

LEGAL MANAGEMENT

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Dealing with Changing Marijuana Laws

As a fourth state prepares to legalize the recreational use of marijuana in late February, employers are faced with new questions about their own drug policies and whether they'll hold up against local measures.



GINA HARKINS
Journalist

Alaska legalized recreational pot use on February 24, following the November passage of Measure 2, which allows state residents to use, sell and possess marijuana. Alaska follows three other states — Colorado, Washington and Oregon — that also allow legalized, recreational use of the drug. Nearly two dozen other states allow marijuana to be used for medicinal purposes.

The changing rules raises new questions for law firms as their employees who live in or travel to those states can use the drug without legal ramifications. What's the best way to enforce a company-wide policy that goes against state law? And can employees call drug testing a privacy violation if their behavior was within the law?

Here's what experts say law firms should know when it comes to their own anti-drug policy as state and local laws change.

PRIVACY ISSUES

With more people living in or traveling to states that allow legalized marijuana use, dealing with employees who use the drug is going to become an issue that employers face more frequently, said Mark Hudson, an attorney with Shuttleworth & Ingersoll, P.L.C., in Iowa.

"Regardless of anybody's moral or principled approach to usage or how it's being done, whether for medical use or otherwise, understanding how that's going to work in the workplace is going to be a challenge for a lot of places," he said.

The biggest challenge that is likely to arise is tied to privacy, Hudson said. Law firms will have to determine how they deal with things that happen legally during non-working hours.

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"Since it's legal in certain states ... [if] an individual is smoking pot in a state that allows you to, is that a private issue or a work issue?" he said.

That's a question law firms in Colorado have faced since 2012. Employers don't always agree with new state laws that make recreational drug use legal, said Cheri Vandergrift, a staff attorney with Mountain States Employers Council in Denver. Whether on or off the premises, some employers believe employees shouldn't be smoking marijuana, she said.

And privacy can become an especially important issue when it comes to drug testing, she added. Law firms testing employees for drug use need to be certain there's a policy in writing.

"Everybody has a right to privacy when it comes to their own bodily fluids," Vandergrift said. "But if that expectation of privacy has been eliminated through a testing policy, then it's fair game and there isn't really a privacy issue."

ENFORCING THE RULES

Clear-cut employment policies can extend far beyond just privacy issues though. If a law firm has a documented drug policy that prohibits the use of marijuana, employers really have the final say over state or local laws, Vandergrift said.

In states like Colorado where marijuana use is legal though, employers are facing some pushback from employees about zero-tolerance drug policies.

"On the employee side, what they're arguing is essentially, 'It's legal in Colorado. Why should I lose my job because I engaged in a legal off-duty activities?'" she said. "For other activities like smoking and drinking, the employer doesn't have a say. So they ask why an employer can have a say with [marijuana]."

Rather than firing high-performing employees outright for marijuana use in a state where it's legal, Vandergrift said she has seen some employees adopt a "last-chance policy." That means an employee who pops positive for marijuana signs an agreement stating that they'll be subject to random drug tests for about another year. If they test positive for the drug one more time, they're terminated.

Ultimately though, with more people living in or able traveling to states where marijuana is legal, law firms should be sure they have a clear guidelines and verified drug testing in place. That can help protect a law firm in the case of a wrongful termination suit.

"They need to have a clear cut policy and it needs to be disseminated so there should be a sign-off page," Vandergrift said. "It should also be a standalone policy – not mixed in with other policies in the employee handbook. And they should have a verified positive test result in-hand."

EMPLOYEE RIGHTS

Employers will ultimately need to address whether marijuana use is a private issue or a work issue. For people who drive heavy equipment for a living, Hudson said it's likely to be a work issue. But for those outside of industries with severe safety standards, the issue becomes more individualized.

"It becomes, 'What kind of employer do I want to be?'" he said. "Do I care if somebody does something in their home life?"

In Colorado, that issue of home-life versus work-life has gone all the way to the state Supreme Court. Legal experts there will now determine what kinds of rights employees have in a state

where the drug use is legal.

“Colorado recognizes the protected status of legal off-duty activity,” Vandergrift said. “We’re pretty unique in that way.”

That means anything an employee does off-duty that’s legal – like smoking tobacco, drinking or gambling — are considered activities employers are prohibited from terminating individuals over. And one man who was fired for off-duty marijuana use is alleging that law applies to him.

Coats v. Dish Network, a case now pending before the Colorado Supreme Court, will examine whether a quadriplegic who was licensed to use medicinal marijuana was wrongfully terminated from his job. His argument: That he used marijuana in compliance with Colorado state law, thus making it a protected legal off-duty activity.

Similar cases involving marijuana have been argued in other states, Vandergrift said. But the employers have always won the case because of the preemption issue, which argues that because marijuana is illegal under federal law, it can’t be legal in any state, she said.

“If that case goes in favor of Mr. Coats, it’s really going to turn everything on its head,” Vandergrift said.

Washington, D.C., voters also chose to approve an initiative that would legalize recreational marijuana use in November, but the measure has been blocked by Congress since December.

A federal spending bill sought to block the District from using funds to legalize marijuana. While the D.C. government is largely autonomous, Congress has constitutional authority over some of the city’s laws. The argument about whether Washington will have the right to carry out the voters’ wish continues to play out on the national stage.

States like California, Maine, Massachusetts, Nevada and Arizona are expected to let voters decide on the issue in 2016.

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