CLARIFICATION ON MEDICAL MARIJUANA IN THE WORKPLACE

In the past few years an increasing number of states have approved the use of medical marijuana and, consequently, many JATCs have become concerned that apprentices may be protected for marijuana use, and even impairment, in the workplace.

This is not the case, however. This article will first describe how the *ALLIANCE*'s own Model Substance Abuse Policy and Program for Joint Apprenticeship and Training Committees (Model Policy) does not protect an applicant or apprentice who tests positive for marijuana in the workplace, even if the individual is authorized to use marijuana for medical reasons.

Second, the article will then explain that, of the very few states that provide any sort of workplace protection for medical marijuana, none protect possession, use, or present impairment on the job.

Finally, the article will address the fact that medical marijuana use remains unlawful under federal law.

I. The *ALLIANCE's* Model Substance Abuse Policy and Program Does Not Protect an Applicant or Apprentice Who Tests Positive for Medical Marijuana

The *ALLIANCE's* Model Policy follows the Federal Government, specifically the "U.S. Department of Health and Human Resource Services' 'Mandatory Guidelines for Federal Workplace Drug Testing Programs,' as set forth in the Federal Register." These standards test for *marijuana* and do not make any exception for medical marijuana. For applicants, that means any conditional offer of instatement is withdrawn after a confirmed positive test. For an incumbent apprentice, a confirmed positive test, which is a "first strike" results in referral to rehabilitation, with on the job training (OJT) suspended for the duration of rehab. The Model Policy is silent on what happens on the second strike, and the *ALLIANCE* generally recommends that the apprentice go before the Committee, as for any other infraction.

A word on what a confirmed positive test result means. When the initial testing is performed, the sample is split in two, and only one part is tested (Part A). If the initial test on Sample A is positive, a second, more rigorous test is then performed, which is the confirmatory test. At this point, the applicant or apprentice still has an opportunity to convince a Medical Review Officer (MRO), that the test results are not valid positive test results. He or she can do this in one of two ways. First, he or she can have the second part of the original sample (Part B) tested, at his or her own expense, at a certified laboratory: if those results are negative, the test will be considered negative. Second, he or she can show the MRO proof that he or she is taking prescription medication that is known to produce a false positive test result for marijuana. This second option is not open to the applicant or apprentice. Logically the MRO cannot accept an excuse that marijuana taken pursuant to a prescription causes a "false" positive for marijuana.

Moreover, marijuana remains an illegal substance under federal law and, regardless what any state law provides, federal law remains controlling.

II. State Medical Marijuana Laws Do Not Excuse Use, Possession or Present Impairment on the Job

Most of the states that have legalized medical marijuana, do not offer workplace protection. Of the handful that do offer some protection (AZ, CT, DE, MN, NY and RI), most offer it only for *status*, that is, individuals generally cannot be penalized at work because they hold a medical marijuana card, etc. However, *no state offers protection for possession, use or impairment at work*. Arizona and Delaware have the broadest on-the-job protections for holders of medical marijuana prescriptions. But even those two states only prohibit employers from disciplining employees when marijuana metabolites are present in their testing samples, but there must also be no signs of on-the-job use, possession or impairment. However, as discussed below, even these two states may have their laws overridden by federal law, which still holds marijuana use, even for medicinal purposes, to be illegal.

III. Federal Law Continues to Outlaw Marijuana Use, Even for Medicinal Purposes

Colorado is one state where medical and recreational marijuana use are both legal under state law. However, the Colorado Supreme Court upheld the firing of an employee because his off-duty use of medical marijuana, which showed up in a workplace drug test, remained unlawful under *federal law*. *See Coats v. Dish*, Case No. 13-SC-394 (June15, 2015). In this case, the state law provided that an employee could not be terminated for engaging in any "lawful activities" while off the premises. The court interpreted "lawful activities" to include those activities that are lawful not only under state law, which Coats' medical marijuana use clearly was, but under federal law as well, which it clearly wasn't. As the Colorado supreme court explained in *Coats*, the federal Controlled Substances Act prohibits the use of marijuana as a Schedule I substance, 21 U.S.C. §844(a)(CSA). Although the federal government is not presently prosecuting use of medical marijuana, it also has not removed it from Schedule I.

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