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Are We Seeing the Slow Death of Pre-Employment Marijuana Testing?

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Pre-employment drug testing has long been considered a "standard" or "tried and true" part of the new hire process, typically one of the last, but necessary, boxes on the hiring checklist. But how much longer will it be around? With varying state laws at play for employers who operate in multiple states and with at least some major companies announcing that they are no longer conducting pre-employment drug testing for marijuana use for some positions, many employers now find themselves taking a second look at the reasoning and/or necessity behind pre-employment drug testing for cannabis.

Tennessee's Stance and Forecasting of Future Legislation:

Given the varying trends across the country on the treatment of cannabis use in the hiring process, you may be wondering: What's going on in Tennessee? The short answer is that Tennessee has been knocking on the door of legalizing medical cannabis for a number of years.

When considering Tennessee's legislative efforts to legalize medical cannabis, it is important to remember that Tennessee has a drug-free workplace law which provides the opportunity for workers' compensation premium discounts to participating employers who implement and maintain a drug-free workplace program, which includes conducting drug tests. It is not clear how much of a role that has played in the roadblocks to legalize medical cannabis. But, Tennessee is in the minority of states on this issue, as the majority of states have legalized medical cannabis at this point.

This year, the state legislature came close to legalizing cannabis for medical use for qualifying patients and establishing a regulatory framework for its use within the State in SB 854. Also, there were various bills introduced that could affect drug testing policies of job candidates, including SB 1359, which would prohibit employers from discriminating against job candidates who test positive for marijuana use.

However, after SB 854 failed to pass, Tennessee's legislature approved SB 118. Though viewed as a consolation prize to many marijuana supporters, SB 118 does include some notable changes, such as: 1) creation of a commission to study and provide recommendations on the legislation of medical cannabis; and 2) expansion of the list of medical conditions for which Tennesseans may qualify to use tetrahydrocannabinol ("THC"). The goal of the commission is to provide recommendations regarding the establishment of a potential legal framework of a medical cannabis program to be implemented in Tennessee upon the federal rescheduling or descheduling of marijuana as a Schedule I drug. In sum,

SB 118 appears to be just another knock on the door in Tennessee, but the formation of a cannabis commission indicates that the door to more expansive cannabis legislation may be opening in the future.

Cannabis Legislation in Surrounding States Several of Tennessee's surrounding states (Kentucky, North Carolina, Georgia and Mississippi) have not legalized medical cannabis, either. However, Tennessee's other surrounding states (Alabama, Arkansas, Missouri and Virginia) have legalized medical cannabis under various circumstances. And, Virginia has gone further in that it has a regulated program for medical *and* non-medical cannabis use.

Is Approval of Medical Marijuana a Bellwether of Recreational Legalization?

Currently eighteen states and the District of Columbia have legalized recreational use of marijuana. A commonality among these states is that they first legalized medical cannabis before approving recreational use, with an average of 11.5 years in between. So, while the numbers do not necessarily reveal a quick leap from medical to recreational legalization, that is the trend.

In addition to the recreational-use states mentioned above, seventeen states have legalized medical marijuana and stopped there – at least for now. However, fourteen of the seventeen have only legalized medical cannabis use in the last decade, so it cannot yet be said that they have deviated from the trend.

What's Happening at the Federal Level?

Despite expansive legalization at the state level, marijuana remains designated as an illegal Schedule I drug (deemed to have high potential for abuse and no accepted medical use) under the federal Controlled Substances Act ("CSA"). Under the CSA, the manufacture, distribution, dispensation, and possession of cannabis is illegal under federal law regardless of any state law authorizing medicinal or recreational use.

Over the last decade, the federal view on legalization has been in flux, and multiple efforts to reform cannabis laws have been tried and failed. The first major action occurred in 2013 with the Cole Memorandum, issued under by the Obama Department of Justice ("DOJ"). The Memorandum established a DOJ policy of nonenforcement of federal cannabis law in states that legalized cannabis and had "strong and effective regulatory and enforcement systems." A watered-down version of this policy was made law in 2014 with the passage of the Rohrabacher–Farr Amendment, which prohibits the Department of Justice from expending funds to interfere with the implementation of state *medical* cannabis laws, essentially crippling the DOJ's ability to prosecute medical cannabis providers under federal law. However, the Trump administration struck-back in January of 2018, when then Attorney General Sessions released a memorandum rescinding the Cole Memorandum and immediately reinstating DOJ enforcement of federal cannabis law.

In 2019, the coin appeared to have flipped again with the introduction of the Marijuana Opportunity Reinvestment and Expungement Act of 2020, which provided for de-scheduling cannabis from the CSA, retroactively and going forward, and enactment of various criminal and social justice reforms related to cannabis, including the expungement of prior convictions. In the most dramatic development in federal marijuana reform, the bill passed in the House of Representatives in December of 2020, which marked the first time any legislation to end federal cannabis prohibition was passed in a chamber of Congress. Despite its support in the House, the Act died in committee.

