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An Employers Guide To Medical Marijuana Policies
HaHaHa that was so funny!
Let us know when you've found one!

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A little bit of history

The Comprehensive Drug Abuse Prevention and Control Act was passed by congress and signed into law by Richard Nixon in 1970. This legislation set the foundation for the federal government's drug policies and methods of enforcement. Specifically, Title II of this legislation (named the Controlled Substances Act), created five classifications, or "schedules" of drugs to which drugs were assigned based on the perceived danger and level of medicinal value the drug possessed. Schedule I, to which marijuana was assigned, are drugs defined as having:

A. A high potential for abuse.
B. No currently accepted medical use in treatment in the United States.
C. No accepted safe use, even under medical supervision.

Despite marijuana's classification as a "dangerous schedule I drug," many argued that marijuana had medicinal value and was therefore erroneously classified. This argument grew strength and support over the years as studies were made public that marijuana had helped people with various disorders and diseases including glaucoma and cancer. As early as 1976, a federal court found in favor of an individual using marijuana as a treatment for glaucoma and dismissed criminal charges brought against the individual.

Support for medical marijuana continued to grow, and in 1996, California became the first state to decriminalize marijuana for medicinal purposes. Since then, many states have followed California and have passed their own medical marijuana laws. Currently, 31 states have legislation that allows the use of impairment inducing marijuana for medicinal purposes, and many more states are moving towards similar levels of decriminalization.

Even though many states have adopted laws that allow its citizens to use marijuana for medicinal purposes, the federal government maintains its view that marijuana is unsafe and refuses to change its stance. This, coupled with the fact that state laws vary in terms of protections users have regarding employment, the current landscape regarding the decriminalization of marijuana for medicinal use is confusing at best.

Ok, Now here is the skinny on how this pertains to you…

Its simple… be in the know and understand the Law in the States you do Business.

Ok not so simple, but here is some guidance…

Employers must gain an understanding of both legislation and case law in the states in which they do business. The laws in each state are written differently with varying levels of detail regarding the rights of both employers and employees. These differences are leading to what seems like variation in case law. *For example:*

- In August 2018, a United States District Judge in New Jersey ruled that an employer was within their right to indefinitely suspend an employee after failing a post-accident drug screen due to using marijuana for medicinal purposes. The employee had been compliant with NJ's medical marijuana law, but the employer's policy did not recognize medicinal use marijuana. As a result, the employer suspended the employee indefinitely. The judge found that NJ's law did not give the employee protection and the employer was within their right.

- In September 2018, a United States District Judge in Connecticut ruled in favor of an individual who had a job offer revoked after testing positive for marijuana. The individual had been prescribed marijuana by a physician and was using marijuana legally per Connecticut's law. Unlike New Jersey's medical marijuana law, Connecticut's medicinal marijuana law specifically states that employers may not refuse employment to individuals based solely on their participation as a qualifying patient under the law.

The difference in findings is a direct result of the language in each state's law, and whether or not the law provided rights to either employer or employee.

Employers with Federal Contracts

Employers with federal contracts must also be cognizant of their requirement to comply with the Drug-Free Workplace Act of 1988. This law states that employers with federal contracts must have a drug-free workplace and must write and distribute a policy prohibiting the unlawful manufacture, distribution, dispensing, possession or use of controlled substances. This policy, according to the Drug-Free Workplace Act must also outline the consequences for not complying with the policy.

Unfortunately, the case law regarding the enforcement of Drug-Free Workplace policies as they relate to medicinal marijuana is contradictory and leaves little to be regarded as guidance. As a result, employers should continue to follow the guidelines of the Drug-Free Workplace Act.

Employee Handbook Policies

Unsure what your rights are….. Be In the Know! It is within every employer's right to have a zero-tolerance policy regarding working while under the influence. Regardless of the states in which the company operates, employers are not obligated to allow employees to consume marijuana in any form or work while under the influence of marijuana. This prohibition includes those individuals who possess a medical marijuana card and a physician's prescription.

Employers that have operations in states with medical marijuana laws and require pre-employment drug screens may want to review this requirement if the drug screen tests for marijuana using the candidate's urine sample. An organization that rejects a candidate on the basis of urinalysis results may be putting itself at risk, depending on the state's medical marijuana laws.

Urine Screening vs. Blood Draw… What type of Screening should you select?

To enforce the company's policy prohibiting the consumption of or being under the influence of controlled substances while on the job, it is recommended employers ask their occupational health provider if they have the capability of completing drug screens via blood draw. Marijuana use can be detected in an individual's urine up to 30-days after the individual last used the substance, so even though the individual tested positive, it doesn't mean they're currently under the influence. Disciplining individuals that test positive for marijuana on a urine-based drug-screen puts your organization at risk if that individual is legally using marijuana under your state's medical marijuana laws.

Medicinal Marijuana and the Americans with Disabilities Act

Employers are not required to accommodate employee's use of medical marijuana under the Americans with Disabilities Act (ADA). The ADA is a federal law, and marijuana use is still prohibited at the federal level. However, it is imperative that employers stay informed as the landscape is changing nearly every day.

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Best Practice~ Seek guidance now!

As you are reviewing or thinking about amending your policies, reach out to us at McCloskey Partners, LLC and we can provide invaluable insight into complying with state medicinal marijuana laws. Please don't hesitate to contact McCloskey Partners, LLC if you have any questions.

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