Ohio Association of Public Treasurers 2018 Fall Conference

Drug Testing and Understanding how (if) Medical Marijuana will impact the Workplace

Presented by
Andrew Esposito
Account Manager / Shareholder

THE ROOTS

- Under federal law, marijuana remains a Schedule I substance
  - Marijuana was established as a Schedule I substance under the Controlled Substances Act, initially enacted in 1970.
  - Schedule I designation is reserved for substances with no currently accepted medical use and a high potential for abuse
  - The following drugs are also included in the Schedule I category: heroin, lysergic acid diethylamide (LSD), methaqualone, peyote, and 3,4-methylenedioxymethamphetamine (ecstasy)
- Beginning in 1996 with the passage of Proposition 215 in California, states have slowly been passing legislation to allow the medical use of marijuana; since then some 29 other states in the US have adopted similar legislation including Ohio.

REGULATORS

- **Department of Commerce**
  - Licenses cultivators, processers, or testing laboratories
  - Maintain an electronic database to monitor medical marijuana from its seed source through its cultivation, processing, testing, and dispensing
- **State Board of Pharmacy**
  - Licenses retail dispensaries
  - Registers patients and caregivers
  - Monitors dispensing of medical marijuana through OARRS (Ohio Automated Rx Reporting System)
- **State Medical Board**
  - Issues doctors a "certificate to recommend"

OHIO'S BACKGROUND

- Ohio became the 25th state to allow marijuana for medical purposes.
- Two (2) years to complete implementation:
  - May 2017 - Commerce – rules for licensure of cultivators
  - September 2017 - Commerce and Pharmacy – program rules
  - September 2018 - Program must be fully operational

Ohio Medical Marijuana Control Program website:
http://medicalmarijuana.ohio.gov/default

CCAO County Advisory Bulletin 2016-02:
http://www.ccao.org/userfiles/CAB2016-02%20%208-17-16.pdf

MEDICAL MARIJUANA DEFINED

- **Federal Law:**
  - Marijuana is still Schedule I Substance under the Controlled Substance Act. This means there is **NO** currently accepted medical use.
- **State Law:**
  - Medical Marijuana is a Schedule II Controlled Substance.
  - Marijuana that is cultivated, processed, dispensed, tested, possessed, or used for a medical purpose [ORC Sec. 3796.01]

OHIO'S MEDICAL MARIJUANA LAW

- "Recommend" for specific list of qualifying medical conditions [ORC Sec. 4731.30]
  - AIDS, amyotrophic lateral sclerosis, Alzheimer's disease, cancer, chronic traumatic encephalopathy, Crohn's disease, epilepsy or another seizure disorder, fibromyalgia, glaucoma, Hepatitis C, inflammatory bowel disease, multiple sclerosis, pain that is either chronic and severe or intractable, Parkinson's disease, positive status for HIV, post-traumatic stress disorder, sickle cell anemia, spinal cord disease or injury, Tourette's syndrome, traumatic brain injury, and ulcerative colitis.

OHIO'S MEDICAL MARIJUANA LAW

- **Dispensed:**
  - As oils, tinctures, plant material, edibles, patches
  - Not in form considered attractive to children
  - Prohibits smoking or combustion
  - Allows for vaporization
- **THC content:**
  - Plant material not more than 35%
  - Extracts not more than 70%

USE

- Physical exam
  - diagnosis by Doctor with a Dr./Patient relationship
  - Patient registration by doctor to Pharmacy Board
  - Prescription required to obtain medical marijuana
    - Valid not more than 90 days
    - three day renewals
    - new exam
  - Possession by registered patient
    - Medical marijuana
    - Paraphernalia or accessories
    - Amount possessed – not to exceed a 90-day supply

WHAT DOES THIS MEAN FOR EMPLOYERS

- Do Employers have to allow employees to be "under the use" of marijuana?
  - No
  - Treated similar to alcohol use
- Do Employers have to change the way they conduct drug tests?
  - No
  - Employers are still permitted to establish and enforce drug testing, drug free, and zero tolerance policies

WHAT DOES THIS MEAN FOR EMPLOYERS

- Are Employers limited in their ability to refuse to hire applicants because of medical marijuana possession, usage, or distribution?
  - No
- Are Employers prohibited from discharging, disciplining, or otherwise taking adverse action against a person because of that person's use, possession, or distribution of medical marijuana?
  - No
- Additionally, medical marijuana use is not protected under the ADA or FMLA

WHAT DOES THIS MEAN FOR EMPLOYERS

- Does the new law impact BWC and Unemployment Compensation benefits?
  - No BWC defenses remain unchanged. Additionally, if use of medical marijuana violates an employer policy such use constitutes just cause to terminate an employee with regard to Unemployment Compensation benefits.
  - For additional information see: https://www.bwc.ohio.gov/downloads/blankpdf/MedMarijuanaImpact.pdf

WHAT ABOUT FMLA & THE ADA

- Marijuana is still a Schedule I drug making it illegal under federal law for all purposes, including medicinal, for the foreseeable future.
- Use of medical marijuana is not covered or protected by the ADA or FMLA.

