OSHA, Medical Marijuana & Drug Testing: New Rules for Safety

Adele L. Abrams, Esq., CMSP
Law Office of Adele L. Abrams P.C.
www.safety-law.com

Overview

- "Reasonable accommodation" of workers under ADA (use of medical marijuana) and workplace safety conflict – evolving area of case law
- Employers have legal obligation to protect workers from direct threats to safety under OSH Act – new penalties can reach $132,598 per affected worker (willful) or $13,260 (serious or OTS)
- BUT …
- If disability arises from workplace injury/illness, OSH Act Sec. 11C policies, new e-Recordkeeping provisions on drug testing/incentive programs/discipline may trigger citations
  - State worker's comp "anti-retaliation" provisions may be implicated

Overview

- 33 states (and DC) have legalized MMJ; 10 states (and DC) have legalized recreational MJ
- A recent Gallup poll (10/16) showed support for legalized at over 64 percent in the US
- Smaller employers (especially small employers and construction/mining companies) lag behind in terms of substance abuse prevention programs
  - WHY?
    - Perceived lack of resources and administrative staff,
    - High employee turnover.
  - Some employers do not know where to start in putting a program together.

Forecast: More Legalization

2019

- Recreational MJ consideration in CT, IL, MN, NH, NJ. NM, NY, RI
- Medical MJ: KS, WI … maybe TX?

2020

- Recreational MJ on ballot (probably) in: AZ, FL, OH, ND
- Medical MJ on ballot (probably) in: MS, NE, SD

Developing Substance Abuse Prevention Programs

There are five basic components of substance abuse prevention programs:

1. A written policy
2. Supervisor training
3. Employee education
4. Employee assistance
5. Drug and alcohol testing

Drug Free Workplace Policy

- Should include:
  - Rationale
  - Prohibited behaviors - – is focus “impairment” or “positive test”?
  - Substances covered
  - Employees affected
  - Consequences of policy violation
  - Enforcement means
  - Availability of assistance
  - Very important that programs at union operations be developed in conjunction with union agreement to avoid CBA violations or claims of Sec. 8(a)(1) violations (changes in terms and conditions of employments unilaterally by employer)

Drug/Alcohol Testing

- While drug testing may not be cheap, it is essential that this be a component of the program.
- Many companies test post-accident, as this provides a legitimate basis for disciplinary action, and may offer a possible defense to worker's compensation claims).
- New OSHA rule targets post-accident drug tests as "discipline" that can impact reporting of injuries or violate Sec. 11(c) of OSH Act and/or 29 CFR 1904
- Certain individuals (e.g., CDL drivers) may be subject to random testing.
- Some companies test individuals who behave in a manner that suggests the worker is impaired and poses a danger to himself and others ("reasonable suspicion")
  - ✓ Caution: Collective Bargaining Agreements may have specific provisions on drug/alcohol testing.

Drug Testing & Discipline

- New OSHA electronic recordkeeping rule took effect 12/1/16 and includes a ban on discrimination against injured employees that is not imposed on uninjured workers
  - This allows penalties of up to $132,598 to be imposed for Sec. 11(c) violations (whistleblower rights) – expands SOL to 180 days
- 29 CFR 1904.35 and 1904.36 require employers to inform employees of right to report work-related I/I free from retaliation
- OSHA **final rule preamble** said that blanket post-incident drug testing policies can deter employees from reporting
- Agency **modified** position in new policy (10/11/18)

OSHA 2018 Policy on Drug Tests

- OSHA issued "clarifying" policy on 10/11/2018: https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11
- Policy says permissible drug testing includes:
  - Random drug testing.
  - Drug testing unrelated to the reporting of a work-related injury or illness.
  - Drug testing under a state workers' compensation law.
  - Drug testing under other federal law, such as DOT regs for CDL
  - Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees
  - ***If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.***

State Laws on Drug Testing

- Most states set mandatory procedural requirements for employers who subject employees or applicants to drug testing, which require employees to:
    - provide employees with a written statement of their drug testing policy;
    - require confirmatory tests in the case of an initial positive test result;
    - allow employees or applicants who have tested positive to have the sample retested at their own expense;
    - offer employees who test positive the opportunity to enroll in a drug rehabilitation program; and
    - allow termination of employees testing positive only when they refuse to participate in such a program, fail to complete such a program, or violate the terms of the rehabilitation program.
- States like Connecticut and West Virginia require employers to have reasonable grounds to suspect that employees are using drugs before subjecting employee (other than employees in safety-sensitive positions or subject to federal drug testing requirements) to drug test.

