With a Little Help From My Friends: Managing the Minefield of Marijuana in the Workplace

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The State of Legalization
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• Marijuana is still illegal under Federal law.

• What is your mine’s policy on marijuana?

• Most mines have a zero tolerance marijuana policy.
What do the MSHA regs say about drugs?

• 30 CFR 56/57.20001 – Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job.

• What do the coal regs say?
Trending

• State laws providing worker friendly anti-discrimination protections and recent court decisions may force companies to reexamine their blanket zero tolerance policies, and necessitate an emphasis on safety.
Federal Preemption

• The Controlled Substance Act (CSA) only preempts state law where there is an actual, positive conflict such that the two cannot consistently coexist.
  • Courts differ on whether the CSA preempts state law.
  • The question of preemption is not settled, and will likely progress on a state-by-state basis as challenges occur, analyzing the text of each state’s statute.
Judicial Review Trends

• Employers have traditionally been free to choose to reject applicants or to terminate employees on the basis of their voluntary disclosure of medical marijuana use or positive drug test results.

• A growing number of courts have ruled that, depending on the safety considerations at play in the applicant or employee’s role, medical marijuana cardholders are provided with some protections from adverse employment actions based on their cardholder status.
Trends (cont’d)

• Courts in California, Colorado, Michigan, Montana, Oregon, New Jersey, New Mexico, and Washington have ruled against workers challenging adverse employment actions, and declined to create a private right of action in their medical marijuana statutes.

• Courts in Arizona, Connecticut, Delaware, Massachusetts, and Rhode Island have issued pro-worker rulings.
Notable Case


• Safety Considerations:
  • Plaintiff was denied employment when she applied for an internship with Darlington Fabrics, after disclosing that she would fail the mandatory pre-employment drug screen due to her medical marijuana usage under the Rhode Island Hawkins-Slater Act.
  • The Defendants asserted that their manufacturing facility has dangerous equipment and workplace safety concerns demand adherence to a strict no-tolerance drug policy.
  • The Court held the Act expressly states that an employer may not refuse to employ a person due to his or her status as a medical marijuana cardholder.
Private Rights of Action and Protective Language

• The following states have each adopted some form of anti-discrimination, protective language in their respective medical marijuana statutes:

Arizona, Nevada, Delaware, Arkansas, Illinois, Minnesota, New Mexico, New Jersey, Pennsylvania, Oklahoma, Rhode Island, West Virginia.
Brief Review of Law in the West and Rocky Mountain District and Coal District 9
Alaska

• Employers are NOT required to accommodate medical marijuana use in any place of employment.
Arizona

• The 2010 Arizona Medical Marijuana Act provides:

“Unless failure to do so would 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 imposing any term or condition of employment or otherwise penalize a person based upon ... [a] person’s status as a cardholder... [or a] registered qualifying patient’s positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.”
Arizona (cont’d)

• *Whitmire v. Wal-Mart Stores Inc.*, 2019. The U.S. District Court for Arizona held that the anti-discrimination protection in the AMMA creates an implied private right of action for alleged violations.
  
  • Plaintiff was a Walmart cashier and customer service supervisor who was a cardholding medical marijuana user in Arizona. Plaintiff was injured when a bag of ice fell on her wrist while at work. She tested positive for THC on a post-accident urine drug test. Plaintiff was terminated due to her positive test.
  
  • Court held in the absence of expert testimony establishing Whitmire was impaired at work, Walmart was unable to prove her test gave it a good faith basis to believe she was impaired at work.
Colorado

• Employers are not required to accommodate medical marijuana use in any place of employment.

• The Colorado Supreme court upheld the termination of an employee who tested positive despite having used the drug off-duty to treat a serious medical condition. The employee was not in a safety sensitive position. *Coats v. Dish Network* (Colo. 2015)
California

• Any guesses?

• Employers are NOT required to accommodate medical marijuana use on employer property or premises or during working hours.
Hawaii

• Medical cannabis is unauthorized for a patient’s workplace.
Idaho, Kansas, Nebraska, South Dakota and Wyoming

• No marijuana user employee protection.
• Marijuana is not legal in these states.
Montana

• Employers are not required to accommodate marijuana use by registered cardholders.

• Employees do not have a cause of action against employers for wrongful discharge or discrimination under Montana’s medical marijuana laws.
Nevada

• Employers may not refuse to hire, discharge, or otherwise discriminate against an employee because the employee engages in the lawful use of any product outside the employer’s premises during non-working hours if the use does not adversely affect the employee’s ability to perform the job or the safety of other employees.

• Effective January 1, 2020.
  
  • Newly enacted marijuana law prohibits employers from denying employment to job applicants who test positive for marijuana in pre-employment drug screening tests. The bill creates the following exceptions to the mandate if an applicant is applying for a position as any of the following:
    • Firefighter
    • Emergency Medical Technician
    • Any position that requires the employee to operate a motor vehicle and for which federal or state law mandates that the employee submit to screening
    • Any position that could adversely affect the safety of others

• Provides that if an employer requires its employees to submit to an initial screening test within the first 30 days of employment, the employee has the right to rebut the results of the initial test with a second screening, at their own expense. Employers are required to accept and give appropriate consideration to the results of the second test.
New Mexico

• Employers may NOT take adverse action against an applicant or employee for legally using medical marijuana.

• Employers MAY prohibit or take adverse employment action against employees for being impaired by medical cannabis at work or during working hours.

• These employment protections do not apply to employees working in safety sensitive positions.
North Dakota

• Employers may discipline an employee for possessing or consuming marijuana in the workplace or working under the influence.
Oregon

• Employers are not required to accommodate medical marijuana use in the workplace.

• The Oregon Supreme Court ruled that an employer did not violate state law by terminating an employee for testing positive for marijuana. *Emerald Steel Fabricators, Inc. v. BOLI* (Or. 2010).
Utah

• No marijuana user employee protection.
Washington

• Employers are not required to accommodate medical marijuana use in the workplace and can establish drug free workplaces.
How should you modify your policies to avoid claims that you discriminated based on positive marijuana test results?
Policy Ideas

• Identify jobs with responsibilities that affect the safety of others.

• Modify job descriptions to include the safety sensitive nature of the position.

• (In states with pre-employment testing prohibitions.) For all jobs that are not safety sensitive, consider omitting a pre-employment screening test for marijuana.

• Establish a clear policy for employees regarding drug use in the workplace, communicate the policy to employees, identify the consequences for being under the influence of marijuana and other drugs while on the job, and include the drug testing policies.
What kind of testing are you doing?
Testing Methods

• Employers should always take care that employees are tested for drugs in a consistent, fair and non-discriminatory and uniform manner.
What if you are testing a resident of Nevada for a job in Idaho?
Conclusion

• Employers have to be aware of state protections for workers and modify their policies, if needed.
• Blanket policies for employers working in multiple states should be avoided.
• Safety remains the primary importance. Be certain to emphasize which of your positions are safety sensitive when posting jobs.
Questions?
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