

Medical marijuana and the workplace

Colorado and Washington have been in the news recently as the first states to legalize marijuana for recreational use. California was the first state to legalize medical marijuana in 1996 and Nevada recently signed into law legislation that establishes a framework for medical marijuana dispensaries making it the 15th state that has decriminalized medical marijuana. The Division of Public and Behavioral Health is scheduled to release a final draft of the medical marijuana regulations on April 1, 2014.

Whether you agree or disagree with the issues concerning taxing marijuana and legalizing it for recreational or medical use, we know that businesses could potentially see an increase of usage in the workplace once these dispensaries are opened. There are many questions and concerns for companies to discuss in light of these regulation changes. Employers should be asking, "How should we deal with this issue in the workplace?"

First of all, let's establish the law. The passage of these laws does not allow one to go out and purchase or grow marijuana legally, as it remains state and federally illegal to possess. An individual will be able to legally obtain marijuana for medical purposes in Nevada after getting a medical marijuana prescription from their doctor and obtaining a medical marijuana card from the Nevada State Health Division. Once approved, they may possess a limited amount for medical use.

So what laws do employers need to be aware of? Employers with 15 or more employees must consider various employment regulations that relate to medical disabilities and reasonable accommodation as defined in the American with Disabilities Act. This does not mean an employer must accommodate the medical use of marijuana in any workplace.

So what if an employee uses medical

QUOTE OF THE WEEK

“I have found the best way to give advice to your children is to find out what they want and then advise them to do it.”

Harry S Truman



Diana Albiniano

marijuana off the employers property, claiming they are lawfully allowed to use it during their off-duty activities and cannot be terminated? In Colorado, where medical marijuana has been legal since 2000, in the Coats vs. DISH Network LLC case, an employee argued that his medical marijuana use was a lawful off-duty activity and therefore his termination violated Colorado's Lawful Off-Duty Activity Statute. The court disagreed and dismissed the case stating: "use of marijuana, even where such use is in full compliance with Colorado's Medical Marijuana Amendment, is not a lawful activity." ("Medical Marijuana and Employment-New Developments" by Ann E. Christoff). The medical marijuana amendment does not give the employee the right to violate employers' policies in regard to the use of controlled substances. This case helps support the employer's right to set policies that their employees must follow or be subject to discipline up to and including termination. However, if an employee requests to adjust their work schedule to ensure that they are no longer impaired when they come to work, an employer may accommodate the request if the employer determines it is reasonable and does not impose an undue hardship. If the employer has a zero-tolerance drug policy and the employee is subject to random drug tests or there is an accident involving the employee the employer may terminate the employee for cause if the employee fails the drug test.

So does that mean I have to jeopardize the safety of my workplace? All employers must follow OSHA rules which require that all employers provide a safe work environment. If it can be shown that an employee's impairment is a danger either to him or herself or to another worker, the employer can suspend or terminate the employee. In California, the State Supreme Court has ruled that drug testing for marijuana is legal and that terminating an employee for medical marijuana use, even outside the workplace, isn't discrimination. So what do you do if you reasonably suspect that an employee is impaired? Can you test them? Again this will relate back to what you have outlined in your drug testing

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policy. The difficulty comes into play as to what levels of THC imposes impairment to an individual. THC can stay in the bloodstream for up to six weeks even though the individual is no longer impaired.

To complicate the issue some states like Arizona have passed a law that says people that do not hold a "safety sensitive" job (i.e. airline pilot) are safeguarded from being fired for using medical marijuana. In addition, employers that have federal contracts are subject to the federal Drug Free Workplace Act and need to abide by this policy or be subject to losing their contracts.

So how does an employer limit its liability? Employers should inform applicants and their employees of their drug-testing policies. If they have a zero tolerance policy, the policy needs to be clearly communicated. Writing the policy to state "any detectable amount of illegal drugs in an employee's system will result in termination" as opposed to using an "under the influence" standard would be an easier way to defend the policy. Employers should make sure that they receive acknowledgements from each employee that they have read, asked questions and understand the policies. Employers must also uniformly enforce these policies including for applicants. Employers should train their managers on detecting impairment and what to do if these issues arise. The important thing is to keep an employee's medical condition confidential, but also follow the employer's drug policies.

It will be important to closely monitor legislative and legal developments around these issues, change your policy accordingly and consult a professional when you have questions.

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