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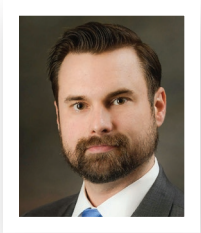
June 2016

Drug-Testing Dilemma: How Ohio's Forthcoming Medical Marijuana Law and a New OSHA Rule Combine to Make Headache for Employers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With the Ohio Senate's passage of House Bill 523 on May 25, 2016, Ohio is poised to become the nation's 25th state to legalize medicinal marijuana.[1] Although the proposed state law provides direction for employers, a new OSHA rule affecting drug testing provides a confusing federal overlay for employers to navigate.

Ohio's Medicinal Marijuana Law

At first blush, the notion of medicinal marijuana is enough to make an employer ill with uncertainty. How does this change in Ohio law impact an employer's standing duty to provide "reasonable accommodations" under the state's anti-discrimination law?[2] How does a change in the law affect an employer's workplace drug-free policy? What is an employer to do if, as is the case with those regulated by the Department of Transportation, the employer is required by federal regulations to test for marijuana use and prohibit employees testing positive for the drug from working in safety sensitive positions?

Fortunately for employers, the Ohio legislature took these concerns into consideration and provided some clear workplace guidelines:

- Employers *may* still test employees for marijuana, and *may* terminate an employees' employment, even if the employee uses marijuana on "off duty" time, no evidence of impairment on the job exists, and even if the employee has a valid prescription to use marijuana.
- Employers are *not required* to provide an "accommodation" for employees who use medicinal marijuana in connection with otherwise protected disabilities.
- Employers *must continue* to comply fully with any federal laws which require them to perform drug tests, such as those found in the Department of Transportation regulations.
- Employees *cannot prevail in a lawsuit against the employer* if they are terminated for medicinal marijuana use, even if the medicinal marijuana was taken while the employee was off duty and with a valid prescription.
- A termination for marijuana use—even if medicinal—constitutes a termination for "just cause" for the purposes of Ohio's unemployment compensation statute, meaning that the employee *would not* be eligible to collect unemployment compensation.
- Moreover, should an injury occur on the job and an employee tests positive for medicinal marijuana, a rebuttable presumption would still arise that the use of medicinal marijuana was the cause of the workplace injury. Accordingly, the *employee would not* be eligible to receive workers' compensation benefits unless he or she demonstrates that drug use was not a factor in the injury and overcome the rebuttable presumption.

In other words, from the stand point of H.B. 523, employers remain free to continue in their operations as if marijuana remained fully illegal under state law, irrespective of the new medicinal marijuana law.

OSHA's New Rule

Although H.B. 523 makes following the law as straightforward as an employer can reasonably expect, the Occupational Safety and Health Administration's ("OSHA") new accident reporting rule (the "Rule")[3] muddies the waters considerably.

OSHA's Rule requires employers to establish "a reasonable procedure" for employees to report

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work-related injuries no later than August 10, 2016, and takes aim at workplace policies or procedures that may provide an employer a pretext for retaliating against employees who report workplace injuries. The comments to the Rule make clear that "blanket" post-injury drug tests are at the center of OSHA's crosshairs:

> Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting.

Thus, the agency reasons, "[t]o strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use *is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use*." (emphasis added). The agency goes on to specifically identify bee stings, repetitive strain injuries, or injuries caused by a lack of machine guarding or a machine or tool malfunction as instances in which a post-accident drug screen would "likely not be reasonable."

How Should Employers Respond?

Employers justifiably may feel like the interplay between OSHA's new Rule and Ohio's impending medical marijuana law leaves them in a sort of drug-testing Catch-22. However, employers can begin to navigate the forthcoming legal landscape by reviewing their policies with a few questions in mind:

- ***Does my workplace drug-free policy fit my operation?*** The looming changes in the law provide employers with a good opportunity to revisit their existing workplaces policies at a broader, conceptual level. Employers may wish to revisit fundamental aspects of their policy such as what substances are tested, and how the operation wishes to respond to the approaching legalization of medical marijuana in Ohio.
- ***Does my workplace have a "blanket" post-injury testing policy?*** Although Ohio law gives employers the green light to administer drug tests, OSHA warns that "blanket" post-injury policies will be scrutinized for their tendency to serve as a reporting deterrent. Employers with such policies should choose to either include a "reasonable suspicion" element to their post-injury testing policy, or should be prepared to defend their policy with justifications as to why such a program does not serve as a reporting deterrent. Employers may also consider enhancing their workplace drug testing program to include random drug testing unconnected to an accident, with the hope that such a program would prevent drug-related incidents before they occur.
- ***Is my workplace complying with all federal drug testing requirements applicable to its industry?*** If you are required to give drug tests for safety sensitive positions, for example, as is the case with DOT-regulated employers, you should continue to test for all required substances. OSHA is on the lookout for employers who are using drug testing as a means to discourage accident reporting. A policy which is crafted with such regulatory requirements is defensible against any such scrutiny.

[1] As of the date of this publication, H.B. 523 is awaiting signature by Governor Kasich, and has not yet become law.

[2] As marijuana remains an illegal "Schedule 1" controlled substance under federal law, the federal Americans with Disabilities Act does not require that employers accommodate marijuana use.

[3] The Rule, titled "Improve Tracking of Workplace Injuries and Illnesses," was published in the Federal Register on May 12, 2016. The full text of the Rule is available at https://www.gpo.gov/fdsys/pkg/FR-2016-05-12/pdf/2016-10443.pdf

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