

UP IN SMOKE: THE RISE OF MEDICAL-MARIJUANA LAWS

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As more states enact laws allowing patients to ingest marijuana as a means of coping with various diseases and symptoms, the question quickly arises for human resources professionals about how this affects the employment relationship. If employees are legally allowed to smoke at home to manage night seizures, are they still going to be affected by marijuana the next day at work? Do you have to accommodate this?

Background

Although some statutes specifically provide that employers are not required to “accommodate” marijuana in the workplace, the meaning of such one-to-two-sentence directives can be unclear. Does it mean that employees cannot smoke at work, cannot be high at work, or does it mean that the employer does not have to provide a room or the means to smoke marijuana during work hours?

Furthermore, our system of federalism brings federal as well as state laws into the mix. U.S. Attorney General Eric Holder recently stated that federal agents will not seek criminal charges against marijuana users unless they are in violation of both federal and state laws. This is a departure from the Bush administration’s policy of prosecuting people for violating federal drug laws despite the user being a medical marijuana user in line with appropriate state laws. Holder’s stance seems likely to lead to increased usage and more legal drug sales as the Obama administration has clearly demonstrated a hands-off approach in this area. The hands-off approach will also make it difficult for employers to predict what they can and cannot do in the midst of a myriad of state and federal laws that sometimes seem to conflict.

THE LEGAL LANDSCAPE

The U.S. Supreme Court has ruled that people who are arrested under federal marijuana-distribution charges may not raise a “medical necessity” defense in federal court. The Court discussed the Controlled Substances Act and the federal recognition that marijuana is a strongly restricted, Schedule I drug. *United States of America v. Oakland Cannabis Buyers’ Cooperative*.

The high Court also ruled that the federal government has the power, under the Commerce Clause of the Constitution, to prohibit purely intrastate cultivation and possession of marijuana even if that cultivation and possession is authorized by state marijuana laws. Thus, the ultimate message is that federal authorities could continue to arrest marijuana users, even if those users were using for state-authorized, medicinal purposes. *Gonzales v. Raich*.

A district court in the State of Washington held that the Americans with Disabilities Act (ADA) did not protect individuals who are currently engaged in the use of illegal drugs, regardless of whether state law allowed the use. *Barber v. Gonzales*:

These cases tell us that even though some states are choosing to allow the use of medical marijuana, the federal stance on marijuana is still strong and anti-use. Therefore, the likelihood of medical marijuana use adversely affecting federal employment claims is questionable at this time.

Michigan, one of the most recent states to pass medical marijuana laws, removed state penalties for the use, possession, and cultivation of marijuana if one applies for a permit and is registered with the Department of Community Health. To obtain a permit, the applicant must submit a doctor’s note, paperwork stating the need for medical marijuana, attach a copy of a photo ID, and pay a fee.

Going even further, Rhode Island in June 2009 joined just two other states, New Mexico and California, that allow the sale of medical marijuana from licensed producers. The states that do not allow such producers turn a blind eye to where the patients are getting the marijuana and do not condone its sale. But in Rhode Island, legislators voted to override the governor’s veto and the state will now allow state-licensed dispensaries to supply patients with marijuana for medical usage.

How Medical-Marijuana Laws Affect Employment

Essentially, many states’ medical-marijuana laws appear to be decriminalization statutes which provide a defense in state court to those who are using marijuana under a doctor’s recommendation. In a wrongful-discharge case that was brought in Montana, the Supreme Court of Montana ruled in April 2009 that the state’s medical-marijuana act did not protect an employee who was fired for using marijuana. The court not only held that the employer’s policy and subsequent termination did not violate the state’s Act, but it also did not violate the federal ADA. The court relied on

the fact that the Act did not require an employer to accommodate the medical use of marijuana.

The ADA states that an employer may hold an illegal drug user to the same standards as other employees. But the issue remains as to whether employees can successfully claim the underlying disease which causes them to ingest the marijuana is a qualifying disability deserving of ADA protections. With the recent expansion of the ADA we may see things changing in the treatment of medical marijuana use. Keep in mind that even though federal law may not protect illegal drug use, state laws and arbitral decisions could interpret use and impairment issues differently.

What Do You Need To Do?

Review your company's drug policies and make sure that testing is done in a fair and non-discriminatory manner. Additionally, make sure that reasonable accommodations are made for those with disabilities and that negative employment actions are not being taken under the guise of marijuana use when in fact the employee is being adversely treated for having a disability. If you will not allow your employees to use marijuana in their off time, you may have to provide for reasonable accommodations for the underlying disability itself so that the employee can still work.

Review policies in light of your state's medical-marijuana laws, fair-employment-practice laws, and the courts' interpretations.

As the laws in this area evolve, more states adopt medical-marijuana laws, and the federal government becomes increasingly "hands-off," it remains to be seen what the outcome will be if employees sue their employers after being terminated for marijuana use. Case law is limited but we can assume more suits will arise. Always ask for help before making any questionable termination decisions, especially in touchy areas such as this one that may have case-by-case legal implications beyond the ADA and drug testing laws.