

Legal Alert

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Michael R. King
mking@gblaw.com
602-256-4405

Medical Marijuana

QUESTION: WILL MEDICAL MARIJUANA MAKE MY BUSINESS GO UP IN SMOKE?

ANSWER: YOU NEED TO PLAN CAREFULLY TO AVOID REEFER MADNESS IN THE WORKPLACE!

Can I do anything about my employees coming to work high? What if your workers operate heavy equipment? (“Wow, man, I crashed the forklift . . .”) Is attentive customer service important to your business? (“Dude! I must have spaced on what you told me.”) Are you simply worried about getting the chips and salsa to the customers? (“Sorry, I guess I had the munchies.”) Has your drug screening program just gone to pot?

Sixteen states have legal medical marijuana laws. Not surprisingly, California and Colorado seem to be the states with the highest use of medical marijuana. Arizona’s law was only recently passed by the voters. So, the issue of what to do about stoned workers isn’t all smoke!

You can still enforce your drug-free workplace policies. But keep in mind that you will have many more false positives in your drug screening tests because cannabis will stay in the user’s system much longer than other substances, such as alcohol or cocaine. If your worker has a state-issued permit for medically recommended marijuana, you cannot prevent the worker from using his or her medicine. You can, however, prevent employees from being impaired on the job. Does that make sense, or are we just playing mind games?

Can anyone qualify to be treated with medical marijuana? Under Arizona’s law, a qualifying patient must have a “debilitating medical condition.” Debilitating medical conditions include cancer, glaucoma, HIV/AIDS, hepatitis C, Lou Gehrig’s Disease, Crohn’s Disease, Alzheimer’s Disease or symptoms from the treatment of these conditions. Alternatively, the patient may qualify for medical marijuana treatment for chronic or debilitating disease or if the treatment for that disease produces wasting syndrome, severe and chronic pain, severe nausea, seizures, or severe and persistent muscle spasms. Fortunately, employers will not need to weed out legitimate users from run of the mill potheads. Under Arizona law, legitimate users will have cards issued by the state.

While businesses can discriminate against tobacco users, they cannot penalize medical marijuana cardholders. An employer may not discriminate in hiring, terminating or imposing terms or conditions of employment or penalize a person because:

1. The person has a medical marijuana card; or
2. The registered patient tests positive for “marijuana components or metabolites, unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment.”

The exception is that employers can discriminate against medical marijuana users if they would lose either money or licenses under federal law by having those folks in the workforce.

Get out the Visine and let's be clear! Your place of business does not need to turn into Woodstock! Arizona statutes do not require that you allow the ingestion of marijuana in the workplace. Nor does the law require you to allow employees to work while under the influence of marijuana. A registered and qualifying patient should not be considered to be under the influence of marijuana, however, just because of the presence of “metabolites or components of marijuana that appear in insufficient concentration to cause impairment.” You can still discipline employees for using marijuana in the workplace or working while stoned. Proving the impairment will take more than merely showing that the snack vending machine is empty, however!

Keep in mind that the use of marijuana is illegal under federal law, even if medical marijuana is legal under some state laws. Your business may still need to comply with the federal Drug-Free Workplace Act of 1988. Also, the Occupational Safety and Health Act (“OSHA”) generally requires employers to provide a workplace which is free of recognized hazards. But if your employee has a “debilitating condition” that qualifies for use of medical marijuana, is that a disability covered by the Americans with Disabilities Act? Do you need to make reasonable accommodations for employees with disabilities requiring medical marijuana treatments? And you thought controlling employees' smoke breaks was difficult before?!!

You may need to revisit your drug testing policy. Most of your drug testing procedures won't change, but you can no longer terminate an employee solely for a positive marijuana test if that person is a registered user with a medical marijuana card from the state. Instead, you will need good evidence of impairment beyond just bloodshot eyes!

Before reaching for your hookah in despair over reconciling compliance with these different laws, talk to your lawyer. A sober review of your employee handbook and your drug testing policies will be prescribed. So, before you roll up that paper or reach for that next brownie, consider modifying your personnel handbook and drug testing policies.

Don't get busted for wrongfully firing employees! Remember that employees can sue you if you fire them in violation of state statutes, including medical marijuana laws.

If the medical marijuana law is causing you severe and chronic pain, nausea or lack of appetite, please call me for legal advice before applying for your own medical marijuana user's card!