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THE EFFECTS OF MEDICAL MARIJUANA ON EMPLOYER DRUG POLICIES

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The legalization of marijuana, for either medical or recreational purposes, in 28 states and the District of Columbia has created issues for employers that wish to maintain a drug free work-force. Though there is no protection against adverse employment action for employees that use legalized marijuana recreationally, employees that use medical marijuana may be afforded such protection. While the interpretation and enforcement of state marijuana laws should be done on a state-by-state basis, there are emerging trends that employers across the country should be aware of when crafting, revising, and enforcing their employee drug policies. This article does not address all the issues an employer may encounter in states

that have legalized medical marijuana (i.e. workers' compensation, drug testing, wrongful termination, unemployment, and off-duty activities) nor is it meant to be an exhaustive analysis of the issues discussed, but it does examine pertinent issues related to medical marijuana and employer drug policies and provide practical advice about how employers can take steps to keep their work-force drug free.

MARIJUANA IS STILL ILLEGAL UNDER FEDERAL LAW

The federal Controlled Substances Act (the "CSA") makes it illegal to distribute, manufacture, or dispense marijuana. This begs the question – why are individuals and

businesses that engage in this illegal activity not prosecuted under federal law? In 2013, the United States Department of Justice (the "DOJ") issued a memorandum, commonly known as the "Cole Memo," that outlined eight enforcement priorities for federal law enforcement agencies and prosecutors as it relates to marijuana enforcement under the CSA.

The Cole Memo directs federal prosecutors and law enforcement to use their limited resources to focus on these enforcement priorities. The Cole Memo serves only as guidance to federal prosecutors and law enforcement, however, and does not limit the federal government's ability to enforce federal law relating to marijuana.

Congress, in passing the Consolidated Appropriations Act of 2016 (the “CAA”), has temporarily provided some protection from prosecution for users of legalized medical marijuana. The CAA contains an appropriations rider that prohibits the DOJ from using funds to prevent the implementation of state laws that authorize the use, distribution, possession, or cultivation of medical marijuana in 40 states and the District of Columbia. A recent 9th Circuit Court of Appeals decision found that the appropriations rider prohibits the DOJ from prosecuting individuals who comply with state-medical-marijuana laws under the CSA. However, without Congressional action the appropriations rider is due to expire in April of this year.

The Cole Memo coupled with the appropriations rider has created an environment in which the federal government is likely to turn a blind eye to the use and distribution of marijuana for medical purposes as long as individuals comply with state marijuana laws and do not implicate any enforcement priorities. As a result, the prosecution of individuals who do not implicate the enforcement priorities is a rarity.

MEDICAL MARIJUANA AND DISABILITY DISCRIMINATION

The vast majority of states that have legalized marijuana have done so, initially, for medical purposes. Medical marijuana implicates the Americans with Disabilities Act (the “Federal ADA”) and similar state statutes (“State ADA Laws”) (collectively, the “ADA”) because this population of marijuana users is more likely to suffer from a disability. Additionally, most medical marijuana statutes require individuals to demonstrate that they suffer from a qualifying medical condition and obtain a medical doctor’s recommendation before they can receive medical marijuana. The ADA itself prohibits employers from discriminating against employees and applicants based upon a disability and requires employers to provide reasonable accommodations that would allow disabled employees to perform the essential function of a job.

The Federal ADA does not require employers to provide reasonable accommodations for “illegal activity.” Because marijuana is illegal under federal law, which makes its use an illegal activity, employers are not obligated to provide accommodations to medical marijuana users under the Federal ADA. It should be noted, however, the Federal ADA does require employers to provide accommodations to recovering drug addicts.

States have taken differing approaches in addressing an employer’s duty under

State ADA Laws and their relation to medical marijuana users. Some state statutes affirmatively provide that employers may not discipline any employee due to their participation in a state-sanctioned medical marijuana program unless doing so would require the employer to violate federal law or regulations. Other states have statutory provisions that require employers to make reasonable accommodations to any medical marijuana user that is a “qualified individual” under a State ADA Law. In states without such protections, courts have held uniformly that employers do not have a duty to accommodate an employee who uses marijuana outside of work either because 1) marijuana is illegal under federal law or 2) if the voters intended to prevent employer discipline for medical marijuana use, it should have been stated in the statute.

***Practical Tips:** Employers should familiarize themselves with their state’s medical marijuana laws and regulations and how they relate to the ADA. Employers should also stay up-to-date with state-specific legal decisions that interpret the interaction between the ADA and the duties of employers regarding medical marijuana users. Using these protocols will help employers to quickly implement and revise their drug policies to ensure compliance with the ADA.

ZERO-TOLERANCE DRUG POLICIES

Even with the varied approaches states take in applying disability discrimination laws, zero-tolerance drug policies may serve as an effective tool to for employers that seek to exclude the use of marijuana from employment positions that by their very nature pose a high risk of harm to employees and the public alike. The Drug Free Workplace Act (the “Drug Free Act”) requires federal contractors and grant recipients to establish and enforce zero tolerance drug policies. Any employer that fails to adhere to the requirements of the Drug Free Act risks losing its federal contract or grant. Employee violations of a zero-tolerance drug policy subject employees to disciplinary action, up to and including termination. Similar to the rationale applied to the Federal ADA, because marijuana is illegal under federal law, employers required to comply with the Drug Free Act must prohibit marijuana use even if the state has legalized marijuana. It follows that, pursuant to the doctrine of preemption, a qualified employer may discipline an employee for marijuana use regardless of state law.

It is discretionary whether employers that are not covered by the Drug Free Act adopt a zero-tolerance drug policy, but adoption of such a policy may be especially bene-

ficial to employers with “safety-sensitive” positions in dealing with medical marijuana users. Safety-sensitive positions require employees to be responsible for the safety of themselves or others. While what constitutes a safety-sensitive position varies from state to state, states typically allow employers to randomly drug test employees in those positions and terminate them for refusal to take or failure of such a test. Employers are not given such liberties with other types of positions. It is unclear whether states will allow employers to discipline employees in safety-sensitive positions that fail drug tests for using medical marijuana, but the Federal ADA and most State ADA Laws do not require employers to provide accommodations to employees that pose a significant risk of causing harm to themselves or others. If an employer can establish a nexus between an employee’s use of medical marijuana and the increased risk it poses to a safety-sensitive position, the employer is not likely required to accommodate the employee’s marijuana use regardless of state laws that may suggest otherwise.

***Practical Tips:** Employers covered by the Drug Free Act should review their zero-tolerance drug policies for compliance and ensure they are being properly enforced. Other employers should evaluate their business to identify safety-sensitive positions, if any, and determine whether a zero-tolerance drug policy will help to reduce the risk of medical marijuana users occupying those positions.

CONCLUSION

Employers in states where marijuana is legal under state law must consider the impact of legalization on their drug policies. Employers should determine: 1) if the Drug Free Act covers them; 2) what safety-sensitive positions they possess; and 3) whether their state has ADA protections for medical marijuana users and how those protections affect their line of business. Moving forward, as the marijuana industry grows and the law surrounding it develops, employers must stay informed and remain flexible enough to adapt to the changing landscape.



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