

RISK MANAGEMENT

Safety Insight



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Marijuana and Weapons: Workplace Challenges Based On New Laws

By Mark A. Lies II and Kerry M. Mohan

INTRODUCTION

Changes in laws regulating medical marijuana and guns create have made it more cumbersome for employers to legally manage their workplace. The Occupational Safety and Health Administration (“OSHA”) requires employers to provide a safe workplace for employees, which include ensuring that employees are not impaired in a manner that creates a safety hazard to the employee and other employees, as well as protecting employees from workplace violence. However, new laws regulating medicinal marijuana and the right to carry firearms, including concealed firearms, have created additional uncertainty and anxiety for employers, human resource and safety professionals, and supervisors. This ambiguity extends to many issues, including when an employer can test an employee for suspected marijuana use, whether an employer can lawfully discipline employees for marijuana use, whether an employer can prohibit employees from bringing personal firearms to the workplace, and whether an employer can prohibit an employee from bringing personal firearms in company vehicles.

This article addresses the potential liability issues employers may face regarding employee drug use and testing and firearms in the workplace. Because each state has its own laws regarding these two issues, this article is presented in a question-and-answer format to provide essential information on these issues.

MARIJUANA IN THE WORKPLACE

Q. Is medical marijuana legal where I live?

To date, 20 states and the District of Columbia have enacted laws that decriminalize or authorize, to varying degrees, the use of marijuana for medical purposes. Those states are Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Delaware, Hawaii, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. Under federal law, use of marijuana for medicinal purposes is still illegal.

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Q. Can an employer prohibit its employees from using medical marijuana?

Most states permit an employer to establish reasonable rules regarding the use of medicinal marijuana. However, the states with the most recent medicinal marijuana legislation, such as Delaware, Illinois, and Arizona, have explicitly prohibited employers from discriminating against medicinal marijuana users on that basis alone. In those states, an employer is permitted to prohibit medicinal marijuana use and discipline an employee for failing a drug test if it would put the employer in violation of federal law or would cause the company to lose a federal contract or money.

Q. Are medicinal marijuana users protected by disability discrimination laws?

Medicinal marijuana users have continually challenged policies prohibiting marijuana use on the basis of disability discrimination. Thus far, federal courts have found that medical marijuana use is not protected under the Americans with Disabilities Act (ADA) because its use remains prohibited under federal law. Employers must be aware that if an employee discloses that he/she is legally authorized to use medicinal marijuana that such disclosure could also involve revelation of an underlying “disability” that is protected under the ADA. Thereafter, if the employer decides to take any form of adverse employment action against the employee, the employer must be prepared to demonstrate that the adverse action was based upon a legitimate business reason having no relationship to an actual or perceived disability. In addition, because states (and many municipalities) have their own anti-discrimination laws, an employer may run afoul of a state’s disability discrimination law by disciplining medicinal marijuana users for off-the-clock use. Finally, many state privacy laws can protect employees for lawful conduct outside of working hours at long as such conduct does not create a hazard or violate any legal obligations at the workplace.

Q. Can an employer discipline an employee for having marijuana at the worksite or for being under the influence of medicinal marijuana while at work?

Yes. Even the most pro-user medicinal marijuana statutes permit employers to properly discipline employees who are found to have medicinal marijuana at work or who are under the influence of or impaired by medicinal marijuana while at work.

Q. How can an employer determine whether an employee is under the influence of medicinal marijuana?

Medicinal marijuana use is easy to spot when an employee smokes or ingests marijuana in front of a supervisor, which is certainly not the typical scenario. However, determining whether an employee is under the influence or “impaired” by the marijuana, may be difficult to do under the circumstances, and may be even more difficult for

untrained staff. Thus, employers must train supervisors, managers, and foremen on how to identify behavior that demonstrates potential impairment and the proper procedures for responding to and investigating alleged instances of impairment. Further, employers should develop a written definition and understanding as to what constitutes an “impaired” employee. For instance, Illinois’ recent medicinal marijuana statute provides a comprehensive definition of when an employee is considered “impaired” when (s)he:

manifests specific, articulable symptoms while working that decrease or lessen his or her performance of the duties or tasks of the employee’s job position, including symptoms of the 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.

