MARIJUANA IN THE RECRUITING AND HIRING PROCESS

***August 01, 2020* | By Edward J. Easterly, Esq.**

**LEGAL ISSUES**

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**NACE Journal, *August 2020***

Given the complexity and variety of laws, it is not surprising that employers, applicants, and career services professionals alike are often confused about what is and is not legal: This is especially true in the case of marijuana—medical and recreational. Laws differ greatly not only between states and the federal government but also among the states. In this article, we will address marijuana use as it pertains to some of the most pressing questions surrounding recruiting and hiring.

BACKGROUND

To begin, we need to lay the background for the issues that will be addressed. Currently, a majority of the states (and the District of Columbia) have enacted laws that legalize the use of medical marijuana, and more than 10 states have legalized the use of recreational marijuana. Additionally, in some instances where a state has not specifically adopted legislation permitting the use of marijuana on a medical or recreational basis, several cities within the state have adopted such legislation.

The first issue that needs to be addressed is that every state has a different version of the law. While many states have legalized medical marijuana, each law has its own wrinkles and variations. As such, each state law poses different issues and challenges for employers, applicants, and career services. Additionally, depending on the state, courts have interpreted similar laws in different manners. For example, courts in New Jersey and Pennsylvania may issue decisions on issues related to the use of medical marijuana in the workplace in entirely different ways, thereby impacting how employers and individuals are required to proceed.

The biggest issue, however, is that the federal government has not adopted any legislation that legalizes marijuana, medical or otherwise. In this regard, marijuana is currently a Schedule I drug under federal law. Schedule I drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse. Schedule I drugs are the most dangerous drugs of all the drug schedules with potentially severe psychological or physical dependence. As such, regardless of whether marijuana is legal in numerous states, it remains an illegal drug under federal law. The disparity among state laws and between state and federal law make it challenging for employers trying to thread the needle of compliance while acting in the best interests of the company and its employees.

EMPLOYER ISSUES

Employers are faced with the biggest issues when it comes to handling marijuana in the workplace. As noted, each state has different laws impacting an individual’s right and ability to use marijuana, medical or otherwise. The laws of each state also impact how an employer may treat employees who use legally prescribed marijuana.

As an initial matter, the answer to the question of “what to do” is very simple for states that have not enacted legislation pertaining to the legalization of marijuana. Unless marijuana has been legalized in your particular state, it is still an illegal drug, and employees should not be permitted to engage in the use of the drug. While many, including employers, may not have an issue with the use of marijuana, if an employer permits its employees to engage in the use of marijuana or does not treat a positive test for marijuana as an issue, it is opening the door to other potential claims, such as claims of discrimination or potential third-party liability claims if an accident or incident occurs.

If a state has legalized the use of medical marijuana, the organization should look to the specific language of its state’s statute and its state court’s interpretation of the law. Each state is different, and employers must comply with their state’s law.

The first major issue that comes into play with regard to the legalization of marijuana is drug testing in the workplace. Generally, an employer is permitted to conduct pre-employment, random, or reasonable suspicion drug testing provided it has a drug and alcohol policy. The question that has been presented is whether employers in states that have legalized marijuana are still permitted to conduct such testing. The simple answer to that question is yes. Employers are permitted to continue to engage in drug testing regardless of their state’s law regarding marijuana.

What an employer does with the test results is a different story. For example, recently the New Jersey Supreme Court ruled that an employee cannot be terminated solely for failing a drug test if the individual has a medical marijuana card. In *Justin Wild v. Carriage Funeral Holdings, Inc.,*the employee was involved in a car accident and tested positive for marijuana after a drug test. The employee provided a legally prescribed medical marijuana card, however, he was still terminated by a duty to accommodate an employee’s use of medical marijuana while “off the clock.”

The ruling in *Justin Wild*is similar to other recent decisions in Rhode Island, Connecticut, and Massachusetts. In each state, courts have held that an employer may have a duty to accommodate an employee’s use of medical marijuana while outside of the workplace, similar to the use of other prescribed medications. Those are only certain state’s decisions. At this time, however, there is no majority rule on the issue.

