



GROWING PAINS: EMPLOYERS GRAPPLING WITH MARIJUANA IN THE WORKPLACE

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2018 was a busy year for the marijuana industry in the Northeast. Vermont legalized recreational marijuana, while Massachusetts saw the opening of the Commonwealth's first recreational marijuana stores. These developments reflect a pattern as more states across the country pass laws legalizing marijuana. In fact, medical marijuana use is now legal in 33 states and the District of Columbia, while recreational use is legal in 10 states and the District of Columbia.

Although more states are legalizing marijuana, its standing in the workplace is not always clear. The drug remains illegal under the federal Controlled Substances Act, but it has become increasingly difficult for employers to enforce zero-tolerance drug policies as states pass laws permitting marijuana use. For employers seeking to reconcile medical marijuana use with disability discrimination law, things can be even more complicated and confusing.

Here are three areas of consideration for employers grappling with uncertainty around marijuana policies in the workplace.

REEXAMINE DRUG TESTING POLICIES

As marijuana use becomes more commonplace, employers should reexamine policies for pre-employment screening and random drug testing to ensure compliance. Some employers choose to treat marijuana like alcohol, prohibiting use while at work but otherwise taking a hands-off approach to off-hours use. For employees with safety-sensitive positions, such as truck drivers, drug tests are likely to continue, since working while under the influence could create unsafe conditions.

But not all drug testing policies are so straightforward. In Massachusetts, for example, it is legal for employers to refuse to hire someone if they fail a drug test because of recreational use, even though adult use is legal under state law. As explained below, the question becomes more complicated when employees use marijuana for medicinal purposes.

UNDERSTAND EVOLVING COURT RULINGS

The Americans with Disabilities Act (ADA) prohibits employers from discriminating against qualified individuals on the basis of a disability. It also requires employers to provide reasonable accommodations to employees with disabilities so that they can perform the essential functions of their job. Many individuals use medical marijuana to treat disabilities that are recognized under the ADA. Since marijuana is illegal under federal law, however, courts

have generally ruled that employers are not required to accommodate the use of medical marijuana under the ADA.

At the state level, on the other hand, court decisions are trending toward protecting medical marijuana patients from discrimination. Consider three rulings from 2017. First, a Rhode Island Superior

they use the drug. And in Connecticut, the Federal district court held that federal law does not preempt a state statute barring employers from firing or refusing to hire a medical marijuana user. The precedent set in these cases require employers to determine whether permitting an employee to use medical marijuana is a reasonable accommodation or whether it would be an undue hardship. In 2019 and beyond, it will be fascinating to watch as the courts confront new marijuana issues.

REMEMBER: CHANGE IS THE ONLY CONSTANT

2019 promises to bring more change to the Northeast, as marijuana continues to become more prevalent across the region. In Massachusetts, more recreational marijuana stores are expected to open. In Connecticut, the newly elected governor expects recreational marijuana legislation to be a priority for state lawmakers. With marijuana poised to remain a hot topic in legislatures and court rooms moving forward, new court decisions should be anticipated.

In Massachusetts, for example, the SJC has left a few noteworthy questions unanswered. The court has not addressed if it is legal for an employer to prohibit medical marijuana use, even outside of work, if the employer can prove there is a business reason for doing so. The SJC has also not ruled on the legality of employees who use marijuana to treat a disability without a doctor's recommendation – nor has it ruled on any case involving recreational marijuana use and its impact on employment.

To keep pace with this fast-changing legal landscape, multi-state employers should have specific state drug testing policies in their employee handbook. As always, employers should consult with their legal counsel to mitigate any risks and make sure they are fully compliant, both with laws that protect their employees, and laws that provide for a safe workplace.

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Court held that employers cannot refuse to hire a medical marijuana cardholder, even if the individual admittedly would not pass a pre-employment drug test. In Massachusetts, the Supreme Judicial Court (SJC) ruled that Bay State companies cannot fire employees who have a prescription for medical marijuana simply because



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