

CPRA Byline Article

Medical Marijuana --- What Does It Mean For Your Workplace?

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With all the press surrounding medical marijuana dispensaries in Colorado, employers are starting to wonder whether medical marijuana use must be allowed in the workplace. The short answer: no. Well, at least for now. Amendment 20 specifically states that it does not require "any employer to accommodate the medical use of marijuana in any work place." Seems pretty straightforward, right? Well it does, except for the pesky potential conflicts the law may have with: the Americans with Disabilities Act (ADA) and the Colorado Anti-Discrimination Act (CADA), which require employers to provide reasonable accommodation of prescription drugs that do not interfere with the employee's ability to perform the essential functions of the position; Colorado state law that prohibits employers from taking adverse action against an employee for lawful off duty conduct; and any potential state Constitutional rights claims that may arise.

While no Colorado court has yet addressed the issue of medical marijuana in the workplace, courts in Washington, Oregon, Montana, and California have. Based on several different theories all the courts have resoundingly rejected the notion that employers have any obligation to allow marijuana use on the job or even to allow its presence in the employee's system. The reasons for rejecting this notion vary. First, because marijuana is still an illegal substance under Federal law, and the ADA clearly excepts accommodation of illegal drugs (and let us not forget it is still illegal under federal law), the courts have said the ADA offers no protection. Second, the ADA and CADA only require accommodation of prescription use. Those who have received permission to use marijuana for medicinal purposes have not done so through a prescription, but rather by receiving a doctor's certification and applying to the State for a medical marijuana card, which is not the same as a prescription in the eyes of the law. Third, while some states, like Colorado, prohibit an employer from taking an adverse employment action against any individual arising from off-duty conduct, none of these lawful off-duty conduct statutes suggest that lawful off-duty use equates to allowing use on the job or even tolerating traces of the substance in the system while on the job. Uniformly, safety concerns under OSHA and workers' compensation statutes seem to take precedence over allowing an employee who has legally used marijuana for medicinal purposes to have traces of it in his system while at work. Indeed, the U.S. Department of Transportation had such concerns relating to safety and the possibility that employers would "ease up" drug testing requirements

on the job that it issued a proclamation in October that transportation workers — including pilots, aircraft maintenance workers, truck drivers, school bus drivers, train engineers, subway operators and ship captains — are not allowed to use marijuana under any circumstances, even in states that allow its medical use.

What separates Colorado from these other states is that the law that allows marijuana use for medicinal purposes is not just a creature of statute, but rather an amendment to the Colorado constitution. Thus, do employees who legally use marijuana have a constitutional right to do so that would trump other federal and state laws? We simply do not know at this time. As recently articulated by the *Denver Post*, this all creates a "cannabis conundrum." Thus, until the legislature or Colorado courts provide clarification, employers should: tread lightly in dealing with this issue; seek competent legal counsel to help it walk through this minefield; adopt policies clarifying the employer's position on the use of medical marijuana and presence in the system while on duty (taking into consideration federal and state regulations governing the position, drug testing requirements, and safety concerns); determine what other options may be available (i.e. leave of absence); train managers on such policies and appropriate enforcement; and stay informed of any changes in the law or opinions of the court. With more than 30,000 users registered with the Colorado Department of Public Health and Environment, and nearly 600 new applications filed each day, employers are bound to face the issue in their workplace sooner than later --- be prepared.

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