

Changing Times: Marijuana in the Workplace

As Bob Dylan sang, “the times they are a changin’,” and this never has been truer than with public attitudes toward the use of marijuana. Once feared as a drug that would create “Reefer Madness,” as the title of a 1930’s movie proclaimed, marijuana use increasingly has become acceptable among the general population both for medicinal and recreational purposes.

This year, the Republican and Democratic candidates running for governor have called for decriminalizing marijuana use, and in response to a request from Senate Majority Leader Tommy Norment, the Virginia State Crime Commission will be studying whether marijuana should be decriminalized in the Old Dominion. The Commission’s executive committee has said that it will issue the study this year.

So, what does all of this portend for Virginia employers? If marijuana is decriminalized in Virginia, does that mean that persons who use marijuana to treat medical conditions that rise to the level of disabilities now may find protections under the Americans with Disabilities Act (“ADA”) and be entitled to use marijuana as a reasonable workplace accommodation? In order to seek some guidance on these and other questions involving marijuana use, the Virginia Employment Law Letter asked DiMuroGinsberg partner, Jonathan R. Mook, who is a nationally recognized authority on the ADA, as to what he thinks employers need to know.

How is marijuana use dealt with under the ADA?

Because marijuana still is an illegal drug under federal law, it comes within those provisions of the ADA that exempt from the statutes’ protections persons who are engaging in the illegal use of drugs. That means there are no limitations on employers asking questions about whether a job applicant or employee currently is engaging in the use of marijuana or for employers to test for such use, and if the answer is “yes” or the test is positive, take a job action such as refusal to hire or termination. There also is no need to accommodate an employee who currently is using marijuana, even if for medical purposes.

What conditions are treated with medical marijuana?

Medical marijuana has been prescribed for a variety of medical conditions including PTSD, pain relief (instead of opioids), and to enhance appetite for those persons who are HIV positive. Importantly, even though the ADA allows an employer to take a job action against an applicant or employee based upon the use of marijuana, the employer may run into problems if the employer bases the job action on the underlying medical condition that the person has. In the latter event, the ADA would come into play.

What is the importance of state law?

Any legal protections that an employee may have will be founded upon state laws legalizing use of marijuana for medicinal or recreational purposes. Hence, Virginia employers who have operations outside of the Commonwealth need to keep current on the marijuana laws in each of the states in which they have operations and abide by those laws.

How is the legalization of marijuana in other states affecting employer attitudes toward “drug free” workplaces?

Particularly in those states that have laws allowing for the use of recreational marijuana, many employers are considering adjusting their “drug free workplace” policies to recognize the reality that many otherwise qualified job applicants may test positive for marijuana use. That’s because signs of marijuana use can turn up in drug tests long after the drug’s mind-altering effects have worn off. Automatically disqualifying all applicants who test positive severely reduces the available pool of qualified individuals.

Employers, therefore, are beginning to evaluate, on an individualized basis, job applicants who test positive for marijuana, rather than disqualifying those applicants off the bat. This change in employer practices has occurred irrespective of whether the state in which the employer is located has an explicit state law protecting job applicants or employees who use, for example, medical marijuana.

Given these changing times, what’s the bottom line for employers?

At base, employers have rules prohibiting their employees from engaging in the use of drugs because of the negative impact such use can have on employee performance and workplace safety. Even if marijuana use is legalized in the Commonwealth, employers still have these legitimate concerns, and should be able to discipline employees for any poor or unsafe performance of their job duties that occurs due to marijuana use. Thus, if you suspect that an employee is coming to work impaired by the effects of smoking marijuana, remember the best way to deal with the issue is to focus on the employee’s job performance problems, irrespective of what may be the cause.

Jonathan R. Mook is a nationally recognized authority on the Americans with Disabilities Act and is a co-editor of the Virginia Employment Law Letter. For questions regarding this article or other employment law issues, you may contact Jonathan at jmook@dimuro.com.