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Weed in the Workplace: What You Need to Know

Authors: Zachary B. Busey
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You have not heard the presidential candidates discuss medical marijuana or efforts to decriminalize recreational use. Nevertheless, state legislatures and local governments have been tackling these issues for some time, passing a number of state laws and local ordinances. Under federal law, however, marijuana remains illegal. Given that marijuana is illegal under federal law, recent actions by state legislatures and local governments generally have little impact on the workplace or employment decisions. This is because federal law largely regulates both, and to the extent there is a conflict with state law, federal law overrides it.

So marijuana is legal in some states but illegal under federal law?

Correct. The relevant federal law is the Controlled Substances Act (CSA). Under the CSA, federal agencies, such as the Drug Enforcement Agency or the Food and Drug Administration, classify or "schedule" virtually every substance capable of interacting with the human body. Substances are classified across five schedules. Schedule 1 substances have a high potential for abuse and no currently accepted medical use, while Schedule 5 substances have a low potential for abuse and a currently accepted medical use. Marijuana has always been a Schedule 1 substance, along with heroin, LSD, and ecstasy, for example. As a Schedule 1 substance, under federal law, possession or use of marijuana for any reason is strictly illegal.

Nevertheless, as of right now, at least 25 states and the District of Columbia have outright authorized marijuana for medical and/or recreational use. Many other states and municipalities have reduced criminal penalties for marijuana possession, or now allow those charged with possession to assert medical necessity as a defense to prosecution. Thus, in some places, marijuana is legal (under state law or local ordinance) but illegal (under federal law).

So can an employee be fired for using marijuana in the workplace?

Yes. Marijuana use or possession in the workplace is grounds for disciplinary action, up to and including immediate termination. Under federal law, marijuana use and possession are illegal. For this reason alone, employers can take disciplinary action based on marijuana use or possession in the workplace.

Can an employee be fired for using marijuana outside of the workplace?

Likely yes. Only three states currently provide employment protection for individuals using marijuana outside of the workplace—Arizona, Delaware, and Minnesota. In these three states, assuming the employee is lawfully registered for medical marijuana use, employers must show actual impairment during working hours to terminate. Otherwise, marijuana use—medical or recreational—is not protected at the state or local level. Additionally, every federal court to consider the issue has held that marijuana use is not a reasonable accommodation under the Americans with Disabilities Act (ADA).

For employers, this is generally good news, but it does not provide the answer to every question or situation. Take, for example, an employee asking to use medical marijuana outside of the workplace to treat a medical

condition. While this may not be a reasonable accommodation under the ADA, the employer should still engage in the interactive process required by the ADA, such as by soliciting other proposed accommodations from the employee. As another example, say an employer learns from social media that two employees used marijuana outside of the workplace. If one employee is terminated but the other is not, this inconsistency could be seen as discriminatory if the employees are different races, genders, etc. Or say an employer learns an employee sometimes uses marijuana outside of the workplace in connection with a religious practice or ritual. This may provide an employer grounds for drug testing the employee, but using it as grounds for immediately terminating the employee will likely give rise to a charge of religious discrimination.

The overall takeaway is this: As of right now, marijuana remains illegal under federal law; therefore, employment decisions based on the use of marijuana outside of the workplace are generally defensible. By avoiding snap decisions and following the traditional decision-making process, employers make any decision that much more defensible.

You keep saying "as of right now" — what is about to change?

Good catch! Currently working its way through Congress is the Compassionate Access, Research Expansion, and Respect States Act of 2015. The CARERS Act seeks to address the conflict between federal and state laws concerning medical marijuana. It enjoys bipartisan support, and by all accounts, is the most comprehensive piece of marijuana-related legislation ever introduced. In general, under the Act, marijuana is no longer a Schedule 1 substance; legal marijuana businesses gain access to banks; and restrictions on marijuana research are removed.

Of particular note to this article, if the Act passes, the conflict between federal and state laws would largely disappear, at least with respect to medical marijuana. Without this conflict, employers are more likely to be subject to state laws protecting medical marijuana use by employees outside of the workplace. And without this conflict, medical marijuana is more likely to be treated as a prescription drug—as opposed to an illegal drug—when it comes to workplace drug testing. Unlike tests for illegal drugs, tests for prescription drugs can be considered medical examinations under the ADA. The EEOC requires any medical examination under the ADA to be job-related and consistent with a business need.

Congress has until the end of the year to vote on the CARERS Act.

If you have any questions or need any additional information about this topic, please contact the author or your regular Baker Donelson attorney.