Chronic Dispute: What The Sessions Marijuana Memo Means For Employers

Insights
1.05.18

Attorney General Jeff Sessions issued a one-page memorandum yesterday rescinding Obama-era guidance that had allowed states to legalize medical and recreational marijuana with marginal federal interference, eliminating any doubt about his position against the trend towards legalization. The bad news is that the current state of the law regarding the legality of marijuana use remains confusing, to say the least: it is dependent on the state you are in, and while the legislatures and courts across the country continue to revisit and shape the laws at issue, marijuana continues to be classified as an illegal Schedule I drug pursuant to the Federal Controlled Substances Act.

The good news for employers: yesterday's memorandum doesn't seem to have impacted your approach to the issue from a workplace law perspective. Where state law had permitted you to take a zero tolerance approach to those testing positive for marijuana, you can continue on the same course. And if you took a more relaxed approach—whether due to state law or your own company philosophy—you can likely carry on with business as usual. But there could be turbulence ahead, so you will want to get up to speed on the latest and pay close attention to the upcoming developments on this topic.

How Did We Get Here?
Currently, 29 states allow some form of medical marijuana use, while eight states and the District of Columbia permit recreational use. These numbers continue to grow each year, as public support for loosening restrictions on the drug continues to grow. For example, when California became the first state to vote in favor of legalizing cannabis for medical purposes in 1996, it passed with only 55 percent of the vote; when Florida became one of the most recent states to legalize medical marijuana in 2016, it passed with 71 percent.

However, while the states continue to pass laws changing the legal status of marijuana use, the federal government has not. Marijuana has remained a Schedule I drug since 1970 when the Controlled Substances Act was signed into law by President Nixon. Since 1972, there have been repeated attempts to remove it from this classification, but none have been successful. In other words, while someone may be able to use marijuana legally for recreational use in Colorado, or for medical use in Pennsylvania, those who do are technically subject to federal penalties for violating the Controlled Substances Act.

This direct conflict has made many employers wary of condoning marijuana use, regardless of their state law. Under President Obama, Deputy Attorney General James Cole issued guidance in August 2013 to all federal law enforcement personnel indicating that the government would take a fairly relaxed approach when it came to the conflict between federal and state law. The "Cole Memo" essentially concluded that the federal government would not focus its attention on enforcing marijuana related cases, but would instead focus on preventing distribution to minors, preventing marijuana revenue from being used to fund criminal enterprises (such as gangs or cartels), and preventing marijuana from moving into states where it is not legal. Congress followed suit by prohibiting the Justice Department from spending funds to prosecute marijuana patients and providers who are acting lawfully under state laws. Thus, under the Cole Memo and subsequent Congressional action, the federal government essentially agreed not to go after marijuana users.

This hands-off attitude no doubt prompted many states to feel more comfortable passing laws that permitted the legal use of the drug. Moreover, under this relaxed atmosphere, an entire industry of cannabis purveyors sprung up, especially in the states that passed recreational marijuana laws.

But with the election of President Trump, many wondered whether this hands-off policy would change. Even though President Trump indicated a support of state laws governing and permitting medical marijuana during the election campaign, his choice for Attorney General has been repeatedly vocal about his own opposition to all marijuana use. For example, Attorney General Sessions previously referred to marijuana as a "real danger" and "not the kind of thing that should be legalized," and also stated that "good people don't smoke marijuana." It thus came as little surprise that in April 2017 Attorney General Sessions ordered his Justice Department to review the Cole Memo and make recommendations for possible changes. This lead to the issuance of the January 4, 2018 Sessions Memo.

The Sessions Memo Means The Cole Memo Is Up In Smoke

The Sessions Memo was released just four days after California's recreational marijuana law took effect, restoring the ability of federal prosecutors to enforce federal marijuana laws and effectively rescinding the Cole Memo. The Sessions Memo now allows U.S. Attorneys to use "well-established prosecutorial principles" and "investigative and prosecutorial discretion" to decide whether or not to enforce federal marijuana law, regardless of state legalization laws.

The Sessions Memo does not directly call for a crackdown on the prosecution of marijuana laws or indicate that the Department of Justice intends to do so in the future, but it reaffirms the Controlled Substances Act and reminds top federal authorities that marijuana is a "dangerous drug" and "marijuana activity is a serious crime." Without more, the Sessions Memo simply rejects the special treatment of marijuana initially established by the Cole Memo, indicating a shift in the Department of Justice's marijuana policy—and adding increased uncertainty as to the ongoing tug-of-war between state legalization and federal criminalization.

