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Light Up or Leave Me Alone: Medical Marijuana is an Ongoing Challenge for Employers

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The 2014 election had four major marijuana ballot initiatives. Recreational legalization initiatives passed in Alaska, Washington State and the District of Columbia. A constitutional amendment in Florida to legalize medical marijuana came just short of passing, garnering 58 percent of the vote (Florida passed a constitutional amendment in 2006 requiring a 60 percent supermajority to approve constitutional amendments).

As the year came to a close, 23 states and the District of Columbia had legalized medical marijuana, with additional states having legalized marijuana derivatives, and Congress passed a $1.1 trillion dollar spending bill, blocking the DEA from using funds to go after state-legal medical marijuana programs. However, there is also the recent lawsuit filed by Nebraska and Oklahoma against Colorado, which contends that Colorado's marijuana statutes violate the commerce clause.

Employers should anticipate a number of additional medical marijuana initiatives in the 2016 election. The Florida Secretary of State has approved the 2016 Petition being circulated by United for Care, and it seems a virtual certainty to re-appear on the ballot. Marijuana ballot measures are also being pushed in Arizona, Arkansas, California, Florida, Georgia, Idaho, Maine, Massachusetts, Mississippi, Montana, Nevada and Wyoming.

So what does this new marijuana "utokepia" mean for employers? As described in a previous post to L&E Compass discussing New York's Compassionate Care Act, employers need to be familiar with the employment and anti-discrimination provisions of medical marijuana laws in each state where the employer does business, as well as general anti-discrimination, disability or "free-time" statutes which might be invoked by an employee as a defense to testing positive for marijuana.

On the former point, employers should be reviewing their employment handbook, understanding that accommodation for medical marijuana use, especially in the workplace, could form the basis for employer liability for negligence claims. Conversely, policies which fail to offer reasonable accommodations or punish employees for off-the-job use of medical marijuana in states which provide explicit protections are subject to suit.

On the latter point, one case which has yet to be resolved is *Coats v. Dish Network, LLC,* 2013 SC 0000394. Currently on appeal before the Colorado Supreme Court after a 2-1 decision in the Colorado Court of Appeals in favor of Dish, the state's highest court heard oral argument on September 30, 2014, and has yet to rule.

Dish Network fired Coats, who is a quadriplegic and state-licensed medical marijuana user, after a positive test for marijuana. Coats contends that he was never impaired on the job. Because Colorado's constitutional amendment authorizing medical marijuana, Art. XVIII, §14(b)(10), provides that "[n]othing in this section shall require any employer to accommodate the medical use of marijuana in any work place," the issue in *Coats* is whether the termination of a state-licensed medical marijuana user violated Colorado's "Lawful Activities Statute", Section 24-34-402.5, an employment discrimination provision contained in the Colorado Civil Rights Act.

While the weight of the cases dealing with employee termination for testing positive for (medical) marijuana have come down in favor of the employer, with fairly recent decisions in the Sixth Circuit and the Ninth Circuit, among others, ongoing changes to state law, coupled with federal disengagement from medical marijuana enforcement should not foster complacency. Employers face a dynamic, challenging set of circumstances when dealing with medical marijuana in the workplace, and the pace of these changes continues to accelerate. A proactive approach to these issues is key to mitigating the risks posed by medical marijuana legalization. If you have any questions, please do not hesitate to contact your Baker Donelson Labor & Employment attorneys.