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AN OUTLINE OF LEGAL ISSUES WITH MARIJUANA IN THE WORKPLACE

By Dan S. Cross, Esq.

I. INTRODUCTION.

A. Federal law makes it unlawful to manufacture, distribute, dispense or possess marijuana, pursuant to the Comprehensive Drug Abuse Prevention and Control Act of 1970 (CSA).

B. The CSA classifies marijuana as a Schedule 1 substance, meaning that by definition marijuana has no accepted medical use and no accepted safety for use in medically supervised treatment, 21 U.S.C. §§ 812(b)(1), 812(c), 841(a)(1) and 844(a).

C. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court determined that pursuant to the CSA, Congress has the power under the Commerce Clause to prohibit the local cultivation and use of marijuana, even when such activities are in compliance with state law.

D. In 2009, the Obama administration stated that federal authorities would no longer make it an enforcement priority to pursue those who are in "clear and unambiguous compliance" with state medical marijuana laws. [*See* U.S. Department of Justice, Office of the Deputy Attorney General, "Memorandum: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana" (Oct. 19, 2009]

E. The Drug Free Workplace Act of 1988 applies to companies that have contracts with the federal government of $100,000.00 or more, and all recipients of federal grant aid. The Act requires employers to establish and publish to all employees a policy prohibiting the use of drugs in the workplace, and establish an awareness program that informs employees of the dangers of drug abuse in the workplace and the penalties for violations of company policy. The Act also requires employers to notify the government of any workplace criminal violations of law relating to drug statutes and to continue its good faith efforts to maintain a drug-free workplace.

F. An Initiative was passed by Colorado voters on November 7, 2000, sanctioning the use of marijuana for specified medical purposes as an amendment to the Colorado State Constitution, C.R.S.A. Article 18, § 14. The medical marijuana provisions of the Colorado State Constitution became law on December 28, 2000.

G. Individuals who are eligible to receive medical marijuana receive a registry identification card.

H. The medical marijuana provisions of the Colorado State Constitution did address

some employment issues, as follows: "Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place." § 14(10)(b).

I. However, Colorado also has a statute intended to protect employees from discrimination in the workplace based on "lifestyle." C.R.S. § 24-34-402.5 (1990).

J. The title of the "lifestyle" statute is "Unlawful Prohibition of Legal Activities as a Condition of Employment" and it states, in part:

> It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction:
>
> (a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or
>
> (b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.

K. This purpose of this outline is provide some guidance to private employers regarding how to navigate their way through the issues posed by employees with registration cards for medical marijuana, and more specifically to:

(1) Discuss how to handle medical marijuana issues when dealing with employment matters such as interviewing, drug testing, leaves of absence, discharge and discipline, and requests for accommodations; and,

(2) Discuss what modifications to employer policies may be advisable or necessary.

L. However, this outline and any attachments are intended to provide general information only and is not legal advice. Anyone with specific questions should obtain legal advice regarding application of topics discussed in this outline.

II. MEDICAL MARIJUANA AND EMPLOYMENT ISSUES.

A. Interview and Hiring.

1. Several studies have linked workers' marijuana smoking with increased absences, tardiness, accidents, workers' compensation claims, and job turnover. For example, a study among postal workers found that employees who tested positive for marijuana on a pre-employment urine drug test had 55 percent more industrial accidents, 85 percent more injuries, and a 75-percent increase in absenteeism compared with those who tested negative for marijuana use. [National Institute on Drug Abuse (www.drugabuse.gov/PDF/RRMarijuana.pdf; 01-20-2011)]

2. Therefore, employers should routinely do pre-employment drug testing.

3. The job application form should authorize pre-employment drug testing and should require the applicant to acknowledge that a positive test for

marijuana will terminate further consideration of the applicant.

4. The job application should release the employer, and its testing facility from any and all liability related to drug testing and test results.

5. As always, the job application should confirm employment with employer will be "at-will."

6. Employers are prohibited from asking questions which relate to age, race, pregnancy, color, gender, disability, marital status, ethnic origin, religion or due to lawful activities engaged in by the employee away from work.

7. Since legal use of marijuana in the State of Colorado is based on a medical need, interview questions about medical marijuana should be avoided as such questions could be unlawful questions relating to an applicant's disability.

B. Drug Testing.

1. Engage a U.S. Department of Transportation certified testing company and laboratory.

2. The contract with the testing company should include indemnification of the employer for errors, injuries and/or privacy violations caused by the testing.

3. It is recommended that a positive test for marijuana be defined as more than or equal to 50 ng/ml of THC, which is the level used by the U.S. Department of Transportation. 49 CFR § 40.87.

4. Drug test all applicants who receive an offer of employment.

5. To avoid potential claims of unlawful discrimination (and as a matter of common sense), the employer should reject all applicants with a positive test for marijuana.

6. Do not allow applicants to begin work until the employer has received a negative test result.

7. At a minimum, drug test all current employees who either (i) are involved in an accident or whose performance cannot be discounted as a contributing factor to an accident, or (ii) as required by Department of Transportation regulations.

8. It is also typical to test employees when there is "reasonable suspicion" that an employee is impaired.

C. There is no legal obligation for an employer to accommodate an employee's use of medical marijuana.

1. The medical marijuana provisions of the Colorado State Constitution did address employment, as follows: "Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place." § 14(10)(b).

