

Employment Law Corner

Monthly Report



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August Updates

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[The Supreme Court Raises the Threshold to Deny Religious Accommodations](#)

Employment Law Corner: Marijuana and Drug Testing

Weeding through the Law:

The legalization of marijuana, whether for medicinal use, recreational use, or both, has certainly made the employment law world more interesting and challenging. First issue: Depending on the state where an employee is located, marijuana laws could be vastly different. The biggest impact of marijuana legalization is in pre-employment drug screening, but there are other situations to consider. Let's dig into the weeds:

Protections for Medical Marijuana:

In most cases, you can usually treat marijuana use like alcohol use: you are not required to allow it in the workplace. With that said, some states that have legalized medical marijuana have provided additional protections to these users. In every state where medical marijuana is legal, you cannot discipline an employee for *off-work* medical marijuana use. This sounds like common sense – the employer's jurisdiction will always be the workplace. With marijuana, there is the complication of how long marijuana stays in one's system.

The Complication:

The two key issues that most employers face when testing for marijuana are knowing when marijuana was used and if the employee is under the influence. Marijuana stays in your system well after the effects have worn off, which means a candidate could have legally used marijuana for a physical ailment a day before they took a drug test and it would still show up positive. If that applicant has a medical marijuana card, then you should put on the brakes before automatically refusing to hire.

What the Law Requires:

Each state that has legalized medical marijuana handles the positive drug test differently. Some are more employee friendly, and others are more employer friendly. Here are some of the standards below:

- Zero tolerance: Some states allow employers to still move forward with termination if an applicant or employee shows up with a positive drug test result – even if they have a medical marijuana card. These are called zero tolerance policies meaning there is no reasonable suspicion required. Positive test is an automatic out.
- Safety Sensitive Positions: Other states walk the line between the

harshest test and the most employee-friendly test. If an applicant tests positive for marijuana and presents a medical marijuana card, then you would be able to refuse to hire if the position is considered safety sensitive under the law. This can include use of heavy machinery, forklift driving, driving their car for work, etc.

- Reasonable Accommodations: This is the most employee- friendly test. Essentially, if an applicant or employee tests positive for marijuana and they have a medical marijuana card, you must go through the interactive process, determine reasonable accommodation, and determine if the accommodation is an undue hardship. You would be accommodating off property use of medical marijuana so in many cases, it is not likely it would be an undue hardship. For these states, it is best to have a well-developed reasonable suspicion policy.

Reasonable Suspicion:

The best way to manage these challenges and the state specific laws is to have a Reasonable Suspicion and Drug Testing Policy. The policy should define reasonable suspicion clearly and provide an outline for supervisors to follow. There should be guidance on how to document employee's behavior when you believe they are under the influence. (Supervisors need to be familiar with the policy and process.) Having that documentation plus the positive drug test is enough to discipline in most states.

Substance Abuse:

Some states, including Minnesota and Maine, require employers to provide EAP (Employee Assistance Program) resources and assistance when an employee tests positive, regardless of the type of drug. Even if your state does not require this, it is a good idea to consider providing these types of resources. Also remember, if an employee states that they need to take leave for participation in an addiction recovery program, that time may well be covered by the FMLA and ADA as well.

Federal Law:

Currently, marijuana is still illegal on the federal level. This means that employers who are federal contractors, work with the DOT (Department of Transportation), or other federal agencies still cannot allow employees to use marijuana, both off work and at work. This would mean that you would be permitted to refuse to hire an applicant if they test positive for a preemployment drug screen, regardless of whether they have a medical marijuana card or not.

Something to keep in mind – Congress just introduced the Cannabis Users Restoration Eligibility Act (Cure Act), about a week ago. This would eliminate marijuana as a controlled substance in connection with receiving federal security clearance. It also ensures that the federal government will not deny employment based on past or current marijuana use. Something to keep an eye out for in this fast-changing area of the law—we will keep you posted!

Need a Reasonable Suspicion Policy? Or a review of your current one? **We can help!**

Contact Us



www.foleylawpractice.com

info@foleylawpractice.com

(844) 204-0505