



H.R. Alert April 2015

What's Hot about Pot?

Your employee comes to you and says, "I have a medical marijuana card and I am concerned about working on the roof today. I need to smoke some weed on my break so I can calm down and get back on the roof." Do you...

- (1) Verify his doctor's recommendation and tell him to do it outside in the designated smoking area?
- (2) Tell him to go smoke at home and don't come back until the effects wear off?
- (3) Send him to get drug tested and terminate him if he tests positive?
- (4) Lay him off because he cannot perform a key responsibility of the job
- (5) Assign him work that does not involve him working on roofs
- (6) Call your wife/husband and tell him/her to start packing because you are starting your vacation to Maui this afternoon

As more states legalize medicinal marijuana, questions like these are becoming more common. The answer varies by state, and it's not always clear-cut.

In California, employers must accommodate employees with medical conditions or disabilities, but they do not have to let them use weed in the workplace, even if a doctor has recommended it to treat their condition.

Neither federal nor state law prohibits employers from disciplining or terminating employees for marijuana use, even when the drug is used to treat a disability in accordance with California's medical marijuana law.

The state's Compassionate Use Act ensures that people who use marijuana for medical purposes, upon the recommendation of a doctor, are not subject to criminal sanctions or prosecution. But a 2008 California Supreme Court decision, in *Ross vs. RagingWire Telecommunications Inc.*, made it clear that the Compassionate Use Act does not apply to employment, and that marijuana, even for medical use, remains illegal under federal law. "Under California law, an employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions," the court said.

Employers can prohibit employees in California from possessing, using or being under the influence of marijuana at work, just as they can forbid them from being drunk on the job. But they cannot fire or refuse to hire workers because they have a medical condition they are using marijuana to treat, and that's where things get hazy.

Disability Rules

Federal and California laws prohibit nearly all employers from discriminating against workers or applicants because of a mental or physical disability. They must make reasonable accommodations for the disability, unless it would pose an undue hardship, or unless the disability poses a health or safety threat. What qualifies as an undue hardship depends on the size of the employer, the cost of the accommodation and other individual factors.

The federal Americans with Disabilities Act defines disability as "a physical or mental impairment that substantially limits one or more major life activities." The California Fair Employment and Housing Act define it more broadly, as an impairment that makes performance of a major life activity "difficult." Neither act lists conditions that meet the disability test.

Drug Testing

Employers, nearly without exception, prohibit marijuana use at work because it impacts productivity and could pose a risk to others. Sending the employee for drug testing — is also problematic. In California, employers can require job applicants to pass a drug test as a condition of employment. But they generally cannot test a current employee unless they have a reasonable suspicion the worker is under the influence.

Random testing of un-suspicious employees is allowed in only a few cases. Federal law requires random testing of certain transportation industry employees. California law allows it for certain safety-sensitive jobs, but there are many rules and safeguards. San Francisco bans random testing in employment, except when required by federal law,

Random testing is risky in most settings. Employers should have a policy that says, “We test employees for drug use under these circumstances,” to ward off complaints that the drug test was an invasion of privacy.

Employer advice

The best approach for employers is to adopt a policy that says, “We do not tolerate use of any illegal drug during the workday, including medical marijuana. If you have a condition for which you are being treated, you need to talk to HR about any possible accommodations.”

If an employer has a zero-tolerance policy, or no drug policy, and an employee with a medical marijuana card for anxiety says he needs to smoke, he should be sent home,

To the extent that his request is one seeking accommodation for his anxiety, the company can discuss any reasonable accommodation he might need, which could include modifying his work schedule. But first he needs an assessment from his health care practitioner that he has anxiety and that it is affecting one or more major life activities. If the employee was complaining of glaucoma, cancer or some other condition that is unquestionably disabling, I think you would move immediately to the discussion of what accommodation is needed.

The Americans with Disability Act (ADA)

Your obligation under the ADA and California law is to talk to the employee: Is there some other way we can get the work done that won't interfere with your ability to perform and allow you to be productive? The courts do not require employers to do the one accommodation the employee asks, he said. Getting him some assistance or taking away some duties are potential accommodations.

The Ninth Circuit Court of Appeals case of *Collings v. Longview Fibre Co.* clarifies that the ADA does not protect individuals who are currently using drugs. You can terminate or deny employment to people who use drugs illegally. However, employees who have been rehabilitated successfully are protected under the ADA. Thoroughly investigate any suspected illegal use of drugs before terminating those involved. An employee who

was terminated after erroneously being perceived as a drug addict is likely to have a valid claim under the ADA and FEHA. Performance of a good faith investigation may serve in your defense.

As always, if you have questions please call me at (415) 892-1497 or e-mail me at larrylevy@earthlink.net.

Larry Levy
Employee Relations Management

My Recommendations

1. Develop a clear policy prohibiting the use of illegal drug and alcohol use during work hours. Ensure the policy is documented in your employee handbook.
2. Also develop a drug and alcohol testing policy for those employees whose behavior, performance, accidents and physical demeanor indicate the employee may be impaired.
3. Develop a drug and alcohol testing policy for all job applicants and ensure the policy is documented in your employee handbook. If you test one applicant you must test them all otherwise you are facing the challenge of discrimination.
4. Develop a business relationship with a local medical lab to refer and escort applicants and employees who exhibit the symptoms of impairment.
5. Should an employee or applicant provide you with a Medical Marijuana card conduct an ADA discussion with the employee to determine the existence of a disability and forewarn him/her of the consequences if they test positive for drugs. Discuss what they are able to do and not do on the job.