

MEDICAL MARIJUANA

Compliance Best Practices

This is an area of the law that will continue to be tested in the courts. There are some key things you can do to ensure compliance with state and federal marijuana laws.

Understand Your State Marijuana Laws

- It is important that you understand your rights and obligations—and those of your employees—under any state-specific marijuana laws in place where you do business. Each state has different requirements, and by keeping yourself up to date on the constantly changing laws, you can avoid surprises down the line.

FLORIDA LAW Amendment 2 to the Florida Constitution allows qualified physicians to issue a physician certification for the medical use of marijuana to individuals with debilitating medical conditions. § 381.896, Fla. Stat. In Florida, Employers are not required to accommodate an employee's use of medical marijuana at work and the statute expressly denies the creation of "a cause of action against an employer for wrongful discharge or termination." Additionally, the statute expressly prohibits medical marijuana users from using medical marijuana at their place of employment without their employer's permission. For employers with drug-free policies and programs, § 381.986(15) provides that "this section does not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy." Florida law does not explicitly address whether employers may have to accommodate medical marijuana use outside of the workplace.

A Florida company, to maintain compliance with federal law, can prohibit its employees from using medical marijuana on and off the worksite by arguing:

- 1) that federal law, under the Controlled Substances Act, preempts state law;
- 2) that the language of the Florida marijuana statute expressly prohibits on-site use; and
- 3) that the lack of language regarding off-site use of medical marijuana is different than the states that have allowed off-site use and discrimination claims against employers because Florida law denies a cause of action against an employer for wrongful discharge or termination based on medical marijuana use.

Drug Testing

- Have a written policy in place
- Have a written procedure in place
- Meet with/interview suspected employee
- Document reasonable suspicion indicators
- Arrange for transportation to and from testing facility (and, if necessary, home)
- Be consistent with procedure
- Be consistent with discipline
- Maintain confidentiality as reasonably appropriate

Policies

- Include information addressing how you treat marijuana use as part of an updated, comprehensive substance abuse and testing policy
- Consider whether use poses a threat to workplace safety and identify areas/positions of high risk
- Notify applicants and current employees of the policy
- Tailor policies to adhere to differing state requirements
- Ensure managers are aware of policies
- Maintain uniformity in policy enforcement and discipline
- Adopt measures for ensuring confidentiality
- Compliant with the Florida Drug Free Workplace Act

DOT Stands Its Ground

- DOT motor carrier regulations cover “safety-sensitive” transportation employees
- Pilots, bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire armed security personnel, ship captains and pipeline emergency response personnel, among others.
- No driver may report for or remain on safety-sensitive duty while using any controlled substance
- No driver shall report for or remain on safety-sensitive duty after testing positive for unlawful drugs
- On 10/22/09, DOT issued a statement asserting that its regulated drug testing program will not change based upon the DOJ’s 10/19 statement.
- DOT regs do not authorize ‘medical marijuana’ under state law to be a valid medical explanation for a transportation employee’s positive drug test result.
- “Therefore, Medical Review Officers will not verify a drug test as negative based upon information that a physician recommended that the employee use ‘medical marijuana...’ It remains unacceptable for any safety-sensitive employee subject to drug testing under the Dept. of Transportation’s drug testing regulations to use marijuana.”

Americans with Disabilities Act

- Employers may prohibit current illegal use of drugs and alcohol in the workplace; and
- Require that employees report for duty without engaging in the unlawful use of drugs.
- A positive test result establishes “current” use.
- Under federal law, medical marijuana use is excluded from protection as illegal drug use.
- Employers should still approach challenges to test results based upon ADA with care.

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