LOS ANGELES
Daily Journal
www.dailyjournal.com
MONDAY, JULY 11, 2016

PERSPECTIVE

Have employees using medical marijuana?

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With legalized marijuana use on the rise, employees and employers are quickly finding themselves in a sticky situation. Employers now face many challenges, namely whether they may fire employees for using marijuana. While 42 states have decriminalized marijuana, the majority of which support legailized medicinal marijuana, the Federal Controlled Substances Act still classifies marijuana as an illegal Schedule I drug. Otherwise stated, in the Venn Diagram of American Jurisprudence, marijuana use finds itself in the precarious overlap of "state-sanctioned" and "federally-prohibited."

Marijuana's roots are deeply engrained in American culture. The Spanish introduced cannabis as a fiber to North America in 1545. Soon thereafter, the English brought hemp to Virginia as a major commercial crop.

In the mid-to-late 19th century, marijuana was sold as an ingredient to pharmacies. By the 20th century, recreational marijuana use increased, and became known for its psychoactive effects. Concerns continued through the 1930s, resulting in the 1937 Marijuana Tax Act.

Federal statutes such as the Boggs Act and Narcotics Control Act provided mandatory minimum sentences for marijuana-related offenses. Found unduly harsh, these sentences were repealed in 1970. Instead, Congress passed the Controlled Substances Act, classifying marijuana as a Schedule I drug — a designation for drugs with no medicinal use.

State experimentation with reduced marijuana penalties rose, and quickly declined during the Reagan Administration with the Comprehensive Crime Control Act of 1984 and Anti-Drug Abuse Act of 1986.

California legalized medicinal marijuana in 1996, and in 2012, Colorado and Washington legalized recreational marijuana for adults 21 years of age or older.

Weeding Out the Workforce: Termination Based on Failed Drug Tests

Working under the influence is, of course, discouraged. But marijuana remains in one's system after its psychoactive effects dissapear. Therefore, whether employers are able to penalize employees' state-sanctioned marijuana use, despite no indication of impaired work performance, is a difficult question to answer.

Currently, only Arizona, Delaware, New York and Minnesota have statutes specifically protecting employees testing positive for medicinal marijuana. There, the burden is on the employer to prove that the employee was impaired at work.

However, other relevant state statutes are either inherently ambiguous or entirely silent, making them difficult to comprehend. Maine, for example, enacted laws prohibiting employers from taking adverse employment actions based

New York Times

Medical marijuana prescriptions for sale on the Venice Beach Boardwalk in Los Angeles.

"solely on that persons status" as a medical marijuana user, but are silent on issues surrounding failed drug tests. Pennsylvania similarly offers protection for one's "status" as a cardholder, but its law only addresses failed drug testing for certain classifications of employees. Such ambiguities set the stage for potentially inconsistent statutory interpretations.

In 2008, the California Supreme Court concluded the Compassionate Use Act does not shield employees from termination based on medicinal marijuana use, holding "nothing in the text or history of the Compassionate Use Act suggests that voters intended the measure to address the respective rights and duties of employers and employees." *Ross v. RagingWire Telecommunications*, 2008 DJDAR 1217.

Similarly, the 6th U.S. Circuit Court of Appeals in *Casias v. Wal-Mart* concluded "the Michigan Medical Marijuana Act does not regulate private employment[,]" and the Montana Supreme Court in *Johnson v. Columbia Falls Aluminum* opined, "the Medical Marijuana Act … cannot be construed to require employers 'to accommodate the medical use of marijuana in any workplace.'"

Employers are even given deference to police their workplace in states with liberal marijuana laws.

In Washington state, the Supreme Court permitted an employer to deny employment based on a failed drug test despite the Medical Use of Marijuana Act (MUMA). There, the court concluded, "MUMA does not prohibit an employer from discharging an employee for medical marijuana use, nor does it provide a civil remedy against the employer." *Roe v. TeleTech Customer Care Management*.

