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Further Considerations on Drug Testing and Medical Marijuana

We recently posted an article about drug-testing issues and medical marijuana. Due to a large number of inquiries, we thought it would be helpful to provide some further analysis.

Substance abuse can have a significant impact in the workplace, particularly on health and safety issues. Increased accidents in the workplace can be attributed to substance-abuse issues. Alcohol use is linked to 40% of industrial fatalities and 47% of industrial injuries. Substance abuse can also lead to increased medical claims, workers' compensation claims and insurance costs, as well as to increased absenteeism and use of sick time due to injuries. There can also be increased damage to property and equipment.

For these reasons, it is recommended that employers implement substance-abuse policies and conduct drug and alcohol testing. Such policies can help to ensure the safety of employees, customers, and invitees. Such policies can discourage drug-abusing applicants from seeking a position and reduce turnover and associated hiring costs. A drug-free workplace reduces risk of injuries and damage to equipment, improves productivity, efficiency and morale, and can help control insurance costs. The proliferation of medical marijuana laws, including that in New Hampshire, has raised questions regarding drug-testing programs and policies.

The New Hampshire law states that "nothing in this chapter shall be construed to require . . . [a]ny accommodation of the therapeutic use of cannabis on the property or premises of any place of employment or on the property or premises of any jail, correctional facility, or other type of penal institution where prisoners reside or persons under arrest are detained. This chapter shall in no way limit an employer's ability to discipline an employee for ingesting cannabis in the workplace or for working while under the influence of cannabis."

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The New Hampshire Medical Marijuana statute does not contain a per se requirement that an employer is required to excuse a positive drug-test result based on medical marijuana usage. The law allows an employer to discipline an employee for using marijuana on the premises and/or for working under the influence. The law also states that an employer is not required to accommodate the medical use of marijuana on the property or premises of any place of employment. Therefore, an employer may still lawfully prohibit employees from using marijuana at work and may discipline employees who violate such prohibition, despite the fact that the drug use may be sanctioned under state law.

While it is possible that New Hampshire's anti-discrimination laws could require employers to tolerate medical marijuana use by employees in the future, neither the courts nor the New Hampshire Commission for Human Rights have offered guidance on the matter yet.

The New Hampshire Medical Marijuana Law does not address an employer's rights and obligations toward medical-marijuana users with regard to drug-testing policies. While such policies have yet to be tested in New Hampshire courts, courts in other states with legalized medical marijuana use have consistently found that employers may continue to enforce pre-employment drug-testing policies that screen for the use of drugs, including marijuana. Such courts have also upheld the employer's right to terminate a current employee who tests positive for use of medical marijuana, whether or not the employee was working while under the influence. Although the New Hampshire Medical Marijuana Law, like other medical marijuana laws, prevents criminal or civil prosecution under state law, it does not prevent employers from disciplining or taking other action against an employee using marijuana for medical purposes.

In addition, the New Hampshire Supreme Court has not addressed the issue of whether employers can deny employment to applicants and employees who use medical marijuana. Other courts that have considered the issue have found that these laws do not require an employer to modify their employment practices, drug-free-workplace policies, drug-testing policies, or accommodation policies. These courts have found that because federal law preempts state medical marijuana laws, medical-marijuana users authorized under state law are not protected from employer drug-testing policies. Further, the courts have held that medical marijuana laws do not create a public policy protecting medical-marijuana users. A New Hampshire court could conceivably decide that a termination for such authorized use outside of the workplace and not on work time, nor causing impairment at work, amounts to a wrongful termination based on a violation of a public policy. While there are strong arguments and persuasive authority upon which employers can rely in disputing the viability of such a claim, nothing is certain.

This continues to be an evolving area of the law, and it is uncertain if greater or lesser protections will be afforded employees through case law or regulations. At this time, no identification cards have been issued, a prerequisite to legal protections under the statute. Therefore, employees at this time do not have legal protection under the statute, and employers can continue to administer their drug policies in the same manner. Employers should, however, continue to monitor these issues and be prepared to revise their drug policies as required as the law evolves.

For additional information regarding this, or any other labor or employment law matter, please contact the attorneys in the Portsmouth, New Hampshire office of Jackson Lewis P.C.

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