

February 5, 2014



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Preparing for the Future: the Legalization of Recreational Marijuana

By Aaron J. Graf

Most employers are well aware of the recent legislation passed in Colorado and Washington concerning the legalization of recreational marijuana use. Of course, the vast majority of employers have not been affected by such changes given they do not conduct business in these states. However, these employers should not rest easy simply because they are not presently and directly impacted by these changes.

There can be little doubt that the recent legalization in the states of Washington and Colorado represents a significant shift in the public perception and attitudes towards marijuana use. A recent CNN poll suggested that 55% of Americans support legalizing recreational marijuana use - up from 16% in 1987 and 43% in 2011. It is not difficult to imagine, with the first two dominoes falling, that several other dominoes will fall in subsequent years. In fact, it is expected that at least five states will see some form of ballot initiative in 2014 regarding the legalization of medical or recreational marijuana. Thus, all employers need to take notice and begin considering the present or future impact of these changes on their business - even if there is very little concrete guidance that can be determined at this very early stage.

The good news is that, at least initially, employers have grounds for continuing to treat marijuana in the same fashion as any other

illegal substance. Additionally, even if marijuana were legalized at both the state and federal level in the future, employers would likely be appropriate to simply extend most current policies regarding other legal substances, such as alcohol and tobacco, to marijuana.

Generally speaking, both the Washington and Colorado laws permit individuals over the age of 21 to possess one ounce or less of marijuana for recreational use and require that such marijuana be available for purchasing from licensed marijuana retailers. The good news for employers, at least for the time being, is that there is presently a basis for continuing to treat recreational marijuana use the same as other illegal substances. After all, marijuana is still illegal under federal law and is classified as a Schedule 1 substance. While the federal government has essentially exercised prosecutorial discretion in announcing they will not prosecute individuals for recreational marijuana use in Washington and Colorado, employers can use the ongoing illegal nature of the substance at the federal level to justify continuing to treat it in the same fashion as any other illegal drug for the time being. However, if the shift continues and, eventually, marijuana becomes legal at both the state and federal level, it will need to be treated more similar to other legal recreational products such as alcohol or tobacco.

If recreational marijuana use continues to trend towards legalization at the state and federal level, employers should keep in mind that it is not their job to legislate employee activity outside the workplace. The same type of policies that apply to other lawful products, such as alcohol and tobacco, should be applied to recreational marijuana use, unless there is a justification for treating it differently. For example, if you have a zero tolerance policy for being under the influence of alcohol at work, that zero tolerance policy should be extended to recreational marijuana use. If you have a policy banning alcohol at work-related functions, that same ban should be extended to recreational marijuana use. Similarly, just because marijuana may become legal does not necessarily mean that you would need to allow it at work functions, even if alcohol or tobacco use is allowed at those same functions. And, while marijuana can be prescribed medically, employees who operate machinery or are otherwise engaged in activities where operating under the influence is dangerous and possibly illegal, the same policy that applies to alcohol use or the influence of prescription medication can apply to legalized marijuana.

While, in most situations, simply extending such policies to recreational marijuana use may be appropriate, there are some special issues and concerns regarding recreational marijuana use that pose specific problems - some of which are unlikely to be ironed out until the courts get involved. For example, the chemical in the body which renders a positive drug test - THC - can remain in

the body for an extended time regardless of whether the individual is still experiencing the "high" or is otherwise under the influence of the drug. Thus, one can test positive for marijuana even though they may not have used marijuana in the past several days and may be perfectly capable of carrying out one's job duties. In such a scenario, it is unclear whether employers will need to treat drug testing for marijuana differently than other substances in this regard.

The seeming change in the public perception towards the legalization of recreational marijuana use is certainly significant. Presently, there are many unanswered questions and issues as such legalization is still in its infancy. And, at least in the near future, multi-state employers with operations in Colorado and Washington will have to contend with conflicting state laws and adjust the state-specific policies accordingly. However, regardless of where they operate, employers would be well served to begin thinking about the issues that will arise if the legalization efforts continue to spread and to monitor legal developments out of Washington and Colorado.

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