In this regard, some state courts, such as in Colorado, have held that an employer is permitted to have “zero tolerance” policy that prohibits the use of any illegal drug, which would include marijuana as it remains a Schedule I narcotic under federal law. As such, in those states, an employer may terminate an employee or refuse to hire an employee if the organization has such a policy and an employee or applicant tests positive for marijuana.

What is clear based on these rulings, and similar rulings in other states, is that employers do not have an obligation to accommodate the use of medical marijuana at the workplace or where the use of medical marijuana impacts the employee’s ability to perform the job. Accordingly, if an employer believes that an employee is under the influence of marijuana, medical or otherwise, while on the job, the employer should document the behaviors of the employee and immediately send the employee for a drug test.

RULES FOR FEDERAL CONTRACTORS

It should be noted that employers that are federal contractors have different requirements. With regard to federal contractors, the Drug-Free Workplace Act (DFWA) requires federal contractors to prohibit the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance by employees in their workplace as a condition of employment.

Under the DFWA, federal contractors must establish programs regarding drug-free awareness and create and enforce policies that subject employees to discipline and termination for any violations. Because marijuana is still an illegal substance under federal law, it is covered under the DFWA. As such, employers with federal contracts must have policies that prohibit the use of the illegal drug.

If an employer does not have federal contracts and resides within a state that has legalized the use of marijuana, the development of a policy is within its discretion. If an employer adopts a policy that permits the use of marijuana, it is recommended that the organization treat marijuana in a manner similar to its treatment of alcohol. In this regard, the policy should prohibit employees from reporting to work or working while “under the influence of alcohol and/or other drugs, including prescription drugs, that adversely affect the employee’s ability to safely perform his or her job duties.” The policy should further permit employers to conduct random and reasonable suspicion drug and alcohol testing. The policy should also indicate that an employee’s refusal to take a drug or alcohol test will be considered a “positive” result that may lead to discipline or termination. Such a policy should also specifically indicate that employees may be required to provide proof of a medical marijuana card and the legal purchase of marijuana in the event of a positive test.

Given the disconnects among the laws, employers should be careful when terminating an employee or rescinding a job offer based upon a positive test for medical marijuana. If an individual is applying for a “safety sensitive” position that may put the applicant or others in danger if the employee is under the influence of marijuana, an employer may have a clearer right to rescind an offer. Regardless, an employer should have a clearly defined policy that determines how such issues will be handled.

It should also be noted that an employer should not terminate, refuse to hire, or interview an individual *solely*because the individual has a medical marijuana card. Such an action would likely be viewed as discrimination based upon the specific state law at issue that legalized medical marijuana.

APPLICANT AND EMPLOYEE ISSUES

The legal issues for applicants and employees are similar to those for employers. If a student is applying for a position and has a medical marijuana card, he or she should understand the implications of disclosing that information to a potential employer and possibly testing positive in a drug test.

One of the biggest issues individuals should be mindful of is that medical marijuana cards “do not travel.” What this means is that if a student obtains a medical marijuana card in New Jersey and applies for a job in Alabama (where it is still entirely illegal) and tests positive for marijuana during a preemployment screening, the New Jersey authorization does not protect the applicant. The law of the state where the job is located is what applies. As such, if a state does not permit the use of medical marijuana, a student can be rejected from a position, regardless of the fact that he or she has a medical marijuana card from the “home” state.

Individuals should also be aware of the policies and procedures of the employer during the application process. Applicants should also keep their cards up to date and keep all receipts proving the legal purchase of medical marijuana. In the event someone tests positive in a drug test, the individual is generally provided with the opportunity to explain or justify the results before an adverse employment action occurs. Having the supporting documentation ready to present will assist in the justification process.

Applicants and employees should not refuse to take a drug test, either preemployment or after hire. Most employers have policies that indicate that a refusal counts as a positive drug test. Accordingly, if an individual refuses to take a test, he or she is not even provided with the opportunity to justify or explain the positive result.

Once an individual is hired, the same rules and laws apply; generally, based on the law specific to the state, individuals cannot be subject to discrimination based solely on having a medical marijuana card. The key, once again, is that the laws are state specific. If an individual tests positive for marijuana, even with a medical marijuana card, there is no federal law that requires an employer to accommodate the use of medical marijuana outside of the workplace.

