoping to avoid these landmines may want to take the following steps.

- Review policies and focus on race and ethnicity.

Many companies have already begun reviewing their pay policies with an eye toward gender disparities in light of last year's amendments. Employers that have not done so may want to do so now, and all employers may want to conduct a proactive assessment concentrating on race and ethnicity to ensure compliance.

- Retain records and make sure you can justify differences.

Last year's amendments require that employers keep records regarding pay for three, rather than two, years. In addition, employers may want to review their records to ensure that they can justify any pay discrepancies and make certain that future record-keeping practices include information and/or statistics that will do so.

- Ask open ended questions about pay.

Although California has stopped short of an outright ban, interview questions surrounding pay remain tricky. Rather than asking specific questions related to past pay, employers may want to ask open-ended questions and inquire about salary expectations to avoid any perception that pay decisions are based on impermissible factors. Employers relying on reports about an employee's past wages should ensure the report is not the only factor in setting future pay.

- Review written policies and train managers.

Now is also a good time to review written policies to ensure that they spell out a compensation practice that is fair, consistent, and lawful—and to ensure that managers receive training on such practices.

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Considering Criminal History in Employment Decisions

California law generally prohibits most employers from asking about or considering the following information when making employment decisions: an arrest or detention that did not result in a conviction; referral to or participation in a pre-trial or post-trial diversion program; a conviction that has been judicially dismissed, expunged or ordered sealed; a non-felony conviction for possession of marijuana that is two or more years old; and a few other convictions. As a result, most employers who ask about criminal history focus their inquiry on permissible areas of criminal convictions rather than arrest records.

Juvenile Arrest Records

Until January 1, 2017, an employer at a health facility was permitted to ask about arrests (rather than just convictions) for certain crimes if the applicant was seeking a position with regular access to patients or regular access to drugs and medication. As of January 1, 2017, California Labor Code section 437.2(a)(2) prohibits all employers, including health facilities, from asking applicants and employees about an arrest, detention, processing, diversion, supervision, adjudication or court disposition that occurred while the applicant or employee was subject to the process and jurisdiction of the juvenile court.

Proposed FEHC Regulation

The Fair Employment & Housing Council has proposed a regulation that would make consideration of criminal convictions unlawful in certain circumstances in which the consideration has an adverse impact on a protected class such as gender, race and national origin. If an employee is able to prove the consideration of criminal history creates an adverse impact, the employer may avoid liability by proving the opposed practice is job-related and consistent with business necessity. This means the conviction policy or practice must bear a "demonstrable relationship to successful performance on the job and in the workplace" and measure the individual's fitness for the specific job rather than evaluate the individual in the abstract. The employer must demonstrate the policy or practice is appropriately tailored, taking into account factors such as "the gravity and nature of the offense or conduct; the time that has passed since the offense or conduct and/or completion of the sentence; and the nature of the job held or sought."

The method for demonstrating that a policy is appropriately tailored depends upon whether the employer uses criminal history by applying a bright-line policy or by conducting an individualized assessment. If an employer uses a bright-line conviction

disqualification, the employer must demonstrate the bright-line can distinguish between applicants or employees that do and do not pose an acceptable level of risk and that the conviction has a direct and specific negative bearing on the individual's ability to perform the duties of the position. If the employer conducts an individualized assessment of the circumstance, the employer must inform the individual he or she has been screened out because of the conviction, provide a reasonable opportunity for the individual to demonstrate the exclusion should not apply. Regardless of whether the employer uses a bright-line policy or conducts an individualized assessment, if the employer obtained the criminal history from someone other than the applicant or employee, the employer must provide the individual with notice of the conviction and a reasonable opportunity to present evidence that the information is inaccurate.

If an employer demonstrates that its policy or practice of considering criminal convictions is job-related and consistent with business necessity, adversely impacted applicants and employees may still prevail if they demonstrate there is a less discriminatory practice that serves the employer's goals as effectively.

It is unclear when the proposed regulation will be issued or whether there will be further modifications to the regulation prior to that time.

