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Arizona Governor Jan Brewer has signed into law House Bill 2541, legislation that permits employers who comply with the law's provisions to conclude that a positive drug test is evidence of workplace impairment. Evidence of impairment, in turn, allows an employer to take adverse employment action against medical marijuana users who might otherwise be owed a workplace accommodation pursuant to the recently enacted Arizona Medical Marijuana Act.

Arizona Legislature Helps Clear the Haze for Employers Dealing with the Arizona Medical Marijuana Law

By Neil Alexander and Kristy Peters

In 1994, the Arizona Legislature enacted a comprehensive drug and alcohol testing act called "The Drug Testing of Employees Act," which offered private employers who opted to conduct drug tests of applicants and employees a shield from liability in exchange for voluntarily adopting "best practices" designed to ensure the testing process was fair and accurate. Although the provisions of the statute are optional (opt-in), a significant benefit of compliance are the safe harbors from employee lawsuits challenging an adverse employment action based on good-faith reliance on a positive test result conducted in accordance with the statute's provisions.

Last November's elections led to the passage of the Arizona Medical Marijuana Act (AMMA), which authorizes the use and cultivation marijuana for medical reasons as a matter of state law – although such use and cultivation continues to be illegal under federal law. AMMA, which went into effect in mid-April 2011, requires Arizona employers to make reasonable accommodations for applicants and employees who use medical marijuana and creates generalized non-discrimination obligations. Employers are not permitted, for example, to base adverse hiring or disciplinary decisions on an individual's use of medical marijuana pursuant to AMMA unless the employer can show that the individual was impaired at work or unless such use violated an employer's affirmative obligations as a matter of federal law, leaving Arizona employers scrambling to understand how to implement the law within the context of their larger drug-free workplace programs.

Unfortunately, the implementing regulations to AMMA focused on making marijuana accessible to authorized users and did not attempt to clarify the new employment-related obligations placed on Arizona employers. H.B. 2541 was introduced and moved fairly quickly through the legislature in an effort to remedy this lack of guidance.

The new law allows employers to refuse to place medical marijuana users in safety-sensitive jobs, and allows them to discipline individuals when there is a good faith belief that the employee was impaired by or improperly possessed marijuana while at work or during work hours. Nonetheless, the new law does not strip away the continuing general duty to reasonably accommodate and not discriminate against medical marijuana users. Moreover, to take advantage of these provisions, the employer must come into

compliance with The Drug Testing of Employees Act, to the extent it relies upon such tests as evidence of impairment.

On April 29, 2011, Governor Brewer signed House Bill 2541, expanding an employer's right to take adverse action against marijuana users under The Drug Testing of Employees Act. The new legislation has been widely welcomed by Arizona employers tasked with ensuring compliance with AMMA. The Bill will go into effect on July 20, 2011, but is retroactively effective to April 12, 2011.

The new legislation contains the following key provisions that modify The Drug Testing of Employees Act:

1. What is Prohibited: Allows an employer to take disciplinary action against an employee based on its good faith belief of the following:

- an employee used or possessed any drug while on the employer's premises or during hours of employment; or
- an employee was impaired while working while on the employer's premises or during hours of employment.

2. Safety-Sensitive Job Accommodation Restrictions: Allows an employer to exclude an employee from a safety-sensitive position based on the good faith belief that the employee is engaged in the current use of any drug, whether legal, prescribed by a physician or otherwise, if the drug could cause impairment or decrease the employee's job performance or duties.

- Specifies that an employer's options for safety-sensitive jobs includes reassigning the employee to another position or placing the employee on paid or unpaid leave.
- Allows the "good faith belief" to be based on: drug or alcohol test results; warning labels or other instructions for the use of the drug; statements by the employee; medical certification from a physician or pharmacist; information from reputable reference sources or other information the employer believes to be reliable.

3. The Safe Harbors: When disciplining an employee due to the good faith suspicion of impairment or possession, the following employer actions are immune from litigation:

- implementing, monitoring or measures to assess, supervise or control the job performance of the employee;
- reassignment of an employee to a different position or job duties; or
- suspension or termination of employment.

4. Good Faith Suspicion: Outlines criteria that can serve as the basis of *good faith*, which includes the following:

- observed conduct, behavior or appearance;
- information reported by a person believed to be reliable, including a report by a person who witnessed the use or possession of drugs or drug paraphernalia at work;
- written, electronic, or verbal statements;
- lawful video surveillance;
- records of government agencies, law enforcement agencies or courts;
- results of a test for the use of alcohol or drugs; or
- other information reasonably believed to be reliable or accurate.

5. Key Definitions: Defines the phrases and terms "*current use of any drug*," "*impairment*," and "*safety-sensitive position*":

- **Current use of any drug** means drug use that has occurred recently enough to justify an employer's reasonable belief that involvement with drugs is ongoing. Current use of any drug is not limited to any specific time frame and depends on the facts of each individual case.
- **Impairment** means symptoms that a prospective employee or employee while working may be under the influence of drugs or alcohol, including diminished capacity for: speech, walking, standing, physical dexterity, agility, coordination, actions,

movement; as well as an employee's demeanor, appearance, clothing, body odor, irrational or unusual behavior, negligence or carelessness in operating equipment, machinery or production or manufacturing processes, disregard for the safety of the employee or others, involvement in an accident that results in serious damage to equipment, machinery or property, disruption of a production or manufacturing process, any injury to the employee or others or other symptoms causing a reasonable suspicion of the use of drugs or alcohol.

- **Safety-sensitive position** means any job reasonably designated by an employer as a safety-sensitive position or any job that includes tasks or duties that the employer in good faith believes could affect the safety or health of the employee performing the task or others, including any of the following:
 - Operating a motor vehicle, other vehicle, equipment, machinery or power tools.
 - Repairing, maintaining or monitoring the performance or operation of any equipment, machinery or manufacturing process, the malfunction or disruption of which could result in injury or property damage.
 - Performing duties in the residential or commercial premises of a customer or vendor.
 - Preparing or handling food or medicine.
 - Working in any occupation regulated under Arizona Revised Statutes Title 32 (generally medical, engineering, pharmacy, security).

Marijuana-e-verify. Additionally, H.B. 2541 modifies A.R.S. section 36-2807, which addresses verification systems under AMMA. The Arizona Department of Health Services is going to establish a verification system for certain persons, including employers, to verify registry identification cards. Based on H.B. 2541, an employer may use the verification system only to verify a registry identification card that is provided to the employer by a current employee or by an applicant who has received a conditional offer of employment.

What This Means for Employers

This legislation helps clear up some of the ambiguity created by the passage of AMMA, since that legislation requires Arizona employers to make reasonable accommodations for the use of medical marijuana and creates generalized non-discrimination obligations. The final regulations to AMMA did not attempt to clarify the new employment-related obligations placed on Arizona employers. H.B. 2541 is fairly deferential to employers in determining the safety-sensitive nature of a particular job, and in finding a good faith belief of impairment or improper possession at work or during work hours. Nonetheless, the new law does not strip away the continuing general duty to reasonably accommodate and not discriminate against medical marijuana users. Employers should take maximum advantage of the safe harbor provisions of the Arizona drug testing laws by adopting written drug testing policies that clearly articulate when, how, and why employees are subject to drug testing as well as its approach to the use of medical marijuana.

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