

RiskTopics

Marijuana and Workplace Drug Policies

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This Risktopic will provide some background on the current status of marijuana legalization and provide some strategies for the review and update of workplace drug policies.

Introduction

The legal status of marijuana has changed drastically over the last ten years. While it is considered a Schedule 1 narcotic by the U.S. Federal Government¹, many states and some local jurisdictions have legalized medical and even recreational uses of marijuana. Other states have decriminalized the use and possession of small quantities of marijuana. This has impacted workplace drug policies and the concept of drug free workplaces. Given the changes made, it is important to understand the impact that Federal, state and local regulation have on your drug policy. Ultimately, any workplace drug policy developed or revised should be reviewed by competent legal counsel familiar with the business operations and applicable regulations in the locations where the company does business.

Discussion

The map below shows the 23 states, including the District of Columbia, which have legalized marijuana, for medical and/or recreational use. Red indicates medical marijuana is legal, blue denotes legal recreational use.



States Where Medical Marijuana is Legal States Where Recreational Marijuana is Legal

¹ <http://www.dea.gov/druginfo/ds.shtml>

Similar to alcohol use, most state laws allow employers to regulate the use of marijuana at their facilities even though its use may be legal. This, combined with the fact that marijuana remains illegal under Federal law, provides some challenges for businesses as they consider workplace drug policies. The U.S. Department of Transportation continues to consider marijuana unacceptable under its Drug and Alcohol Testing Regulations, so safety sensitive positions like pilots, bus and truck (CDL) drivers, locomotive engineers, subway operators, aircraft maintenance personnel, ship captains and others must comply with the guidelines². Also, businesses functioning as Federal Government contractors must comply with The Drug-Free Workplace Act³. Existing workplace drug policies will need to be reviewed / adjusted particularly if operations occur in states with legalized marijuana.

Most states with laws legalizing some aspect of marijuana use do not preclude businesses from setting workplace drug policies, particularly in safety sensitive positions.

Here is one definition of safety sensitive positions: A safety sensitive position is a job or position where the employee holding this position has the responsibility for his/her own safety or other people's safety. It would be particularly dangerous if such an employee is using drugs or alcohol while on job. An employee has to be with clear mind and diligent while occupying such positions.⁴

What types of jobs might be safety sensitive positions? Here are some example job duties:

- Driving motorized vehicles, including highway, off road, industrial forklifts, or construction equipment
- Working with heavy machinery
- Exposure to machinery that might represent entanglement hazards
- Working at heights
- Working with hazardous chemicals/materials or hazardous processes

Job descriptions should clearly define these types of characteristics. Most white collar type jobs can be difficult to classify as safety sensitive, unless driving a vehicle for business is required.

Newly arisen complications promoted through the legalization of marijuana provide the employer adequate cause to begin a review of their existing workplace drug policy.

Guidance

As a review of the workplace drug policy begins, one aspect that should be considered is whether to implement a policy which outlines zero tolerance to specified drugs or a policy that prohibits employees from being impaired while working. Zero tolerance may be the easiest to enforce and most protective. Testing looks for presence of a specified drug, and if detected, the employee may be found in violation of the company policy. This approach provides more test options, blood, urine, hair, saliva, etc. Enforcement of disciplinary actions may be more straight forward.

² <https://www.transportation.gov/odapc/medical-marijuana-notice>

³ <http://webapps.dol.gov/elaws/asp/drugfree/screen4.htm>

⁴ USLegal.com Definitions: <http://definitions.uslegal.com/s/safety-sensitive-position/>

Impairment, that is, stating that employees are prohibited from being impaired at work, may make sense in some situations, particularly in states with legalized recreational use of marijuana. Testing looks for documentation of a specified drug level above a documented impairment amount. Since a more specific result is needed to substantiate impairment, testing options may be limited to the use of a blood test. For example, urine testing, the most common test for tetrahydrocannabinol (THC) levels (the active ingredient in marijuana), may not be sensitive enough to provide the degree of certainty required to prove impairment.⁵

For policies that stipulates a lack of impairment, supervisors / employees must clearly understand the policy and be trained in the signs / symptoms of impairment. Here is one definition of impairment...paraphrased from the Illinois medical marijuana statute: The employer can have a "good faith" belief that an employee is impaired if he/she exhibits behaviors such as decreased job performance or "symptoms of employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence or carelessness in operating equipment or machinery, disregard for the safety of the employee or others, or involvement in an accident that results in serious damage to equipment or property, disruption of a production or manufacturing process or carelessness that results in any injury to the employee or others."⁶

