

POT ON THE JOB: EMPLOYER RIGHTS

By Leonard T. Bier, JD, CAPP

I spent the first nine months of my legal career defending and monitoring the legal process of three American citizens accused of conspiring to smuggle marijuana into Bolivia. Thirty-seven years later, two of the last three U.S. presidents have admitted to smoking pot (the third refused to answer).

Twenty states have legalized medical marijuana at press time, and two have legalized recreational marijuana use. The federal government still classifies marijuana as an illegal prohibited substance and a Schedule 1 drug—the same category as heroin.

Is America ready for Cheech and Chong in the workplace? The legal landscape for employers is confusing. How do you deal with an employee who tests positive for marijuana? Can you test an employee for marijuana use? Can you refuse employment to someone who uses medical marijuana? What about federal regulations prohibiting marijuana use?

The answers to these questions are emerging on a case-by-case and state-by-state basis. Some states have addressed some of these issues in legislation legalizing medical and/or recreational marijuana use. In some jurisdictions, marijuana is treated like a prescription drug or alcohol. All state jurisdictions permit an employer to prohibit an employee from working while under the influence and testing positive for marijuana.

Court Decisions

Supreme Courts in Montana, Washington, California, and Oregon have permitted employers to discharge employees who are medical marijuana users. The courts rejected arguments that the legalization of marijuana for medical use gave employees a protected class status. Instead, the courts found that the legislative intent and public policy of the states was to decriminalize the use of marijuana and not to create any special employment protection for medical marijuana users.

In Illinois, Washington, Montana, Oregon, California, and Massachusetts, employers may prohibit the use and possession of marijuana in the workplace. However, Illinois, Delaware, Arizona, and Maine prohibit employment discrimination against qualified persons who are registered users of medical marijuana. To date, claims under the federal Americans with Disabilities Act (ADA) by medical marijuana users for employment protection

have failed because marijuana is a banned and illegal drug substance under federal law.

Other federal laws that affect employees in IPI member environments are those governing employees in the transportation industry, such as highways, airports, and mass transit systems, where drug testing is federally mandated and a positive test requires an employee to be removed from safety-sensitive positions. Additionally, public and private agencies in medical marijuana states that have received funding from the federal government may be in conflict with the federal Drug Free Act (Just Say No!) that requires employers to maintain workplaces in which employees are prohibited from using controlled substances, including marijuana.

Parking Employers

Employers who fall under federal drug-testing jurisdiction because of federal transportation regulations, grantsmanship, or Homeland Security or other federal programs should review their employee handbooks and reinforce that testing positive for marijuana is a dischargeable offense, notwithstanding any state statute that permits patient registration and medical marijuana use.

For employers in medical marijuana-approved state jurisdictions that are silent on the employer's right to discharge an employee for testing positive or where there is currently no case law, there is a need to state in the employee manual (as with all prescription drug use) that the employee must not be impaired or place himself, coworkers, the public, or property in danger of injury or damage.

Lastly, in jurisdictions that prohibit discrimination against medical marijuana use, there should be a clear policy in the employee manual of referring registered medical marijuana users who are impaired on the job, to appropriate medical (drug, urine, saliva) and other testing to determine the degree of impairment. That policy should also spell out disciplinary actions for workplace impairment, including suspension or discharge from employment. **P**



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