

AG'S CONFLICTING MARIJUANA POLICY COMMENTS LEAVE SOME DAZED AND CONFUSED

Insights
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If you have been following recent comments by Attorney General Jeff Sessions in an attempt to predict marijuana policy under the Trump Administration, you might be left scratching your head. In recent comments before Congress, Sessions seemed to provide a clear indication that the federal government would not soon change course to ramp up enforcement of federal anti-marijuana law. Then, just last week, Sessions seemed to suggest that his Justice Department might soon take a tougher enforcement stance on recreational marijuana – something of particular interest to the growing list of states that have legalized recreational marijuana.

All of this might leave you feeling dazed and confused, and it might not have anything to do with something you may or may not have smoked. What, if anything, should employers make of these recent comments?

BACKGROUND: CLASH HAD BEEN ANTICIPATED

This issue has been on the forefront of the minds of many given the growing disconnect between state and federal law. As an increasing number of states move forward with efforts to legalize medical and recreational marijuana, the glaring conflict between these state and federal laws has become more pronounced. As of today, 29 states and the District of Columbia allow some form of medical marijuana, and 8 states (plus D.C.) permit some type of recreational use. Many observers – including employers – have been waiting for some indication of what the Trump administration's

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approach to this issue would be, especially given that marijuana remains an illegal Schedule I drug under the federal Controlled Substances Act.

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Attorney General Jeff Sessions has been a longtime vocal opponent of marijuana, and there was some speculation that his opinions would influence the White House's approach to marijuana enforcement. For example, during an April 2016 Senate drug hearing, then-Senator Sessions referred to marijuana as a "real danger" and "not the kind of thing that should be legalized." At that same hearing, he pronounced his opinion that "good people don't smoke marijuana." Just this March, in fact, after taking office as Attorney General, he indicated that the drug was "only slightly less awful" than heroin while speaking to law enforcement personnel.

OBAMA DOJ AND CONGRESS HAD TAKEN LENIENT POSITION

Sessions took control of a Justice Department that had previously indicated a rather lenient approach to the issue. In August 2013, Deputy Attorney General James Cole issued guidance to all federal law enforcement personnel indicating that the government would take a somewhat relaxed approach when it came to the conflict between federal and state law. This guidance, referred to as the "[Cole Memo](#)," established criteria under which the federal government would allow state legalization laws to move forward largely without federal enforcement or other intervention.

Essentially, under this policy, the federal government would not go out of its way to enforce marijuana cases, but would instead focus enforcement resources on those situations needed to prevent distribution to minors, prevent marijuana revenue from being used to fund criminal enterprises (such as gangs or cartels), and prevent marijuana from moving into states where it is not legal.

Following that memo, Congress passed a budgetary amendment (known as a "rider") prohibiting the Justice Department from spending funds to prosecute marijuana patients and providers who are acting lawfully under state laws. This May 2014 law ensured that the Obama-era "hands off" policy would continue until and unless it was specifically reversed by a subsequent administration.

With Trump's election and his nomination of Sessions as his Attorney General, that is exactly what many assumed would

occur. In fact, in April 2017, Sessions ordered his Justice Department to review the Cole Memo and make recommendations for possible changes, leading to speculation that the Trump administration would take steps to significantly curtail or even revoke the guidance.

SESSIONS' RECENT CONGRESSIONAL TESTIMONY CAME AS SOMEWHAT OF A SURPRISE

However, with recent comments, Sessions first appeared to indicate that there are no widespread changes to the enforcement policy of the federal government on the horizon. In testimony offered before a House Judiciary Committee oversight hearing on November 14, Sessions signaled a softer approach that appears to indicate that the enforcement position previously taken by the Obama administration would continue for the foreseeable future. In his testimony, Sessions conceded that marijuana is not as dangerous as heroin, which is a shift in his opinion from statements made earlier this year. Whether that signals the current administration will move to reschedule marijuana from a Schedule I drug remains to be seen. These comments also seemed to indicate that the Cole Memo would remain in effect for the foreseeable future.

With regard to the budget rider blocking federal funds from being used to go after users of marijuana in certain states, Sessions had earlier this year sent a letter to Congress asking lawmakers to discontinue it. During his recent comments, however, Sessions acknowledged that the Department of Justice was "bound" by the federal prohibition and would not seek to challenge it through direct action.

SESSIONS BACKTRACKS?

However, Sessions appeared to back away from his previous Congressional testimony in further comments last week. During a November 29 press conference, he stated, "It's my view that the use of marijuana is detrimental, and we should not give encouragement in any way to it, and it represents a federal violation, which is in the law and is subject to being enforced." Sessions went on to say, "We are working our way through a rational policy, but I don't want to suggest in any way that this department believes that marijuana is harmless and people should not avoid it." A spokesperson

for Sessions declined to clarify what he meant by “rational policy” or when such a policy might be implemented.

WHAT DO EMPLOYERS NEED TO KNOW?

So what, if anything, do these recent statements mean for employers? From a legal perspective, perhaps not much. Marijuana remains an illegal drug under federal law, and employers can still enforce drug policies and drug testing rules in accordance with state and federal law.

From an enforcement perspective, these comments appear somewhat contradictory and don't shed much light on how the Trump administration might approach this issue. Although there had been some concern that there would be a significant clash between the federal government and the states given Sessions' earlier pronouncements about the drug, which might have caused a measure of uncertainty for employers, his recent Congressional testimony seems to indicate that there will not be any increased enforcement activity at the federal level. However, his more recent comments seem to backtrack and sound like the Jeff Sessions of old. All of this has created an unfortunate “haze” of confusion on where federal marijuana enforcement might take us, and employers will just have to hold tight until we see further formal articulation of federal policy.

This is a constantly evolving area of the law, especially when it comes to the impact on workplace law. So far, courts have generally not held that employers are required to accommodate marijuana use, although there are some significant exceptions (most notably a July 2017 [victory for medical marijuana users in Massachusetts](#)). But because this is an area of the law that will continue to be tested in the courts, particularly states with statutes protecting employees who engage in “lawful” off-duty conduct, employers should consult with counsel when developing personnel policies and when deciding whether to take action regarding a specific incident.

If you have any questions about these developments or how they may affect your organization, please contact the authors at BEbbink@fisherphillips.com (916.210.0400), DUrban@fisherphillips.com (303.218.3650), or your regular Fisher Phillips attorney.

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