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Employers Scrambling To Revisit Boilerplate Drug Policies

By **Braden Campbell**

Law360 (May 7, 2018, 10:02 PM EDT) -- James Reidy, chair of Sheehan Phinney Bass & Green PA's employment group, maintains a traditional practice that includes advising employers on wage laws and handling discrimination suits. But lately, one issue has been demanding more and more of his time: workplace drug policies.

As more and more states legalize recreational and medical marijuana and the opioid epidemic continues to rage, attorneys are increasingly getting calls from clients asking for help updating outdated, boilerplate drug policies that may be putting them at legal risk.

"I probably have in the queue right now seven different clients that are updating their drug and alcohol policies," Reidy said.

Where federal law once made clear that employers could freely fire or deny jobs to anyone who used marijuana, the rapid advancement of recreational and medical marijuana laws has muddied the waters for employers across over half the country. Medical marijuana is now legal in 29 states and the District of Columbia, and nine states and D.C. allow recreational marijuana. And though these laws have some similarities, their differences preclude one-size-fits-all solutions.

In response, many employers will want to reconsider testing job applicants for marijuana use, attorneys say. The reasons are both legal and economic: Some of the new laws make it illegal for employers to test applicants for marijuana use or to refuse to hire them based on test results, and as the labor market tightens, many employers can't afford to write off otherwise qualified employees. Even Labor Secretary Alex Acosta has endorsed relaxing drug testing policies, saying at a recent congressional hearing that some employers shouldn't "make the assumption that because there's a negative result on a test [an applicant] would not be a good employee."

Some medical marijuana laws block employers from denying jobs to valid prescription holders "solely" because of their marijuana use. Peter Lowe, a partner at Maine-based Brann & Isaacson, said he's advising clients in these states to consider applicants on a case-by-case basis.

"Are you hiring them to be in a clerical position?" Lowe said. "It doesn't seem as if [marijuana use] would be a bar for you hiring them. If you're hiring them for a safety-sensitive position, then that may be a different call." Employers in the latter group may want to refer the applicant to a physician to decide their fitness for a given job, Lowe said.

Though employers may want to rethink writing off applicants because they use marijuana, they should still do what they can to keep marijuana out of the workplace, attorneys say. Policies

should clearly state that workers shouldn't go to work under the influence of marijuana and provide for drug testing following an accident, they say.

But such rules pose their own challenges. While devices like breathalyzers can test whether a worker is under the influence of alcohol, marijuana tests only reveal use over a period of days or weeks. Employers in states that bar employers from firing workers based on off-duty marijuana use may struggle to justify firing a worker even with a positive drug test in hand.

"If you're relying entirely on the positive test, and the employee tells you [they used marijuana] two weeks ago, you have to rely on your policy," said Leigh Goddard, co-chair of Nevada-based McDonald Carano LLP's employment practice. "In some states, that creates quite a conflict."

Some laws, like Nevada's, require employers to "reasonably accommodate" workers who have valid prescriptions for medical marijuana, much as the federal Americans with Disabilities Act requires employers to accommodate disabled workers. And some courts have interpreted discrimination laws to protect medical marijuana users even when drug laws don't.

The legalization trend poses especially difficult questions for government contractors, who are required by federal law to do what they can to keep their workplaces drug-free.

"They have to have zero tolerance," Goddard said. "There are conflicts between requirements for them to follow federal law while still being in a state that permits medical and recreational use, and it becomes quite difficult for them to navigate."

The spread of legal marijuana comes as millions of Americans continue to abuse opioids, a class of narcotics that includes prescription drugs like Oxycodone and illicit drugs like heroin. Opioids don't pit states against the federal government, but they impose legal obligations on employers and dire personal costs on individuals.

Employers should bar employees from showing up to work under the influence of opioids beyond prescribed use, attorneys say. Along these lines, employers should train managers to recognize the signs of use — drops in performance, poor attendance, trouble focusing — and ask whether something's ailing workers who show them, attorneys say.

Employers should know their obligations under the ADA, which requires them to accommodate, with some limitations, workers who take prescription drugs to treat disabilities, and the Family and Medical Leave Act, which guarantees workers time off to treat illnesses including substance abuse disorders.

Employers are increasingly recognizing a social obligation to do what they can to combat the opioid crisis, Reidy said. They can do so by operating and referring workers to an employee assistance program, which can help them find counseling services, and by taking on workers in recovery, he said.

Between the opioid crisis and the web of state marijuana laws, employers have their work cut out for them as they try to keep their workplaces free of drugs without inviting legal trouble. And though the dust hasn't settled, employers need to do what they can.

"Just when you think we've nailed it down with regard to marijuana or the opioid crisis, something else will come along," Reidy said. "This is an increasingly tough area of the law, but from a societal standpoint, it's something you can't avoid, so let's get ahead instead of playing catch-up."

--Editing by Brian Baresch and Breda Lund.

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