It should be noted that, with regard to the federal law, the Americans With Disabilities Act (ADA) generally provides protections to employees with disabilities. The ADA prevents an employer from subjecting an employee to discrimination on the basis of his or her actual or perceived disability. The ADA further requires an employer to provide an employee with a “reasonable accommodation” and to engage in the “interactive process” of determining whether such an accommodation is possible. An employer is not, however, required to accommodate an “illegal activity” under the ADA.

As noted above, under federal law, marijuana remains an illegal drug and, therefore, the use of marijuana constitutes an illegal act. Because the use of marijuana remains illegal under federal law, the ADA does not require an employer to accommodate employees who request the use of marijuana, regardless of the law of the state. The individual state law may differ, but federal law requires no such accommodation. Regardless, there is also no law—state or federal—that allows an employee to use medical marijuana while at the workplace.

Applicants and employees must be aware of their state’s law and should be mindful of the specific policies and procedures of the workplace. If an employer prohibits the use of marijuana, medical or otherwise, based upon an employee’s position or as a general practice, the medical marijuana card may not be worth the paper it was printed on.

IMPACT FOR CAREER SERVICES PROFESSIONALS

The other group of individuals impacted by medical marijuana laws are career services professionals. These individuals are often asked questions about recruiting for positions in the marijuana industry, what to tell students, and how to handle employers that want to post positions. Each individual state law is different, so career services professionals need to ensure they are in compliance with their state’s law at all times. Nevertheless, some general guidance can be provided based upon the laws in place at this time.

As an initial matter, career centers should be wary of permitting employers in the marijuana industry to recruit or post positions through the educational institution. While marijuana may be legal in a specific state, it remains illegal under federal law. As such, while there is currently no case law directly on point, permitting marijuana employers to recruit on campus may ultimately impact an educational institution’s ability to receive federal funding.

In this regard, the Drug-Free Schools and Communities Act of 1989 (DFSCA) states, in part, that as a condition of receiving funds or any form of financial assistance under any federal program, an institution of higher education must certify that it has adopted and implemented a program to prevent the unlawful possession, use, or distribution of illicit drugs or alcohol by students and employees. The DFSCA also requires educational institutions to maintain standards of conduct that prohibit the unlawful possession, use, or distribution of illicit drugs by students and its employees on its property *or as part of its activities.*

A liberal reading of the foregoing can be interpreted to prohibit an educational institution from permitting an employer in the marijuana industry from recruiting or posting opportunities through the career center. In this regard, the words “as part of its activities” can be read to prohibit such activities. If an educational institution permits such activities in violation of the DFSCA, it may jeopardize its federal funding.

Based upon the foregoing, it is not recommended, at this time, for career centers to permit or promote job opportunities available through such employers. It is also not recommended that the educational institution engage in any partnership (for internships or otherwise) with a medical marijuana employer as that will likely be deemed a violation of the requirements of the DFSCA.

What career services professionals *can*do is provide guidance to students with regard to the impact of marijuana use on their job search—including use of medical marijuana. Career services professionals must be mindful not to provide legal advice; however, they can provide information on what risks may be presented for students who use marijuana for medical or recreational purposes. Such information may include the potential for drug testing for a specific employer, if known, the employer’s stance on marijuana, or how to handle marijuana-related questions in a job interview.

If a career services professional is merely providing guidance—and not directing a student to act one way or another or guaranteeing that certain things will occur—there is generally no potential liability for engaging in such actions. It is no different than providing information about the rights and responsibilities of a student and an employer for any issues related to a job search or interview.

Career services professionals, much like employers and applicants, must comply with the laws of their specific state and any applicable federal requirements. Career services professionals must also comply with any requirements or policies of the educational institution, which may directly relate to marijuana issues. This does not mean career services professionals cannot provide information and guidance to their student population; rather, it means that they should be knowledgeable about the information they are providing.

RECOMMENDATIONS

Based upon the foregoing, it is recommended that employers, individuals, and career services professionals review the current status of their state law pertaining to the legalization of marijuana. In addition, employers should review and revise their current drug and alcohol policy to ensure that it is in compliance with the law. For employers and applicants alike, merely *believing*that what you are doing is acceptable because it is “legal” or “illegal” is not sufficient with regard to this area of the law.

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