

The Cavanagh Law Firm, P.A.

Workplace Issues Involving Medical Marijuana

Hot Topics in the Cool Pines Sizzling Employment Law Issues

September 27, 2018

By:

David A. Selden

dselden@cavanaghlaw.com

602.322.4009

Heidi Nunn-Gilman

hnunngilman@cavanaghlaw.com

602.322.4080



**The Cavanagh Law Firm
1850 North Central Avenue Ste. 2400
Phoenix, Arizona 85004
www.cavanaghlaw.com**

Important Legal Notice

2

This presentation is to provide general information and updates regarding some potential legal issues relating to drug and alcohol testing. These materials are not intended to provide legal advice on specific compliance issues. Attendees should consult with legal counsel for legal advice about whether, based on specific facts and circumstances, the company complies with the applicable laws.

Drug & Alcohol Free Workplace Policies

1. Importance of written policies
2. Address the action prohibited
3. Address disciplinary consequences
4. Address diluted results/retesting
5. If employee is in safety sensitive position, require notification to company if using drug that may cause impairment

ARIZONA'S DRUG TESTING STATUTE

1. Julie Pace and David Selden worked with the business community to pass law in 1994.
2. In 2011, Julie and Dave worked with the business community to amend the drug testing statute to address medical marijuana and impairment at work.

Provisions of Arizona's Drug Testing Statute

1. If employer complies with statute, it provides employers protection from liability for:
 - a. Unemployment
 - b. Claims based on false positive test results (unless employer had knowledge or should have known results were in error)
 - c. Termination or discipline based on test results
 - d. Excluding persons using impairing drugs (including medical marijuana) from safety sensitive positions
 - e. Claims based on employer's actions based on good faith belief employee possessed, used, or was impaired by drugs at work

Provisions of Arizona's Drug Testing Statute

2. Requires employer to have drug and alcohol testing program with the following elements:
 - a. All persons employed by the company must be subject to testing
 - b. Employer must pay the cost of testing for current employees, including reasonable transportation costs to the testing center
 - Applicants can be required to pay for the costs of applicant testing
 - c. Written policy contain the elements described in statute
 - d. Testing results must remain confidential and must be made available to the employee.
 - e. Testing methods are regulated by statute

Requirements of Employer Drug Testing Policy

3. To comply with statute, employer's drug testing policy must include:
 - a. a description of which employees will be subject to testing;
 - b. the circumstances under which testing may be required;
 - c. the substances for which tests may be given;
 - d. a description of the testing methods;
 - e. the consequences for refusal to submit to a test and the potential adverse action based on results of the test; and
 - f. the employer's policy regarding confidentiality of the test results.

Types of Testing Allowed

Employers can conduct the following types testing:

1. Pre-employment (drugs only)
2. Post-accident
3. Regularly scheduled for all employees in certain job categories for safety reasons
4. Regularly scheduled for all employees in certain job categories to maintain productivity, quality or security
5. Random
6. For cause/suspicion

Consequences of Positive Test Result

1. Employer may take adverse action based on positive test result.
2. Adverse action can include counseling, rehabilitation, suspension, or termination of employment.
3. Failing or refusing to take drug test is “willful misconduct” under unemployment statutes, so employee can be denied unemployment.

Testing Methods

1. Testing should be immediately before or after scheduled work hours.
2. Time spent in testing should be treated as working time for purposes of compensation and benefits.
3. Testing can be based on urine, blood, breath, saliva, hair, or other substances.

Testing Methods

4. Testing must be conducted under reasonable and sanitary conditions with scientifically accepted analytical procedures
5. Testing must be conducted by a lab approved or certified by:
 - a. The U.S. Department of Health and Human Services
 - b. The College of American Pathologists
 - c. Arizona Department of Health Services

Diluted Test Results

1. Diluted test results may be the result of deliberate actions by the employee or by natural causes
2. Employers may require a retest of the individual and require them to refrain from large amounts of water or diuretics prior to test (subject to individual's medical conditions)
3. Employers may require testing by a different method, such as hair or saliva.

Changes to Drug Testing Statute to Address Impairment at Work/Medical Marijuana

1. Provides that employers are protected from lawsuit:
 - a. For actions taken based on employer's good faith belief that employee used or possessed or was impaired by drugs on employer's premises
 - b. For actions taken to exclude an employee for performing a safety-sensitive position, including reassignment, leave, etc. based on a good faith belief that a person is currently using any drug (legal or otherwise) that could cause impairment or decrease person's ability to perform their job in safety-sensitive position

