

## MANAGING THE UNMANAGEABLE WORKPLACE SAFETY IN A CANNABIS REVOLUTION

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**At the Owners Roundtable meeting at ADSC's Annual Meeting, one of the main issues that was raised and captured the attention of everyone in the room, was the ability of a contractor to regulate, monitor and address potential marijuana use by its employees, especially in states where medical marijuana use and/or recreational marijuana use may now be legal.**

There is certainly no disputing the vast uncharted waters for contractors around the country as they attempt to navigate cannabis laws and regulations that are changing daily. Workplace safety, employee drug testing and the fluctuating legal status of cannabis are creating uncertainty on safety-sensitive jobsites. Foundation drilling is an extremely complex construction process – how can a contractor protect its employees and worksite while adapting to the increasingly accepted use of cannabis – medical or recreational?

### QUICKLY EVOLVING LAWS

There are now 33 states that have legalized medical cannabis, ten that have legalized recreational cannabis, and more are soon to come. Many of these state's laws have employer protections for safety-sensitive jobs, and generally allow an employer broad discretion to enact and implement zero-tolerance policies. For example, Arizona allows employers to discipline an employee for possessing or using marijuana on company premises or during work time, even if that employee is authorized to use medical cannabis (A.R.S. Sec. 36-2814(B)). However, note some contradictory caselaw in states such as Rhode Island (See *Callaghan v. Darlington Fabrics, C.A. No. P.C. 2014-6680*, where an employer was found to have violated the state medical cannabis law for failing to hire a job applicant who had a medical cannabis card and stated she could not pass a drug test) and Connecticut (*Noffsinger v. SSC Niantic Operating Company, LLC, 2018 WL 4224075*, at 1, D. Conn. Sept. 5, 2018, where an employer was found to have violated the state medical cannabis law when refusing to hire a medical cannabis patient who tested positive on a pre-employment drug test).

Notably, the vast majority of cases have ruled in favor of employer discretion regarding whether to discipline or terminate medical cannabis users. Even when anti-discrimination provisions were implicated, courts have consistently left open the possibility for an employer to take action against medical cannabis users in safety-sensitive positions (See *Barbuto v. Advantage Sales and Marketing, LLC, SJC – 12226*; July 17, 2017).

On its face, these decisions make sense. There are some industries where workplace drug testing is increasingly rare – such as in the technology sector where millennial workers are more in-demand and others where the employer approaches cannabis as a substance scientifically less harmful than alcohol or more dangerous drugs. Yet, safety-sensitive positions such as construction sites, medical facilities and large warehouses will always require more stringent workplace standards.

### ZERO-TOLERANCE POLICIES AND DRUG TESTING

There are no medical or recreational cannabis states that prohibit employee drug testing. Yet, many include anti-discrimination laws for medical cannabis users. Practically, this means employers should not hire, fire or discipline applicants or employees solely because they are medical cannabis patients. If a job applicant discloses their status as a medical cannabis patient, generally the employer should not use this status, or the possession of a medical cannabis card, as the reason for the employment decision. Whether the employer may discipline or terminate in the event of a failed drug test is precisely the question raised in *Noffsinger*, and employers should consult with legal counsel in their respective state to ensure compliance.

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# SAFETY SENSITIVE POSITIONS AND WORK-SITES PROTECTING YOUR BUSINESS AND YOUR EMPLOYEES

- 1) **Review Workplace Policies** - Thoroughly reviewing your workplace policies is the single most important thing you can do to protect your business with regards to cannabis use and employee testing. Look for language that employees can easily understand and follow, and protocols that reflect the nature of the business. Consider whether zero-tolerance will be applied to both safety-sensitive positions and those that are not, how post-accident testing will occur, and whether drug testing will be used only upon hiring or throughout employment. If possible, provide access to support for employees with substance abuse problems.
- 2) **Consistency** - A business should ensure not only consistency in the treatment of suspected substance abuse regardless of the substance, but consistency in staff training and management enforcement. Inconsistent treatment can quickly become the basis for legal action against an employer.
- 3) **Protecting the Workplace and Complying with the Law** - Carefully examine the impact of any cannabis impairment at the worksite, and design employee pol-

icies that ensure optimal safety for the workplace. Before finalizing new policies and procedures confer with employment counsel to ensure compliance with state laws and legal decisions.

Although state and federal workplace laws will continue to evolve, employers should expect that workplace safety will continue to be the primary focus when considering how to manage cannabis use by employees. Employer discretion to implement drug testing and zero-tolerance policies will continue in most states, but consult with counsel to ensure strict compliance in these quickly evolving times. ▲

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