EXPERT ADVICE

High Stakes: Marijuana in the Workplace

Employers' drug testing policies and practices must adapt to changes in the law.

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With legalized medicinal and recreational marijuana use on the rise, employees and employers are quickly finding themselves in a sticky situation. Currently, marijuana has been legalized for recreational use in four states and our nation's capital; legalized for some form of medicinal use in California and 34 other states, Guam and Puerto Rico; and decriminalized in three states and the U.S. Virgin Islands, leaving only eight states, American Samoa and the Mariana Islands, where marijuana is illegal for all purposes. In other words, forty-two states and three U.S. territories permit some form of marijuana use, with the majority supporting legalized marijuana for medicinal purposes.

The issue may well spike here in California this Fall when the voters face Proposition 64 on the November ballot—the Adult Use of Marijuana Act. If approved, the measure would legalize recreational marijuana use in the state.

Given these developments, and others likely to follow, employers who have workers who use marijuana face a daunting task. How do they comply with statutes, regulations and case decisions that conflict on this issue?

It goes without saying that working under the influence of marijuana—or any intoxicant for that matter—is to be discouraged. But marijuana is known to stay in one's system after its psychoactive effects wear off. Therefore, whether employers are able to penalize employees for engaging in state-sanctioned marijuana use, despite no indication of

impaired work performance, is a difficult question to answer. As with most marijuana-related issues, this is a state-by-state determination.

While 84% of states have decriminalized marijuana use, the Federal Controlled Substances Act still classifies marijuana as an illegal Schedule I drug. See 21 U.S.C. §812(c); *Gonzales v. Raich*, 545 U.S. 1 (2005). Otherwise stated, in the Venn Diagram of American Jurisprudence, marijuana use finds itself in the precarious overlap of "state-sanctioned" and "federally-prohibited."

The Growth of Marijuana in America

Those unfamiliar with marijuana may be surprised that its roots are deeply ingrained in American culture. Dating back to 1545, the Spanish introduced marijuana to North America as it imported the cannabis plant to Chile for its use as fiber. Soon thereafter, the English brought hemp to Virginia, where it quickly became a major commercial crop.

In the mid-to late 19th Century, marijuana became a medicinal ingredient and was sold to pharmacies in the United States. By the turn of the 20th Century, however, recreational marijuana use increased, which drew significant media coverage. In the 1920's, marijuana became increasingly known for its psychoactive effects as a recreational drug. Concerns continued to mount through the 1930's, resulting in the 1937 Marijuana Tax Act (50 Stat. 551), restricting possession of the drug to those paying a hefty tax for limited industrial and medicinal uses.

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Federal statutes such as the Boggs Act of 1952 (65 Stat. 767) and the Narcotics Control Act of 1956 (70 Stat. 567) provided severe minimum mandatory sentences for marijuana-related offenses. Found unduly harsh, these minimum mandatory sentences were repealed in 1970. Instead, Congress passed the Controlled Substances Act, which established classifications of drugs. Marijuana was classified a Schedule I drug – a designation for drugs the federal government deemed as having no medical use. (21 U.S.C. § 812(c).)

State experimentation with reduced marijuana penalties rose, and then quickly declined during the Reagan Administration with the advent of the Comprehensive Crime Control Act of 1984 (98 Stat. 1837) and the Anti-Drug Abuse Act of 1986. (100 Stat. 3207.)

Medicinal Use in California

In 1996, California voters passed Proposition 215, codified as California Health and Safety Code § 11362.5, which legalized medicinal marijuana. This began a ripple effect, prompting several states to follow suit. Then, in 2012, Colorado and Washington legalized recreational marijuana for adults 21 years of age or older; similar laws exist in Alaska, Oregon and, as noted above, the District of Columbia.

The direct conflict between California's Compassionate Use Act (Cal. Health & Saf. Code § 11362.5) and the Federal Controlled Substances Act (21 U.S.C. § 812) has led to a wealth of employment litigation.

In 2008, however, the Supreme Court of California made it clear that the Compassionate Use Act does not shield employees from termination based on medicinal marijuana use, holding "California's voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes. Nothing in the text or history of the Compassionate Use Act suggests that voters intended the measure to address the respective rights and duties of employers and employees." *Ross v. RagingWire Telecomms., Inc*., 42 Cal.4th 920, 926 (2008).

Weeding Out Workers: Termination Based on a Failed Drug Test

Marijuana, and its impact on employment law, is currently a very prevalent topic in our legal system. The current status of the law, however, is convoluted and varies significantly by state.

Currently, only four states (Arizona, Delaware, New York, and Minnesota) have enacted statutes which specifically protect employees who possess a medical marijuana license and test positive for marijuana use. In these four states, the burden is on the employer to prove that the employee not only tested positive for marijuana, but was impaired at work.

