

How to cope with dope: Marijuana & the Minnesota workplace

Although Minnesota has not legalized recreational use of marijuana, it has legalized medical marijuana. Some of your employees may be users of legal medical marijuana.

Federal law still prohibits possession of marijuana, and Attorney General Jeff Sessions has made it clear he intends to enforce federal law.

That leaves Minnesota employers stuck in the middle of the battle between state and federal law. For example, regardless of state law, it is a violation of federal law for truck drivers to use marijuana. The tension between federal and state laws may create confusion for employers trying to legally enforce their policies, including drug-free workplace policies.

Minnesota's marijuana law

Not everyone may use marijuana under Minnesota's medical marijuana law. Medical marijuana use is limited to persons suffering from specific medical conditions including:

- Cancer, if the underlying condition or treatment produces severe or chronic pain, nausea or severe vomiting, and/or cachexia or severe wasting
- Glaucoma
- HIV or AIDS
- Tourette's syndrome
- Amyotrophic lateral sclerosis
- Seizures, including those characteristic of epilepsy
- Severe and persistent muscle spasms, including those characteristic of multiple sclerosis
- Crohn's disease
- Terminal illness, with a probable life expectancy of less than one year, if the illness or its treatment produces severe or chronic pain, nausea or severe vomiting, cachexia or severe wasting.

To be covered under Minnesota's medical marijuana law, a patient must be diagnosed with one of the listed conditions and be prescribed the medical cannabis. Patients must be enrolled in the state's cannabis registry program.

Minnesota has a well-established law prohibiting employers from taking adverse employment action against employees who use "lawful consumable products" outside the workplace. Minnesota's Lawful Consumable Products Act provides that an employer may not discipline or refuse to hire an applicant or employee for using "lawful consumable products" (e.g., liquor, tobacco, or now cannabis) off the employer's premises during nonworking hours.

What employers can do

Employers may not discriminate in hiring or promotion against an applicant or employee because he or she is registered on the state's cannabis registry. In this way, the fact that the applicant or employee is taking medical marijuana legally must be treated as any other disability.

Employers, however, may reject an employee for certain positions if allowing him or her to take medical cannabis would "would violate federal law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations" (Minn. Stat. § 152.32 Subd. 3(c)). As with any decision to take adverse action against an applicant or employee, employers must document the decision thoroughly, showing how the action falls under the state statute's safe harbor.

Similarly, employers do not have to tolerate an impaired employee. Employers may discipline a worker who fails a drug test if the employer can establish that the employee used, possessed or was impaired by medical cannabis at the place of employment or during the hours of employment. (Minn. Stat. § 152.32 Subd. 3(c)(2))

Drug testing issue

Employees who test positive for marijuana have the right to show that they are on the state's medical marijuana registry. Other than the circumstances mentioned above, employers may not discriminate against the employee for the failed drug test.

State law always permits employees the right to present evidence to explain banned substances in their system such as prescription drugs being used according to doctor's orders or over-the-counter remedies used according to instructions. State law requires employers to have policies in place that allow employees to present explanations of failed drug tests.

Medical vs. recreational use

Employers would be wise to compare the approach to recreational marijuana use in the workplace to alcohol use in their workforce. While the Minnesota Human Rights Act does not recognize alcoholism as a disability, the federal ADA does. Therefore, it is impermissible for an employer to terminate an employee or take other adverse employment action simply because that individual suffers from the disability of alcoholism.

That doesn't mean employers' hands are tied. While employers may not terminate someone simply for being an alcoholic outside of work, they can make employment decisions based on work performance, absenteeism and productivity.

The same rationale should hold true for employees using marijuana. When marijuana use adversely affects work performance, it is no different than any other personal issue affecting an employee's performance, and employers may take adverse action against an employee based on the lack of performance.

Employers should carefully consider all applicable laws when adopting, enforcing or modifying workplace drug-testing policies. But they should be able to conduct business as usual when it comes to assessing employee performance.