

VITA

● Insights to life at work and beyond

Opus®

Q&A

Medicinal Marijuana: Chronic Pains for Employers

The fall issue of Vita Opus featured an article, 'Medicinal Marijuana: Chronic Pains for Employers.' The article provided a legal framework for employers when dealing with legalized forms of marijuana among employees/applicants.

Labor attorney, Jerome Schreiberstein, Esq., a Magna Cum Laude graduate of the University of San Francisco School of Law, provides insight to the legal pitfalls surrounding medical marijuana in the workplace. Mr. Schreiberstein, represents private and public sector employers, primarily in advice and counsel matters, policy drafting and implementation, as well as employment-related disputes.

As an additional resource for employers, following is the complete Q&A with Mr. Schreiberstein addressing all the issues we weren't able to cover in the article:

Are employers required to offer employment to applicants who test positive on a drug screen for marijuana, with a doctor's prescription, if they operate in 1 of the 13 states that have enacted medical marijuana laws?

Almost certainly not. Federal law squarely prohibits marijuana possession and use, and the United States Supreme Court has held that there are no exceptions to this prohibition, even where state regulations provide immunity or a defense to criminal charges for use or possession of marijuana under medical direction. Further, no final state court decision has yet let stand a claim for discrimination or unlawful employment practices based on the theory that an employer failed to

accommodate an individual who tested positive on a drug test, even where the individual had medical authorization for marijuana use under state law.

Can an employer terminate employment of an employee who tested positive on a drug screen for marijuana if they have a doctor's prescription and reside in 1 of the 13 states that have medical marijuana laws?

Almost certainly yes. Most employers have substance abuse or drug testing policies that stipulate an individual will be terminated if determined to have used any specified unlawful substance, including marijuana. In many of the 13 states which authorize some level of use/possession of medical marijuana, covered employees or applicants have raised discrimination and failure to accommodate claims where termination has followed a positive drug test. These claims have been rejected because an employer cannot be forced to accommodate or sustain the employment of an individual engaging in unlawful activity, which marijuana possession/use remains as a matter of federal law.

Might there be an obligation on the part of an employer to engage in an "interactive dialogue" or to attempt reasonable accommodation of an applicant or employee who discloses medical marijuana use?

Possibly. While court decisions – to date – have universally held that an employer may

discharge an employee who tests positive for marijuana use on a drug test – even where medically prescribed – the general legal ADA framework (and that under comparable state laws) is that an employer must engage in an interactive dialogue and attempt reasonable accommodation upon knowledge of a qualifying disability. While an employer would likely still be on solid ground in adhering to the posture that an employee may not use marijuana in the workplace, or even be "under the influence" of marijuana, one could certainly envision a scenario where an individual tests positive for marijuana use, but not be considered under the influence, or to pose a risk of safety to self or others. In an Oregon Court of Appeal case (overturned by the Oregon Supreme Court on other grounds), for example, the Court narrowly construed an Oregon statute that provides an employer need not accommodate marijuana use at the workplace by holding that a positive drug test did not equate with usage and thus that an employer was required to engage in accommodation efforts with an employee failing a drug test due to off-duty use of medical marijuana.

Does the company drug & alcohol policy need to include a clause that specifically addresses medical marijuana in the workplace?

It would be advisable to include specific reference to the federal Drug-Free Workplace Act, which is a requirement for

Making Health Count...From Hire to Retire.

Medicinal Marijuana: Chronic Pains for Employers

federal contractors (and a volunteer goal for others). Under the Act, employers must have a policy prohibiting the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the workplace and specifying what actions will be taken by the employer in the event of violations. Some states have similar acts with which contractors must comply. These provisions do not address medical marijuana as a separate category, but give the employer the broad stance of forbidding any unlawful use/possession of controlled substances, which, again, as a matter of federal law would include marijuana.

What questions should a company address when re-writing its drug & alcohol policy to include a clause on medical marijuana?

Were an employer inclined to innovate in the area of medical marijuana (i.e., to adopt a policy more liberal than the law would require), consideration should be given to (a) the process by which a medical marijuana user is to disclose his/her qualifying status, (b) the allowances which an employer might be willing to provide (e.g., a positive drug screen for applicants) and (c) the specific conditions to be placed on a qualifying individual (e.g., maintenance of the prohibitions of use, possession, distribution in the workplace; potential workplace testing for influence; limitations on specific safety- or security-sensitive positions). In no case should an employer consider a policy that would facially conflict with federal law (e.g., by allowing use/possession) as it could expose the entire enterprise to criminal prosecution.

Can employers require employees who work in safety- or security-sensitive jobs to work under specified work restrictions (e.g., cannot operate heavy machinery, cannot drive, etc.) or in a modified duty position until they discontinue use of medical marijuana or test negative on a drug test?

Absolutely. As mentioned, an employer would almost certainly act lawfully in strictly

prohibiting an individual from working in any position while under the influence of marijuana, even where used at the direction of a physician. Thus, any so-called accommodation would be more than the law would likely require if an individual were under the influence in the workplace.

Can an employer administer an impairment test (sobriety test) at the beginning of a shift to an employee who uses medical marijuana in order to ensure that the employee is not currently under the influence before they begin their job?

Conceivably yes. State laws vary in terms of drug and alcohol testing, however, were an employer lawfully possessed of the knowledge that an employee was a medical marijuana user, it would likely be lawful in any attempt at accommodation to ensure lack of influence at the workplace, particularly if the employee's position were deemed safety- or security-sensitive.

If an employer operates in a state where the State Law does not follow, or contradicts Federal Law, which one does the employer fall under?

As mentioned, no current state law expressly purports to require an employer to accommodate an individual for the use of medical marijuana in the workplace (though a petition drive is underway in Arizona to enact one), or, more broadly stated, to even continue to employ an individual who tests positive for marijuana use. The prohibition on marijuana possession/use is a matter of federal law and would preempt or supersede any contrary or conflicting state law. Unless/until federal law on the subject is changed, an employer should act strictly to forbid the possession/use of controlled substances, including so-called medical marijuana in the workplace.

Again, however, this may not necessarily eliminate the need for an employer to engage in or discuss reasonable accommodation for an employee who has an underlying medical condition which constitutes a qualifying disability under the ADA (or state law) and has led to the recommendation of medical marijuana usage. Due to the intricacies of state laws and the evolving court decisions interpreting them, an employer contemplating a personnel decision involving these issues is wise to consult with informed local legal counsel.

References:

- Jerome Schreiberstein, Esq., Owner, Law Office of Jerome Schreiberstein, Email: jschreiberstein@jschreiberlaw.com