Changes to Drug Testing Statute to Address Impairment at Work/Medical Marijuana

2. Definition of “good faith” belief – reasonable reliance on fact without the intent to deceive or be deceived and without reckless or malicious disregard for the truth and not including a belief formed with gross negligence. Good faith could include:
 - a. Observed conduct, behavior, or appearance
 - b. Information provided by a person believed to be reliable, including statements by witnesses to drug use, paraphernalia, etc
 - c. Written, electronic, or verbal statements
 - d. Lawful video surveillance
 - e. Records of government agencies or law enforcement
 - f. Results of test for drug or alcohol use
 - g. Other information reasonably believed to be reliable or accurate

Changes to Drug Testing Statute to Address Impairment at Work/Medical Marijuana

3. Definition of impairment is key, because Arizona Medical Marijuana Act allows employers to take adverse action against an employee who is impaired on the employer's premises or during work hours.
4. Supervisors should be training to recognize signs of impairment.
5. Impairment – under the influence of drugs or alcohol that may decrease or lessen the employee's performance of the duties or tasks of the employee's job position

Changes to Drug Testing Statute to Address Impairment at Work/Medical Marijuana

Areas to watch for impairment include:

1. Speech
2. Walking
3. Physical dexterity
4. Agility or coordination
5. Demeanor
6. Appearance
7. Clothing

Changes to Drug Testing Statute to Address Impairment at Work/Medical Marijuana

1. Definition of Safety Sensitive Position – any job designated by employer as safety sensitive or any job that includes tasks or duties that the employer in good faith believes could affect the safety or health of the employee or others, including:
 - a. Operating a motor vehicle, equipment, machinery, or power tools
 - b. Repairing, maintaining, or monitoring the performance or operation of any equipment, machinery or manufacturing process, the malfunction or disruption of which could result in injury or property damage
 - c. Performing duties in the residential or commercial premises of a customer, supplier or vendor

Changes to Drug Testing Statute to Address Impairment at Work/Medical Marijuana

Definition of Safety Sensitive Position – continued

- d. Preparing or handling food or medicine
- e. Working in any occupation regulated pursuant to Title 32, which includes:
 - i. Doctors and therapists of all types and nurses
 - ii. Dentists
 - iii. Pharmacists
 - iv. Architects
 - v. Cosmetologists/barbers
 - vi. Security guards
 - vii. Other regulated professions

Recommendations

1. Review job descriptions to identify safety-sensitive positions
2. Designate safety-sensitive positions
3. Train managers and supervisors to identify signs of impairment
4. Keep good records relating to employment decisions based on drug use to help defend good faith in the adverse actions

State Marijuana Laws

1. 30 States and DC have legalized medical marijuana
2. 9 states have legalized recreational use, including California, Colorado, Nevada, Oregon, and Washington.
3. Recreational marijuana initiative was defeated in November 2016 election in Arizona.

Arizona Medical Marijuana Act

1. Effective Date: April 14, 2011
2. Permitted for treatment of "debilitating conditions"
 - a. Cancer, glaucoma, AIDS, hepatitis C, ALS, Crohn's Disease, agitation of Alzheimer's Disease
 - b. Chronic or debilitating disease or medical condition (or treatment therefor) causing cachexia or wasting syndrome, severe & chronic pain, severe nausea, seizures, or muscle spasms, or
 - c. Any other condition approved by DHS

-

Permitted Acts

1. Registry identification cardholders can possess marijuana (2.5 oz. every two weeks) and paraphernalia for medical use
 - a. Qualifying patient – may also use the marijuana
 - b. Designated caregiver
 - c. Dispensary agent
2. Dispensaries may possess and cultivate medical marijuana

Prohibited Use

1. The Act does not permit:
 - a. Undertaking any task under the influence of marijuana that would constitute negligence or professional malpractice;
 - b. Possessing or using medical marijuana:
 - i. On a school bus
 - ii. On the grounds of any primary or secondary school
 - iii. In a correctional facility
 - c. Smoking medical marijuana:
 - i. On any form of public transportation
 - ii. In any public place
 - d. Operating or being in control of a car, aircraft, or motor boat while under the influence
 - e. Use or possession of marijuana except as authorized by the law

Presumption of Medical Use

1. Person who has registry identification card and is in possession of marijuana is presumed to possess it for medical use.
2. Presumption is lost if individual is in possession of more than 2.5 ounces of useable marijuana
3. It is an affirmative defense to prosecution that the marijuana was for medicinal use.