However, the 2020 legislation was given new life in 2021 when it was reintroduced in May as the Marijuana Opportunity Reinvestment and Expungement Act of 2021, H.R.3617 (the "MORE Act"). Less than two months later, Senate majority leader Schumer proposed an additional draft bill, the Cannabis Administration and Opportunity Act, which would decriminalize cannabis under federal law and allow states to legalize and regulate cannabis without the risk of federal interference. In addition, the Marijuana 1-to-3 Act, H.R. 365, which is currently pending in committee, would simply transfer cannabis from a Schedule 1 drug to a Schedule 3 drug under the CSA, as the name suggests. Under this draft bill, marijuana would remain an illegal drug under federal law, but would result in increased ability to perform research on cannabis through the removal of numerous hurdles currently facing researchers due to the Schedule 1 classification.

The likelihood of success for the proposed legislation at this time is tenuous at best given the current make up of Congress. At the executive level, Vice President Harris was an original sponsor of the 2020 version of the MORE Act, and President Biden has indicated that he would support removing cannabis from Schedule 1 classification. However, President Biden has also said he does not support legalization for recreational use.

What Does This Mean for Your Business?

If your business only operates in Tennessee, it can be business as usual for now in terms of your drug testing policies and compliance with applicable law. However, if your business operates in multiple states, life is not so easy as you have to navigate the impact that comes from state laws which have legalized medical and/or recreational marijuana use. Specifically, some of these laws also include protections for individuals who use medical or recreational cannabis, including workplace antidiscrimination provisions. These protections may impact whether you may deny employment to applicants or impose discipline on employees who test positive for cannabis, and they may create a duty for you to accommodate medical cannabis use.

Take Arizona's medical cannabis law as an example. Arizona employers are prohibited from taking adverse actions against qualified medical cannabis patients on the basis of a "positive drug test for cannabis 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." Arizona is not alone in this type of protection, and Nevada and Massachusetts take these protections a step further by requiring employers to attempt to make reasonable accommodations for lawful medical cannabis patients.

With regard to recreational use, some states -- like New York and Illinois -- prohibit employers from discriminating against employees solely due to off-duty use and possession outside the workplace. However, no state requires employers to tolerate on-the-job or on-premises use or prohibits disciplining employees whose marijuana use creates a safety hazard or impairs their ability to perform their job duties, typically determined through "reasonable suspicion testing."

In light of the varying laws, employers who operate in states where medical or recreational marijuana use is lawful should take the following steps in adjusting policies and testing procedures to comply with state, and in some cases city or county, cannabis laws:

1. Determine whether any state (or locality) that you operate in prohibits adverse employment actions based on off-duty and off-premises cannabis possession or use or testing positive for cannabis. If so, adjust any drug screening or workplace drug use policy to exempt or otherwise account for legal cannabis use. However, if your workplace is unionized, it may be necessary to engage in the collective bargaining process before implementing any unilateral changes to drug testing and drug use policies, as these generally will be considered mandatory subjects of bargaining.
2. Determine whether you are obligated under certain overriding federal and/state laws to maintain a drug-free workplace and decline to employ applicants who fail a cannabis drug screening. If so, continue to enforce your policies and procedures in accordance with those mandates.
3. For states/localities where you are permitted to continue disqualifying applicants or terminating employees for legal cannabis use, consider whether the benefits of continuing to do so outweigh the risk of losing highly qualified applicants and productive employees due to their legal marijuana use. For example, some employers have chosen to remove cannabis from their drug screenings or implement more lenient policies with respect to positive cannabis tests (similar to their treatment of alcohol use), while others have chosen to eliminate drug screening altogether with the exception of safety-sensitive positions.
4. Determine whether any state (or locality) in which you operate requires you to attempt to provide reasonable accommodations for medical cannabis use, and if so, consult with labor and employment counsel to create a compliant policy to address the process for requesting a reasonable accommodation and to assist in the interactive process.
5. Continue to enforce policies prohibiting on-the-job or on-premises marijuana use. However, if your policy refers to generic terms such as "illegal" or "illicit" drugs, consider specifying that the policy applies to cannabis in states/localities where medical or recreational use is permitted, since the terms "illegal" or "illicit" arguably no longer apply to cannabis.

Conclusion

Is pre-employment drug testing for cannabis dead? Certainly not yet for most employers. But it may be in the process of a slow death. The legalization of cannabis in numerous states and the pending legislation in other states foreshadows additional considerations and more complications in requiring pre-employment drug testing for cannabis, particularly for multi-state employers. Of course, employers who operate in industries regulated by the Department of Transportation and other regulatory authorities will probably continue to include marijuana in pre-employment drug testing. But other employers may follow the example of companies forging a different path, which does not include pre-employment testing of cannabis.

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