What's the Buzz on Medical Marijuana and the Workplace?

How Health Care Employers Can Address Medical Marijuana Use

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Sound reasons exist for a health care employer to have a zero-tolerance drug testing policy and program. These reasons include quality patient care, government contracting requirements, compliance with the federal Drug Free Workplace Act ("DFWA") and other laws, workplace safety, productivity, health and absenteeism, and third-party liability.

How marijuana is being societally treated is clearly evolving, and remains controversial. Medical marijuana issues in particular continue to pose complicated legal and philosophical questions for health care employers.

State legislative efforts or voter initiatives frequently occur around the country, backed by supporters seeking to regulate, legalize or decriminalize marijuana use and/or broaden medical marijuana users' workplace rights. Currently, 23 states and the District of Columbia authorize some form of medical marijuana use. Going further, Washington State and Colorado have legalized certain amounts and usage of so-called "recreational marijuana," with regulated and taxed growing and retail operations opening to much fanfare in both states. All these laws stand in contrast to federal law, which classifies marijuana as a Schedule I drug (the same as heroin, LSD and ecstasy) under the Controlled Substances Act - meaning under federal law marijuana remains illegal, with a "high potential for abuse" and "no currently accepted medical use."

With regard to workplace rights, while a few states afford a degree of protection to job applicants or employees who are authorized medical marijuana users, most states do not. The courts that have dealt with the issues to date have been uniformly clear - even authorized medical marijuana use does not protect medical marijuana users from adverse hiring or disciplinary decisions based on an employer's drug testing policy. For example, in 2011, the Washington Supreme Court ruled in *Roe v. TeleTech Customer Care Management* that Washington's Medical Use of Marijuana Act ("MUMA") does not protect medical marijuana users from adverse hiring or disciplinary decisions based on an employer's drug testing policy.

Jane Roe (who used a pseudonym because medical marijuana use remains illegal under federal law) sued TeleTech for terminating her employment after she failed a drug test required by TeleTech's zero-tolerance substance abuse policy. She alleged that she had been wrongfully terminated in violation of public policy and MUMA because her marijuana use was "protected" by MUMA. The trial court granted summary judgment in TeleTech's favor, and Roe appealed all the way to the Supreme Court. The Supreme Court ruled 8-1 in TeleTech's favor, holding that MUMA provides an affirmative defense to state criminal prosecutions of qualified medical marijuana users, but "does not provide a private cause of action for discharge of an employee who uses medical marijuana, either expressly or impliedly, nor does MUMA create a clear public policy that would support a claim for wrongful discharge in violation of such a policy." The Court's holding applies regardless of whether the employee's marijuana use occurred while working or while off-site during non-work time. While the *TeleTech* case did not involve a disability discrimination or reasonable accommodation claim under Washington's Law Against Discrimination, the Court did note that marijuana remains illegal under federal law regardless of what the State of Washington does, and that it would be incongruous "to allow an employee to engage in illegal activity" in the process of finding a public policy exception to the at-will employment doctrine. Moreover, the Court noted that the Washington State Human Rights Commission acknowledges that "it would not be a reasonable accommodation of a disability for an employer to violate federal law, or allow an employee to violate federal law, by employing a person who uses medical marijuana."

The Supreme Courts of California, Oregon and Montana have similarly ruled for employers, as have federal courts. In a closely watched pending case, *Coats v. Dish Network L.L.C.*, the Colorado Supreme Court will sometime in 2014 or 2015 determine whether an authorized medical marijuana user has job protection under Colorado's "Lawful

Activities" statute, which prohibits an employer from discharging an employee for engaging in lawful off-duty activity. However, this in turn begs the question - can activity ever be deemed "lawful" when it remains illegal under federal law?

Many unionized health care employers have collective bargaining agreements ("CBA") covering some or all of their employees. Depending on the circumstances (e.g., CBA language, past practice with analogous issues, principles of "just cause" discipline, and an arbitrator's tendencies), the court decisions referenced above might be applied differently in a labor arbitration. Indeed, some arbitrators have used "just cause" principles to overturn employee terminations for failed drug tests due to medical marijuana use. Regardless, unionized employers can still preserve their rights to drug test if they adhere to certain steps in the collective bargaining process (if not yet negotiated) and consistency in their application of drug testing policies.

Given the continued efforts by advocacy groups to "push the envelope" of medical marijuana laws into the workplace, it is important to closely monitor legislative and legal developments. To best protect themselves, health care employers should review their existing policies to make sure that they comply with the law, and strongly consider prohibiting "any detectable amount" of drugs that are illegal under state or federal law, as opposed to merely prohibiting being "under the influence" of drugs that are illegal under only state law. Employers should also ensure that all human resources personnel and drug testing labs know how to handle medical marijuana issues as they arise.

For more information, see:
http://www.advisory.com/research/health-care-law-roundtable/members/white-papers/2014/general-counsel-agenda-q3-2014

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