Opinion: Nevada businesses struggle with drug testing, medical marijuana

By Ellen Jean Winograd, Northern Nevada Business Weekly

As of Oct. 1, 2012, 18 states have enacted some form of legislation decriminalizing or legalizing the use of medical marijuana under certain circumstances. (Along with Nevada, those states are Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Delaware, Hawaii, Maine, Michigan, Montana, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington.)

Nevada is among the states that has decriminalized some aspects of medical marijuana use, and the Nevada medical marijuana provisions are set forth in NRS Chapter 453A. Employers in Nevada are trying to balance the need for a drug-free workplace, against with the rights of employees who have legal prescriptions for marijuana. Does medical marijuana use have an impact on the workplace drug testing policies? Are terminations based upon medical marijuana use defensible?

Unfortunately, there are no definitive answers; the Nevada Supreme Court has not yet addressed drug-free workplace policies in the context of medical marijuana use. Until there is more legislative and judicial guidance, Nevada employers must look to other jurisdictions' court decisions to weigh and balance the challenges of addressing medical marijuana in workplace drug testing policies.

The starting point for any analysis is the Federal Controlled Substances Act – "CSA" –which prohibits the use of marijuana, medical or otherwise. Some employers have chosen to begin and end discussion of medical marijuana use by citing the CSA and determining that medical marijuana use in the workplace is an

illegal act subjecting the employee to termination.

Nevada's medical marijuana laws, originally enacted in 2001, decriminalize medical marijuana use for persons holding valid Nevad-issued registry identification cards. Use of medical marijuana in Nevada pursuant to a duly issued registry identification card removes certain medical marijuana use from the realm of criminal prosecution and it provides an affirmative defense to a criminal charge in which possession from a delivery or production of marijuana is an element. The issuance of a valid Nevada state registry identification card requires that a treating physician has provided written documentation to the Health Division of the Department of Health and Human Services that the patient has a "chronic or debilitating" condition; a registry identification card is thereafter issued. The law says, "Conditions that qualify as chronic or debilitating include AIDS, cancer, glaucoma, cachexia, seizures, persistent muscle spasms, severe nausea, severe pain …" Nevada law specifically provides that the decriminalization of certain medical marijuana use does not "require any employer to accommodate the medical use of marijuana in the workplace."

The obvious question here is whether an employee's medical marijuana use outside of the workplace must be accommodated. This is an apparent ambiguity in the wording of NRS 453A.800(2). Just last month, the Sixth Circuit Court of Appeals analyzed the Michigan "Medical Marihuana Act" (MMMA) and held that MMMA does not impose restrictions on a private employer's ability to discipline employees for medical marijuana use. Michigan's Statutory scheme, similar to Nevada's NRS Chapter 453A, was found only to provide a potential defense to criminal prosecution or other adverse action by the state. Michigan's Act, MMMA, does not provide a private cause of action or support a wrongful discharge claim by an employee who tested positive for marijuana.

The Washington (state) Supreme Court also held that the

“Medical Use of Marijuana Act” (MUMA) does not prohibit an employer from discharging an employee for medical marijuana use, nor does it provide a civil remedy against the employer. Courts in Montana and California have also interpreted similar state medical marijuana laws and held that they do not regulate private employment actions.

Legislation and case law are constantly changing, effecting the balancing process. Medical marijuana has received a great deal of publicity and significant legislative activity in the last several years. The use of medical marijuana therefore has employment ramifications in other areas as well, including workers’ compensation, unemployment compensation and third-party liability. One Colorado appellate court affirmed denial of unemployment benefits, concluding that although the medical certification may insulate a claimant from state criminal prosecution, it does not preclude him from being denied unemployment benefits based upon termination for testing positive in violation of the employer’s express zero-tolerance drug policy. Ultimately, laws regulating medical marijuana are evolving and employers’ responses thereto will require frequent review of workplace drug and alcohol policies to maintain compliance with legislation and judicial decisions. Employers have legitimate interests in the health and safety of all employees and the public. Medical marijuana laws may change, but public policy safeguarding employees and the public from impairment-related dangers, remains constant. Until there is more guidance from courts on medical marijuana in the employment context, it is incumbent on employers to establish drug testing policies that reflect employers’ workplace values and promote safety, productivity and privacy.

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