

Up in Smoke... Now What?

AUTHOR: TIMM SCHOWALTER

The recent amendments involving the use of marijuana in Missouri and Illinois are not unique; 33 states have legalized marijuana for medical use and 11 states have legalized its recreational use, although there is still a federal ban on the substance. This difference in the law from state-to-state, coupled with the lack of consistency at the federal and state levels, has led to a significant amount of uncertainty and complexity.

This spike in ambiguity is seen in numerous sectors of the law, but one area in particular is the employment law setting. More specifically, there is vast uncertainty amongst employers as to their rights and responsibilities under new state marijuana laws. The Americans with Disabilities Act (ADA) does not protect an employee's illegal drug use, which includes marijuana under federal law. Additionally, there is ultimately no mention of marijuana, medical or recreational in state nondiscrimination laws. In turn, this has led to an even greater division amongst states stemming from court decisions on employer and employee rights. To further complicate the situation both Missouri and Illinois have laws prohibiting an employer from taking any adverse action against an employee for off-duty use of legal products.

More employers are finding themselves asking the following complex questions:

1. Can employers still drug test their employees under federal and state laws?
2. Can the employer terminate or fail to hire an individual for testing positive on a drug test if they have a legal medical marijuana identification card?
3. How does the legalization of medical and recreational marijuana affect employees' right to engage in "lawful" off-duty conduct?
4. Under the ADA, what rights do employees have for the legal use of medical marijuana, and will employer's now be required to provide a reasonable accommodation for those employees?
5. Can an employee be "impaired" in the workplace?
6. Should an employer's drug test be used to detect tetrahydrocannabinol (THC) levels? If so, what level of THC must be detected in an individual before an employer can take an adverse action in response?
7. If employers can still test their employees, when should they? Should they implement only random testing, should they test employees after a provoking incident, or should they test prospective employees as a part of the application process?
8. Can employers still implement/uphold workplace drug-free policies?
9. Would the employer's course of action change if the employee is using marijuana for recreational use as opposed to medical use?

10. Would terminating an employee for off-duty use of medical or recreational marijuana give rise to a cause of action under the ADA or a tort claim for wrongful termination?

If you find that you are beginning to ask these questions in your role as employer, it may be time to seek guidance on your next steps.