Registry Identification Cardholders

1. Qualifying Patient
 - a. Has debilitating condition
 - b. Obtains physician's certification
2. Designated Caregiver
 - a. At least 21 years of age
 - b. Not been convicted of "excluded felony offense"
 - c. Agrees to assist with patient's medical use of marijuana, but for no more than 5 patients
 - d. Reimbursed only actual costs incurred in being designated caregiver
3. Dispensary Agents

Dispensaries

1. First dispensary opened December 6, 2012
2. Almost all Arizonans are within 25 miles of an active medical marijuana dispensary
3. Marijuana products can include food products and infused oils – not merely marijuana for smoking
 - a. Cookies, brownies, etc.
 - b. Infused butter or oils for cooking
 - c. Lotions or oils for absorbed through skin

Employment Protections for Medical Marijuana Users

A.R.S. § 36-2813(B)

Unless failure to do so would cause an employer to lose a monetary or licensing related benefit under Federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either:

- (1) The person's status as a cardholder
- (2) A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient **USED, POSSESSED, OR WAS IMPAIRED BY** marijuana on the premises of the place of employment or during the hours of employment

Issues for Employers

1. Wrongful termination claims
 - a. Compensatory and punitive damages
2. State disability discrimination claims
3. ADA claims
 - a. Prescription drugs
 - b. Medical marijuana

Emerald Steel Fabricators v. BOLI

348 OR 2159 (S.Ct. 2010)

1. 2010 Oregon Supreme Court Case
2. ER refused to hire temporary EE on full-time basis after EE disclosed medical marijuana use.
3. EE sued under STATE disability discrimination law
4. Court said that to extent that State law authorized use of medical marijuana, it was preempted by the Controlled Substances Act
5. Oregon law could decriminalize use of medical marijuana, but not affirmatively authorize its use

Ross v. Raging Wire Telecommunications 42 Cal.4th 920 (2008)

1. California Compassionate Use Act silent on employment discrimination
2. California Supreme Court upheld dismissal of disability discrimination case under CFEHA
3. Court found for employer because Compassionate Use Act did not address employee rights
4. Court also reaffirmed that employer may do pre-employment drug screening and use EE/applicant drug use as factor in employment decisions

Roe v. Teletech Customer Care Management 171 Wn.2d 736 (2011)

1. Washington Medical Use of Marijuana silent on employment discrimination.
2. Applicant failed drug test after conditional offer of employment.
3. ER rescinded offer; applicant sued.
4. Court found that law did not provide for civil cause of action against employer. Law provides only a defense against criminal prosecution.

Callaghan v. Darlington Fabrics Corp.

1. Rhode Island Hawkins-Slater Medical Marijuana Act prohibits discrimination against card-carrying medical marijuana user solely due to status as card holder.
2. Callaghan was denied an internship because of a positive pre-hire test.
3. Trial court held in May 2017 opinion that employer violated the Act by refusing to hire, but confirmed that impairment at work not tolerated.

State Disability Discrimination Law

1. Arizona's Medical Marijuana Act one of few to specifically address the rights and duties of employers and employees.
2. To extent that Act affirmatively permits use of medical marijuana, may be preempted, as in *Emerald Steel*.
3. Best defense to any lawsuit under AMMA is that the employee used or possessed marijuana on work premises or work time or was impaired on work premises or work time

Use, Possession, or Impairment at Work

1. ERs permitted to take adverse action against EE who:
 - a. Uses marijuana at work
 - b. Possesses marijuana at work
 - c. Is impaired at work
 1. Drug test alone not sufficient to prove impairment
2. ERs need to be able to demonstrate “impairment”
 - a. Train managers and supervisors on the signs of impairment
 - b. Create records of signs of impairment in EE

Identifying Signs of Impairment/Reasonable Suspicion Checklist

1. Supervisors should be provided reasonable suspicion of impairment checklist.
2. Areas to Watch for Impairment Include:
 - a. Irrational Behavior
 - b. Red or bloodshot eyes
 - c. Impaired perception of time or distance
 - d. Slurred or incoherent speech
 - e. Lack of coordination, agility, or coordination
 - f. Sudden changes in demeanor
 - g. Appearance
 - h. Odor of drugs or alcohol

Identifying Signs of Impairment

Areas to Watch for Impairment Include:

- i. Slow reflexes
- j. Slow and deliberate responses
- k. Involvement in accidents
- l. Disruptive behavior
- m. Carelessness in operating equipment
- n. Excessive absences
- o. Anxiety or agitation
- p. Chills or sweating

Recent Arizona Medical Marijuana Cases

1. Two recent cases – neither directly addresses employment provisions but could impact employers or lead to different decisions in future.
2. April 2016 – AZ Court of Appeals held that the state cannot make medical marijuana possession and use on college campus illegal, overturning 2012 law. Court said that law did not “further purpose” of the medical marijuana law, and therefore was unconstitutional.
 - a. Court said that the school can make rules prohibiting possession on campus, but state cannot make it a criminal violation.
3. June 2018 – AZ Court of Appeals decision held that hashish (resin extracted from marijuana) is not covered by the medical marijuana law – *State of Arizona v. Rodney Christopher Jones* – thus placing much of the cannabis oils and some edibles made with hashish outside the law.

