

Medical marijuana

Issues surrounding its use in the workplace

Medical marijuana is no longer just an issue for employers in a few states. As marijuana use, both medicinal and recreational, continues to become legally accepted in the U.S., it may ultimately be removed as a Schedule I drug under the Controlled Substances Act.

If and when this occurs, Frank P. Spada, Jr., an attorney with Semanoff Ormsby Greenberg & Torchia, LLC, says employers will have a more difficult task of dealing with medicinal marijuana in the workplace.

“It is almost certain that employers, even in states with laws that don’t require employers to accommodate a medicinal user at work, will face challenges by attorneys who will seek to have the laws interpreted pursuant to these changing social attitudes,” he says.

Smart Business spoke with Spada about medicinal marijuana’s workplace impact.

How does medicinal use of marijuana affect the rights and obligations of employers?

Many of the states, including Pennsylvania, that have enacted medicinal marijuana laws prohibit discrimination against employees based on an individual’s status as a certified user of medical marijuana. Most of these states, including Pennsylvania and New Jersey, protect employers to some degree with provisions in their respective laws that prohibit marijuana use in the workplace. Pennsylvania, for example, does not require employers to accommodate the use of marijuana on the job or ‘when the employee’s conduct falls below the standard of care normally accepted for the position.’ It permits employers to discipline employees who ‘are under the influence’ of medicinal marijuana in the workplace and specifies that employers may prohibit employees from performing certain safety-sensitive positions while under the influence.

FRANK P. SPADA, JR.

Attorney
Semanoff Ormsby Greenberg & Torchia, LLC

(215) 887-2653
fspada@sogtllaw.com



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New Jersey’s law does not presently require an employer to accommodate medicinal marijuana use in the workplace, but there are two pending legislative proposals that, if ultimately enacted, would limit the adverse action that could be taken against an employee for medical marijuana use before establishing that an employee’s ability to perform the job is impaired.

How can it be established that an employee actually used marijuana in the workplace?

Standard urine tests that are universally used by employers do not establish that an individual is ‘impaired’ by or ‘under the influence’ of tetrahydrocannabinol (THC), the psychoactive chemical in marijuana. A urine test measures, in nanograms, the amount of THC metabolites in the body, which are byproducts produced by the chemical changes in the body to THC after marijuana is smoked or ingested. It does not measure the amount of THC that is in the body. Even if a urine test could identify a level of THC in an individual’s body at the time the test was taken, there is not a universal agreement on what level would constitute impairment. Unlike alcohol, where a blood alcohol concentration of 0.08 percent is considered legal intoxication in every state, there is no such legal limit of THC under federal or state law (The PA law does prohibit a patient from specific jobs

when under the influence of more than 10 nanograms of active THC per milliliter of blood in serum). Complicating the matter even further is that the THC metabolites are unlike most drug metabolites, which are water-soluble and can be excreted rapidly from the body. THC metabolites are fat-soluble and exit the body slowly, which can result in a positive test on one day and a negative on the next. Such a situation makes it difficult, if not impossible, to determine through a urinalysis when an employee last smoked or ingested marijuana.

Can employers take action against an employee who has tested positive for marijuana?

The Americans With Disabilities Act does not require an employer to accommodate an employee who is a current user of drugs that are considered illegal under federal law. Therefore, an employer’s reference to the presence of ‘illegal drugs’ in its policy, at present, is still a legitimate basis to take an adverse employment action for a positive drug test for marijuana use. Employers should be careful that their policies do not state that an adverse employment action will be taken if an employee is found to be ‘impaired’ or ‘under the influence’ since establishing impairment or being under the influence cannot presently be determined for marijuana use through a urine test. ●