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Are Employer Drug Policies "Up in Smoke" Now That Marijuana Use is Legal?

While pending local elections decide tax implications, employers continue to ponder the consequences of California law allowing recreational marijuana, and whether to change their drug testing policies or take other proactive measures.

CaNORML the organization devoted to reforming California marijuana laws (see <http://www.canorml.org>), pointed out that one of the most frequently asked questions from employees since Prop. 64 passed legalizing adult marijuana use in California is, "Am I now protected against drug testing on my job?"

The answer is "No, but..." Prop. 64 specifically allows employers to ban marijuana use and impairment in the workplace, even when the marijuana use is during nonworking hours or for medical reasons. In 2008, California's Supreme Court ruled that employers are not required to accommodate employees' off duty use of medical marijuana, and a California law passed to change medical marijuana use was vetoed by Gov. Schwarzenegger.

However, "it ain't over till it's over." CaNORML and other groups are working toward legislation to limit drug testing. In this interim period of implementation, employers recognize that unlike alcohol, there currently isn't a scientific measurement for impairment caused by marijuana use. More importantly, a strict rule terminating employees who test positive for marijuana is hard to apply equally and correctly, and (let's face it) may be impractical in retaining and motivating today's workforce.

Problems connected with drug testing for marijuana include:

- Invasion of privacy without an overriding interest like safety, means weighing the pros and cons on a case-by-case basis. Further, an employee who is regularly absent or tardy and can't remember instructions or procedures may not be tested if he/she does not operate heavy equipment or drive commercially.

- A drug test for marijuana—or any other substance--does not actually measure job performance or impairment. Even a confirmed “positive” test for marijuana provides no evidence of intoxication or impairment, but only indicates that a person may have ingested marijuana at some time in the past—up to 30 days. Further, drug screens are not always reliable, and have a 10% fail rate.

- Another challenge to a drug test occurs not from the test results, but from an employer's faulty or discriminatory procedures in testing. For example, allowing an employee believed to be under the influence to drive himself or herself to the testing facility.

"Truth be told", employers simply want employees to regularly show up and leave on time, keep accurate time records, be available when needed, pay attention while on the job and work efficiently and productively with a minimum amount of errors and without dragging in "drama." According to scientific study and common experience, long term chronic use of "legal" controlled substances, whether alcohol, prescription medication, and now marijuana, impacts performance.

Achieving legitimate employer goals does not require drug testing per se, but rather a focus on the employee's abilities or impairment during work. Employers should remember that they still have a duty to provide a safe workplace and can use this duty to create and enforce policies that might capture marijuana use, among other reasonable safety goals.

Employers may choose one or more of any of the following options:

1. Adopt a drug free workplace policy emphasizing federal law, where marijuana remains illegal and a terminable offense (required if a government contractor), educate employees about the consequences of illegal action, and wait for the law to develop.
2. Dust off the company's IIPP (aka Injury Illness Prevention Program) and revise it to extend existing policies on drug testing for alcohol and prescription medication to marijuana use.
3. Review and update handbook policies that address workplace behavior typically connected to alcohol or drug use, such as attendance, confrontational or emotional behavior that disrupts the workplace, mistakes and low productivity issues.
4. Either assemble existing policies from the IIPP, the handbook, and any standalone policies or create a new workplace impairment policy that goes beyond mere "fitness for duty".

Regardless of which option is ultimately selected, employers should:

- ✓ Limit drug testing to well defined circumstances and consider potential accommodation issues that may arise from other physical or mental impairments, not from current drug use.
- ✓ Provide a checklist and reporting procedure as part of IIPP training for supervisors.
- ✓ Disseminate the company's policies on impairment.
- ✓ Have the "talk" with employees about how your company is implementing its policy on impairment. Explain how the company will deal with prohibited or unsafe workplace behaviors that do not qualify as a disability under the law, regardless of whether the behavior arises from drugs or other factors. Emphasize that it is the impairment that is being measured and grounds for discipline, up to and including termination.

SMT attorneys are experienced in workplace safety issues and have other experienced resources available in Cal-OSHA compliance. Contact us if you are interested in developing a program that fits your company's particular needs and culture.

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