



DELAWARE

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MARIJUANA USE

Delaware employers rush to get high (priority)

by William Bowser

We've been discussing concerns about the Delaware Medical Marijuana Act since it was signed into law in 2011. The Delaware General Assembly has subsequently decriminalized small amounts of marijuana and considered legalizing the drug for recreational use. In light of the rapidly changing landscape, the General Assembly has established a marijuana task force to address the various issues raised by marijuana in the First State. Read on to learn about the task force and how you can make use of this new venue to voice your concerns.

Taking marijuana use to task

In the closing hours of its 2017 legislative session, the Delaware General Assembly created the Adult-Use Cannabis Task Force to study the legalization of marijuana. The task force was formed when it became clear that there weren't enough votes to pass House Bill (HB) 110, which would have legalized the recreational use of marijuana in Delaware.

The 23-member task force will "study adoption of a model for regulation and taxation of adult-use cannabis in Delaware, including local authority and

control, consumer safety and substance abuse prevention, packaging and labeling requirements, impaired driving and other criminal law concerns, and taxation, revenue, and banking issues." The group's first meeting is to occur no later than September 7, 2017, and it must report its findings to the governor and the General Assembly by January 31, 2018.

Impact on employers

The task force is an excellent opportunity for Delaware employers to raise concerns about how legalized marijuana will affect the workplace. One issue that should be addressed is the effect of legalization on employer drug-testing programs. Many Delaware employers have such programs in the interest of safety and productivity or because they are mandated by federal law.

Delaware's medical marijuana law prohibits an employer from disciplining a marijuana cardholder unless it can prove that he is "impaired" in the workplace. Similarly, HB 110 would have prohibited an employer from disciplining a marijuana user unless he is "under the influence." To date, no guidance on how to determine whether someone is "impaired" or "under the influence" has been provided.

It seems clear that current testing protocols are insufficient. Virtually all drug-testing programs use a urine sample. To determine the presence of marijuana, a sample is tested for THC-COOH, a derivative or metabolite of THC, the intoxicating substance in marijuana. Unlike THC, however, THC-COOH is not intoxicating. As a result, a positive urine screen cannot be used to show impairment.

While a blood screen can test for THC, there currently is no agreement on the level of THC that leads to intoxication. Without some objective standard, a blood test alone will not provide employers with the needed clarity.

Without an effective drug test, you are left with your observations of an employee's condition and behavior. Unlike trained law enforcement personnel,

HR professionals will likely be reluctant to require suspected marijuana users to perform a battery of tasks to show impairment. Perhaps that's what you must do to avoid liability, however. That's not right.

Bottom line

You should make sure your voice is heard by the task force to protect your right to a drug-free workplace. At a minimum, an objective standard for impairment should be developed so employers can avoid uncertainty and legal liability. Stand up and let your voices be heard!

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