Don't Fear The Reefer: Legalization of Marijuana To Have Little Effect on WA Employers

Insights
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On November 6, 2012, Washington became a national trailblazer when voters approved a state initiative legalizing the recreational use of marijuana (Colorado passed a similar law the same day). As of December 6, 2012, it will no longer be illegal for adults over the age of 21 to possess one ounce of marijuana. The good news for employers: the new law does not change employers' rights in any way, and zero tolerance policies may still be enforced.

Background

Washington's new law not only decriminalizes the recreational use of marijuana, but also the sale of the drug. It authorizes the state's Liquor Control Board to establish rules for state-licensed stores to sell marijuana. The law also establishes impairment levels for the application of state DUI laws. But there are likely legal roadblocks ahead. As Colorado's governor cleverly summarized: "don't break out the Cheetos" just yet – federal law still says that marijuana is illegal. Although the U.S. Justice Department has not yet taken any action against these new laws, they have reminded potential partakers that pot remains illegal under federal law, leaving open the prospect of suing the state to block the enactment of the law.

What Effect Could This Have On The Workplace?

The new law does not contain a provision that would protect employees' use of the drug at work, nor does it provide individuals comfort should they show up for work with the drug remaining in their system. However, it could also mean that some employers will find themselves in a discussion with an employee about the application of workplace policies. Specifically, some employees may point out that the law sets a standard for marijuana "impairment" (based on how much THC, the drug's active ingredient, is in the bloodstream) and may claim that they should not be in violation of workplace policies if they are below "impairment" levels set by law.

This is especially true because THC drops below the legal impairment level within hours, although certain marijuana remnants can show up in a drug test days after use. More enterprising employees may even claim that marijuana use should no longer be a violation of company policy since it is now legal under state law (ignoring the fact that employers have the right to prohibit the use of legal items at work, such as alcohol). Nevertheless, despite these anticipated arguments, employers are in no way required to amend their workplace drug and alcohol policies to accommodate the new law.

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Nor does the law change a 2011 Washington Supreme Court decision which held that employers are permitted to discipline or terminate medical marijuana users who violate workplace drug policies, and are not required to accommodate an employee's use of medical marijuana. We reported on that ruling when it was handed down in June 2011.

What Does This Mean For You?

Employers continue to have legitimate reasons for implementing and applying policies prohibiting employee use of marijuana at work, and requiring that employees not have traces of marijuana in their system while at work, even if the substance is legal. And marijuana is still considered illegal under federal law. Employers should continue to apply their zero tolerance drug and alcohol policies, drug testing policies, and prohibitions against the possession of the drugs on company property. To avoid any confusion as to how your workplace policies apply to recreational use, we recommend that your policy be issued in writing to applicants and employees It should clearly indicate that the use of marijuana – whether for recreational or medical purposes – is prohibited just as is any other controlled substance. Further, your policies should prohibit any detectable level of drug in an employee's system to avoid any confusion with the state's "impairment" standard.

For advice or further information please contact any attorney in the Portland, Oregon office of Fisher Phillips at (503) 242-4262.

This Legal Alert provides an overview of a specific new state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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