GUEST ESSAYS

Stirring the Pot: Workplace Drug Policy Implementation in the Era of Legalized Medicinal and Recreational Marijuana

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In a wave of change that children of the 1960s only dreamed, debated and theorized about, almost half of the states in the United States have now passed laws legalizing the controlled distribution of medicinal marijuana, and two states have even legalized the sale of recreational marijuana. While this could truly be the "Dawning of the Age of Aquarius" straight out of the Broadway musical Hair, these new laws raise a variety of questions for employers who have drug screening programs or any type of drug-free workplace policy. The big question for employers is - are their drug-free workplace policies still enforceable? More specifically, what happens when an employee or job applicant with a prescription for medical marijuana fails a drug test? Will employers who discipline employees using medical marijuana who fail drug tests face liability under the Americans with Disabilities Act or their respective state anti-discrimination laws? While in one sense, there are easy answers to the questions raised by the states' legalization of marijuana, there are many grey areas which require employers to understand their state and local laws and also to pay attention to the landscape of this evolving issue.

For the most part, courts have been affirming an employer's right to enforce its drug-free workplace policies. Despite the increasing rise of the states' respective medical marijuana laws and the legalization of recreational marijuana in Colorado and Washington, marijuana possession and use is still illegal under federal law. The Controlled Substance Act (CSA) categorizes marijuana as a Schedule I drug, which means that it has a strong potential for abuse and is not currently recognized by the federal government as an acceptable medication. See, 21 U.S.C. §§811-812. In 2005, the U.S. Supreme Court held that the possession of marijuana is illegal under the CSA regardless of whether a state allows the use of medical marijuana. **Gonzales v. Raich**, 545 U.S. 1 (2005). Plainly, with reference to this issue, federal law will pre-empt state law where there is a conflict between the two.

Given that marijuana use and possession are illegal under federal law, employers that have federal contracts or are subject to federal drug-free workplace regulations should not need to change or modify their existing policies. These employers should continue to comply with applicable federal law, even if they are located in a state where marijuana has been legalized for medicinal or recreational use.

Also, the ADA does not require an accommodation for "illegal drug use". As the ADA is a federal statute, "illegal drug use" is defined by federal, rather than state law. Accordingly, the ADA does not require accommodation for marijuana use and employers can discipline employees who test positive for marijuana, even if they hold a legal prescription for medical marijuana.

The grey area for employers rests not with the federal laws at this point, but with the state laws. Most of the states that have enacted medical marijuana laws have statutes that are silent about medical marijuana patients' civil protections. In fact, the majority of these statutes do not provide any employment protections. Further, supreme courts in at least 4 states, including California, Oregon, Washington and Montana, have upheld employer decisions to discharge employees for violating drug policies, despite the fact that the employees were medical marijuana patients. State courts have also found in favor of the employer where employees attempted to bring a claim for wrongful termination under a state public policy or "lawful activities" statute. See, **Coats v. Dish Network, LLC**, 303 P.3d 147 (Colo. App. 2013). In most states, employees that use medical marijuana are not shielded from the risk

of termination solely because the state has a statute on the books that legalizes the limited use of medical marijuana. See, for example, **Casias v. Wal-Mart Stores, Inc.**, 695 F.3d 428 (6th Cir. 2012).

A few states, however, have medical marijuana laws which contain some degree of protection for employees. In Connecticut, Maine, Rhode Island, and Illinois, medical marijuana patients have protected status and cannot be discriminated against on the basis of the fact that they hold a prescription for marijuana. In addition, Arizona and Delaware have adopted more explicit and impactful statutory language that bars employers from discriminating against registered and qualifying patients who have failed a drug test for marijuana. Employers in these states will, of course, have the ability to defend claims either by providing evidence that the discipline was based upon legitimate, non-discriminatory reasons or that the employee either used, possessed or was impaired by marijuana while on the job.

Employees in states that have legalized the recreational use of marijuana, like Colorado, are not necessarily shielded from the risk of termination if they test positive for marijuana on the job. Colorado law plainly permits employers to enforce drug-free workplace policies. The Colorado courts have, in the past, been employer-friendly in this context. For example, in **Beinor v. Industrial Claims Appeals Office**, 262 P.3d 970 (Colo. App. 2011), the court upheld a denial of unemployment benefits to an employee who was terminated after testing positive for marijuana. Also, the U.S. District Court in Denver granted an employer's motion to dismiss an employee's claim for violations of the Colorado Anti-Discrimination Act after the employee was terminated because he tested positive for marijuana. **Curry v. MillerCoors, Inc.**, 2013 WL 4494307, *3.

In addition to the fact that employers need to be aware of state-specific laws and regulations with reference to both medical and recreational marijuana, employers should also re-evaluate their drug-free workplace policy to make sure that their policy is accomplishing their company-specific goal(s). Unlike alcohol or certain controlled substances, marijuana can still be detected in a standard urine drug test for several days after the effects of the drug have worn off. Accordingly, a medical marijuana patient could use marijuana on his or her own time but report to work completely unimpaired while still testing positive for marijuana. In the two states where recreational marijuana is now legal, an employee could use marijuana on vacation or over the weekend, report to work completely sober, yet fail a drug test because of the off work hours, legal (according to the state) use. Most employers don't discipline employees for off-the-clock activities so long as those activities do not interfere with their ability to perform their job. Accordingly, employers located in states with legalized medical marijuana laws and/or legalized recreational marijuana, should evaluate their drug testing policies as well as the drug testing protocols employed, and plan for how they will address the inevitable situations illustrated above.

The legalization of marijuana, both for medicinal and recreational use promises to bring with it many different issues and complications. The fact that the states are legalizing a drug that remains illegal in the eyes of our federal government alone poses numerous challenges and issues. States may also re-evaluate their views concerning the disability status of medical marijuana patients over time. Employers should make certain to pay attention to this evolving landscape because simple changes in federal and state laws or regulations could impact upon the legitimacy of their workplace drug policies. Employers should also review their present workplace drug policies with counsel to make certain that they are in compliance with all applicable federal, state and local laws.

If you have any questions about state marijuana laws, you may contact Stephanie K. Rawitt, (215) 640-8515, srawitt@clarkhill.com, or another member of Clark Hill's Labor and Employment Practice Group.

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Stephanie K. Rawitt, out of the Philadelphia office of Clark Hill PLC, provides services and advice to employers on employment and labor matters. She represents a variety of clients including hospitals, public entities, non-profit organizations, private businesses, colleges, universities, and corporations. Stephanie is a trusted advisor to both public and private companies. She works with Human Resources Departments to create, manage and maintain up-to-date employment policies and procedures to ensure that their companies are in compliance with Federal, State and Local laws. Stephanie advises employers on issues concerning statutory compliance with employment laws (such as the ADA, Title VII, the ADEA, FLSA, FMLA, Form I-9 Compliance and state wage laws). As part of her advisory service, she offers training programs on a full range of employment matters as well as assistance to personnel management on issues related to hiring, performance, assessment, monitoring, investigations, discipline, discharge, workforce reduction programs, affirmative action plans, and risk assessments.

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