

Employee Marijuana Use and the Evolving Law

The change in presidential administration has led many commentators to question what aspects of employment law and labor law will change. At present, we can only speculate.

What we do know is that the decriminalization of marijuana, both medicinally and for recreational use, continues to advance across most regions of the country. Although marijuana is still classified as a Schedule I drug under the Controlled Substances Act (21 U.S.C. § 811), which means the federal government views cannabis use as highly addictive and having no medical value, the federal government traditionally has said that it will not pursue federal charges against low level pot users in States where marijuana usage is legal.

As a result of the 2016 election, California, Nevada, Massachusetts and Maine all chose to legalize recreational marijuana use, while Arkansas, Florida, Montana, and North Dakota expanded or permitted the lawful use of marijuana for medical purposes. The country's patchwork of laws, coupled with changing societal mores, has led many employers to question their "drug-free workplace" status and to reevaluate whether a positive test for cannabis on any drug test should result in discipline.

Employers should ask themselves: (1) what does the state allow; (2) what type of marijuana usage is at issue; and (3) what are the practical effects of an employer's prohibition against marijuana usage.

Employers should ask themselves three (3) questions when contemplating how to handle marijuana usage by applicants and employees.

WHAT DOES THE STATE ALLOW?

In Illinois, where medicinal marijuana is legal, employers are prohibited from discriminating against applicants or employees who use medicinal marijuana. This prohibition contains major exceptions, however. The Illinois statute does not force employers to allow the usage of medical marijuana on their premises, nor does it require Illinois employers to violate U.S. Department of Transportation regulations, provisions of the

Drug Free Workplace Act, or other federal law. Moreover, recreational marijuana usage is not (yet) protected at all in Illinois.

Despite the recent legalization of recreational marijuana usage in California, the practical effect of Proposition 64 is not much different than Illinois. California employers are still free to prohibit or restrict the use of marijuana by employees and prospective employees. And Proposition 64 does not prevent California employers from complying with state or federal law.

Generally, Illinois and California's treatment of both medical and recreational marijuana as it pertains to an employer's right to discipline and control its workforce is the majority view. There are some notable exceptions. The States of Maine and Arizona come to mind.

WHAT TYPE OF MARIJUANA USAGE IS AT ISSUE?

Employers need to know what kind of marijuana usage they are confronting before making any decisions about employee discipline. Generally, employers should be less likely to discipline employees for medicinal than recreational usage, although certain employers - those governed by federal regulations - may have no tolerance for any usage whatsoever.

Furthermore, the context of the usage may be important. It is foreseeable that employers will confront claims by employees that certain types of usage, although not technically medicinal, were in fact an attempt to "self-medicate" for certain kinds of disabilities. This usage may implicate the Americans with Disabilities Act. While the ADA does not require an accommodation of an employee that would cause the employer to violate the law, employers need to be alert to the duty to engage in a discussion with an employee about their disability even if marijuana use is not a practical accommodation.

WHAT ARE THE PRACTICAL EFFECTS OF AN EMPLOYERS PROHIBITION AGAINST MARIJUANA USAGE?

Safety should be an employer's principal non-legal consideration when evaluating a stance on marijuana usage. Employers cannot compromise their safety standards to accommodate marijuana usage.

On the other hand, certain employers may not have the luxury, or the inclination, to take a strong stance against marijuana usage. The national unemployment rate is low, which means labor markets are tightening. It is becoming progressively harder to find qualified employees. Tolerating certain types of marijuana usage may be required to staff a work place fully.

Finally, workplace culture has a lot to do with whether an employer may choose to be strict or forgiving of marijuana usage. Marijuana use correlates strongly with the age and religiosity of a work force. In general, workforces that are younger and less religious tend to be more libertarian about the usage of marijuana.

If you have any questions about the matters addressed in this *CCM Alert*, please contact the following CCM author or your regular CCM contact.

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