Shook, Hardy & Bacon L.L.P.

national employment PERSPECTIVE

FEBRUARY 6, 2013

A PUBLICATION OF SHOOK, HARDY & BACON L.L.P

FOCUS ON POLICY

SHB's National Employment & Policy Practice Represents Corporate Employers Exclusively

STATE MARIJUANA LEGALIZATION STATUTES AND EMPLOYER DRUG USE POLICIES

This Newsletter is prepared by Shook, Hardy & Bacon's National Employment Litigation & Policy Practice[sm]. Contributors to this issue: Bill Martucci and Margaret Inomata.

Contact us by e-mail to request additional documentation or unsubscribe.

Attorneys in the Employment Litigation & Policy Practice represent corporate employers throughout the United States in all types of employment matters. To learn more about the SHB employment group and its members, see SHB.com.

California became the first state to legalize the use, possession and cultivation of marijuana for medical purposes in 1996.[i] Since then, 13 other states have decriminalized the use of medical marijuana. This past November, Washington[ii] and Colorado[iii] became the first states to decriminalize the use and possession of limited qualities of marijuana for recreational purposes. The impact of these new laws could have direct consequences on employers. Given the current state of the law, some employers may question whether they can maintain their current drug use policies.

The answer, for now, is yes. According to the federal government, the use, possession and growth of marijuana remain illegal. Marijuana is considered a Schedule I drug under the Controlled Substances Act of 1970,[iv] which, according to the Act, means it has a high potential for abuse, has no currently accepted use in the treatment of medical conditions, and has not been accepted as safe to use even under medical supervision.[v]

The federal government's classification of marijuana as a Schedule I substance preempts any state statutes decriminalizing the drug for either medical or recreational use. For employers, this means that policies prohibiting employees' use of marijuana remain enforceable, even if employees' use of the drug is legal under state law. Courts in Colorado,[vi] Washington,[vii] Michigan,[viii] and Oregon[ix] have upheld private

employers' rights to terminate employees due to medical marijuana use, despite state legislation legalizing marijuana as a medical treatment.

Still, employers may be wise to clarify their drug-use policies in light of the growing number of states easing restrictions on marijuana use and possession. For example, the National Football League has already sought to publicly reiterate its policies in light of the Washington and Colorado initiatives. Just a day after the November presidential election, NFL spokesman Greg Aiello announced, "The NFL's policy is collectively bargained and will continue to apply in the same manner it has for decades. Marijuana remains prohibited under the NFL substance abuse program." By acknowledging that state statutes allow for limited marijuana use while reiterating that such use remains illegal under federal law and, therefore, prohibited under company policy, employers may limit the number of employees seeking to challenge terminations under current drug policies.

Even in the face of federal decriminalization, some employers will be able to maintain their current, or similar, drug-use policies. Drug bans affecting employees in "safety-sensitive" positions, including motor vehicle operators and emergency responders, will likely survive even if marijuana use were legalized on the federal level.[x] The Department of Transportation recently announced that Washington and Colorado's initiatives will have no impact on the enforcement of its Drug and Alcohol Testing Regulation,[xi] which requires random, reasonable-suspicion, and post-accident drug testing by certain commercial transportation employers.[xii] Similarly, policies prohibiting employees from reporting to work while under the influence of marijuana will likely remain unchallenged.[xiii] Courts have accepted similar policies prohibiting employees from working while under the influence of alcohol even though the use of alcohol is legal under state and federal law.

Many employers, on the other hand, will have to revisit their drug-use policies if the federal government reconsiders the classification of marijuana as a Schedule I substance. Twenty-eight states and the District of Columbia currently have "lifestyle" laws that prohibit adverse employment actions based on employees' engagement in lawful activities outside of the workplace.[xiv] If the federal government legalizes marijuana, employers in states (like Colorado) with "lifestyle" laws will no longer be

able to discipline employees for the use, possession or sale of marijuana, as long as employees are not engaged in safety-related positions and do not show up at the jobsite under the influence.

In fact, the federal decriminalization of marijuana is not a far-fetched notion. On November 16, members of Congress introduced the "Respect States' and Citizens' Rights Act,"[xv] a bill that would allow state marijuana laws to preempt federal law. In support of the bill, Rep. Mike Coffman (CO-6) announced, "The people of Colorado and Washington voted in overwhelming numbers to regulate the sale of marijuana. Colorado officials and law enforcement are already working to implement the will of Colorado voters, and I look forward to continuing to work with my colleagues in Congress and officials in the administration to deliver clear guidance that ensures the will of the people is protected." While the Respect States' and Citizens' Rights Act died when the 112th Congress adjourned, it does signal the possibility of future federal decriminalization efforts.

