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MARIJUANA FOR EVERYONE? SOCIETY'S CHANGING ATTITUDE REFLECTED IN WORKPLACE PRACTICES

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We've entered a new era of acceptance when it comes to the legally permitted use of marijuana. As of today, 28 states have legalized medical use of the drug, and eight states permit its recreational use. With over half of the states permitting some form of marijuana use, employers may be understandably confused about how this shifting stance will impact their businesses and current workplace drug testing programs. Some common questions we've fielded of late include:

- Can we maintain a zero-tolerance policy in a state that permits medical marijuana use?
- What if we are covered by federal drug-free workplace rules, federal safety or similar regulations, or run a business with numerous safety-sensitive positions?
- What if an employee with a medical marijuana card says that we need to make a reasonable accommodation to comply with the Americans with Disabilities Act (ADA)?
- What if our strict drug-testing policies make it difficult to hire and retain workers?
- What does the patchwork of state laws mean for our national employment policies?

This is just a small sampling of the questions that have crossed employers' minds (and our desks) recently. This article will attempt to answer these questions through the lens of two states at different stages of the marijuana

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Danielle S. Urban, CIPP/E
Partner

[303.218.3650](tel:303.218.3650)

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legalization cycle, and provide a discussion of employer experiences in those states.

LEGAL BACKGROUND

Despite the flurry of state-level legalization, federal law still classifies marijuana as an illegal substance. The U.S. Drug Enforcement Agency lists marijuana as a Schedule I narcotic, making it illegal under the federal Controlled Substances Act (CSA). Under President Obama, however, the U.S. Department of Justice adopted a policy to forgo enforcement of the federal law as it applies to marijuana in compliance with their states' respective laws.

Given the recent change in White House leadership, it remains to be seen how the new administration will handle enforcement of federal law in states that have legalized marijuana. Key players in the Trump administration have indicated they will take a hardline approach. In a March press conference, White House Press Secretary Sean Spicer hinted that federal authorities might hone in on states where recreational use is legal. Further, U.S. Attorney General Jeff Sessions, who is responsible for heading any efforts by the federal government to crack down on marijuana use, is staunchly opposed to the use of marijuana. During a Senate drug hearing in April 2016, in fact, Sessions stated "good people don't smoke marijuana" and that it is "in fact a very real danger."

CASE STUDIES: COLORADO AND CALIFORNIA

In 2000, Colorado voters passed Amendment 20, allowing the medical use of marijuana. Twelve years later, Coloradans voted to legalize the use of recreational marijuana through Amendment 64 to the state constitution. Since then, the marijuana industry in the state has exploded. According to the State Department of Revenue there was a total of 2,976 licensed marijuana businesses (retail and medical) in Colorado as of May 1, 2017, including 479 retail stores. These numbers paint a picture of robust demand and use of cannabis in the state. Presumably, much of that demand comes from Colorado residents who are also employed within its borders.

Although some states, Arizona and Minnesota for example, protect the employment of medical marijuana card holders whose use violates zero-tolerance policies, Colorado does

not. In 2015, the state Supreme Court held that employees do not have protection from disciplinary action, including loss of employment, if they violate their employers' workplace drug policies through the use of medical marijuana.

Many employers were relieved by this decision, comforted to know they could continue to enforce zero-tolerance drug policies. For some the relief was short-lived; businesses began to realize that enforcing zero-tolerance policies could result in serious difficulties recruiting and retaining a workforce. Over the past few years, Colorado employers have struggled with this issue, choosing to address it in various ways. None, however, are completely satisfactory in achieving employers' goals.

Meanwhile, although California was the first state to decriminalize marijuana for medicinal use with the Compassionate Use Act of 1996, it wasn't until more than 20 years later that Californians legalized its recreational use. On November 8, 2016, California voters passed Proposition 64, which allows adults aged 21 and over to possess small amounts of marijuana and up to six plants. Although Prop 64 received substantial support (56% of the vote), the numbers indicate that a noteworthy portion of voters (44%) still oppose legalized recreational use of the drug.

