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Bringing Your Employees Down From Their High: Drug Testing and Legalized Marijuana

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Over the last few years, several states have legalized the use of marijuana under certain situations. In some states, the use of marijuana for medicinal purposes has been legal for some time. In others, and particularly more recently in Colorado, possession and use of marijuana is legal, with certain limitations. Meanwhile, across most of the country, marijuana remains an illegal drug, one that subjects a person in possession to varying levels of criminal sanction. Left unanswered are the difficult questions surrounding an employer's duty, responsibility or limitation on disciplining employees who use marijuana legally in those states which permit it.

Over the years, most employers have implemented policies that prohibit the use of illegal drugs during work hours or while on work-related business, which would include travel. Many other employers have made drug testing part of the standard onboarding process for all new employees. With the legalization of marijuana in some states, a difficult conflict exists regarding the applicability, enforceability and wisdom of those policies as they regard employees who may use marijuana legally.

At the outset, it is worth mentioning the obvious: there is no federal right to use marijuana – in fact, an unresolved issue beyond the scope of this article is that the possession of marijuana remains a violation of federal criminal law. Therefore, typical protections similar to those afforded by Title VII or Section 1983 do not exist. However, despite the location of your workforce, if drug testing is part of your management of employees, given ongoing social marijuana use, and now marijuana tourism, employers are wise to be aware of these issues.

First, an employer should pay special attention to the specific language within its drug use and testing policies. If the policy prohibits only the "illegal" use of drugs, and a person uses the drug legally, then the policy's plain language may not bar an employee from use of marijuana in a state where it is legal. Similarly, if a policy only prohibits "use" while working, but does not accurately convey that discipline can occur for being under the influence, the plain language of the policy may need to be tightened up. Finally, employers should evaluate whether their policy language should, and then whether it does, prohibit the legal use of drugs while traveling on company business.

Second, employers would be wise to pay special attention to what goals they are trying to accomplish with their policy. The easiest situations will be where the employer's business necessitates a workforce completely free of any drug use at all (the marine industry, motor carriers or for the use of heavy machinery, as examples). However, to be blunt (pardon the pun), if an employee's workforce is operating at a less hazardous or technical level, the employer's desire to prohibit off-the-clock conduct may be more limited. This evaluation should take place in conjunction with counsel, as the ultimate goal of the employer would be highly relevant to crafting appropriate employment policies.

Third, the employer should consider carefully its willingness to discipline employees who may use marijuana off the clock or while not on company business. It may well be that the employer's gut reaction is that such a policy makes sense. But, as with any policy, if the employer is unwilling to enforce it uniformly, the policy is likely worthy of revision.

Finally, if drug testing is a part of the management of their workforce, employers should take special steps to ensure that the policies are compliant with local drug testing laws, some of which may vary even at a municipal level, and that the policies are uniform in application so as not to trigger unwanted scrutiny from the EEOC or other regulatory agencies.

In sum, although your employees may decide to get a little high while on a trip with their friends, you have great discretion under the law to discipline them when they return – but it would be wise for your policies to reflect that fact.