



# DELAWARE

## EMPLOYMENT LAW LETTER

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### **DRUG USE**

## **Marijuana brings changes to Delaware workplaces**

by William W. Bowser

*Marijuana is making news across the country. A recent Gallup poll revealed that 58 percent of Americans think the drug should be legalized, and a new study from the Journal of the American Medical Association indicates that marijuana usage doubled from 2002 to 2013. Fifty percent of Americans admit to at least trying it. While Ohio voters shot down a proposal to make marijuana legal in that state in November, four other states have already legalized it.*

*Effective January 1, 2016, possession of small amounts of marijuana will no longer be a crime punishable by jail time in Delaware. Instead, individuals in possession of less than one ounce of marijuana will be subject to a civil fine of \$100, similar to getting a parking ticket. Also, Delaware has legalized medical marijuana, and the first marijuana "compassion center" is up and running. A recent article by 24/7 Wall Street said Delaware ranks 11th in states most likely to legalize*

*recreational marijuana.*

### ***Lots of issues for Delaware employers***

Delaware employers face a conflicting patchwork of state and federal laws. Under federal law, marijuana is illegal. Very illegal. Like heroin, it is classified as a "Schedule I" drug under the Controlled Substances Act because it has "no currently accepted medical use" and has a "high potential for abuse." The Drug-Free Workplace Act of 1988 requires federal contractors to have a zero-tolerance policy toward marijuana. The Americans with Disabilities Act (ADA) exempts marijuana use as a reasonable accommodation because users are "currently engaging in the illegal use of drugs." Finally, the U.S. Department of Transportation (DOT) has extensive regulations requiring testing for marijuana for commercial drivers and other jobs.

Although Delaware has not yet legalized recreational marijuana, it has strongly embraced the medical marijuana movement. Most states permit employers to maintain and enforce zero-tolerance policies against medical marijuana use, but Delaware does not. Delaware is one of only two states that do not permit zero-tolerance policies on medical marijuana use. Under Delaware law, an employer cannot discipline a medical marijuana user simply because he had a positive drug test. Rather, the employer must show that the employee possessed or used the drug at work or was impaired on the job. Unfortunately, the law and supporting regulations do not define "impaired."

Employers should not rely on a urine test to show impairment from marijuana use. The active ingredient in marijuana is delta-9-tetrahydrocannabinol, better known as THC. THC is rapidly metabolized by the body soon after marijuana is smoked, and most THC is changed to THC-COOH, or carboxy-THC. THC-COOH stays in the user's system for many hours and is measured by urine tests. Unfortunately, THC-COOH does not impair the user. Thus, a positive urine screen cannot be used to discipline a medical marijuana user or prove that he was impaired by the drug.

While blood screens can test for THC and

intoxicating THC metabolites, Delaware employers' drug policies probably don't address blood tests. Moreover, amending a drug policy to allow for blood samples may be strongly resisted by employees, who may view blood screens as far more intrusive than urine tests. Also, blood tests will likely be more expensive.

Even if an employer adopts a blood-testing protocol, there is currently no agreement on what level of THC or intoxicating metabolites can be used to prove impairment. State laws on driving under the influence might provide some guidance, but they are all over the place.

In the absence of a clear objective standard, employers should always make sure that an employee's condition and behavior are observed and documented before she is tested for marijuana usage. Develop a written list of symptoms, and have trained supervisors — or, if possible, HR professionals — use the list. In addition, the events leading to a drug test (e.g., an accident or behavior suggesting impairment) should be carefully documented.

Demonstrating impairment is essential in union workplaces. Studies show that arbitrators are unwilling to uphold a termination based on marijuana use in the absence of evidence that the employee was impaired at work.

### ***Bottom line***

Marijuana use will continue to present challenges to Delaware employers. Although Delaware has not yet legalized recreational marijuana, it seems clear that it will someday. In the meantime, Delaware's unique medical marijuana statute requires employers to review and, if necessary, revise their policies and procedures. Failing to do so now could lead to problems in the future.

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