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Medical Marijuana and the Arizona Workplace

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A few months after Arizona voters passed the Arizona Medical Marijuana Act (“Act”) in 2010, the Arizona Legislature enacted some much needed clarifications for employers through amendments to Arizona’s drug testing statutes (“Amendment”). This Article provides a general summary of what Arizona employers need to know to properly deal with medical marijuana in the workplace.

Only Valid Cardholders Are Protected. The Act only protects employees/applicants who are valid medical marijuana cardholders (“Cardholder”). Therefore, the first question is easy: Is the employee/applicant a Cardholder or not? If the employee/applicant is not a Cardholder, then he or she does not have any protections under the Act.

If the employee/applicant is a Cardholder, then a different set of rules applies. Employers cannot discriminate against an applicant/employee because of that person’s status as a Cardholder and/or because of a Cardholder’s “positive drug test for marijuana components or metabolites, unless the person used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment”. This means that even a person who is a valid Cardholder cannot: (1) use or possess medical marijuana at work, and (2) cannot be impaired by medical marijuana during work hours.

Showing that a Cardholder has either used or possessed medical marijuana is a factual issue--but how do you prove that a Cardholder is “impaired” by medical marijuana at work? The metabolites from marijuana stay in a person’s system for many weeks after use. Thus, a person could use medical marijuana at home, show up for work days later without being “impaired”, and still test positive for marijuana metabolites.

This quandary prompted the Arizona Legislature to enact the Amendment in 2011. The Amendment allows “employers to take action against employees who are believed, in good faith, to be impaired at work due to prescribed, illegal or synthetic drug use”. Note that this Amendment is much broader than just addressing medical marijuana and covers all drugs, both legally prescribed medications and illegal drugs. The Amendment also allows employers exclude employees from a safety-sensitive position if the employer believes in good faith that the employee is using any drug, prescribed or otherwise, that could cause impairment or negatively impact the employee’s job performance (subject of course to ADA requirements).

Impairment. The Amendment defines “Impairment” by listing numerous symptoms which indicate “that a prospective employee or employee while working may be under the influence of drugs or alcohol that may decrease or lessen the employee’s performance of the duties or tasks of the employee’s job position”. These symptoms range from speech and appearance issues to disregard for the safety of the employee or others.

MINIMUM WAGE ALERT

Effective January 1, 2013, Arizona’s minimum wage increased from \$7.65 to \$7.80 per hour. However, employers should note that any employee that regularly receives tips or gratuities can be paid up to \$3.00 per hour less than the minimum wage. Employers must have records showing that for every week worked, the employee did not make less than the minimum wage. The federal minimum wage remains at \$7.25, which leaves Arizona at 55 cents higher. A copy of the revised notice to employees that is required to be posted in Arizona workplaces advising of the new minimum wage is available at:

http://www.ica.state.az.us/Labor/Labor_MinWag_main.aspx

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Training

These new medical marijuana statutes make it even more important for employers to provide training to their supervisors and managers. For example, employers need to train managers on how to recognize the symptoms that can form a good faith belief of impairment and how to properly document their evaluation process and conclusions. Employers also need to work with their managers to classify the positions that are considered “safety sensitive”.

While the Amendment did not solve all of the workplace issues created by the Act, it does go a long way to giving better guidance to employers. There are still many tough decisions that need to be made in this area. In addition, the Act and Amendment are still subject to challenge on a variety of legal grounds. Therefore, make sure to consult with legal counsel when dealing with a Cardholder who has tested positive for marijuana.

Limited Immunity. The good news is that the Amendment gives employers limited immunity from claims if the employer acted on the “good faith” belief that the employee used or possessed any drug or was impaired at work. These protections apply to all drugs, including marijuana, illegal drugs, alcohol, and legal drugs that may cause impairment for employees in safety-sensitive positions.

Good Faith Belief. So what is a “good faith” belief? “Good faith” is defined as “reasonable reliance on fact, or that which is held out to be factual, without the intent to deceive or be deceived and without reckless or malicious disregard for the truth”. In forming a good faith belief of an employee’s substance abuse or possession, employers are specifically permitted to consider any of the following factors: (1) observed conduct, behavior or appearance; (2) information reported by a person believed to be reliable, including a report by a person who witnessed the use or possession of drugs or drug paraphernalia at work; (3) written, electronic or verbal statements; (4) lawful video surveillance; (5) records of government agencies, law enforcement agencies or courts; (6) results of a test for the use of alcohol or drugs, and (7) other information reasonably believed to be reliable or accurate.

Safety-Sensitive Position. The Amendment introduced a new job designation known as a “safety sensitive position”. A safety-sensitive position is “any job designated by an employer” as such, or “any job that includes tasks or duties that the employer in good faith believes could affect the safety or health of the employee performing the task or others”. The Amendment provides several examples of safety sensitive positions, including the operation of a vehicle, equipment, machinery or power tools; the type of work performed in repairing, maintaining or monitoring certain equipment; performing duties in a residential or commercial premises of a customer, supplier or vendor; handling food or medicine and working in certain regulated occupations (such as the medical profession). Employers may exclude employees from a safety sensitive position if the employer has a good faith belief that the employee is engaged in current drug use.

Current Drug Use. One of the challenges employers have been facing is determining whether an employee is “currently” involved in the use of drugs. The Amendment defines current drug use to include use that “has occurred recently enough to justify an employer’s reasonable belief that involvement with drugs is ongoing”. This definition stops short of identifying any specific time frame and allows employers to make a determination based on individual facts and circumstances.

Drug Testing Policies. All employers need to revise their drug testing policies to reflect the new requirements from the Act and Amendments. If you do not already have a drug testing policy, now is a good time to adopt one. As stated above, a properly prepared drug testing policy provides an employer with limited immunity from lawsuits arising out of the employer’s drug testing procedure and some adverse employment actions. Employers who do not have a drug testing policy do not have these protections. Among other things, a good drug testing policy should include the Act’s anti-discrimination requirements and provide an explanation of good faith belief, impairment, safety-sensitive position and current drug use.

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