2. An employee currently using marijuana is not entitled to accommodation under the Americans With Disabilities Act, 42 U.S.C. § 12114.

3. Therefore, there is no need to accommodate a medical marijuana cardholder with a leave of absence or other time off, unless there is an

underlying serious health condition that would qualify under the Family and Medical Leave Act or an underlying disability that would qualify under the Americans With Disabilities Act.

D. Discipline and/or Termination of Employment.

1. It is likely a violation of Colorado law to terminate employment and/or otherwise discipline an employee solely because of the employee's status as medical marijuana cardholder. [For example, the employee could have ceased using marijuana months prior to the employer gaining knowledge of the card.]

2. It is also likely a violation of Colorado law to terminate employment and/or otherwise discipline an employee solely because the employee tested positive for marijuana use, where the test results are less than the level prescribed as a violation in the employer's drug and alcohol policy.

3. It is acceptable in the State of Colorado for an employer to have a written drug policy and to terminate an employee as a result of a drug test showing the presence of marijuana in the employee's system during working hours, *Slaughter v. John Elway Dodge*, 107 P.3d 1165 (Colo. App. 2005). Accord, *Coats v. DISH Network, LLC*, Colorado Supreme Court (2015).

4. In other words, a "zero tolerance" policy is legal in the State of Colorado, though such a policy must be enforced with both common sense and consistency.

5. An alternative to "zero tolerance," is to mandate immediate termination for employees in "safety-sensitive" positions. Safety-sensitive positions should all be identified at the time the drug policy is revised.

6. In essence, the employer should be prepared to defend a decision to terminate an employee using medical marijuana on the following basis:

> The decision should be based on a good faith belief that an employee or applicant used, possessed, or was impaired by drugs (including medical marijuana) during work hours or on work premises, or that an employee in engaged in current marijuana use that impacted the employer's reputation and/or workplace safety.
>
> An employer demonstrates its "good faith belief" by relying on objective observations, such as: conduct of the employee; employee behavior or appearance; reports by other individuals who witnessed drug use or possession or possession of drug paraphernalia at work; video surveillance; results of drug and/or alcohol tests; and/or other information the employer reasonably believes to be reliable.

7. Regardless of the medical marijuana provisions of the Colorado Constitution, it is also acceptable to terminate an employee for refusing to take a drug test, *Slaughter v. John Elway Dodge*, 107 P.3d 1165 (Colo. App. 2005).

8. To avoid potential claims of unlawful discrimination (and as a matter of common sense), all employees who test positive for marijuana should be terminated.

9. Employees terminated for testing positive for marijuana are not entitled to unemployment benefits. C.R.S. § 8-73-108(5)(e)(IX.5); *Beinor v. ICAO*, 262 P.3d 970 (Colo. App. 2011).

    a. Employer must prove, in part, that the drug test was conducted by

a licensed or certified testing facility and that the employee had marijuana in his or her system during work hours.

E. Employee Information Related to Medical Marijuana.

1. Employers should never solicit information from employees regarding use of medical marijuana.

2. Employers should treat information from registered users the same as all other health-related information received from employees.

3. Employees who advise employer representatives of their use of medical marijuana should be reminded in writing of the employer's policies.

4. The employer should have access to no drug test results other than whether a test is positive or negative.

II. Suggested Revisions to Drug and Alcohol Policies.

A. Drug Policy Introduction.

1. The policy should acknowledge that the employer must furnish to each employee both employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm, 29 U.S.C. § 654 (OSHA), and that the employer therefore seeks to reduce or eliminate the industrial accidents associated with employees who are impaired by use of marijuana in the workplace.

2. The preface to the drug policy should also acknowledge Colorado's prohibition against discrimination on the basis of "lifestyle" with language to the effect that:

In addition, off-the-job involvement with drugs and other intoxicants which adversely affects the Company, such as the employee's ability to perform his or her position, the confidence of co-workers in an employee's ability to perform the position, public trust in the ability of Company to perform its responsibilities, etc., is against Company policy.

B. Suggested Definitions of Impairment.

1. Because a positive marijuana test does not necessarily prove impairment, the policy should be clear that one definition of impairment is a positive drug test.

2. It also makes sense to have an alternative definition of "reasonable suspicion" and/or "impairment" that does not rely upon test results. For example:

Some factors which may provide Company with a basis for identifying "impairment" and/or "reasonable suspicion" follow. These factors include: an individual's speech; walking, standing, movement or physical dexterity; appearance; odor; irrational or unusual behavior; negligence in operation of equipment or machinery; disregard of workplace safety; involvement in a workplace accident causing damage to equipment, machinery or property, or causing injury to the employee or others; and any other conduct causing a reasonable suspicion about the use of drugs or alcohol.

C. Other Policy Issues.

1. Revised drug and alcohol policies and procedures should be posted along with other employment policies, and current employees should be advised of policy changes.

2. Revisions to policies should be acknowledged by employees in writing.

3. Policy changes should be implemented no sooner than 30 days after employees received notice of the changes.

IV. Conclusion.

A. A sample Policy is attached.

B. Use common sense and treat similarly-situated employees the same.

C. Think through the employer's workforce needs to determine what policy terms will be consistent with the company culture.