

Do employers have a duty not to discriminate against medical marijuana users?

While most of our industry has been focused on the obligations of owners and property managers as landlords, there has also been some incorrect information floated around concerning the obligations of employers. Now that the first medical marijuana users have been listed on the registry of the Arizona Department of Health Services (ADHS) it is critical to also look at our employment policies to ensure that they accurately reflect our obligations under the Arizona medical marijuana laws.

*Can't I just continue doing what I have always done? I understand that other states where medical marijuana is legal have said that employers can continue to ban medical marijuana users from employment.*

A lot of people – including some lawyers – will tell you that because other states have permitted employers to terminate or refuse to hire medical marijuana users, Arizona employers do not have to change their current practices of excluding marijuana users. The theory is that because marijuana is still unlawful under federal law, employers can maintain the status quo without negative consequences. That information is incorrect.

The problem with relying on decisions of the courts of other states is that the Arizona law is different than the laws of other states that permit medical marijuana. In Colorado, Washington, Oregon and California – to name just a few – the state laws simply decriminalize the use of medical marijuana and impose no specific obligations on employers or landlords. In contrast, the Arizona medical marijuana law specifically prohibits employers from discriminating “in hiring, termination or imposing any term or condition of employment or otherwise penaliz[ing] a person” based on the person’s status as a cardholder or because of a drug test that detects marijuana. Because no other state’s laws include language like this, Arizona employers cannot rely on the decisions of other jurisdictions that interpret the laws of those jurisdictions.

*Are there any exceptions to the law?*

Yes. The Arizona law permits an employer to discriminate against a medical marijuana cardholder if a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or regulations.

*Is a medical marijuana user a person with a disability within the meaning of the Americans with Disabilities Act or the Arizona Civil Rights Act?*

Technically no, because both laws exclude from their protection persons who are current users of illegal drugs. Because marijuana is still illegal under federal law, the EEOC and the Civil Rights Division will likely not accept a charge of discrimination filed solely on the basis that the employer is discriminating

because the person uses medical marijuana. The Arizona medical marijuana law does not change this, though there are likely other claims that can be raised as a result of any discrimination on this basis.

*If an applicant tests positive for marijuana on a pre-employment test, can we refuse to hire the applicant on that basis?*

Probably not. If an applicant tests positive for marijuana on a pre-employment test, the employer cannot, on that basis alone elect not to hire the person. The employer's correct response will be to commence an interactive process with the person to obtain additional information. Among other things, that process should elicit information as to (1) whether the person is a medical marijuana cardholder; and (2) whether the person's use of medical marijuana outside of the workplace will create an objective health and safety risk at work. This latter determination must be based on specific facts and not on fears, stereotypes or perceptions about persons who "typically" use marijuana. The Arizona law anticipates that applicants for most jobs will not pose health and safety risks that require them to be excluded solely because they are medical marijuana users.

*If a current employee tests positive for marijuana on a random drug test, can we automatically terminate the employee?*

Generally no. Employers may not discriminate against current employees based on their status as registered cardholders. If an employee tests positive, the employer again should engage in the interactive process to ensure that the person is a registered cardholder and was not (a) using or possessing marijuana, or (b) under the influence of marijuana while on the job. If the employer makes this determination, the employer is prohibited from terminating or disciplining the employee because of the positive drug test. The general rule of thumb throughout is that a medical marijuana user who tests positive on a drug test should be treated the same way the employer would treat any other applicant who uses prescription medications.

*What kinds of rules can we impose regarding marijuana use on the job?*

Employers may discipline employees who use or possess marijuana on the job or if the employer has a good faith belief that the employee is impaired by marijuana while working or during work hours. In order to establish impairment the employer should have documented and be able to demonstrate symptoms consistent with impairment such as dilated pupils, poor concentration, impaired perception of time, loss of energy and impaired perception of distance.

Employers may also rely on reliable information reported by a person who witnessed the use or possession of drugs at work, video surveillance and admissions by the person that he or she has used marijuana during work hours.

*What happens if we terminate an employee because he/she is a registered medical marijuana user?*

The Arizona law does not provide specific penalties for discrimination based on medical marijuana use so courts will look at general statutes prohibiting other statutory violations. The most likely statute the courts will use in this situation is A.R.S. 23-1501, which permits employees to pursue tort claims for wrongful discharge in a situation where the employer “has terminated the employment relationship of an employee in violation of a statute of this state.” Under this statute employees who win are entitled to actual, compensatory and punitive damages for injuries they suffered as a result of the violation.

*Is there anything else we should know?*

Now is the time to conduct a thorough review of your personnel manual, to make appropriate changes that are consistent with the new laws, and to train supervisors about the new way of doing business. It is also very important that you establish policies making it clear that while you will not discriminate against an employee simply because the employee is a medical marijuana cardholder, that you will take action if the employee uses marijuana on the job or during work hours, possesses marijuana in the workplace, or is working while impaired by medical marijuana.