

When Medical Marijuana Laws Conflict With Company Policies

Under federal law, marijuana is illegal. Some states, however, have legalized medical marijuana; last month, New Jersey became the 14th state to do so. The general rule of thumb is that when state law bumps up against federal law, employers are required to follow the law that is most generous to employees. Richard L. Hurford of Ogletree Deakins (Bloomfield Hills, MI) addresses employers' rights and obligations in states with medical marijuana laws.

Zero-Tolerance Policies

Situation #1: Your company has a zero-tolerance drug use policy. So when an applicant's pre-employment drug test comes back positive, you withdraw the conditional job offer. The applicant reveals they are a medical marijuana user.

What to do: Start by "verifying that there is a medical prescription for the use of marijuana," said Hurford. "Under state law in those states where the use of marijuana has been legalized, it has only been legalized to the extent that there is a prescription by an appropriate health care provider. Certainly, it is appropriate to request verification that the marijuana is being taken in accordance with a valid prescription." Then, "accommodate accordingly as may be required by state law."

The good news for employers is that medical marijuana laws generally do not address employment rights, and what little case law there is mostly favors employers. In Washington state, an appeals court ruled that an employer did not violate public policy by rescinding a job offer to a medical marijuana user based on a positive pre-employment drug test. *Said the court:* The medical marijuana law "neither grants employment rights for qualifying users nor creates civil remedies for alleged violations of the ." (Roe v. Teletech Customer Care Management, WA App. Ct, No. 38531-7, 2009)

The California supreme court came to a similar conclusion under similar circumstances, ruling that its state medical marijuana law does not speak to employment law and that the state's human rights act does not protect illegal drug users. "Under California law, an employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions." (Ross v. RagingWire Telecommunications, Inc., CA Sup. Ct., No. S138130, 2008)

Suspensions Of Impairment

Situation #2: Company policy calls for an employee to undergo a drug test following an on-the-job accident. The employee tries to hide behind the state's medical marijuana law after testing positive.

What to do: "In those states that have passed legislation, there is no authorization for an employee to be impaired while at work, whether in a safety-sensitive position or otherwise," said Hurford. "If the drug test was for 'good cause' under the employer's written substance abuse policy, appropriate disciplinary action should be evaluated consistent with the employer's policy and applicable state law. This is particularly true in safety-sensitive positions that may also be subject to independent federal law requirements."

In October 2009, the Department of Transportation (DOT) reiterated that it is "unacceptable for any safety-sensitive employees subject to drug testing under the drug testing regulations to use marijuana." The DOT's reaffirmation came in response to formal guidance by the Department of Justice advising federal prosecutors to focus resources on significant drug traffickers and not on individuals who are complying with state laws on medical marijuana.

Requests For Accommodation

Situation #3: An employee reveals that they have an impairment for which their doctor has prescribed the use of medical marijuana and requests additional break time so that they can smoke marijuana.

What to do: "The state laws do not require an employer to accommodate an employee by requiring break time to ingest medical marijuana," said Hurford. While "employers are required to provide individuals with disabilities under the Americans with Disabilities Act with a reasonable accommodation, we know of no case law that would suggest the use of marijuana at the workplace as a reasonable accommodation for any disability. In fact, we would argue that the use of marijuana in the workplace would never be reasonable as there would be other ways in which any alleged disability could be accommodated in a more appropriate manner."

Warning: Do not tell employees with disabilities to stop smoking marijuana in favor of other medications. "We recommend that employers...not interject themselves in the patient/doctor relationship by suggesting alternative treatment," said Hurford.