



Tension Grows as Lawmakers Ignore Medical Marijuana

Publication

6.26.09

Oregon employers were once again dealt a blow in their decade-long battle against medical marijuana in the workplace as the 2009 legislative session comes to an end. For at least the fifth session in a row, Oregon employers had hoped to receive a boost from the Legislature protecting their workplaces from medical marijuana users, and once again have come up empty handed.

To understand why this issue has become so frustrating for employers, it's important to take a step back and examine the long, strange trip employers have faced since 1998, when the medical marijuana law was passed by voter initiative.

Even though the statute allows employers to prohibit "the use" of medical marijuana in the workplace, a 2005 Court of Appeals decision narrowly interpreted employers' rights by saying that only those employees who could be proven to be "impaired" by medical marijuana could be disciplined (*Washburn v. Columbia Forest Products*). Simply having an employee test positive on a drug test would not be enough without running afoul of disability discrimination laws. Soon after the decision, the tide started turning in employers' favor: First the U.S. Supreme Court issued a decision later in 2005 confirming that marijuana remained an illegal drug under federal law no matter what state laws said (*Gonzalez v. Raich*), and then the Oregon Supreme Court ruled in 2006 that the *Washburn* case should be overturned and decided in the employer's favor, although it did not definitively overturn the medical marijuana portion of the case.

The pendulum swung back the other way in June 2008, when the Court of Appeals gave marijuana proponents a lifeline by ruling against an employer on a technicality in a medical marijuana case (*Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*). Although that case was appealed to the Oregon Supreme Court in March 2009 and a decision is soon expected, don't be surprised if it leaves some wiggle room.

Oregon employers have thus turned to the Legislature for salvation, supporting legislation that would permit them to regulate all drugs in the workplace consistently, including medical marijuana. And although the vast majority of legislators support business efforts to clamp down on this pervasive problem (as of April 1, 2009, more than 20,000 Oregonians held medical marijuana cards), Oregon employers have been hamstrung by a few politicians who have blocked efforts to secure a full vote on the issue. In the last session, then-House Speaker Jeff Merkley impeded employer efforts, and within the last few weeks, Senate President Peter Courtney ensured this legislation would not pass in 2009.

would not pass in 2007.

So where does this leave Oregon employers? The same place they have been for the better part of the past 10 years — confused about their rights and responsibilities under the law. There is no clean and easy path when dealing with medical marijuana, and each employment action taken with respect to a user could lead to a lawsuit. Oregon employers can only hope that the Supreme Court rules in their favor, or wait until the 2011 session and hope that things finally turn for the best.

This article appeared in the June 26, 2009 issue of *The Portland Business Journal*.

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