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REVISED FEHA REGULATIONS; TRANSGENDER EMPLOYEES IN THE WORKPLACE

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New FEHA Regulations

The regulations for the California Fair Employment and Housing Act ("FEHA")—the state law prohibiting harassment, discrimination, and retaliation on the basis of fifteen protected categories—were significantly amended this year to include the following:

- Specific requirements for written employment policies regarding harassment, discrimination, and retaliation that must be distributed to employees;
- Updated definitions of "sex" and "gender";
- Updated requirements for reasonable accommodations to be made for disabled employees;
- Expanded coverage to specifically include unpaid interns and volunteers;
- Updated requirements for providing reasonable accommodations for religious practices, dress, and grooming;
- Additional guidelines for when support animals may be used;
- Protection of employees with drivers' licenses that identify them as undocumented employees;
- Adds training requirements to legally-required harassment training regarding bullying; maintenance of sign-in sheets, certificates, and materials; and investigation and remedying of complaints

Transgender Employees

The FEHA has identified transgender individuals as a protected category for years. Under this law, transgender employees cannot be subject to harassment or employment decisions based on their gender identity or expression. Bathrooms are an issue recently brought into the public mind in light of recent laws in North Carolina and other states. In California, employers are required to allow employees to use the bathroom of the gender with which they identify. The complaints or discomfort of other employees cannot be used as a basis to deny employees access to bathrooms if the complaints are about the transgender employee's mere presence in the restroom. Companies, of course, can enforce anti-harassment policies against all employees (including transgender employees) for any inappropriate conduct in bathrooms. Employers can provide a unisex or single-stall bathroom, but cannot compel a transgender employee to use it unless the same is required of all other employees. A new law in effect January 1, 2017 requires that all single-stall bathrooms must be designated as unisex.

Attorney Biography

Brooke Tabshouri is an attorney in the San Diego office of Fisher & Phillips LLP. Her practice focuses solely on employment law. In addition to representing clients in litigation, Brooke regularly conducts trainings and other counseling services, such as drafting employment handbooks, commission agreements, and employment contracts, and advising employers on how to handle tricky employment situations when they arise. Brooke also teaches an employment law course at San Diego State University and serves on the Board of Directors of the San Diego HR Forum. Brooke was featured in *San Diego Daily Transcript* as one of the top Young Attorneys for 2013 and 2014. She received her Bachelor's degree with a double major in English and International Relations from the University of California, Davis and her law degree from Boston University.

SDHR Forum – 2017 Labor Law Update

Wage & Hour issues – Part II

Louis Storrow, Esq.

Storrow Law, APC, Carlsbad

1) Minimum Wage Recap
   a) California Labor Code §1182.12(a) and (b)(1)(A):
      i) Company size – 25 or less / 26 or more
   b) City of San Diego (SDMC Chap 3, Art 9, Div 1)
2) San Diego Sick Leave Recap – see https://www.sandiego.gov/treasurer/minimum-wage-program
3) Rounding of Hours / Grace Period
   a) *Silva v. See's Candy Shops, Inc*. (2016) (4th DCA, Div 1) D068136
   b) *Corbin v Time Warner Entertainment-Advance/Newhouse Partnership* (9th Cir. 2016) – 821 F.3d 1069.
4) What is "*de minimis*" work?
   a) *Troester v Starbucks Corp*. – see Cal. Supr. Ct. Case No. S234969
5) Recording in the Workplace – Privacy v. Labor Protections
   a) *Whole Foods Market Group, Inc. v NLRB* (2d Cir. 16-346)
6) Statutes:
   a) AB 1785 – Veh. C §23123.5 - use of cell phone while driving
   b) AB 1732 – H&S C. §118600 single use bathrooms - genderless
   c) AB 2337 – amend LC 230.1 – new notice of crime victim rights

