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LEGISLATION

Bill would legalize recreational marijuana, give Delaware employers hazy view

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Marijuana continues to make news in Delaware. A recent University of Delaware poll indicated that about 60 percent of Delawareans think marijuana should be legalized. House Bill (HB) 110, which is currently pending in the Delaware General Assembly, would do just that. The bill's purpose is to regulate and tax marijuana "in the same manner as alcohol," and it has passionate supporters and opponents.

'Wait and see'

Supporters contend that revenue from taxing marijuana would generate millions of dollars for the state's coffers. They also claim that legalizing marijuana would reduce the burdens on stressed police forces and allow them to focus on violent crime. Opponents contend that Delaware should wait until it has more data from states that have already legalized marijuana.

While Governor John Carney has stated that he wants to take a "wait and see" approach to marijuana, he has signaled a willingness to listen.

He has assembled panels of supporters and opponents of legalization in an effort to understand the pros and cons of such a move.

Delaware has not yet legalized marijuana for recreational purposes, but it has decriminalized the possession of small amounts of the drug. Individuals in possession of less than one ounce of marijuana are subject to a civil fine of \$100, similar to getting a parking ticket. Delaware has legalized medical marijuana, with two marijuana "compassion centers" operating in the state.

Federal government's stance

While Delaware inches toward legalization, the federal government seems to be moving in the opposite direction. U.S. Attorney General Jeff Sessions is a staunch opponent of marijuana, stating, "Good people don't smoke marijuana." His view is very much in line with existing federal law.

Under the Controlled Substances Act, marijuana is classified as a "Schedule I" drug 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 employees.

What does 'under the influence' mean?

In its current form, HB 110 would present challenges for Delaware employers. While the bill purports to allow employers to discipline employees who are "under the influence of marijuana," it provides no guidance on what "under the influence" means or how it can be proved.

Employers cannot rely on popular urine tests to prove that employees are under the influence of marijuana. 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 can be measured by urine tests, but it does not impair the user. Thus, a positive urine screen cannot prove that an employee was "under the influence" of the drug.

While blood screens can test for THC and intoxicating THC metabolites, many Delaware employers' drug policies don't address blood tests. Moreover, amending a drug policy to allow for blood samples likely would be strongly resisted by employees, who may view blood screens as far more intrusive than urine tests. Also, blood tests likely will be more expensive. Even if an employer adopts a blood-testing protocol, there is absolutely no agreement on what level of THC or THC metabolites is needed to prove impairment.

Bottom line

In the absence of a clear, objective standard, employers should always make sure to observe and document an employee's condition and behavior before testing her for marijuana use. Develop a written list of symptoms, and have trained supervisors — or HR professionals, if possible — use the list. In addition, carefully document the events leading to a drug test (e.g., an accident or behavior suggesting impairment). You likely will need that documentation to show that the employee was "under the influence" of marijuana in the workplace and therefore subject to discipline.

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