

Emerging Trend Regarding Medical Marijuana Will Create Even More Stress for Employers

Background

It is hard enough to attract and retain talent, while still being compliant. Now a new wrinkle arises with the legalization of medical marijuana in over 30 states. Employers need to be aware of all requirements under federal laws, despite any state laws that may prohibit discrimination against medical marijuana users. Employers must consider the following issues when dealing with medical marijuana:

- Discrimination claims for terminating employees
- Negligent hiring and negligent retention claims, since employers are subject to federal law requirements to provide a safe workplace
- Claims arising if a safety issue involving medical marijuana occurs, and it is later revealed that the employer was aware that the employee had failed a drug test

What should an employer do?

In reviewing this issue with your legal counsel, and operations and benefits employees, consider the following:

- *Am I required to offer coverage for Medical Marijuana under my health plan?* – A health plan is not required to provide coverage for medical marijuana in any state where it is legal. As marijuana is considered a Schedule I drug under federal law, a health plan is not required to provide coverage for medical marijuana regardless of the state of residence of the plan participant.
- *Can I still terminate or suspend an employee?* – An employer still retains rights to terminate employees who cannot perform their jobs because of medical marijuana use. Certainly, an employer can be challenged on a discriminatory basis under various state laws.
- *What type of other protections should I consider?* – Employers should make sure that they have written policies that are tailored to the specific jurisdiction and attached to their handbook. This would then create a specific separate policy for each state vs. the creation of a company-wide standard policy. An employer may also want to expand or utilize a medical review officer to assist in the determination of whether or not an employee who is using medical marijuana can safely carry out his/her duties.
- *What overriding factors should I consider on this slippery slope?* – From my perspective, an overriding premise must still be avoiding safety issues and making sure that the job performance is being handled in the most efficient manner possible. Even though medical marijuana is legal in a majority of states, marijuana is still considered a Schedule I controlled substance that can potentially impair those who use it. From a strict non-legal business

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perspective, it would seem to me that until a state law explicitly prohibits discrimination on the basis of medical marijuana, an employer should continue to stand by the premise that their decisions must consider the primary focus of operating a safe and efficient workplace.

In the final analysis, good judgement will drive any decision. For example, suppose an employee's medical marijuana use is outside the workplace with no impairment on the job and it doesn't involve a safety-sensitive position? It would then appear that this would not be an issue.

Additionally the legalization of medical marijuana will cause employers, working with legal counsel and operations and benefits employees, to re-evaluate their drug testing policies, consider their reasons for testing, and understand the importance of engaging in an interactive process.

[Please share your thoughts!](#)

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