The Illinois definition of “impaired” provides a broad range of behavior that an employer can consider being suspicious, and employers should consider whether to adopt this definition for their own internal workplace drug programs. Many states have similar definitions that could be incorporated into a policy. If the employer has properly trained the supervisor on this type of definition and the supervisor properly documents the behavior that has been observed, the employer will be in a position to defend any adverse employment action that it may take against the employee.

GUNS IN THE WORKPLACE

The issue of guns in the workplace also raises additional safety concerns in the workplace.

Q. What is a carrying concealed weapons law?

A carrying concealed weapons (“CCW”) law sets forth the requirements for an individual to carry a concealed firearm in public. CCW laws vary by state and restrict where an individual can carry a firearm. For instance, many CCW laws prohibit firearms from being carried onto schools, hospitals, government buildings, and places that serve alcoholic beverages. Illinois, for example, has 23 identified places where concealed firearms are prohibited.

Q. Do CCW laws affect workplaces?

Yes. CCW laws vary state by state, and this is particularly true with their application to workplaces. Accordingly, employers must conduct a state-by-state analysis to determine what rights and restrictions employers may have to limit or exclude the carrying of firearms at the workplace, onto company premises, or in company vehicles.

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Q. Can an employer prohibit the carrying of firearms by employees?

Many states have no law limiting an employer's authority to limit the possession and carrying of firearms at the workplace, on company premises, or in company vehicles (i.e., Arkansas, California, Massachusetts, and New York). In those states, an employer can typically prohibit the carrying of firearms by employees. However, many other states, including Illinois, Michigan, Texas, and Florida, limit an employer's right to prohibit employees from carrying firearms in certain circumstances when the employee possesses a lawful CCW license.

Q. Can an employer prohibit an employee from carrying a firearm into the workplace?

Yes. Of the states that regulate an employee's right to carry a firearm into the workplace, almost every one permits an employer to prohibit the carrying of the firearm in the actual workplace (i.e., factory, construction site, offices). Those states, however, also require that the employer clearly and conspicuously notify employees that firearms are prohibited, which is typically done through a sign of specified design and size. For example, the required signage in Illinois is specified to be 6" x 4" and must have the following symbol:



Q. Can an employer prohibit employees from having a firearm in their personal vehicles in the company's parking lot?

Even though many states permit an employer to prohibit the carrying of firearms in the actual workplace, those same statutes often allow employees to carry firearms in their personal vehicles, even if they are located on an employer's premises, such as a company parking lot. Depending on the state, however, the employer may be permitted to require that the employee place the firearm out of sight and/or lock the firearm inside the glove box, trunk, or secured area within the vehicle. An employer may also be permitted to require employees carrying firearms to park their vehicles at a separate, but nearby, parking lot.

Q. Can an employer prohibit an employee from carrying a firearm in a company-owned vehicle?

Most, but not all, states, permit an employer to prohibit an employee carrying a firearm in a company-owned, leased, or rented vehicle.

Q. Can an employer prohibit other devices that could be used as a weapon from being brought into the workplace?

Yes. Employers should seriously consider prohibiting employees from bringing other devices, such as Mace and pepper spray, into the

workplace. These devices have been used by employees against co-workers and have led to serious injury and death.

CONCLUSION

New medical marijuana and CCW laws require that employers educate themselves about specific state regulations regarding these issues. Because these matters are subject to state laws, what may be lawful in one state may be illegal in another state. Or, what is lawful under federal law may be unlawful under state law. For these reasons, employers must know each state's specific medicinal marijuana and workplace CCW laws and determine what rights employers have and what restrictions they may implement to ensure a safe and healthy workplace. Some guidelines to consider:

- Develop separate policies to deal with each of these potential hazards that complies with a particular state's laws.
- Train employees, with documentation, on the employer's policies regarding the possession, transportation and storage of weapons and in the case of medicinal marijuana, the consumption, use and penalties for impairment.
- Train supervisors in the requirements of these policies, particularly how to identify the signs and symptoms of impairment and how to properly document such observations.
- Conduct a thorough and documented investigation and discipline employees who violate these policies in a consistent manner and, in the case of violation of medicinal marijuana usage. Ensure that any discipline is not based upon a known or perceived underlying disability.

As the law on these two, distinct topics continues to evolve, following the above recommendations may limit an employer's exposure to liability arising from these issues.

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