mehlman barnes
WORLD CLASS IMMIGRATION SOLUTIONS

Top Immigration-Related Issues That Employers Need To Know In January 2017

1. **H-1B cap lottery**: Now is the time to open up your H-1B cases that are subject to the H cap. All cases must be filed the first five business days of April (starting April 1, 2017) and cases will be subject to a random lottery. In last two years, there was approx. 30% chance on receiving a lottery number. Approved cases will be valid starting October 1, 2017. Further restrictions expected for H-1B cases under new Administration but will not likely affect the lottery for this year. Proposed bill by Darrell Issa (SD) may change the salary and education requirements for all H-1B cases. Harsher and longer adjudications for all cases types, including H-1s, already occurring and will continue under new Administration. There was also a fee increase (21% on average) for all case types in late December.
2. **Travel challenges**: These will affect all travelers and not just foreign nationals. Expect there to be travel delays and additional background checks at consulates and at ports of entry. Under new Administration, additional screenings and restrictions proposed including for individuals who are from or who visit certain countries or with certain backgrounds/religions.
3. **New Employment-Based Immigration Regulation:** A new regulation is set to go into effect on January 17, 2017. Assuming it is not rescinded by the new Administration, this regulation makes a few changes. Highlights include: grace periods of up to 10 days and also 60 days for certain visa classifications; work permits (EAD) for additional categories of spouses and workers; work authorization while certain EAD applications are pending; clarification of AC21 requirements; retention of priority date clarification; and more job flexibility for employees in the green card process. New Entrepreneurial regulation under review.
4. **Changes to E-Verify expected**: The new Administration likely to impose mandatory E-Verify for all or more classes of employers. Changes already coming to E-Verify, including reverification component. More information sharing between agencies based on E-Verify information, process and activities leading to more investigations (also in other areas of worksite enforcement).
5. **Changes to Worksite Enforcement expected**: New November 2016 I-9 form required to be used by employers as of January 22, 2017. Many changes including new fields and guidance. Increased audits and fines expected (higher fines approved in Fall 2016 for I-9 errors). New Administration expected to shift focus to employees and return of raids at worksites in addition to employer penalties including fines, criminal charges and criminal forfeiture.
6. **Increased discrimination claims for violations during the advertising, onboarding, I-9 and E-Verify processes.** Biggest area of investigation nationwide and very active agency (EEOC and OSC). Sessions DOJ confirmation could affect this area of law. Active tip line where employees can file complaints. Very time-consuming and costly process. "Intent to discriminate" standard and new regulation causing many employers to be found in violation.

NOTE: There are now additional California state laws for violations of I-9 and E-Verify including document abuse. These are in addition to Federal laws and penalties. State fines are significant and it means that CA employers need to take issues 4-6 above even more seriously than before.

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- **Luis Castro-Ramirez v. Dependable Highway Express**
    - Delivery Driver's son needed kidney transplant
    - Company refused to accommodate employees alternative schedule to care for son
    - Employer responsible for "associational" disability discrimination for not accommodating.
- **Green v. Brennan**
    - US Supreme Court holds that statute of limitations for Title VII constructive discharge claim begins on the date of the employee's notice of resignation.
- **Wilson v. CNN**
    - Wilson sued for discrimination, retaliation, and wrongful termination after he was terminated following an investigation of suspected plagiarism.
    - CNN answered and filed an anti-SLAPP lawsuit claiming that they staffing decisions were acts in furtherance of CNN's right to free speech.
    - Trial court granted motion, but appellate court reversed finding that allegedly discriminatory and retaliatory conduct was not merely a "staffing decision."
- **Soria v. Univision**
    - Case dealt with notice issue as it relates to disability discrimination.
    - Court held that plaintiff's testimony that she orally notified her supervisor of her condition was enough to create a triable issue to defeat summary judgment.

Ogletree Deakins

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Workplace Drug Policy Considerations: Marijuana Legalization and Drug Testing

The Control, Regulate and Tax Adult Use of Marijuana Act (the "Act") was approved by voters on November 8, 2016. As a result, recreational marijuana for those over 21 is legal. The Act allows adults to possess, transport, and purchase up to one ounce of marijuana and grow up to six plants for recreational use.

