

Are You Prepared for Medical Cannabis?

Labor & Employment Law Update

on November 23, 2015

Medical marijuana (MMJ) is now permitted in 23 states and Washington D.C. Out of those 23 states four of them permit recreational use. Though it remains illegal on the Federal level, the U.S. Department of Justice recently announced the release of over 6,000 inmates convicted of nonviolent drug charges. This begs the question – are you prepared for medical cannabis in the workplace?

Nondiscrimination Policies

Most states with MMJ prohibit discrimination on the basis of a worker or applicant being a registered patient. However, employers should also carefully consider that a registered patient's underlying medical condition is likely a disability under the Americans with Disabilities Act. As a result, employers that discriminate against (or refuse to provide reasonable accommodations for) a MMJ user could face unanticipated exposure under the ADA and other equal employment opportunity laws. Therefore, employers may regulate use and impairment in the workplace, but not discriminate against the underlying condition or status as a registered patient.

Significantly, employers will also have to carefully scrutinize their background check process to ensure compliance with the Fair Credit Reporting Act, EEOC guidance, and "Ban the Box" laws to avoid any unintentional discrimination. This is especially true with the impending release of inmates with actual conviction histories. In general, a background check policy should be tailored to the position (s) being applied for, and employers should have a *bona fide* basis for disqualifying those with a criminal history (*i.e.*, a nurse with access to controlled substances versus a groundskeeper). If there is no *bona fide* reason for excluding those with certain types of crimes, then do not do so.

Drug (In)Tolerance & Testing

Employers need to determine what they will and will not tolerate. Zero tolerance policies and discipline for impaired work (especially resulting in injury or damage) are permitted. Use by a non-registered user is not protected conduct (the same as using another's codeine).

Take a close look at drug testing policies to ensure that they are based on reasonable suspicion: lack of agility, dexterity, and coordination could be the result of impairment from MMJ or other intoxicating substances, or could be the physical manifestation of the underlying protected disability. A good faith basis for considering discipline and providing the employee with the opportunity to explain will help mitigate risk of a discrimination claim.

How to Prepare for MMJ

Employers should take proactive steps today to ensure compliance with the various laws now to avoid bigger problems later. This includes:

- Reviewing the company's philosophy towards medical marijuana and other controlled substances in the workplace, and ensuring that managers and supervisors are training in the company's policies.
- Determining which positions are safety-sensitive, and updating job descriptions accordingly (*side note*: with impending updates to the DOL's FLSA regulations, it is not a bad time to consider which positions are non/exempt).
- Updating handbooks and manuals to reflect drug testing, workplace search, disability, and other related policies.
- Engaging employment counsel to audit policies and practices to ensure compliance prior to there being an incident.

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