

Insight

IN-DEPTH DISCUSSION

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West Virginia Employers Soon to Enjoy Greater Flexibility in Drug Testing Employees, Despite Enactment of Nation's 29th Medical Marijuana Law

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The West Virginia Legislature recently passed two bills – the West Virginia Medical Cannabis Act and the West Virginia Safer Workplace Act – that dramatically change the landscape of West Virginia's laws on medical marijuana use and employee drug testing. The Medical Cannabis Act legalizes the use, possession, and distribution of marijuana to treat serious medical conditions, while also providing employees with protection from discrimination based on the employee's certification for use of medical marijuana. In contrast, the Safer Workplace Act, which was recently signed into law by Governor Jim Justice, drastically (and positively) changes current West Virginia law governing the ability of West Virginia employers to conduct drug and alcohol testing of their employees. Because the Safer Workplace Act requires employers that require employee drug tests to adopt and publish a written drug-testing policy even if they do not wish to amend or update their current practice, all West Virginia employers with testing programs should move swiftly to update their policies and practices.

Medical Cannabis Act

On April 19, 2017, Governor Justice signed the West Virginia Medical Cannabis Act, which will go into effect on July 5, 2017, but not be fully implemented until at least July 1, 2019. The enactment of this legislation makes West Virginia the 29th state to pass a medical marijuana law. Once fully implemented, the Medical Cannabis Act will decriminalize the use and possession of medical marijuana for patients suffering from 15 "serious medical conditions" specified in the Act, including: cancer, HIV or AIDS, amyotrophic lateral sclerosis (Lou Gehrig's disease), Parkinson's disease, multiple sclerosis, spinal nerve damage, epilepsy, neuropathies,

Huntington's disease, Crohn's disease, post-traumatic stress disorder, intractable seizures, sickle cell anemia, severe chronic or intractable pain, and terminal illness. The Act does not authorize patients to grow or smoke marijuana in plant form. Only a licensed dispensary can issue cannabis products in the form of pills, oils, topicals, patches, or vaporized oils.

Importantly, the Act provides certain employment protections for employees who become certified to use medical marijuana. Specifically, the Act states that employers may not "discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee" solely based on that employee's status as a medical marijuana user. Although the law is clear in its intent to protect individuals from adverse employment action simply because they have registered as marijuana patients, it is unclear whether or to what extent the provision would protect individuals who test positive for marijuana on workplace drug tests.

While employees are provided with some protections based on their status as a medical marijuana user, employers are not required to make accommodations for the use of medical marijuana on employer property. Nor does the Act limit an employer's ability to discipline an employee for being under the influence of marijuana (medical or otherwise) in the workplace or while working "when the employee's conduct falls below the standard of care normally accepted for that position." In that regard, employers can prohibit employees from performing any duty or task deemed life-threatening or that could result in a public health or safety risk while under the influence of medical cannabis. Moreover, the law restricts registered patients from operating a motor vehicle with marijuana in their system. When assessing an accommodation issue under the new Act, we encourage employers to continue to be mindful of their legal obligation to engage in the interactive process with employees who are medical marijuana users and, where possible, reasonably accommodate employees with respect to their underlying medical conditions.

Safer Workplace Act

Two days after passing the Medical Cannabis Act, on April 8, 2017, the West Virginia Legislature passed the West Virginia Safer Workplace Act. That law was signed by Governor Justice on April 26, 2017, and becomes effective on July 7, 2017. With the stated purposed of advancing "the confidence of West Virginia workers that they are in a safe workplace," the Act affords employers significantly greater leeway than is presently available to test both current employees and prospective employees for the presence of drugs or alcohol as a condition of continued employment or hire. This is a vast departure from the current state of West Virginia law, which narrowly circumscribes the situations in which employees may be forced to submit to drug and alcohol testing.

Prior to the enactment of the Safer Workplace Act, employee drug testing in West Virginia was governed by judge-created common-law decisions. Pursuant to that line of cases, drug testing of current employees was, as a general rule, deemed to be an impermissible invasion of the public policy protecting employees' right to privacy. With regard to current employees, the West Virginia Supreme Court of Appeals had previously outlined just two exceptions to an employee's right of privacy that would permit drug and alcohol testing of current employees: (1) testing based on a reasonable, good faith, and objective belief that an employee was using drugs; and (2) testing limited to employees whose job duties involve public safety or the safety of others. In addition, testing of employment applicants (whose expectation of privacy was reduced as compared to that of a current employee) was permissible.

The Safer Workplace Act explicitly overrules the current case law governing drug and alcohol testing and permits employers to require mandatory drug and alcohol testing, not only of applicants, but of current employees in a wide variety of circumstances as a condition of continued employment. For example, drug and/or alcohol testing can become a standard portion of a post-accident investigation, when such post-accident testing (without more) was formerly prohibited. Likewise, a random (or even non-random) testing program of employees may be implemented without regard to the "safety-sensitive" nature of job duties

of the affected employee(s). So long as the drug or alcohol screening is being conducted for one of the enumerated employment-related reasons contained in the statute, the employer will be afforded broad latitude in the usage of drug and alcohol screening in the workplace.

If an employer receives a drug test result indicating a violation of the employer's written policy, or if an employee refuses to take the test, the employer may discipline the employee, up to and including termination. In addition, as long as an employer adheres to the accuracy and fairness safeguards outlined in the Act, the employer qualifies for immunity from certain legal claims stemming from its good-faith actions based on the results of a drug or alcohol test.

Going forward, employers wishing to drug test their employees must do so in accordance with the terms of a written policy that has been distributed to all employees subject to testing. The existence of a compliant policy is a critical predicate to being able to conduct drug and alcohol screening pursuant to the Safer Workplace Act. For that reason, all West Virginia employers are urged to update their employment policies promptly, to ensure that drug-free workplace and testing policies meet the specific requirements of the Safer Workplace Act.

With the simultaneous enactment of the Medical Cannabis Act and the Safer Workplace Act, West Virginia employers will see an influx of employees with medical marijuana certifications, while at the same time will enjoy broader drug-testing capabilities. The interplay and overlapping obligations of these two Acts will undoubtedly lead to complex situations involving employee marijuana use, in which careful review of both statutes will be necessary.