However, with the exception of those states, several state statutes on point contain either inherent ambiguities or are entirely silent on the issue of medicinal marijuana in the employment realm, making it difficult for employers and employees to navigate through these unchartered territories. Maine, for example, enacted medical marijuana laws that prohibit employers from taking adverse employment actions based "solely on that persons status" as a medical marijuana user, but is silent on issues surrounding failed drug tests. (22 M.R.S. § 2423-E (2).) Pennsylvania similarly offers protection for an employee's "status" as a medicinal marijuana cardholder, but its law only addresses the implications of failed drug testing on certain classifications of employees. (PA SB3.) Such ambiguous statutes set the stage for potentially inconsistent statutory interpretations by the courts.

For example, the Sixth Circuit has concluded that "the Michigan Medical Marijuana Act does not regulate private employment; rather the Act provides a potential defense to criminal prosecution or other adverse action by the state…." *Casias v. Wal-Mart Stores, Inc*., 695 F.3d 428, 435 (6th Cir. 2012). The Supreme Court of Montana has noted that "the [Montana] Medical Marijuana Act provides that it cannot be construed to require employers 'to accommodate the medical use of marijuana in any workplace.'" *Johnson v. Columbia Falls Aluminum Co., LLC*, 2009 WL 865308 (Mont. unpub.).
Even in states with the most liberal marijuana laws, employers are seemingly given deference to police their workplace for marijuana use.

In Washington, a federal trial court permitted an employer to deny employment to an applicant based on a failed marijuana drug test despite that state's Medical Use of Marijuana Act ("MUMA"). In doing so, the court concluded that the Washington MUMA "does not prohibit an employer from discharging an employee for medical marijuana use,

nor does it provide a civil remedy against the employer." *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wash.2d 736, 760 (2011).

Most recently, the Supreme Court of Colorado rendered a highly-publicized decision in favor of an employer who was sued by its employee under Colorado Revised Statutes section 24-34-402.5, which prohibits an employer from discharging an employee for "engaging in any lawful activity off the premises of the employer during non-work hours." The former employee argued that medical marijuana use was not an "unlawful activity" since his licensed medicinal marijuana use was legal pursuant to Colorado Constitution Article XVII, Section 14 (Amendment). In affirming the decision of the Colorado Court of Appeals – and dismissing the employee's case – the Supreme Court of Colorado held, "the term 'lawful' as it is used in section 24-34-402.5 is not restricted in any way, and we decline to engraft a state law limitation onto the term. Therefore, an activity such a medical marijuana use that is unlawful under federal law is not 'lawful' activity under section 24-34-402.5." *Coates v. Dish Network, LLC*, 350 P.3d 849, 851 (Colo. 2015).

Legalized recreational marijuana use is still a brand new concept, and as of this writing is only permitted in four states—Colorado, Alaska, Oregon, and Washington. (California will joint this foursome if Proposition 64 passes in November.) To date, however, the courts have not yet published a decision on recreational marijuana use in the realm of employment discrimination. But if the plethora of precedent on medical marijuana is any indicator, a high volume of case law may be headed our way.

Turning over a New Leaf: Appropriate Drug Testing Policies

As the law currently stands, employers are afforded the ability to narrowly craft a drug testing policy which meets their company's need and comports with applicable law. See, e.g., *Loder v. City of Glendale* 14 Cal.4th 846 (1997). As such, employers—especially those in states which sanction medicinal marijuana use—should consider outlining a specific marijuana drug testing policy to help preserve a safe and productive work environment, while minimizing risk. Such a policy should coincide with existing policies for other drugs such as amphetamines, opioids, sleeping pills, and pain killers. In other words, just because a drug comes with a prescription does not make it acceptable to consume at work. This is especially true when taking a drug that adversely affects workplace safety and productivity. Regardless of what drug testing policy is in place, it should always be clear that it is not permissible to be under the influence of drugs or alcohol while at work.

FEDERAL RULES

The first area of inquiry should be whether federal regulations apply. For federal entities and federal contractors, creating a workplace drug testing policy is simple—zero tolerance. Marijuana is still federally illegal, and federal law trumps state law. See *Gonzales v. Raich*, *supra*, 21 U.S.C. 812(c).

INDUSTRY LIMITATIONS

Just as with federal regulation, various industries often set parameters and requirements for licensing and daily operations. These requirements may include an all-out ban on marijuana use. Certain industries are governed by independent agencies, vested with the authority to deny, suspend, and/or withdraw licenses.

STATE LAW LIMITATIONS

For employers free from federal mandates and industry standards, the law currently affords employers the ability to implement a drug testing policy tailored to their company's needs, assuming compliance with state laws.