Drug Testing Liability

- EEOC entered consent decree with manufacturer, requiring it to pay $750,000 to employees based on drug testing that violated the ADA. *EEOC v. Dura Automotive Systems Inc.* (MD-TN 2012)
- Employer had tested for "legally prescribed drugs" and required workers to disclose medical conditions for which medications were used as treatment.
- Employer made it a condition of employment for workers to cease taking medications, without evidence that the meds affected job performance, and suspended employees until they were "off the meds"
  - In addition to monetary settlement, employer also was enjoined from making medical inquiries and conducting drug tests that were not job-related and justified by business necessity

OSHA/MSHA Enforcement: Drugs As Safety Hazard

- OSHA can enforce under General Duty Clause (Sec. 5(a)(1) of OSH Act) for permitting employees to be impaired at the worksite – "recognized hazard"
  - Typically used in accident cases where tox screens are positive.
- 30 CFR 56/57.20001: "Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job."
  - No analogous rule for coal.
  - MSHA commenced a rulemaking in Geo. W Bush administration to set coal standard and mandate drug tests (similar to CDL) at all mines but rule subsequently was taken off regulatory agenda.

Americans With Disabilities Act

- Applies to companies with 15+ employees: enforced by EEOC or by state human rights agencies
- Drug addiction and alcoholism are covered disabilities "affecting major life activities" BUT little case law to establish true "bright line" tests on what employers can and cannot do
- MMJ may complicate what is considered "active addiction/use."
  - *James v. City of Costa Mesa* (US Ct. of App. 9th Cir.) – Because MMJ is illegal under federal law, ADA does not protect against discrimination based on MMJ use even though use allowed under state law
  - *Lisotto v. New Prime Inc.* (2016): ADA claim against employer goes forward under ADA for rejecting DOT driver applicant with sleep disorder who had prescribed amphetamine
  - *Lewis v. American General Media* (2015) – New Mexico court held employers must compensate workers who are medical marijuana patients for the cost of the medical marijuana (worker's comp case).

    Two similar cases in NJ (2017 and 2018); pending case in Maryland

ADA & Substance Use/Abuse

- Employers may prohibit the illegal use of drugs and the use of alcohol in the workplace.
- The ADA is not violated by tests for illegal use of drugs (but remember to meet state requirements, which may differ from federal standards).
- The "direct threat to safety" defense can only be raised if there is a tangible (not speculative) threat – again MMJ positive tests (absent impairment) become an issue …
- Employers may discharge or deny employment to persons who currently engage in the illegal use of drugs.
- Employers may not discriminate against drug addicts who are not currently using illegal drugs and have been rehabilitated or have a history of drug addiction.

Legal Decisions - MMJ

- *Noffsinger v. SSC Niantic Operating Co., LLC, d/b/a Bride Brook Nursing & Rehab. Ctr.*, (D. Conn. 9/5/18).
  - Federal court held: refusing to hire a MMJ user because she tested positive on a pre-employment drug test violates Connecticut's medical marijuana law, and granted SJ to applicant on discrimination claim … but court declined to award attorneys' fees or punitive damages, and dismissed her claim for negligent infliction of emotional distress.
- *Coats v. DISH Network, Colo. Ct. of Appeals (2015).*
  - Reinforced right to terminate "positive" employee who held MMJ card, even in absence of evidence of impairment on the job.
    - Basis was the fact that MMJ is still technically "Illegal" under federal law … if congressional bill passes, this decision could be invalid.
- *Casias v. Wal-Mart Stores, Inc.* (6th Circuit, 2012)
  - Court held *Casias* had no claim of wrongful discharge as Michigan's Medical Marijuana law did not regulate private industry. The law only provides protection from criminal prosecution

Legal Decisions - MMJ

- The case law establishes a clear line that at this point, the private sector and employers are not regulated or controlled by state medical marijuana laws (but check statutory language).
  - There are current attempts in states, such as Maine, to limit the ability of private industry to terminate employees
  - *Noffsinger* court rejected "federal pre-emption" argument and held Federal Controlled Substances Act doesn't regulate employment, so not illegal to employ a marijuana user
  - Decision in Michigan held that being fired for MMJ use was not "misconduct" and did not disqualify former employees from receiving unemployment insurance benefits.
    - Employer did NOT allege that the workers were under influence while at work.

