

## *Up in Smoke:*

# The Effect of Legalized Marijuana on Employer Policies

By Michael B. Harrington

So far, 23 states have legalized medical marijuana and in two states, Colorado and Washington, it is legal to possess small amounts of marijuana for recreational use. Let's take a look at Washington's recreational-use law and what impact it may have for employers.

### **The Law**

#### *Medical Marijuana*

Keep in mind that marijuana, even for medical use, is illegal under federal law. In 1998, Washington legalized medical marijuana and the following health care providers became authorized to prescribe it:

- Medical doctors (MD);
- Physician assistants (PA);
- Osteopathic physicians (DO);
- Osteopathic physician assistants (OA);
- Naturopathic physicians (ND); and
- Advanced registered nurse practitioners (ARNP).

In Washington, marijuana can be prescribed only for terminal or debilitating medical conditions, which include cancer, human immunodeficiency virus (HIV), multiple sclerosis, epilepsy, renal failure, glaucoma, debilitating Crohn's disease and debilitating hepatitis C.

However, the statute makes it clear that employers are not required to accommodate the use of medical marijuana "in any place of employment."<sup>1</sup>

#### *Recreational Marijuana*

In Washington, individuals 21 years of age or older are legally authorized to possess and use:

- One ounce of usable marijuana;
- 16 ounces of marijuana-infused product in solid form; or
- 72 ounces of marijuana-infused product in liquid form; and
- Marijuana-related drug paraphernalia.

However, any use of marijuana is still prohibited:

- In public or in view of the general public;
- At the retail shop(s) where purchased;
- Most hotels and other accommodations;
- Restaurants, lounges, clubs, bars, sports stadiums and concert venues; and
- All federal land, including national parks and national forests.

## Marijuana at Work

There is nothing in the law that protects employee use of marijuana at work and there is nothing that prohibits an employer from disciplining an employee who shows up for work with the drug in their system. As stated in Washington's law on medical cannabis, "Employers may establish drug-free work policies. Nothing in this chapter requires an accommodation for the medical use of cannabis if an employer has a drug-free workplace."<sup>2</sup>

In 2011, the Washington Supreme Court provided the public with guidance on this issue in *Roe v. TeleTech Customer Care Management*. The case involved a woman who worked at a call center. Her job did not include operating heavy equipment or any other task that would raise an on-the-job safety concern, but her company did have a zero-tolerance policy for drugs. After the woman was fired for testing positive for marijuana, she sued claiming that she was legally allowed to use the drug under the state's Medical Use of Marijuana Act.

The Supreme Court ruled that employees who legally use medical marijuana can still be fired from their jobs if they violate an employer's substance-abuse policy. The court noted that there are many reasons why employers have no-tolerance policies for drugs, including workplace safety issues, productivity issues and concerns over an employee's health or absenteeism. While this case was decided before recreational use was permitted, it was after medical use was legal. There is no reason to believe that recreational use would be permitted any more than medical use.

*Could marijuana be covered by health insurance or Labor & Industries (L&I)?*

Consider the case of an employee who has a terminal or debilitating disease. If a licensed physician prescribes marijuana to treat the effects of this employee's disease, could the employer's health plan be responsible for paying for the marijuana?

Consider the same employee, but now the disease is debilitating hepatitis C that was contracted on the job. Would L&I cover the marijuana prescription? What if the employer has a policy that prohibits the use of marijuana by employees? This is starting to look like a bar exam question!

There are a few areas in Washington laws that make it highly unlikely that this scenario would occur. The first statute to consider is RCW § 69.51A.060(2), which provides:

Nothing in this chapter establishes a right of care as a covered benefit or requires any state purchased health care as defined in RCW 41.05.011 or other health carrier or health plan as defined in Title 48 RCW to be liable for any claim for reimbursement for the medical use of cannabis.

So, it would seem that insurers are not going to have to cover medical marijuana. However, the last sentence in this section leaves the door open to the discretion of the insurers: "Such entities may enact coverage or noncoverage criteria or related policies for payment or nonpayment of medical cannabis *in their sole discretion*."<sup>3</sup> Consequently, one could suppose that employers could request a policy that does include coverage for medical marijuana. However, the insurer is not obligated to provide one.

*What about workers' compensation?*

Currently, Washington's Administrative Code requires L&I to consider reimbursement only for drugs that are approved by the Federal Drug Administration (FDA).<sup>4</sup> Since the FDA has not approved the use of marijuana for any disease or condition, employers are not likely to be faced with this situation in the near future. However, as public opinion changes, the federal agencies may revisit this issue to determine if there is compelling medical evidence that should be considered.

## The Bottom Line

Employers may have legitimate reasons for implementing and applying policies that prohibit employee use of marijuana and other drugs. If employees violate substance-abuse policies, then they can be legally subjected to discipline, including termination.

Employers should remember these key points for effective policies:

- Clearly state why the policy is being implemented. Reasons can be as simple as being committed to protecting the safety, health and well-being of employees and customers, and recognizing that abuse of alcohol and using drugs compromises this commitment.
- Provide a clear description of behaviors that are prohibited. At a minimum, this should include a statement that the “use, possession, transfer or sale of drugs that are illegal under state or federal laws or controlled substances is prohibited.” Try to stay away from basing violations on “being under the influence,” as this unnecessarily complicates matters.
- Explain the consequences for violating the policy. Be consistent with other existing policies.
- As always, consult with an attorney to ensure that the policy will accomplish the employer’s goals.



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<sup>1</sup> RCW § 69.51A.060(4).

<sup>2</sup> RCW § 69.51A.060(6).

<sup>3</sup> RCW § 69.51A.060(2) (emphasis added).

<sup>4</sup> WAC 296-20-03010.