Although Prop 64's passage immediately allowed Californians to possess and cultivate their own plants, selling marijuana for recreational use will not be legal until at least January 1, 2018. By then the state will have developed regulations and issued licenses for retail stores. State finance officials predict that approximately 4.8 million Californians (a little over 10% of the state's population) will purchase marijuana at the outset of the regulatory rollout, and that the number will increase significantly over the following several years.

Similar to Colorado, the California Supreme Court held in 2008 that employers are not required to accommodate an employee's use of medical marijuana. Further, Prop 64 specifically states that employers may continue to enforce zero-tolerance policies prohibiting the use of marijuana, regardless of the reason for use.

California employers need to be able to improvise and adapt to the changing legal landscape with an eye on both federal and state law. Given that a sizeable portion of California's

voting population disfavored legalized recreational use, it is uncertain what will happen when January 1, 2018 rolls around. The new law might entice more Californians to use the drug, enable current users to consume more of the drug, and relax the attitudes of users such that they bring it into the workplace either in plant or edible form. To prepare for this change, employers need policies in their arsenals that will allow them to make adjustments as the impact (or lack thereof) becomes clearer.

STRATEGIES FOR NAVIGATING THE CHANGING LEGAL LANDSCAPE

As we head into this new era, you should examine your personnel policies to see how they address marijuana use. Review them with a critical eye and ask yourself whether these policies, which were probably written in a bygone era, are still right for your business and workforce today. Most critically, ask whether you still need or want a zero-tolerance policy.

The answer to that question may depend on your line of business, whether the position or type of work is safety-sensitive, and your typical employee demographic. Further, the federal Drug-Free Workplace Act (DFWA) obligates federal contractors and grantees to maintain a workplace that is free of “illegal drugs” as defined by the CSA. Employers who fall within the constraints of the DWFA have additional obligations to consider beyond those listed above.

If you are not subject to federal drug-free workplace standards or other state or regulatory requirements to maintain a zero-tolerance policy, and are without safety-sensitive positions, you might have a little more freedom when designing workplace drug policies. In some ways, that freedom makes for more complicated decision and policy-making.

For example, employers who are not required by federal law to enforce zero-tolerance policies may wonder whether they must then provide an ADA reasonable accommodation to an employee who has a medical marijuana card. The answer depends on the state in which the employer is located. In enacting their medical marijuana laws, some states (Oregon, for example) created additional provisions that expressly state employers have no duty to accommodate employees who use medical marijuana. But New York, Arizona,

Minnesota, and Illinois have enacted specific provisions that require just the opposite.

The case law regarding reasonable accommodation for medical marijuana in states where the law is silent on the issue (California, for example) have overwhelmingly determined that, because it is an illegal drug under the CSA, employers have no obligation to accommodate employees who use medical marijuana. The ADA excludes from its protections employees or applicants “who [are] currently engaging in the illegal use of drugs” as defined by the CSA.

Few employers want to announce they are throwing away their drug policies, which might as well serve as a signal to employees that they are free to do whatever they want. Many employers, however, have expressed ambivalence in assuming any sort of role – such as workplace drug testing – that effectively monitors employees’ off-duty conduct. Your employee who uses marijuana at Saturday night’s party will likely test positive on Monday’s drug test, even though that employee is no longer under the influence of marijuana.

Although there is no perfect answer, and each “solution” has its own legal risk, employers have found some relief for their hiring and retention problems with the following options:

- Maintaining zero-tolerance drug testing, but only at the time of hire;
- Announcing any such testing in advance as part of the job-posting process, allowing potential applicants time for marijuana to clear from their systems;
- Retaining the right to test employees who appear impaired while at work;
- Removing marijuana testing from the drug-panel test;
- Raising the threshold at which an employee’s THC level is deemed acceptable under workplace testing policies; and
- Doing away with pre-employment and random drug testing, and retaining only reasonable suspicion testing.

Because each of these options may still present legal risks, it is always a good idea to discuss any proposed changes to workplace drug policies with your legal counsel before implementation.

For more information, contact the authors at DUrban@fisherphillips.com (303.218.3650) or KSandberg@fisherphillips.com (916.210.0406).