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Working Through The Haze: What Legal Marijuana Means For Nevada Employers

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One in eight adults in the United States smokes marijuana, according to a 2016 Gallup poll. That means about 13% of the adult population in this country smokes pot, nearly double the percentage that reported such use in Gallup's 2013 survey. In fact, about 22 million Americans reported they had used marijuana in the past month, according to 2014 data collected by the Substance Abuse and Mental Health Services Administration.

It is unclear whether the increase in the number of Americans reporting they use marijuana is due to an actual increase in use of the drug, or if it simply represents an increase in the willingness of survey respondents to admit to using marijuana. What is clear, however, is that more states are legalizing marijuana for both medical and recreational use. This past November, nine states had marijuana initiatives on the ballot. Voters in four states – California, Maine, Massachusetts, and Nevada – passed recreational marijuana use while voters in four other states – Florida, Montana, North Dakota, and Arkansas – passed medical marijuana initiatives. The undeniable result is that marijuana is becoming more acceptable, and more marijuana-related issues are likely to arise in the workplace.

Nevada Legalizes Recreational Marijuana Use

In November 2016, Nevada voters approved a ballot question that legalizes the recreational use of marijuana by adults. The ballot measure amends the Nevada Revised Statutes to make it lawful for a person who is 21 years of age or older to purchase, possess, and consume up to one ounce of marijuana and to grow a limited number of marijuana plants for personal use. Questions have arisen how the legalization of marijuana will impact employers.

No Marijuana Use Or Possession At Work

Under the recently passed recreational marijuana initiative, public and private employers may maintain, enact, and enforce a workplace policy prohibiting or restricting actions or conduct otherwise permitted under the new law. In other words, although the initiative provides that marijuana may be consumed without criminal prosecution by the State of Nevada, it does not affect an employer's right to implement policies prohibiting marijuana consumption or possession. Nevada employers may, therefore, prohibit the possession and use of recreational marijuana at work.

This provision is consistent with the state's medical marijuana law which also does not require any employer to allow the use of *medical marijuana* in the workplace. Consequently, even though use of marijuana may be legal in the state, employers may restrict such use and possession on its

premises and while employees are on duty. And, although not specifically stated, Nevada's marijuana laws appear to allow employers to terminate or discipline employees who violate workplace policies that prohibit using, possessing, or being impaired by marijuana while at work.

So Must Employers Tolerate Off-Duty Marijuana Use, So Long as It Is Not Done While on Duty or on Company Premises?

The short answer in our opinion is generally no, with some caveats for medical marijuana users described below, but employees' off-duty consumption raises some difficult practical issues. First, many employers have policies prohibiting employees from being "under the influence" or "impaired" by prohibited substances while at work. It is often challenging, however, to determine when an employee is "under the influence" or "impaired" while at work. If the employee is visibly affected or slow to react, impairment may be easier to demonstrate. However, not everyone experiences side effects from marijuana consumption and even if they do, the timeframe within which the side effects can be observed may vary by individual. Accordingly, employers who prohibit employees from working while being impaired or "under the influence" should not jump to conclusions that someone was "under the influence" just because their drug screen comes back positive for Tetrahydrocannabinol (THC).

Second, employers should be mindful of NRS 613.333, which makes it an unlawful employment practice for an employer to refuse to hire a prospective employee, or to discharge or discriminate against an employee because the employee engages in the lawful use of any product outside the premises of the employer during the employee's nonworking hours, as long as the use does not adversely affect the employee's ability to perform his or her job or the safety of other employees. Although the statute was initially enacted to protect tobacco smokers, the recent legalization of marijuana makes the statute also potentially applicable to marijuana users.

Unlike tobacco, however, marijuana remains illegal under federal law, which begs the question whether its off-duty use is "lawful." Currently, no Nevada cases have considered or decided this issue, but a key case involving Colorado's lawful activities statute, C.R.S. § 24-34-402.5, was decided by the Colorado Supreme Court last year. In that case, a quadriplegic employee who used medical marijuana during non-working hours to help control his pain was terminated after a random drug test showed a positive result for marijuana in his system. He sued his employer alleging that his termination violated the Colorado lawful activities statute. The Colorado Supreme Court ruled that his termination did not violate the statute because marijuana use was unlawful *under federal law*. *Coats v. Dish Network, LLC*, 350 P.3d 970 (Colo. 2015).

Even though the Colorado case is not binding on Nevada courts, its reliance on the illegality of marijuana under federal law may be persuasive. Still, it is unclear how a Nevada court would rule if asked to decide whether an employer violates the Nevada lawful product statute by terminating or disciplining an employee due to his or her off-duty marijuana use. The risk of such a claim should be considered when making adverse employment decisions involving positive marijuana drug tests or other marijuana-related

issues. Employers should also be mindful of potential developments in federal law with respect to the legalization of marijuana. Such legalization will transform marijuana into a “lawful” product under both federal and state law, and the above analysis will change greatly.