State citizens have many reasons for voting to decriminalize marijuana, including reducing the costs of enforcement and raising tax revenue. Restricting employers' ability to enforce current drug-use policies may, however, be an unintended consequence of marijuana legalization. Given the potential for confusion, state legislatures passing marijuana decriminalization statutes in the future should specify the impact that new laws will have on employers' termination rights.

Colorado's Amendment 64 provides a good example of one way state legislatures can address employers' drug-use policies in the face of marijuana legalization measures. Section 16(6)(a) of Amendment 64 states, "Nothing in [the Amendment] is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees." It's a good start, but if Congress legalizes marijuana, this section of Amendment 64 may conflict with Colorado's "lifestyle" law, which prohibits disciplining employees due to their lawful off-duty conduct. As a result, states such as Colorado may revisit and revise their "lifestyle" laws to clarify whether workplace marijuana bans would remain enforceable if use of the drug becomes legal under both state and federal law.

In summary, the recent legislative developments in this area require careful consideration by employers concerning the appropriate application of workplace drug-use policies. For the most part, however, the policies are enforceable and remain an integral aspect of sound corporate human-resource policy.

---

[i] California Compassionate Use Act 1996, Cal. Health & Safety Code § 11362.5 (1996).

[ii] Initiative Measure No. 502.

[iii] Colo. Const. art. XVII, amend. LXIV.

[iv] 21 U.S.C. § 801 et. seq.

[v] 21 U.S.C. § 812.

[vi] *See Beinor v. Indus. Claim Appeals Office of Colo. & Serv. Group, Inc*., 262 P.3d 970, 974 (Colo. Ct. App. 2011) (noting that "the federal government may: 1) prosecute any physician who prescribes or recommends marijuana to patients; 2) prosecute any patient who uses prescribed marijuana; 3) revoke the DEA registration numbers of any physician who prescribes or recommends marijuana to patients; 4) exclude any physician who prescribes or recommends marijuana to patients from the Medicaid and Medicare programs; and 5) enforce all federal sanctions against physicians and patients" (quoting *Pearson v. McCaffrey*, 139 F. Supp. 2d 113, 116 (D.D.C. 2001)).

[vii] *See Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wash. 2d 736, 759 (Wash. 2011) ("Washington patients have no legal right to use marijuana under federal law.").

[viii] *See Casias v. Wal-Mart Stores, Inc*., 695 F.3d 428, 437 (6th Cir. 2012) (holding that Michigan's medical marijuana statute "[does] not regulate private employment" and that "private employees are not protected from disciplinary action as a result of their use of medical marijuana, nor are private employers required to accommodate the use of medical marijuana in the workplace").

[ix] *See Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus*., 348 Or. 159, 178 (Or. 2010) ("[t]o the extent that ORS 475.306(1) affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it without effect" (internal quotations removed)).

[x] In fact, federal law *requires* some employers to ban, and even test for, the use of drugs and alcohol. *See* Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. §§ 31301 and 31306 (requiring mandatory drug and alcohol testing for certain employees holding commercial driver's licenses who operate commercial motor vehicles).

[xi] Department of Transportation, *DOT Office of Drug and Alcohol Policy and Compliance Notice*, *available at* http://www.dot.gov/sites/dot.dev/files/docs/ODAPC%20Notice%20Recreational%20MJ.pdf (last visited Dec. 6, 2012).

[xii] 49 C.F.R. pt. 40.

[xiii] *See* The Drug-Free Workplace Act of 1988, 41 U.S.C. § 701 (requiring some federal contractors and grantees to establish employment policies restricting the use, possession or distribution of controlled substances in the workplace).

[xiv] *See, e.g.* Cal. Labor Code § 96(k) (prohibiting the demotion, suspension or termination of employees from employment for lawful conduct occurring during nonworking hours away from an employer's premises). Sixteen states and the District of Columbia prohibit adverse employment actions based on employees' off-duty use of tobacco products only. *See, e.g.,* D.C. Code Ann. § 7-1703.03 (2004) (prohibiting adverse employment decisions on the basis of tobacco use except where tobacco restrictions constitute bona fide occupational qualifications).

[xv] H.R. 6606 112th Cong. (2012).