Employers Do Not Appear To Be Affected By Sessions Memo

The Sessions Memo will not likely have much of an effect on current state marijuana programs. In states where marijuana is unlawful, the Sessions Memo has no impact. In states where marijuana is legal, it is too early to tell how federal prosecutors will react to the Sessions Memo, but federal authorities are not likely to suddenly prioritize federal marijuana enforcement. Several state attorneys general have already released statements indicating that they will continue with the status quo despite the Sessions Memo.

Because of this, the Sessions Memo should not change your overall approach regarding how to deal with marijuana in the workplace. The Memo does not alter employer marijuana policies already in place, and does not impact employment marijuana policies in states where marijuana is legal. So far, courts have generally not required employers to accommodate marijuana use, and although there are some significant exceptions (most notably a July 2017 victory for medical marijuana users in Massachusetts), yesterday's news does not alter that. And in those states that offer employment protections to medical marijuana users, yesterday's Memo does little to change things. Employers should not feel emboldened to take a stricter approach against applicants or employees in those states because of this potential shift in federal prosecutorial discretion.

Marijuana Law Compliance Best Practices

But because this is an area of the law that will continue to be tested in the courts, particularly in states with statutes protecting employees who engage in "lawful" off-duty conduct, you should consult with counsel when developing personnel policies and when deciding whether to take action regarding a specific incident. Moreover, there are some key things you can do to ensure compliance with state and federal marijuana laws.

1. **Understand Your State Marijuana Laws.** It is important that you understand your rights and obligations—and those of your employees—under any state-specific marijuana laws in place where you do business. Each state has different requirements, and by keeping yourself up to date on the constantly changing laws, you can avoid surprises down the line.
2. **Implement A Drug-Free Workplace Policy.** Although every state is different, courts generally allow you the right to require a drug-free workplace and enforce zero tolerance policies. You may generally take consistent adverse employment actions against employees for violations of your drug policy, even in states where recreational marijuana is legal, and even in situations when an employee uses marijuana outside of work but comes to work under the influence of the drug. Be careful, however, if your state law includes specific protections for medical marijuana users, or offers protections for lawful off-duty conduct.

You should carefully consider your unique needs when determining what type of drug free workplace policy is appropriate:

- ***Mandatory drug testing.*** Some employers require drug testing as a condition of employment. Employers who do so need to ensure they follow the specific state law with regard to any disciplinary action taken based on positive tests. Some states forbid discipline for positive tests

unless the employee was impaired at work. However, employers that require mandatory drug testing may have a difficult time recruiting and finding employees that comply with the drug-free requirements. If that is a concern, you may want to consider another option.

- ***Policy against use, possession, and impairment.*** Employers that wish to forego mandatory drug testing should instead have strong policies in place that prohibit the use and possession of marijuana at the worksite and prohibit impairment during work hours. Employers who choose to use these types of policies instead of requiring mandatory drug testing may still be able to require an employee take a drug test after the occurrence of a workplace incident, or if there is reasonable suspicion that the employee is impaired at while at work. Again, the specific requirements vary by state.

1. **Consider Reasonable Accommodations**. Generally, most courts have held that employers need not accommodate medical marijuana in the workplace. However, some courts have recently indicated that reasonable accommodations may be appropriate in certain situations, and employers in those states should at least engage their employees in the interactive process.
2. **Have Policies For Safety-Sensitive Positions.** As explained in more detail on our firm's Workplace Safety and Health Law Blog, you will want to take special consideration in mind when it comes to those jobs with safety-sensitive components (or where federal law provides mandatory enforcement of certain policies).

Conclusion

There continues to be a chronic dispute between federal law and state law on the issue of marijuana, and yesterday's Sessions Memo amplified the conflict. The increasing number of states that allow medical or recreational marijuana use indicates a societal shift towards acceptance of marijuana, but the federal government continues to persist with the steadfast belief that marijuana is an illegal drug. This conflict does not appear to be on the verge of resolution anytime soon.

However, if you follow these simple guidelines as they relate to marijuana and the workplace, you should be in a good position when it comes to labor an employment law. Our advice at this point: stay up to date on state specific marijuana laws, develop state-appropriate policies for all applicants and employees, and apply your marijuana policies in a uniform fashion.

If you have any questions about these developments or how they may affect your organization, please contact your regular Fisher Phillips attorney.

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

Related People

Howard A. Mavity
Partner
404.240.4204
Email

Lisa A. McGlynn
Partner
813.769.7518
Email

Service Focus

Counseling and Advice