Rhode Island MMJ Case

- *ACLU v. Darlington Fabrics,* held applicant was discriminated against for refusal to hire due to admission of MMJ use for migraines
- Candidate had disclosed use and promised not to come to work under influence but was told she would not be hired because of current use of MMJ.
- She was NOT alleging discrimination under federal ADA, but under RI MMJ Act, which prohibits employment discrimination based on individual's status as MMJ cardholder.
  - Employer lost on Summary Judgment and case is still active
- States with similar protections: AZ, CT, DE, IL, ME, MN, NV and NY
  - Arizona and Delaware laws are similar to RI and seek to prevent discrimination in "*hiring, termination, or any term or condition of employment, or otherwise penaliz[ing] a person…status as a cardholder*" or due to positive drug test for marijuana.

Direct Threat to Safety

- 42 USC 12111(3): Means "significant risk" to health or safety of others that cannot be eliminated by reasonable accommodation
- 42 USC 12113: It may be a defense to a charge of discrimination [under ADA] that an alleged application of qualification standards, tests, or selection criteria that screen out or deny a job or benefit to disabled individual has been shown to be "job-related and consistent with business necessity" and such performance cannot be accomplished by reasonable accommodation.
  - The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.
- 29 CFR 1630.2(r): The determination that an individual poses a direct threat shall be based on an individualized assessment of the individual's present ability to safety perform the essential functions of the job. This assessment is based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

Direct Threat to Safety: Factors

- *Bragdon v. Abbott* (S. Ct. 1998) – A "good faith belief" that a risk is significant is not enough to meet the standard. The determination of "significant risk" must be based on medical or other objective or scientific belief.
- In determining whether an individual would pose a direct threat, the factors to be considered include:
  - The duration of the risk
  - The nature and severity of the potential harm
  - The likelihood that the potential harm will occur
  - The imminence of the potential harm

EEOC Interpretative Guidance

- ADA does not prohibit employer from refusing to hire or from removing employee with disability from job if employer can demonstrate that the individual poses a direct threat.
- Any reasonable accommodations that would eliminate the risk of harm or reduce it to acceptable level must be considered.
- “Reasonable accommodations” are any changes in the workplace or in the way things are done that enable applicants and employees to enjoy equal employment.
- Determination of “direct threat” must be based on objective, factual evidence – “not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes, about a particular disability.
- Relevant evidence includes:
  - information from the disabled individual,
  - his/her experience in previous similar positions, and/or
  - opinions of medical doctors, rehabilitation counselors, or physical therapists with experience in the disability involved or direct knowledge of the disabled individual.

Toxic Chemical Exposure & Preexisting Illness

- *Chevron USA v. Echazabal* (S. Ct. 2002)
- Supreme Court upheld EEOC regulation permitting defense that worker's disability on the job would pose a direct threat to his own health, even though the ADA statutory language defines it as only risks to health/safety of others.
  - Employee had liver disease (caused by Hep C) that would be exacerbated by exposure to chemicals in the workplace.
  - Supreme Court held worker was "not otherwise qualified" because he was unable to tolerate the working environment.
- EEOC had leeway in creating this regulation because they had to balance the competing objectives in OSHA (protecting worker's health and safety) and the ADA.

Employee Assistance Programs

- EAPs can offer information & referral services for workers with substance abuse issues (as well as other stress factors)
- When these problems are identified the employee can be referred to the EAP for additional assessment
- Worksite health fairs, education campaigns and EAP brochures should include specific references to substance abuse prevention
- Support can be offered through AA, NA or Al-Anon programs
- Several behaviors regarding job performance can indicate substance abuse issues – HR and supervisors should watch for:
  - A pattern of poor quality or poor quantity of work
  - Attendance problems
  - Problems related to interaction with clients or customers
  - Employees may self-identify that their misuse behaviors are causing problems

ADA and EAP Information

- EEOC says that an Employee Assistance Program (EAP) counselor may ask employees about their medical conditions if the counselor:
  - Does not act for or on behalf of the employer
  - Is obligated to shield any information the employee reveals from decisionmakers
  - Has no power to affect employment decisions.
- Any disclosure that an EAP manager or counselor makes to an employer would be subject to whatever legal, medical, and/or ethical standards regulate the EAP's work.