Recently, the Colorado Supreme Court rendered a highly publicized decision in favor of an employer who was sued by its former

employee under Colorado Revised Statutes section 24-34-402.5, which prohibits discharging an employee for "engaging in any lawful activity off the premises of the employer during non-work hours." The Supreme Court held, "the term 'lawful' as it is used in section 24-34-402.5 is not restricted in any way… medical marijuana use that is unlawful under federal law is not 'lawful' activity under section 24-34-402.5." *Coates v. Dish Network.*

Legalized recreational marijuana use is still a new concept, and only permitted in Colorado, Alaska, Oregon and Washington. To date, the courts have not published an employment discrimination decision regarding recreational use. However, if medical marijuana is any indicator, voluminous case law is not far behind.

Turning over a New Leaf: Implementing the Appropriate Drug Testing Policy

As the law currently stands, employers are afforded the ability to craft drug testing policies which meet their company's need and comport with applicable law. Employers should outline a specific drug testing policy to preserve a safe and productive work environment. Such a policy should coincide with existing policies for other drugs, such as amphetamines. In other words, just because a drug is prescribed does ¬not make it acceptable to take at work.

Federal limitations. The first area of inquiry should be whether federal regulations apply. For federal entities and contractors, creating a drug testing policy is simple — zero tolerance. Marijuana is still federally illegal, and federal law trumps state law.

Industry limitations. Just as with federal regulations, industries often set parameters for licensing and operations. These may include an all-out ban on marijuana use. Additionally, certain industries are governed by independent entities, vested with authority to deny, suspend or withdraw licenses.

State limitations. For employers free from federal mandates and industry standards, the law affords them the ability to implement a narrowly-tailored drug testing policy, assuming state law compliance.

This may still mean prohibiting even state-sanctioned marijuana use. However, the more appropriate approach may be to construct a policy that permits marijuana for "low-risk" jobs, but bans marijuana for "high-risk" positions, i.e., heavy machinery operators, chemical workers, etc.

Uniform application. State and federal statutes prevent discrimination by employers based on protected classifications. Employers may, therefore, be on the hook if drug testing is performed in a discriminatory manner, i.e., targeting certain genders, races, etc. Uniform application of drug testing policies is the best way to ensure legal compliance.

HIPAA compliance. The Health Insurance Portability and Accountability Act protects sensitive health care information. Medical marijuana now falls within its purview. This would include information supplied to a doctor when qualifying for medicinal marijuana. Employers are not notified if an employee holds a medical marijuana card, and employers are barred from attempting to obtain this information. In essence, one's status as a medical marijuana cardholder is afforded the same protections as someone with HIV.

An important distinction to make, however, is between one's "status" as a cardholder and a marijuana user. The former is a protected classification, while the latter is an objective determination. These two concepts often overlap, but failure to differentiate the two can land an employer in hot water.

To summarize, even if drug testing is permitted, and terminating based on failed drug tests is legal, inquiring as to why an employee uses marijuana, whether they are a cardholder, or looking into their medical history, is not.

Applicants vs. employees. Certain laws place limits on how/when drug testing can occur. Employees tend to have greater rights than applicants, but employers must adhere to state testing notification and methodology specifications. Prospective employers cannot require an applicant to take a drug test, but they can make passing a post-offer drug test a condition of employment, assuming there is no conflict with state law.

Staying current. The law is constantly evolving. Recently, a New Jersey Senate Committee voted to release a bill to the full Senate which would prohibit employers from firing employees based on failed marijuana drug screenings "unless an employer establishes … marijuana has impaired the employee's ability to perform the employee's job responsibilities." This is but one example of the ever-changing legal topography of marijuana laws in this country through which employers and employees must navigate.

Ending on a High Note

To avoid potential liability, employers should implement a clear and comprehensive drug testing policy which fully complies with applicable laws. The issues discussed herein just scratch the surface of what is to come in this ever-changing and fast-paced area of law. As the law continues to evolve, so too should employment policies and practices.

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