Language Addressing Workplace Rights in the Act

The Act leaves employers' workplace rights undisturbed. It states that its purpose and intent, among other objectives, is to "[a]llow public and private employers to enact and enforce workplace policies pertaining to marijuana." The Act also states that nothing in it shall be construed or interpreted to amend, repeal, affect, restrict or preempt the rights and obligations of public and private employers to maintain a drug and alcohol free workplace. Further, it does not require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace. It does not affect an employers' ability to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law. It also creates a placeholder for future regulation by adding section 147.6 to the Labor Code, which provides for an advisory committee to evaluate the need for industry-specific regulations.

Other Relevant California Laws

Proposition 215 (the Compassionate Use Act of 1996) is a California law concerning the medical use of marijuana. Patients and defined caregivers who possess or cultivate marijuana with a doctor's recommendation are exempt from the state's criminal laws that otherwise prohibit possession or cultivation of marijuana.

SB 420 was enacted into the Health and Safety Code of California (Sections 11362.7 through 11362.83) to address problems with Prop 215. SB 420 added a definition of a "serious medical condition" for which medical marijuana may be prescribed. A serious medical condition, as defined by SB 420, is any of the following: AIDS; anorexia; arthritis; cachexia (wasting syndrome); cancer; chronic pain; glaucoma; migraine; persistent muscle spasms (i.e., spasms associated with multiple sclerosis); epileptic seizures; severe nausea; any other chronic or persistent medical symptom that either substantially limits a person's ability to conduct one or more of major life activities as defined in the Americans with Disabilities Act of 1990, or if not alleviated, may cause serious harm to the person's safety, physical, or mental health.

Relevant Federal Law

At the federal level, marijuana is regulated by the Controlled Substances Act (21 U.S.C. § 811), which makes any use of marijuana illegal. Federal law characterizes marijuana as it does any other controlled substance, such as cocaine and heroin. The law places the drug on "Schedule I." Schedule I drugs are

categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. (21 U.S.C. § 812(b)(1).)

The federal government has decided not to enforce most of the act. In a policy updated on August 29, 2013, the U.S. Department of Justice announced that it is generally taking a hands-off approach, with the exception of a few areas, such as distribution to minors and organized crime. On December 16, 2014, Congress passed a law, known at the Hinchey-Rohrabacher medical marijuana amendment to a spending bill, prohibiting federal agents from raiding growers of medical marijuana in states where it is legal.

Is There a Right to be Stoned at Work?

An employer's primary concern is maintaining a safe and productive work environment and the use of drugs and alcohol can interfere with these legitimate concerns. So far, no laws have prohibited an employer from enforcing workplace rules prohibiting using, possessing, or being under the influence of alcohol and/or controlled substances, including marijuana, while at work.

In California, employers may choose to rely on federal law, even if the government isn't enforcing it. When medical marijuana became legalized in California, the California Supreme Court dealt with the issue of whether employers could "discriminate" against employees who tested positive for marijuana. In *Ross v. RagingWire* (2008) 42 Cal.4th 920, an employee was discharged after he tested positive for marijuana. The employee had a doctor's note indicating he was allowed to use marijuana for back pain. The court held the employer was free to discharge the employee based on his marijuana use despite the legalization of medical marijuana. The court reasoned that although medical marijuana use was legal in California, it was still illegal under federal law. Thus, the employer did not violate the Fair Employment and Housing Act by discharging the employee.

Additionally, the medical marijuana law in California specifies that it does not require accommodation of medical marijuana at the workplace. California Health & Safety Code § 11362.7-11362.83 provides in part: "Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment…"

California law does provide general protection for employees' off duty lawful conduct. California Labor Code § 96(k) provides that the Labor Commissioner may pursue claims "for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises." Labor Code § 98(a) prohibits, among other things, the discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged the conduct described in section 96(k). However, given that marijuana use (either for medical reasons or for recreational purposes) remains illegal under federal law, the use of the substance is not lawful off duty conduct.

Next Steps

Employers should do the following in preparation for the effects that legalization of recreational marijuana will have on the workplace:

- Review and update company policy as necessary;
- Educate supervisors and employees regarding company policy relating to medical and recreational marijuana;
- Revisit drug testing policies (i.e. pre-hire screening, random drug testing, reasonable suspicion testing, and post-accident testing); and
- Review and update safety procedures and Employee Assistance Programs as necessary.