Also, the level of THC that indicates impairment is still up for interpretation – some states that have legalized recreational marijuana suggest 5 ng/ml blood plasma as the level, above which would indicate impairment.⁷

Any workplace drug policy should outline when testing would be conducted, possible common time points or circumstances are:

- Pre-employment, such as post offer, but pre-hire testing
- Random testing
- Testing in the event of suspected impairment, sometimes called reasonable suspicion
- Testing after an incident that involves property damage or injury

When drug testing is part of a workplace drug policy, additional aspects of the testing program will need to be specified:

- Who will be tested (all employees or only those in production or safety sensitive positions)
- What type of testing will be done (which and what number of drugs, such as a 5 panel or 10 panel test)
- Testing occasions (as noted above)
- Consequences of a positive test (termination, disciplinary action, etc., depending on whether the policy is no tolerance or impairment based)
- Testing specifics, such as collection protocols, analytical cut offs, confirmation tests, etc.

⁵ Phillips, Jennan A., Michael G. Holland, Debra D. Baldwin, Linda Gifford Meuleveld, Kathryn L. Mueller, Brett Perkison, Mark Upfal, and Marianne Dreger. "Marijuana in the Workplace." *Journal of Occupational and Environmental Medicine* 57.4 (2015), P.462

⁶ 410 ILCS 130/1, Sec.50 Employment; employer liability (e) (f) 2013

⁷ <http://www.marijuanaduilawswashington.com/marijuanaduilawswashingtonstate.html>

In addition to the drug testing timing/occasions and procedures noted above, workplace drug policies may also contain the following components:

- Rationale for the policy. This may outline the importance of a drug free workplace to promote the safety, health and well-being of employees, maintaining appropriate production activities and assuring product quality.
- Prohibited behaviors. This section would outline those activities or conditions that are to be avoided as part of the policy. This may include, prohibiting drug use (zero tolerance) or an outline of the expectation that workers will not come to work in an impaired state.
- Substances that are covered. This will specifically outline the substances that are included on the prohibited substance list, such as marijuana, cocaine, opiates, amphetamines and PCP. Other substances may be added as appropriate.
- Drug level thresholds at which impairment will be confirmed.
- Employees affected. It is important to outline which employees may be subject to the policy. This could be all employees, only those in safety sensitive positions or those subject to Federal guidelines (such as CDL truck drivers).
- Consequences of a policy violation. Clear descriptions of the possible policy infractions along with the steps that will be taken to enforce the violations support the authority of the policy. Most companies have an established disciplinary policy that covers escalating actions that can occur with policy or procedural violations. Actions that mirror other policies may allow for smoother handling of disciplinary matters.
- Availability of assistance. A holistic policy will also provide substance abuse assistance in much the same way as company wellness policies provide for smoking cessation assistance. The availability of drug abuse assistance may be an off shoot of company wellness activities. The assistance may take the form of employee assistance programs, formal drug treatment programs or more general counseling. The assistance program should also outline the steps that may be needed for an employee who has requested assistance to return to work.

All aspects of the company's workplace drug policy should be communicated to all employees through clear education messages. Select employees, such as supervisory and management staff may need specialized education that covers the details of the enforcement of the policy, such as:

- Policy effective date (e.g., lead time for communication)
- Circumstances for enforcement
- Special training on identifying potential impairment, if appropriate
- When / how medical reviews / testing will be done
- Handling disciplinary actions

Training and educational efforts will be particularly important if any changes have been made to the workplace drug policy.

Conclusion

Workplace drug policies are an important aspect of many companies that can outline the company's goals for keeping employees safe, production sound and customers served with high quality products and services. Given the recent changes in marijuana legalization and continued legislative efforts, it is important for companies to review their workplace drug policies, first exploring if "no tolerance" or "impairment" approaches are appropriate. They should reevaluate drug testing protocols, if present, to see if they match the goals of the policy and clearly educate all parties on the requirements of the policy. Finally, any changes in workplace drug policies should be thoroughly reviewed with human resource and legal counsel familiar with local statutes and the jurisdictions involved. Following these steps should help companies develop an effective workplace drug policy.

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