

Navigating a Drug Free Workplace

Monday, September 16, 2019
8:00 AM-8:50 AM & 9:00 AM-9:50 AM

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High Times



- State Marijuana Use Laws
- Some Things to Consider
- Policy Pointers
- Post Accident Drug Testing

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State Marijuana Use Laws



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What does state law provide?

- Decriminalization of marijuana
- Some include anti-discrimination protection
- Some speak to not being denied rights and privileges under the law



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States with Pro-Employer Laws

- Alaska
- Colorado
- Washington
- Massachusetts
- California
- Hawaii
- Maryland
- Michigan
- West Virginia
- Ohio
- D.C.
- Montana
- New Jersey
- New Mexico
- Oregon
- Vermont
- New Hampshire
- North Dakota
- Florida
- Louisiana
- Missouri

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Arkansas Medical Marijuana Law

- (B) A cause of action shall not be established against an employer based upon, and an employer is not prohibited from, any of the following actions: . . .
- (ii) Acting on the employer's good faith belief that a qualifying patient:
 - (a) Possessed, smoked, ingested, or otherwise engaged in the use of marijuana while on the premises of the employer or during the hours of employment; or
 - (b) Was under the influence of marijuana while on the premises of the employer or during the hours of employment, provided that a positive test result for marijuana cannot provide the sole basis for the employer's good faith belief; or
- (iii) Acting to exclude a qualifying patient from being employed in or performing a safety sensitive position based on the employer's good faith belief that the qualifying patient was engaged in the current use of marijuana.

Oklahoma Medical Marijuana Law

- For the purposes of this section, "safety-sensitive position" shall include, but not be limited to, the following types of tasks, duties or objectives:
 - a. the handling, packaging, processing, storage, disposal or transport of hazardous materials,
 - b. the operation of a motor vehicle, other vehicle, equipment, machinery or power tools,
 - e. the operation, maintenance or oversight of critical services and infrastructure including, but not limited to, electric, gas and water utilities, power generation or distribution,

States with Laws Providing Employment Protection

- Arizona
- Connecticut
- Delaware
- Illinois
- Maine
- Oklahoma
- Utah (public only)
- Minnesota
- Nevada
- New York
- Pennsylvania
- Rhode Island
- Arkansas

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Sample Employment Protection Statute (MN)

Unless a failure to do so would violate federal law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations, **an employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon either of the following:**

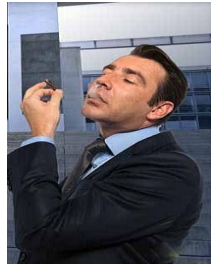
(1) the person's status as a patient enrolled in the registry program under sections 152.22 to 152.37; or

(2) a patient's positive drug test for cannabis components or metabolites, unless the patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment.

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Exceptions

- Under the influence at work
- Possession at work
- Compliance would cause loss of monetary or licensing related benefit under federal law
- Safety sensitive positions



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Some things to consider . . .

- Federal law
- State laws addressing off-duty conduct
- State anti-disability discrimination laws



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Federal Law

- Marijuana remains illegal as a Schedule I drug under the Controlled Substances Act
- The Americans with Disabilities Act
- The Federal Drug Free Workplace Act
- OSHA



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State Laws Addressing Off-Duty Conduct

- Is marijuana illegal?
- Coats v. Dish Network

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Coats v. Dish Network



- Colorado Supreme Court Case
- Colorado has a law addressing off-duty conduct
 - Prohibits termination for “engaging in any lawful activity off the premises of the employer during nonworking hours,”



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State Anti-Discrimination Laws

- Consider state law versions of the Americans with Disabilities Act
- Are marijuana users qualified individuals?
- What is a reasonable accommodation?
- What about undue hardships?

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Barbuto v. Advantage Sales and Marketing



- Massachusetts Supreme Judicial Court Case
- Motion to Dismiss
- Massachusetts is a pro-employer state
 - BUT has language addressing denial of rights/privileges
- Massachusetts has a disability discrimination law

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Holding

“Under Massachusetts law, as a result of the act, the use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication. **Where, in the opinion of the employee’s physician, medical marijuana is the most effective medication for the employee’s debilitating medical condition, and where any alternative medication whose use would be permitted by the employer’s drug policy would be less effective, an exception to an employer’s drug policy to permit its use is a facially reasonable accommodation.**”

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How does the Court get there?

- Looks to language in the law:
 - Patients shall not be denied “any right or privilege” on the basis of their medical marijuana
 - Law does not require “any accommodation of any **on-site** medical use of marijuana in any place of employment.”

Court Responds to Employer’s Arguments

- Only employee is exposed to federal law violation
- Court draws analogy between insulin and marijuana – it’s still discrimination
- Court discusses undue hardship

Emerald Steel Fabricators v. Bureau of Labor & Industries

- Supreme Court of Oregon (2010)
- Disability discrimination case
- No accommodation required
- Court looks to ADA definition
- Controlled Substances Act preempts state law
 - “Affirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act.”
- No duty to engage in interactive process

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What to do?

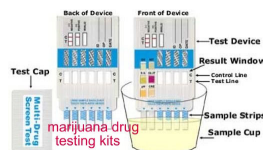
- Applicant discloses his cardholder status
 - What about an existing employee?
- Applicant/Employee tests positive for marijuana
- What about ADA claims?
- What about safety concerns?
- Employee appears impaired



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Policy Pointers

- Consider state law
- Publish it, follow it uniformly



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Policy Pointers

- Stress safety
- Define what are “illegal” drugs
- Address discipline, but be careful about zero-tolerance policies
 - Allow for explanation of a positive test result

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Policy Pointers

- Discuss on the job impairment
- Include signs and examples of impairment
- Address testing circumstances

Types of Testing

- Pre-Employment
- Post-Accident
- Reasonable Cause/Reasonable Suspicion
- Rehabilitation/Re-Entry
- Random
- Periodic



Reasonable Suspicion Training

- Provide awareness training
- Be timely
- Seek a second opinion
- Document grounds for reasonable suspicion (may be required by law)
 - Legal standard: Reasonable suspicion must be based on specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience

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Post-Accident Drug Testing



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New Rule Requirements: Injury and Illness Reporting

- Effective as of December 1, 2016
- Employees must be informed of the following:
 - Right to report
 - Right to be free from anti-retaliation or discrimination
 - Reporting procedures
 - Use OSHA's Workplace Poster



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Anti-Retaliation Component



- Concern with post-accident drug testing policies
- *Blanket* post-injury drug testing policies deter proper reporting, per DOL
- If required to comply with a state or federal law, policy is permissible
 - Consider wc premium reduction laws

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OSHA Compliant Drug Testing Policies

- Identify specific accidents where a drug test will be administered
- Consider a catch all: “Those accidents where there is a reasonable possibility drug use was a contributing cause of the accident.”



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Complete the Online Evaluation

Up Next...

- **10:15 am-11:30 am** – *General Session with John Ondrasik* in Mandalay Bay Ballroom EFGH
- **11:30 am-4:00 pm** – *NECA Show Hours*

