



Cannabis: Considerations for Employers

Employers must carefully consider hiring, policy, discipline and termination decisions when faced with a cannabis card holder or user, as these choices involve navigating multiple complex state, local and federal laws.

Cannabis is legal in a growing number of states. More than half of the states in the U.S. permit cannabis for a variety of medical purposes and nearly a dozen states recognize cannabis as legal or decriminalized for adult recreational purposes. However, it still remains illegal under federal law.

State Considerations

Each state has its own set of regulations for how it approaches protections and obligations for employees in regard to cannabis use and the workplace. Nearly every state that has legalized cannabis has rules on what employers may and may not do regarding employees who are cannabis card holders or users. However, these regulations are often incomplete and offer little additional guidance. Case law is slow to develop in this emerging area and varies widely in each jurisdiction.

Off Site v. On Site Use

While each state differs in its regulation of employees and cannabis, the majority of states do draw a similar distinction between use on work site premises, offering little to no protection for employees who use at work, and off site use, where the protections for employees run the spectrum. Some states treat cannabis like alcohol, where, so long as you are not intoxicated at work, there can be no adverse employment decisions; others treat cannabis like an illegal substance, where a positive test, regardless of influence at work, can result in termination; and still other states continue to develop a labyrinth of special circumstances.

Under the Influence and Testing

Most state statutes make reference to employees who work 'under the influence' and prohibit certain related activities. However, due to the lack of immediate, accurate, and readily available testing, this term of art is ambiguous at best and rarely defined. Blood tests offer the best results at this time, but they are expensive and can take weeks to obtain results; they also can still produce a positive result for someone who used days or even a week prior to the test. Urine, the most widely used testing method, can offer a more speedy and inexpensive result, but is often inaccurate, as it will show

positive results for someone's use weeks or even months before. Breathalyzers are being developed for use by law enforcement and would offer immediate results regarding a person's current influence; however, it may be years before such devices are available for employer use. Employers also must be mindful of regulations that guide drug testing of applicants and employees. At least one state has recently enacted legislation which prevents the use of a positive.

Other Legal Considerations

While cannabis remains illegal under federal law, this is not a "get out of jail free" card for employers - they still must comply with local and state laws. Some states have existing laws that protect an employees' off work legal behavior that could be applicable to cannabis use. Additionally, medical cannabis is often used for a serious medical condition that may be considered a disability under federal or state law, and such disability can require an accommodation. Questions also have arisen regarding medical cannabis's coverage under prescription drugs and worker's compensation plans. Medical cannabis entities must also be particularly careful, as states carefully regulate who can be employed by the entities involved in this industry and have many strict compliance procedures.

Whether it is advice regarding an application from a medical cannabis card holder, providing training to management, disciplining an employee for being under the influence, developing a drug free work policy that is compliant with state law, or recruiting for a grower processor, the attorneys at Leech Tishman have the knowledge, experience and insight to assist employers in the many areas of cannabis affecting their workforce.