Finally, an employee who is terminated for marijuana use may attempt to argue wrongful termination in violation of public policy, given the recent marijuana legalization. Because the Nevada Supreme Court has been traditionally conservative in creating new exceptions to the at-will employment doctrine and marijuana remains illegal under federal law, such claims do not bear high likelihood of success. As mentioned above, however, legalization of marijuana under federal law will substantially affect this analysis.

Reasonable Accommodations For Medical Marijuana Users

Although employers may create workplace policies prohibiting recreational marijuana use, employers need to remain cognizant of their obligations to accommodate medical marijuana users. As of April 1, 2014, Nevada employers must, in certain circumstances, make reasonable accommodations for the medical needs of an employee who holds a valid medical marijuana registry card. Although an employer is not required to modify the job or working conditions of a person who uses medical marijuana when the job requirements or working conditions at issue “are based upon the reasonable business purposes of the employer . . .,” employers must attempt to make reasonable accommodations for the medical needs of an employee who holds a valid registry identification card and uses marijuana for medical purposes, subject to certain limitations. Specifically, employers need not provide reasonable accommodations that would:

- (a) Pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or
- (b) Prohibit the employee from fulfilling any and all of his or her job responsibilities.

The difficulty with interpreting the statute stems from the fact that there is no clear definition of the level of accommodation that must be provided. On its face, the statute appears to impose a lesser duty to accommodate than the Americans with Disabilities Act (“ADA”) because, for example, it does not require accommodations that would preclude employees from fulfilling “any and all” of their job responsibilities. By contrast, under the ADA, removal of non-essential job functions may be a reasonable accommodation. Another reasonable accommodation may be a transfer to a different position for which the employee is qualified. In addition, the “direct threat” exception under the ADA appears narrower than the “threat of harm or danger to persons or property” exception to the accommodation for medical marijuana use.

Nevertheless, employers are urged to engage in an interactive process with an employee who holds a valid registry medical marijuana card before taking any adverse action due to the employee's off-duty marijuana use. Not all positive marijuana tests are terminable offenses. Rather, employers

must first determine whether the employee who tested positive for marijuana has a valid registry identification card. If not, the employee may be terminated in accord with any drug and alcohol policy and other laws (e.g., non-discrimination laws). If the employee has a valid registry identification card, the employer must determine whether the employer can reasonably accommodate the employee's "medical needs", including the use of medical marijuana. In making this determination, the employer may consider whether the use would pose a threat of harm or danger to persons or property, pose an undue hardship on the employer, or whether the only available accommodations would limit the employee from fulfilling his or her legitimate and reasonable job responsibilities. There are many difficulties and complexities in complying with this requirements and few clear answers, but factors employers should consider include:

- the nature of the employee's position;
- the nature and cost of the accommodation needed;
- the overall financial resources of the facility making the accommodation; the number of persons employed at this facility; the effect on the expenses and resources of the facility;
- the overall financial resources, size, number of employees, and type and location of the employer's facilities (if the facility involved in the accommodation is part of a larger entity);
- the employer's type of operation, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and
- the accommodation's impact on the facility's operation.

If after considering these and any other relevant factors, an employer determines an accommodation would be reasonable, it should provide the accommodation to the medical marijuana user until the courts interpret these statutes in a more favorable way.

There is no reasonable accommodation requirement for recreational marijuana use.

Employers should also bear in mind that certain specific federal laws and regulations such as the Department of Transportation regulations and the federal Drug-Free Workplace Act of 1988 may present their own unique issues and evaluate any potential accommodations in light of applicable federal requirements.

Workers' Compensation and Marijuana

Nevada's Workers' Compensation law provides that if an employee has "any amount of a controlled substance in his or her system" at the time of a workers' compensation covered injury for which the employee does not have a "current and lawful prescription ... or that the employee was not using in accordance with the provisions of" the Nevada medical marijuana laws, the controlled substance is presumed to be the proximate cause of the injury and benefits may be denied. Under N.R.S. § 616C.230, this

presumption is rebuttable and an employee may overcome that presumption by providing clear and convincing evidence that his or her being under the influence of a controlled or prohibited substance was not the proximate cause of the injury. Still, the causation presumption implies that if the employee uses medical marijuana in compliance with the medical marijuana laws, a positive test for the existence of marijuana in the employee's system after a covered injury must be treated similarly as a positive test for any other lawfully prescribed drug for purposes of workers' compensation.

Final Thoughts

Take this opportunity to review your workplace drug policies and revise them to reflect that the use and possession of marijuana on work premises or while on duty is prohibited. In our experience, many employers' policies fail to account for medical marijuana accommodations. Being under the influence of marijuana while on duty should be prohibited, with a statement that your organization will comply with applicable reasonable accommodation laws. If faced with a positive marijuana drug test result, ask the applicant/employee if he or she holds a valid registry identification card, and if so, engage in an interactive reasonable accommodation process to determine whether an accommodation for off-duty medical marijuana must be made. Finally, take time to remind employees of your policies in light of the legalization of recreational marijuana in Nevada.