Sessions Changes the US DOJ's Position on Prosecutorial Discretion Involving Marijuana in States Permitting Use – But is that a Big Deal for Employers?

Insights
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As predicted by Politico, the *Wall Street Journal, Washington Post* and other sources, U.S. Attorney General Jeff Sessions today rescinded the 2013 Cole Memorandum "Guidance Regarding Marijuana Enforcement," which has established US DOJ Prosecutorial Discretion toward medical and recreational marijuana users and producers in states with State laws. The Cole Memorandum was in turn a revision of the June 2011 and October 2009 Memorandums.

To oversimplify, the Cole Memorandum memorandum basically took a *don't ask, don't tell* - kind of approach, and stated that the US Department of Justice would not spend its resources to enforce Federal drug laws arguably in conflict with state laws on medical and recreational marijuana – at least where the regulatory structure was robust enough to limit distribution and production in violation of the US DOJ's overall priorities for Drug enforcement.

The new memorandum, which Politico has posted, rescind the Cole Memorandum and returns the US DOJ to return to "well-established" prosecutorial principles.

- So the Sessions Memorandum does not set out specific goals or affirmatively state that the US DOJ is going to war on users and producers in compliance with state laws. The Memorandum simply rejects the nuanced guidance in place in different forms since 2009.

Today, the *Wall Street Journal ably* explained the result:

Attorney General Jeff Sessions Thursday is expected to rescind an Obama-era Justice Department policy that took a largely hands-off approach to the marijuana industry in states that have legalized the drug's sale for medical and recreational purposes, according to an official familiar with the plan.

The attorney general will instead permit local U.S. attorneys, the top federal prosecutors in the states, to decide whether to more aggressively enforce drug laws governing marijuana trafficking and sales.

The Sessions Memorandum will create more questions rather than answer them, but may or may not affect the current trends in employer and employee rights.

Relevance to Employers.
Marijuana remains a Schedule I Drug under the **Controlled Substances Act (CSA)** and is therefore unlawful under Federal Law … period.

For a number of years, courts in states with medical or recreational marijuana laws have upheld an employer's right to require employees to report to work free from the presence of unlawfully used drugs and to take adverse action against them even when the state either legalized marijuana in some form and/or maintains a law protecting prohibiting employers from taking adverse action against employees for lawful off-duty conduct.

As an example, see the seminal Colorado decision, **Coats v. Dish Network** in which The Court rejected the argument that the General Assembly intended the term "lawful" to mean *"lawful under Colorado state law:"*

"We therefore agree with the Court of Appeals" … "that the commonly accepted meaning of the term 'lawful' is 'that which is 'permitted by law' or, conversely, that which is 'not contrary to, or forbidden by law.'"

Generally, courts concluded that even if the state legalized some form of marijuana use, that use was still unlawful under the Controlled Substance Act (CSA). Thus the state laws did not change the definition of lawful for purposes of employment decisions. Likewise, the ADA and most disability discrimination laws would not protect marijuana use because that use was still unlawful under Federal Law.

Many states' marijuana laws also expressly or tacitly recognized the employer's right to maintain a drug free workplace and to take adverse action. Please follow this Link to my California Partners Danielle Moore and Benjamin Ebbink's recent piece on the California Marijuana law.

Safety Concerns.
Many employers are not troubled by employee off duty usage of marijuana, and may have sympathy with medical users; however, the active metabolites of marijuana stay in an employee's system after use and has been proven to affect higher levels of judgment and reflexes even days later. For this reason, regardless of an employer's personal opinions, most employers have continued to require employees to report to work free from the presence of unlawfully use drugs. As an example, review the National Highway Traffic Safety Administration Report to Congress and related studies.

The safety challenge is further complicated by the fact that there is no widely accepted method to determine a presumption of impairment based upon the use of marijuana; unlike alcohol. Various states are now experimenting with tests and presumptive standards, but it is unclear as to whether they are accurate or legally defensible in the longer run.

Moreover, even if one limits the requirement of being present in one's system to "safety-sensitive jobs," does this mean that impairment is acceptable for employees using their cars to perform work or to make crucial financial decisions or to enforce no-harassment protections? These are valid questions.

Changing Tide Toward Employees?

In 2017, we began to see some court decisions concluding that employers could not take adverse action against employees lawfully using marijuana under their state laws, in part because legislatures wrote some of the newer marijuana legislation to expressly protect employees.

As an example, in August, 2017 the Massachusetts Supreme Judicial Court held in **Barbuto v. Advantage sales and Marketing** that, as with the use of any properly prescribed medication, the use of lawfully prescribed marijuana must be accommodated - Chief Justice Gants stated that:

"an exception to an employer's drug policy to permit its use is a facially reasonable accommodation."

The Court left open the possibility that accommodating an employee's use of medical marijuana could pose an undue burden to employers, holding that the use of marijuana could impair performance or cause a safety issue, which would impose an undue burden on employers.

Such an analysis is essentially the analysis employers have used for years to evaluate licit employee drug use. The Court did confirm that the statute does not require employers to permit the use of medical marijuana in the workplace. See Boston FP Attorneys' Jeff Dretler and Josh Nadreau's take on Barbuto.

Or see **In Callaghan v. Darlington Fabrics** (R.I. Super. Ct., May 23, 2017), in which the Rhode Island Superior Court held that an employer could not refuse to hire a medical marijuana cardholder, even if the employee would not pass the employer's mandatory pre-employment drug test.

Will US Attorneys Really shift resources to such cases?

These decisions occurred while Marijuana was already a Schedule I Drug – and the CSA Schedule, not the Guidance memorandum, is the key to pro-employer decisions. There is also the issue of the Roharabacher-Blumenauer Amendment and whether it will be included in future spending bills and limit US DOJ efforts.Perhaps a US DOJ effort to actively prosecute marijuana producers and users will influence Courts considering the right of employers to take adverse action against users, but it is hard to see how the US DOJ's new stance will change those state Court's analysis.

Possible Action Points.

1. 1. On a **State-by-State basis**, learn about the Medical and Recreational marijuana laws and related issues in states in which you operate. Many such laws are analyzed on our FP Website, such as Lisa McGlynn an Ilanit Fischler's piece on the 2017 Florida Law.

2. Track the Legislatures in states in which you operate, as does Fisher Phillips, and respond to new State Marijuana Laws which may be intended to get around court decisions finding that Federal Schedule I status made the use unlawful for purposes of employment decisions.
3. Determine states where the state law has been interpreted or may be interpreted to require accommodation of medical marijuana users – don't make knee jerk decisions rather than going through an individualized interactive process.
4. Analyze your states' medical and Recreational marijuana Laws. Many medical marijuana laws include restrictions on the conditions warranting marijuana use or the form of marijuana or its active elements.
5. Determine your employee-philosophy with regard to medical marijuana usage. Weigh the risk of creating precedent of a reasonable accommodation versus employee morale and culture.
6. Review your Job Descriptions for safety implications, as well as any essential functions that may be affected by residual marijuana presence.
7. In states where use is lawful, think about how you will handle employees who are cited for driving while impaired while off duty, depending upon their duties.
8. Rethink your drug testing decisions – as Marijuana use increases, are you losing good workers?

- Focus more on the deadly opiates epidemic, which is far more harmful to employers than marijuana usage.

Fisher Phillips will be further discussing the implications of the DOJ change.