

Legal Trends

Marijuana and the Workplace

The last decade has seen a sea change in societal attitudes toward marijuana. A 1969 Gallup poll found that only 12% of Americans supported legalization. By 2017 that number had increased to 64%. More than 30 states now permit the use of medical marijuana, and almost 10 states now legalize marijuana for recreational use; in other words, more than one in five American adults can now consume marijuana legally. As with other monumental cultural shifts, the law has been slow to adapt, and Courts are only now beginning to grapple with the intersection of marijuana and the workplace. Until recently, employers justified widespread drug testing programs and broad prohibitions on marijuana use by relying on the fact that marijuana remains an illegal Schedule 1 drug under Federal law. As described in more detail below, however, such reliance no longer may be warranted, despite the Trump Administration's rescission of the prior Administration's "hands-off" policy.

As is often the case, Massachusetts is leading the charge. It legalized marijuana for medicinal purposes in 2012, and legal recreational use followed shortly thereafter. Last year Massachusetts' highest Court held that employers must -- as a reasonable accommodation under state law to disabled employees validly using medicinal marijuana -- waive mandatory drug tests. In other words, disabled employees in Massachusetts have the right to use medical marijuana off hours, so long as they are not impaired while on the job. Notably, the Court was not moved by the fact the employer could be subject to liability under Federal law. A former UPS employee is advancing this same argument in a Federal Court in Arizona, albeit under the reasonable accommodation provisions of the Federal Americans with Disabilities Act.

A worker in New Jersey is proceeding on a different legal theory. Like many states, New Jersey has a law making it illegal to terminate a worker in violation of "public policy." A worker fired after Amazon learned she uses medical marijuana is arguing that the state's compassionate use law reflects such "public-policy," thereby making the termination of her at-will employment illegal.

Similarly, a Rhode Island state Court judge recently held that an employer violated the state's medical marijuana law when it refused to hire an employee who had medical permission to use the drug. Likewise, late last year a Federal court in Connecticut ruled that an employer acted illegally when it withdrew an applicant's job offer after she disclosed her off-hours use of marijuana.

What does all of this mean for employers? Most urgently, employers need to revisit and reconsider their drug-testing programs. With respect to marijuana, testing can reveal prior use but not active impairment, and it also can eliminate a wide swath of otherwise qualified candidates. Thus, does it continue to make business sense to incur the cost of testing for marijuana? Does it make sense to incur potential legal liability by testing in those jurisdictions where medicinal or legal use is permissible? Should employers only test for safety-sensitive positions, or only after an accident? What about employers subject to OSHA, which takes the position that drug-testing employees



involved in a workplace accident actually violates certain OSHA regulations. Employers will continue to struggle with these and other issues as the laws surrounding marijuana use continue to change, and they are advised to consult with experienced counsel to ensure ongoing compliance.

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