

Medical Marijuana Creates Problems for Employers

It just makes sense for a business to take any reasonable steps to make sure no one gets hurt. Your reputation, productivity and ability to stay in business depend on your success here so you most likely take the responsibility very seriously.

So what are you supposed to do now that medical marijuana is legal?

If you have an employee with chronic pain or cancer are you supposed to let them take a smoke break at work (and get high) the same way you let your cigarette smokers? And, worse yet, will HIPAA even let you confirm the employee actually has the medical problem they claim? I don't know the answers but I can tell you what I've learned so far.

Nationally, most courts have said you do not have to accommodate medical marijuana use. In Montana a 2009 Supreme Court ruling said you don't have to accommodate an employee's use of medical marijuana. In Oregon and Colorado, however, the courts are still deliberating so it sounds like you really need to be careful where you are working and what you are doing.

Fourteen states have legalized medical marijuana and twelve more have legislation with the same goal in the works (according to Procon.org) so change is coming. How can we be ready?

1) Know your risks:

- I mentioned HIPAA already but be aware of what you can ask and what you can legally know about your employees' health conditions.
- Discrimination. Can you fire, neglect to hire or fail to promote an employee because they smoke marijuana? Would that violate the ADA (Americans with Disabilities Act)?
- Negligent entrustment. Because there is no standard for how much marijuana you can have in your blood and still be able to work safely and effectively you could face severe penalties if an employee is involved in a tragic accident and is found to have been under the influence of the drug.

2) Know your options. Attorneys and Human Resource experts across the country have said:

- Treat it the same as any prescription drug. What would you do if an employee took Percocet on the job? Even if they had a prescription would that be acceptable?
- Take a hard stand. One attorney stated you can "treat marijuana as any other illegal substance" and fire any employee who tests positive. Remember federal law still calls marijuana an illegal drug.
- Get a release. Have your attorney draft a release to gain access to your employees' medical records to make sure their need is legit.

As you go through all of this please keep your internal rules, manuals and documents in mind. Whatever you do make sure you are clear, consistent and legal. Use your attorney and HR expert early and often and if you don't have either or both call me. I can give you a few highly-qualified names.

Consider Employment Liability coverage as well. It is relatively inexpensive and will help protect you from claims, lawsuits and overall headaches tied to dealing with potential, current and past employees.

I hope this helps but if you need more don't hesitate to contact me directly at (406) 457-5165 or via e-mail at tmcgree@pfgworld.com.

Tom McGree

Source: Business Insurance; February, 2010.