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Professional Perspective

Employer Prep for Recreational Cannabis Legalization During Covid-19

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Contributed by Margo Wolf O'Donnell, Benesch

In 1996, California became the first state in the country to legalize cannabis use when voters approved the formation of a medical cannabis program. By May 2020, only two states permit no cannabis use at all. With the advent of Covid-19, documented use of cannabis has risen, necessitating employers to focus even more on how these laws affect their employees. Detecting whether or not cannabis use affects a remote workforce and deciding how to handle these issues within the parameters of the law is even more relevant.

In order to comply with new laws relating to cannabis usage, human resources departments and employers must take proactive measures to adequately explain new guidelines to their employees and prevent future legal problems. Because many new state laws do not offer clear guidance to employers and HR executives about how to navigate the impact recreational use might have on the workplace, managers across the country are seeking legal counsel to help them refine existing policies and craft new policies to address the issues unique to their companies.

This complex process requires in-house counsel to receive input from both labor and employment lawyers and attorneys specifically focused on cannabis regulations. HR departments that act now to address this issue will be better prepared to navigate workplace changes and avoid the surprises recreational marijuana legalization may bring.

This article offers guidance on some of the biggest legal questions facing employers today about cannabis and the workplace.

Revising the Employee Handbook

Not all states that have legalized recreational cannabis require employers to update their handbooks and other written policies, but employers that act now to update their policies and procedures will be best-positioned to navigate the maze of state and federal laws that now apply to their workplaces.

Written policies are the most effective tool for clearly communicating workplace rules and standards, and preventing violations and legal troubles. Employers should review all drug-free workplace policies to ensure that stated impairment standards, remote workplace policies, and drug-testing protocols are updated and in compliance with the new state law. In addition, they should revise their zero-tolerance or drug-free workplace policies to ensure that they address the impermissible use of cannabis while employees are working or on call, rather than making blanket prohibitions.

Preparing Employees

Employers should institute training programs on the new state standards, particularly for supervisory staff and those responsible for implementing revised policies around cannabis use. It is critical to ensure that all policies are applied fairly across all members of the staff to protect an organization from any claims of discrimination.

It is also important to devise clear standards for documenting violations of a company's policies. Because drug testing in many cases is not an option, employers will need to rely on a record of good-faith belief of impairment and the specific ways that impairment violates employer policies if they wish to take action against an employee for cannabis use on the job. Employers must determine which symptoms or behaviors demonstrate "actual" impairment in the context of performing specific job duties and articulate how they plan to evaluate and document performance.

Under most state laws, employers are still free to impose restrictions on marijuana use to comply with U.S. Department of Transportation drug and alcohol testing regulations. And federal law is clear that employees in certain safety-sensitive positions cannot use marijuana.

Other Questions for Revising Policies

Labor and employment attorneys and cannabis-law experts can help employers examine how nuanced issues will operate with the context of their particular workplace, such as:

- Can an employer still have a zero-tolerance policy?
- Is drug testing still permitted in legalized states and under what circumstances?
- May an employer base an employment decision on a candidate's self-disclosure of medical or recreational cannabis use?
- When is a state's anti-discrimination law or worker's compensation statute implicated?
- What power does an employer have to keep a satellite employee from using cannabis outside of the normal workday?

Lessons Learned From Medical-Use States

For a number of years, employers benefited from statutory and common law protections to establish and implement drug-free workplaces with drug testing and other zero-tolerance protocols. This trend was encapsulated by the Colorado case *Coats v. Dish Network*, 350 P.3d 849 (Colo. 2015), where the company had fired a self-disclosing quadriplegic medical cannabis user for failing a drug test. The Colorado Supreme Court held that Colorado's antidiscrimination statute was not violated by the termination, as the state law did not protect employment decisions based on violation of federal laws—a strongly pro-employer decision.

Yet recent decisions have started to trend in the other direction:

- A state's fair employment practices law could be violated for failing to accommodate a medical cannabis user. *Barbuto v. Advantage Sales and Marketing*, 477 Mass. 456 (2017)
- A state's medical cannabis act can create an implied right of action for the refusal to hire a medical cannabis user. *Callaghan v. Darlington Fabrics*, No. PC-2014-5680, 2017 BL 216178 (R.I. Super. Ct. May 23, 2017)
- An employer discriminated against its employee under the state medical cannabis law solely for firing the medical cannabis cardholder due to a failed drug test. *Whitmire v. Wal-Mart Stores Inc.*, 359 F. Supp. 3d 761 (D. Ariz. 2019)

Legal Questions Related to Recreational-Use Laws

Labor and employment law continues to evolve in states where marijuana is legal. But shifting from medical cannabis to recreational cannabis brings into focus the complex issue of a state-permitted activity that violates federal law.

For example, in 2019, Illinois legalized adult use of cannabis with the enactment of the Illinois Cannabis Regulation and Tax Act. The CRTA also amended the Illinois Right to Privacy in the Workplace Act to include marijuana among the legal substances that an employee may permissibly use under state law during non-working and non-call hours, and employers may not discriminate against employees for such use.

In late 2019, the CRTA was amended to clarify that an employer may adopt a reasonable and nondiscriminatory zero-tolerance policy for drug use that includes drug testing for cannabis both prior to and during employment. The amendment also clarified that employers may make employment decisions based on a failed drug test. However, the amendment did not specify what constitutes a reasonable testing policy–this likely will differ from industry to industry and should be carefully considered before implementation.

An employer may consider an employee to be impaired or under the influence of cannabis if the employer has a good-faith belief that an employee manifests specific, articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job. An employer must ensure that any action taken relating to an employee's use of cannabis is done consistently and in a nondiscriminatory manner.

Employers in Illinois also can prohibit the use of marijuana if it is at the workplace or deemed to impair an employee's performance of their job duties. It is important to note that most employers in Illinois have not yet encountered employment issues that develop as a result of legalized cannabis use by their employees. For a sense of scale, before the enactment of the CRTA, the medical cannabis program in Illinois had approximately 60,000 patients enrolled. With the passage of the CRTA, the utilization of cannabis is expected to eventually reach anywhere from 750,000 to 1 million monthly users and perhaps more.

As other states look to follow suit, preparation is key. Courts in Delaware, Massachusetts, Connecticut, Rhode Island, New Jersey, and Arizona have all interpreted their state marijuana statues to restrict an employer from taking any adverse employment actions against marijuana use if it complies with those statutes. Nevada has gone even further by adopting a law making it unlawful for an employer to refuse to hire a prospective employee because he or she tested positive for cannabis. Other jurisdictions are considering eliminating pre-employment drug testing for marijuana completely.

Employers are now faced with a conundrum of attempting to comply with the strictures of those laws as well as federal law and ensuring the safety of their workforce.

Human resources leaders and employers in states where recreational cannabis has been legalized face many questions about how to balance workplace safety with the new legal rights of their employees, and how to navigate contradictions between state and federal law. Good legal counsel and proactive updates to policies and procedures will help them treat employees fairly and follow the law.