Other Employment Issues

1. Risk of injury to EE who is using medical marijuana or to others
 - a. WC Claim
 - b. Third party claim against employer
2. Knowledge of medical marijuana use may create other employment law issues. Employers need to keep in mind the interplay of AMMA with:
 - a. FMLA
 - b. GINA
 - c. ADA
 - d. WC
 - e. HIPAA

Protection for Employers Who Will Lose Federal Licensing or Monetary Benefit

- If complying with AMMA would result in ER losing licensing or monetary benefit under federal law or regulations, ER is not required to employ a medical marijuana user in violation of those Federal laws or regulations
- E.g. Federal grants to law enforcement require compliance with Federal Controlled Substances Act. Sheriff Joe not required to allow deputies to use medical marijuana.
- Positions requiring Commercial Drivers' License
 - Federal DOT has taken position that all CDL drivers must comply with CSA. Cannot drive if using medical marijuana.

Commercial Drivers

1. Employers with commercial drivers must comply with federal drug testing and transportation safety requirements.
2. Commercial drivers not protected for medical use of marijuana or other impairing drugs.
3. Follow CDL drug and alcohol policy.

Potential Issues with Legal Drugs

1. Misuse or abuse of prescription drugs is on the rise
2. US Substance Abuse and Mental Health Services Administration found that 15.3 million people used prescription drugs non-medically in 2013

Potential Issues with Legal Drugs

1. Prescription drugs abused more than any drug other than alcohol & marijuana
2. Even proper use of prescription narcotics can result in impairment, drowsiness, or other effects that may be dangerous in safety sensitive positions
3. Policies should address synthetic drugs, i.e., K2, spice, etc.

Hypothetical # 1

1. Applicant with great resume is hired, and then prior to drug test provides company with a medical marijuana card.
2. What are the Company's options?
 - a. Can they rescind offer of employment?
 - b. Is the Company required to proceed with hiring process, i.e., drug test and allowing person to work?
 - c. Does it matter what position is at issue
 - CDL Driver
 - Equipment operator
 - Receptionist

Hypothetical # 2

1. Employee is sent for drug test due to safety accident at work. Post-accident testing is required by Company's policy. Drug test shows positive result.
2. What are company's options?
 - a. Can employer terminate employment based on safety violation?
3. Does it matter if employee presents medical marijuana card or prescription?
4. If employee discloses that they are using medical marijuana due to a disability, does the company have to provide a reasonable accommodation?

Recommendations

1. Update drug and alcohol policy to address medical marijuana, prescription drugs, and synthetic drugs, and diluted results
2. Review job descriptions and identify safety-sensitive positions
3. Train managers and supervisors to identify signs of impairment

Recommendations

4. Implement reasonable suspicion checklist
5. Keep good records relating to employment decisions based on drug use to help defend adverse actions

- QUESTIONS??

David A. Selden

Heidi Nunn-Gilman

HEIDI NUNN-GILMAN is a partner with The Cavanagh Law Firm in Phoenix, Arizona. Ms. Nunn-Gilman's practice focuses on employment litigation and human resource matters. She has experience in working with both public and private employers. She advises clients on matters relating to labor and employment law, including I-9 and immigration compliance strategies, E-Verify, ICE and worksite enforcement, Title VII, FLSA, FMLA, ADA, leaves, drug and alcohol, NLRB, wrongful discharge, non-competition and confidentiality agreements, wage and hour laws for both public and private employers, employee handbooks, and executive agreements.

Ms. Nunn-Gilman also handles issues involving the Affordable Health Care Act and addresses the changes and options it presents to companies. Her Davis-Bacon and prevailing wage practice includes counseling and training on state and federal prevailing wages and benefits requirements, coverage and applicability of prevailing wage laws, coverage exemptions, worker classification and pay issues, addressing wage determinations, wage surveys, and representation of employers before the Department of Labor Wage and Hour Division and similar state agencies.

Ms. Nunn-Gilman is a frequent speaker on a number of employment law topics, including I-9 and immigration compliance strategies and wage and hour compliance. She is a contributing author of three books on immigration and employment law -- *Employment Verification: An Employer's Guide to Immigration, Form I-9 and E-Verify*; *Arizona Human Resources Manual*; *Model Policies and Forms for Arizona Employers*, all published by American Chamber of Commerce Resources. Ms. Nunn-Gilman received her J.D., *summa cum laude*, from Lewis & Clark Law School in Portland, Oregon in 2005, where she graduated first in her class, was on the Trustee's Fellowship Scholar List, and was a member of the Cornelius Honor Society. While at Lewis & Clark, she served as Editor in Chief of the *Lewis & Clark Law Review*. Ms. Nunn-Gilman earned an M.A. degree in Philosophy, Teaching Ethics Emphasis, *summa cum laude*, from the University of Montana in 2000. She earned a B.A. degree in political science, history and philosophy, *summa cum laude*, from Ouachita Baptist University in 1998.

Ms. Nunn-Gilman can be reached at (602) 322-4080 or hnnungilman@cavanaghlaw.com.