This may still mean saying "nope to dope" and maintaining a drug-free workplace, excluding even card-carrying medical marijuana users. Conversely, the more appropriate approach may be to construct a policy that permits medical marijuana usage for low risk jobs, but bans the substance for positions involving high-risk employees, such as transit drivers and pilots, heavy machinery operators and chemical workers, to name a few examples. Safety should always be a primary concern, and a drug testing policy must reflect that mentality.

APPLY DRUG TESTING POLICIES UNIFORMLY

Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e*, et seq*.), along with several other state and federal statutes, prohibits discrimination by employers on the basis of a number of protected classes. Employers may be off the hook for drug testing in general, but back on it if their testing is performed in a discriminatory manner, such as when an employer targets certain age groups, genders, races and other protected categories of employees. Uniform application of drug testing policies is the best way to ensure legal compliance.

HIPAA

The Health Insurance Portability and Accountability Act, commonly known as HIPAA (Pub. L. No. 104-191), is a federal law designed to protect sensitive health care information. Medical marijuana now falls within its purview.

As with other medical records, marijuana-related doctors' visits are protected under HIPAA. This would include information supplied to a doctor when qualifying for a medicinal marijuana card. Employers will not be alerted if an employee holds a medical marijuana card, and employers are similarly prohibited from attempting to ascertain this information. In essence, one's status as a medicinal marijuana cardholder is afforded the same protections as someone who takes medicine for bipolar disorder or HIV.

An important distinction to make, however, is between one's "status" as a medicinal marijuana card holder and a marijuana user. The former is a protected classification, while the latter is an objective determination. For example, one can hold a medicinal marijuana card, but never actually smoke marijuana. More often than not these two concepts overlap, but failure to differentiate the two can land an employer in hot water.

To summarize, even if drug testing is permitted, and terminating an employee based on failed drug tests is legal, inquiring as to *why* an employee uses marijuana, whether they hold a medical marijuana card, or looking into their medical history, is not. However, if an employee fails a drug test, he or she may then voluntarily elect to inform the employer of his or status as a cardholder in order to protect his or her interests.

APPLICANTS VS. EMPLOYEES

Drug testing clearly implicates one's privacy rights. For that reason, certain laws place limits on how and when drug testing can occur. In general, employees tend to have greater rights

than applicants when it comes to drug testing. Employers must adhere to state testing notification and methodology specifications. Further, prospective employers cannot require an applicant to take a drug test, but they can make passing a post-offer drug test a condition of employment, assuming there is no conflict with existing law. See *Loder*, *supra*, 14 Cal.4th at p. 862.

STAY CURRENT ON THE LAW

The law is constantly evolving, and it is imperative for all involved to keep up with the latest statutory and decisional developments.

For example, recently, the New Jersey senate's Health Human Services, and Senior Citizens Committee voted to release a bill to the full 40-member state senate which would prohibit employers from firing employee because of failing marijuana drug screening "unless an employer establishes by a preponderance of the evidence that the lawful use of medical marijuana has impaired the employee's ability to perform the employee's job responsibilities…." (NJ SB 3162.) This is but one example of the ever-changing legal topography of marijuana in this country through which employers and employees must navigate.

HOMEGROWN: CALIFORNIA IMPLICATIONS

What are Californians to make of all this? To be sure, the Golden State has long been recognized as "a pioneer in the regulation of marijuana." *Gonzlaes v. Raich*, *supra*, 545 U.S. at p. 5. We have adopted laws that not only regulate but legalize certain uses of cannabis. In a few months, California voters may even legalize it for recreational use. But the fact remains: given our state's confusing and often contradictory interpretations of marijuana laws, not to mention the Federal preemption problem with the status of marijuana as a controlled substance, it is crucial for anyone interested in complying with the law to consult with experienced and knowledgeable legal counsel.

DRUG TESTING AT WORK

As noted above, California courts have determined employers may require prospective employees to pass a drug test as a condition of employment, assuming testing is performed in a uniform, non-discriminatory manner. See *Loder v. City of Glendale*, 14 Cal.4th 846 (1997).

For existing employees, however, drug testing is a bit more regulated. California has implemented a balancing test to determine whether a drug test is conducted in a legal manner – the employer's basis for testing vs. the employee's expectation of privacy. See *Loder*, *supra*, 14 Cal.4th at pp. 887-888. Overall, an employer's objective reasonable suspicion that an employee is using drugs will likely validate a drug screening, especially when there is a threat to workplace safety. California employers are generally given deference to eliminate a potential risk of harm to their business and their employees' safety.

To prevent any ambiguity, California employers should strongly consider adopting a thorough written policy, clearly delineating the circumstances under which they can and will perform non-discriminatory drug screenings.

Ending on a High Note

To avoid potential liability, employers should implement a clear and comprehensive drug testing policy which fully complies with applicable laws. The issues discussed herein just scratch the surface of what is to come in this ever-changing and fast-paced area of law. As the law continues to develop and evolve, so too should employment policies and practices.