What Can Employers Do?

- Treat all employees who perform “hazardous duty” the same whether white or blue collar … hazard of driving on sales call in company car is not that different from operating a forklift!
- Continuing testing for use of illegal drugs (and, where possible, focus on impairment in cut-off values)
- Publish policy requiring EE who have hazardous duty jobs to report to HR or company medical dept if they are taking medication (including prescription opioids and MMJ) that may affect ability to safely perform job.
- Make inquiry “job related and consistent with business necessity”
- If EE reports being on such a medication, consult with his/her health care provider and – if needed – remove from job until safe to return (move to vacant safe position if feasible)
  - If they are going to take “unsafe” medication indefinitely, have established policy to assess whether EE is medically qualified to continue in their jobs.

Solutions: Document Accommodation Efforts

- Make sure to engage in interactive process with employee concerning reasonable accommodations that may be options to address EE's disability needs in order to perform essential job functions
- Make sure to have WRITTEN job descriptions that delineate what each position's "essential job functions" actually are and which positions are classified as "safety sensitive"
- If the disability posing threat to safety cannot be mitigated:
  - Document the accommodations ER has considered
  - Explain why they did not sufficiently minimize the risk of direct threat to safety
  - Make sure your determination is based on objective criteria, nonbiased decision maker, and (where applicable) sound medical judgment.

Supervisor Training

- Supervisors' role: recognition, documentation, confrontation, referral, follow-up (not diagnosis or counseling)
- Supervisors need to be informed on how to identify an addiction-related problem in advance of a catastrophic event, as well as how to get help for addicted workers.
- Workers who are suspected of being "under the influence" should be taken to a private area, and a second supervisor or witness should be present to document any action or statements.
- Senior management must be notified of these events.
- It may be necessary to suspend a worker until an investigation can take place and/or until the worker completes treatment or is evaluated by the company EAP.

What is Impairment???

- Many employers use 20 ng for MJ
  - Cottage industry growing on how to thwart drug tests
  - Typical types: urine, blood, hair, saliva
- Colorado, Washington and other states where now legal will need to address through DUI laws …
  - 5 ng level *per se* in WA; "permissible inference" in CO at 5 ng
- DOT has zero tolerance for CDL drivers, pilots and train engineers
- Growing field of forensics to determine if workplace accident victims were impaired – consequences for worker's compensation, OSHA/MSHA liability, affirmative defenses in wrongful death and personal injury cases of contractors injured OTJ

Bottom Line

- The trend is toward legalization of MMJ (or possibly all marijuana) and better tests may be needed to gauge impairment versus "positive tests" … but evolving case law suggests that employers currently can terminate (most) employees legally taking MMJ if they are in safety sensitive positions.
- Employer seeking protection under a state MMJ or recreational statute should adopt and publish substance abuse prevention policies that indicate:
  - types of testing required
  - circumstances under which applicants/employees will be tested
  - consequences of failing a test
  - testing methodology to be used (hair, saliva, urine, etc.)
  - information to be provided to tested employee upon request

Things to Do Now

- Check your current drug testing program against new OSHA e-Recordkeeping rule and applicable state law(s) for your company
- Watch developments in adjudicated cases (state and federal) – you may have to have different programs in different states as case law evolves
  - Enumerate the prohibited substances – watch out for broad terms like "illegal drugs"
- Make sure you are conforming with requirements that might apply under rules for government contractors, and requirements under the ADA
- Make sure that in a union environment, any policy is negotiated as part of the CBA as drug testing can be a "term and condition of employment" under the NLRA
- Make sure supervisors are trained on identifying impairment
- Make sure all employees are treated fairly and do not treat injured workers in a disparate manner

Burning Questions?

Adele L. Abrams, Esq., CMSP
301-595-3520
safetylawyer@gmail.com