LABOR AND EMPLOYMENT LAW UPDATE

MEDICAL MARIJUANA USE BY EMPLOYEES: ANOTHER QUANDARY FOR EMPLOYERS!

Marijuana is a Schedule 1 drug under the federal Controlled Substances Act. A Schedule 1 drug is one (1) which has a high potential for abuse, (2) which has no currently accepted medical use in treatment in the U.S., and (3) for which there is a lack of accepted safety for use under medical supervision. The Act outlaws the possession of marijuana for any purpose.

Notwithstanding the federal prohibition, fourteen states have now legalized the medical use of marijuana: Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington. As of March 18, 2010, there were at least fourteen additional states with ballot measures or pending bills to legalize medical marijuana use.

The number of medical marijuana cards issued by state agencies is significant and is on the rise. The following statistics are only a sampling:

California: 37,236 (since 2004)
Colorado: 17,356 (since 2001)
Michigan: 11,835 (since April 6, 2009)
Oregon: 26,274 (as of January 1, 2010)

With these developments, employers are asking difficult questions about their legal rights and responsibilities in dealing with applicants and employees who are or were medical marijuana users.

CAN AN EMPLOYER PROHIBIT MEDICAL MARIJUANA USE OR POSSESSION AT WORK?

The short answer to this question is "yes."

THE AMERICANS WITH DISABILITIES ACT: The ADA expressly provides that an employer may (1) prohibit the "illegal use of drugs" at the workplace by all employees; and (2) require that employees not be engaging in the "illegal use of drugs" in the workplace.

The term "illegal use of drugs" means the use of drugs, the possession of which is unlawful under the federal Controlled Substances Act. The term thus includes the use of marijuana for any purpose.

FEDERAL AND STATE PROHIBITIONS: The prohibition of marijuana use for any purpose continues to be a mandate of the Drug-Free Workplace Act of 1988 (for federal contractors), industries regulated by the Department of Defense, Nuclear Regulatory Commission and Department of Transportation and some state employment laws.

CAN AN EMPLOYER PROHIBIT MEDICAL MARIJUANA USE AWAY FROM WORK?

Although the answer is likely "yes" under federal law, the states vary in their treatment of medical marijuana use by employees away from work.

MICHIGAN: The Michigan law legalizing medical marijuana use states that a person carrying a medical marijuana card cannot be "denied any right or privilege" by a "business or occupational or professional licensing board."

CALIFORNIA: On January 25, 2008, the California Supreme Court ruled in *Ross v. Raging Wire Telecommunications* that the state's Fair Employment and Housing Act does not require an employer to accommodate medical marijuana use away from work. The Court found that the employer did not violate the Act by terminating an employee based upon a positive drug test for marijuana.

DOES THE ADA PROTECT A MEDICAL MARIJUANA USER?

The ADA only protects a "qualified individual with a disability."

CURRENT USER: Under the ADA, "a qualified individual with a disability" does not include an applicant or employee "who is currently engaging in the illegal use of drugs" when the employer "acts on the basis of such use." EEOC regulations say that employers "may discharge or deny employment to persons who illegally use drugs, on the basis of such use, without fear of being held liable for discrimination."

PAST USER: The ADA's safe harbor is limited to a person engaged in the current "illegal use of drugs." The Act provides that a person may be a "qualified individual with a disability" if he is no longer engaged in the "illegal use of drugs" and has either been rehabilitated successfully or is in the process of completing a rehabilitation program.

UNDERLYING DISABILITY: The ADA's safe harbor is also limited to employment decisions made "on the basis of" the current "illegal use of drugs." If the medical condition for which marijuana has been prescribed is itself a disability, a claimant can theoretically still be a "qualified individual with a disability" if he can show that an employment decision was made "on the basis of" such disability. For an employment decision citing current marijuana use, he would need to show either that:

(1) His underlying disability was a motivating factor in the employer's decision even if the employer was also motivated by his "illegal use of drugs"; or

(2) His "illegal use of drugs" was a mere pretext for discrimination on the basis of his underlying disability

WHAT SHOULD EMPLOYERS BE DOING TO ADDRESS MEDICAL MARIJUANA USE BY EMPLOYEES?

All employers should be updating their drug policies to specifically address medical marijuana use by employees at and away from work. Enforcement of drug policies should be monitored to ensure that such policies are being enforced consistently.

Employment decisions regarding applicants or employees using medical marijuana should also be reviewed carefully before implementation to evaluate the risk of a discrimination suit based on the underlying disability.

QUESTIONS

Questions regarding medical marijuana use by employees can be directed to Robert G. Chadwick, Jr. at Campbell & Chadwick, P.C.

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