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The Arizona Medical Marijuana Act is currently being challenged in federal court; however, the key obligations for employers remain in effect. The bill modifying the Drug Testing of Employees Act becomes effective this week and employers should modify their drug testing policies to take advantage of the safe harbor provisions.

Arizona Medical Marijuana Law Update: State Files Lawsuit to Clarify Obligations Under the Act, and the Drug Testing Modifications Go Into Effect

By Neil Alexander, Jeffrey Judd and Kristy Peters

On November 2, 2010, Arizona voters approved the Arizona Medical Marijuana Act (AMMA). The AMMA, which went into effect in mid-April 2011, permits a qualifying patient with a debilitating medical condition to apply to the Arizona Department for Health Services (ADHS) for an identification card that allows the patient to obtain, or in certain cases cultivate, a limited amount of marijuana. The AMMA also requires Arizona employers to make reasonable accommodations for applicants and employees who use medical marijuana and creates certain nondiscrimination obligations.

The ADHS began processing medical marijuana identification cards in April 2011, and planned to begin accepting dispensary applications in June 2011. However, in May 2011, U.S. Attorney Dennis Burke issued a letter to the ADHS warning that marijuana sellers and growers may be prosecuted under federal drug laws. Due to the uncertainty of federal prosecution, on May 27, 2011, the State of Arizona filed a Complaint for Declaratory Judgment against the United States and the U.S. Justice Department seeking clarification of the legality of the AMMA. While the lawsuit is pending, the ADHS will continue to issue medical marijuana identification cards; however, it has not accepted dispensary applications.

In response to the AMMA, the Arizona legislature passed House Bill (“HB”) 2541, which modified the Drug Testing of Employees Act. The Drug Testing of Employees Act offers private employers who choose 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 is fair and accurate. The modifications contained in HB 2541 are deferential to employers. Specifically, 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. The modifications contained in HB 2541 go into effect on July 20, 2011, but are retroactively effective to April 12, 2011.

What This Means for Employers

Although the future viability of the AMMA is uncertain, the Act is duly passed legislation

in Arizona. The ADHS is issuing medical marijuana cards to qualifying patients, and Arizona employers should continue to comply with their obligations under the AMMA. This means that, unless a failure to do so would cause an employer to lose a monetary or licensing-related benefit under federal law or regulations or the employer can show that the employee was impaired while at work, an employer may not base any employment decision on the applicant's or employee's status as a cardholder or a registered qualifying patient or use of marijuana in compliance with the AMMA. Further, Arizona 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 setting out the employer's rules about possessing, using or being affected by medical marijuana at work.

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