

Re: CLIENT ADVISORY 2018-02
Marijuana Users' Rights

Employers Beware – Recreational Marijuana Users' Rights

Maine's act to legalize marijuana (7 M.R.S. §2454) became effective February 1, 2018. Although the legislature has still not regulated sales and distribution and a cottage industry has sprung up delivering "free pot" for a per-ounce delivery charge, the law fully applies to Maine employers. Read the *Portland Press Herald* article [here](#).

As a Maine employer, you cannot refuse to hire (or penalize an employee) based **solely** on "consuming marijuana outside the...employer's...property."

You can bar use and possession of marijuana and marijuana products "in the workplace" and can "discipline employees who are under the influence of marijuana in the workplace".

Already, employee advocates, appropriating a disability-based construct, are asserting that employers must "accommodate" an employee's marijuana use.

We Can Rely on a Positive Drug Test, Right?

An employer with an approved substance abuse testing policy can still test for marijuana.

The question: what can you do with a positive drug test?

The Maine Department of Labor doesn't have an answer.

On March 5, the DOL issued this Employer Update:

Since the recreational law is overseen by the Maine Department of Agriculture and medical marijuana law is overseen by the Maine Department of Health and Human Services, MDOL can approve testing based on our own law but **we cannot say whether taking disciplinary action or refusing to hire someone will violate their laws**, which is why the Department recommends seeking legal guidance prior to making those decisions.

Federal Law Doesn't Help

As marijuana remains illegal under federal law, some attorneys recommend that Maine employers refuse to hire a confirmed marijuana user based on federal law. The Controlled Substances Act (CSA) lists marijuana as a Schedule I substance, meaning federal law designates it as having no medical accepted use, high risk of abuse, and a lack of accepted safety for use under medical supervision. 21 U.S.C. §812(b)(1)(A)–(C).

Unless you want to invite a lawsuit, we don't think this the best course.

You may remember that the Obama administration provided guidance to U.S. Attorneys (chief federal prosecutors in each state) recommending against enforcement of federal laws in states with medicinal or recreational marijuana laws. This guidance was rescinded by the U.S. Attorney General this January 4. Read the Attorney General's memo [here](#).

It is unlikely that this policy change, however, will aid employers.

Courts have found that the purpose of the CSA – to control the illegal importation, manufacture, distribution, and possession and improper use of controlled substances – is far removed from the realm of employment law.

Congress, aware of states' medical and recreational marijuana laws, has not modified the CSA. This suggests that some tension between state and federal law will be tolerated.

Thus, arguing federal preemption by the CSA does not assure protection.

Eliminate Substance Abuse Testing?

Marijuana has been eliminated by some employers from their substance abuse testing panels. Others have eliminated substance abuse testing entirely.

While this avoids the conundrum of what to do with a positive test, it flies in the face of workplace safety and the trend of increased substance abuse.

Of note, in states where marijuana is legal, car collisions are up three percent according to the Highway Loss Data Institute. Read the HLDI article [here](#). Why would workplace impact be different?

Have Our MRO Decide?

Unlike alcohol testing in which 0.08 grams of ethanol per 100 milliliters of blood has been scientifically determined to cause impairment, there is no similar standard for tetrahydrocannabinol (THC – marijuana's psychoactive component).

No medical review officer (MRO) presented with a confirmed positive test for marijuana can assess impairment or frequency of use. So, your MRO is not going to identify an employee or applicant as an abuser or having been under the influence.

Let's Talk

So, assuming no simple solution, how do we balance safety while minimizing litigation risk?

Interview employees or applicants who test positive for marijuana use. Consider asking:

1. Do you recreationally consume marijuana?
2. How often?
3. Have you ever consumed marijuana immediately before going to work or during a break (including off premises)?
4. Have you ever consumed marijuana at work?

5. Have you ever worked while under the influence of marijuana?
6. Do you understand that any of these three activities are unprotected and unacceptable?
7. For applicants only – if hired, do you agree that the company can monitor your safety practices?

A “yes” to question 3, 4, or 5 provides an independent and supportable basis to reject an applicant or fire an employee (not solely for consuming marijuana outside of work).

A “no” to question 6 also raises an independent basis to act.

Asking question 7 may eliminate applicants looking for a lawsuit rather than a job. And some applicants may self-select. An unreasonable response could furnish an independent basis for rejection.

You may consider recording, with notice, this Q and A session. This formalization might also produce a walk off.

Always interested in your thoughts and experience!

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