How will the Legalization of Marijuana Affect Your Employment Policies?

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BACKGROUND

• Amendment 20—Medical Marijuana
  – Employers do not have to accommodate the use of marijuana in the workplace.
  – The medical marijuana system remains intact and separate from whatever recreational marijuana system develops.
  – Medical marijuana dispensaries can only sell to patients.
BACKGROUND

• Amendment 64 Recreational Marijuana--
  – Marijuana to be obtained as easily as alcohol.
  – Allows individuals 21 or over to cultivate, use and possess limited amounts of marijuana, without having to be certified as having a serious illness or debilitating health condition.
Regulation of Marijuana Use Under Amendment 64

• Amendment 64--“nothing in this Section shall permit consumption that is conducted openly and publicly or in a manner that endangers others.”
  – You cannot smoke marijuana outdoors, in public parks, or on a sidewalk.
  – You cannot possess marijuana in federal office buildings, courthouses, national parks or national forests.
Regulation of Marijuana Use Under Amendment 64

• Recreational marijuana can only be purchased from recreational marijuana stores.
  – These stores wont open until 2014.
• Possession of marijuana paraphernalia under Amendment 64 is legal.
Regulation of Marijuana Use Under Amendment 64

• Amendment 64 creates two ways to get marijuana now:
  – Either grow it yourself (up to six plants); or
  – Get it from a friend as a gift, but legal, recreational marijuana sales can only occur through licensed pot shops, which have yet to open.
Marijuana is Still Illegal Under Federal Law or Is It?

• “We’ve got bigger fish to fry,” President Obama in response to a question concerning prosecution of marijuana users by Barbara Walters on ABC’s “Good Morning America” on December 14, 2012.
Marijuana is Still Illegal Under Federal Law or Is It?

• The president has directed the U.S. Attorney General to examine the legal questions surrounding conflicting state and federal laws on drugs—but no deadline on this has been set.

• The U.N. is concerned that Colorado and Washington’s legalization of Marijuana violates international drug treaties.
Bipartisan Congressional Support

- Representatives Dianna DeGette (D) and Mike Coffman (R), have introduced the “Respect States’ and Citizens’ Rights Act,” in Congress.
  - The bill is designed to exempt states from the federal Controlled Substances Act provision on marijuana—this bill is still pending.
Federal Status

• Bottom Line—marijuana remains classified as a Schedule I narcotic under the federal CSA
  – Marijuana cultivation, distribution, possession and use are still criminal acts under federal law.
  – Marijuana is in the same category as Cocaine, Heroin, LSD and Ecstasy.
How is Local Law Enforcement Addressing Amendment 64?

- Prosecutors in Denver and Boulder counties have stated that they will not charge those 21 and older for possessing less than an ounce of marijuana.
Regulation of Marijuana Use Under Amendment 64

• Gov. Hickenlooper created an Amendment 64 Implementation Task Force.

• The Task Force recommended:
  – No change in employment laws.
  – Employers should be free to bar workers from using marijuana both on and off the job—and to fire employees if they ignore an employer’s zero tolerance policy.
Task Force Recommendations

• Recreational marijuana restrictions—
  – It can only be grown indoors.
  – It cannot be smoked at bars, restaurants or social clubs.
  – It can be sold to people visiting from out of state.
  – It can be given away to adults an ounce at a time, but not in pot-for-donation swaps.
Regulation of Marijuana Use Under Amendment 64

• Actions for State Legislature
  – Licensing standards and excise taxes.
  – Two proposed referendums (for TABOR purposes)-
    • 15% excise tax at the wholesale level.
    • Special marijuana use tax that customers would pay.

• Actions for Local governments
  – Impose sales taxes or prohibit retail sales in their localities.
Can I Regulate My Employees’ Use of Marijuana?

• YES! Amendment 64, states:
  – “nothing in this Section is intended to require an employer to permit or to accommodate the use...of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.”
Can I Regulate My Employees’ Use of Marijuana?

• Benoir v. Industrial Claims Appeals Office
  – Employee can be denied unemployment for testing positive for marijuana in violation of employer’s zero tolerance drug policy.
  – Medical Marijuana Amendment only provides an affirmative defense to criminal prosecution.
Can I Regulate My Employees’ Use of Marijuana?

• The Benoir decision provided some guidance for employers, but left several questions unanswered:
  – What constitutes accommodation of marijuana use in the workplace?
  – Does “use” include any positive result on a marijuana drug screen test?
  – Is use limited to employees impaired on the job?
Can I Regulate My Employees’ Use of Marijuana?

- Colorado’s Lawful Off-Duty Activities Statute, C.R.S. §24-34-402.5, makes it a discriminatory or unfair employment practice to terminate an employee who is engaged in lawful off-duty, off-premises activities.
  - In the pending case of Coats v. Dish Network, the Colorado Court of Appeals may address this issue in the medical marijuana context.
Can I Regulate My Employees’ Use of Marijuana?

• Employers may **restrict** the use of marijuana by employees; but can employers **prohibit**, the lawful off-duty and off-premises use.
  - Does having a trace amount of THC in your body constitute use or possession at work?
  - When is an employee “impaired” or “under the influence” by THC?
  - Combating employees’ perceptions concerning their “constitutional right” to use marijuana v. reality.
Policy Options

No Testing

v.

Reasonable Suspicion/Post Accident Testing

v.

Random Testing

• Beware local drug testing ordinances
• Is there a threshold for impairment?
Can I Still Have a Zero-Tolerance Drug Policy?

• Yes, but--“Damn lawyers! There is always a but!”
  – Marijuana is still illegal under federal law. You could have a zero-tolerance policy for positive test results and the courts would probably uphold your right to terminate an employee for a positive test.
  – However, the expense to defend a wrongful termination suit through the appeal process could easily cost $300,000 in legal fees and costs.
How Should I Address Amendment 64 In My Employee Handbook?

• Review your substance abuse policy to ensure its restrictions concerning marijuana use are consistent with the restrictions contained in Amendment 64.

• Review your job descriptions—can you make a case for all employees having safety sensitive positions? If not, why?
How Should I Address Amendment 64 In My Employee Handbook?

- Treat similarly-situated employees the same.
- The ADA does not require employers to accommodate the use of marijuana to mitigate the effects of a disability, but the CADA, might (has not been decided in court yet).
- Educate your guests and employees about your marijuana possession and use policies.