RECOMMENDATIONS

- Employers should:
  - Establish and consistently enforce a:
    - Drug testing policy,
    - Drug-free workplace policy, or
    - Zero-tolerance drug policy
  - Communicate to all employees that even those using marijuana with a valid prescription are still in violation of the drug policy.

RECOMMENDATIONS

- Employers should also inform employees that:
  - An employee's use or possession of medical marijuana will not be permitted.
  - The employer will not and has no obligation to accommodate an employee's use of medical marijuana.
  - That job applicants may be rejected because of an individual's use, possession or distribution of medical marijuana.
  - Current employees may be discharged, disciplined or have other action taken against them because of the person's use, possession, or distribution of medical marijuana.

RECOMMENDATIONS

- Employers should also inform employees that:
  - An employee who tests positive or refuses to submit a drug test may be disqualified for compensation and benefits under the Ohio Workers' Compensation Act.
  - An employee discharged under the Drug Free Policy will be considered to have been discharged for cause with regard to unemployment compensation or other related pay and benefits.

DRUG TESTING

- Public sector employers wear two (2) hats:
  - They are the employer; and
  - They are the government.
- And since they are the government, they have to comply with the laws that protect citizens from the government interfering with their employees' Constitutional rights.
  - Drug testing in the workplace has a direct impact on an individual's Fourth (4th) Amendment rights.

DRUG TESTING

- The Fourth (4th) Amendment provides for ***"[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."***
- The Fourth (4th) Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 613-14 (1989).

DRUG TESTING

- The U.S. Supreme Court has held that drug tests are "searches" that must meet the reasonableness requirement of the Fourth (4th) Amendment. National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (urinalysis testing of certain U.S. Customs Service employees); Skinner, supra. (government-ordered drug testing of certain railroad employees).

DRUG TESTING

Pre-Employment and Random (Suspicionless) Drug Testing

- While the existence of individualized reasonable suspicion is necessary to conduct drug testing in the public sector employment setting, the U.S. Supreme Court has stressed that, ***"[N]either a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."*** Von Raab, 489 U.S. at 665. Such "suspicionless" testing is permitted ***"where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement . . . ."*** Id.

DRUG TESTING

Special Needs

- The burden of establishing a special governmental need to justify suspicionless testing is a heavy one. ***"When such 'special needs' – concerns other than crime detection – are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties."*** Chandler v. Miller, 520 U.S. 305, 314 (1997). In addition, ***"the proffered special need for drug testing must be substantial – important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."*** Id. at 318.

DRUG TESTING

Insufficient Governmental Interests.

- Employers generalized efforts to drug test based on the premise of having a drug free workplace has been routinely rejected.
- Broad-based drug testing must be related to a substantial governmental interest.
- The mere desire of a drug-free workplace and the general stability and integrity of the workforce do not provide the requisite nexus. O'Keefe v. Passaic Valley Water Commission, 253 N.J. Super. 569, 576-77, 602 A.2d 760, 764 (1992), aff'd on other grounds, 132 N.J. 234, 624 A.2d 578 (1993).

DRUG TESTING

Safety-Sensitive Positions:

- ***"[T]he test for whether employees hold safety sensitive positions is whether the employees 'discharge duties fraught with risks of injury to others that even a momentary lapse of attention can have disastrous consequences.'"*** Knox County Education Ass'n v. Knox County Board of Education, 158 F.3d 361, 377 (6th Cir. 1998)(quoting Skinner, 489 U.S. at 628)

DRUG TESTING

Some of the positions identified by courts as safety sensitive include:

- Operation of railway cars
- The armed interdiction of illegal drugs
- Work in a nuclear power facility
- Work involving matters of national security
- Work involving the operation of natural gas and liquified natural gas pipelines

DRUG TESTING

Some of the positions identified by courts as safety sensitive include (continued):

- Work in the aviation industry,
- Work involving the operation of dangerous instrumentalities, such as trucks that weigh more than 26,000 pounds; that are used to transport hazardous materials; or that carry more than 14 passengers at a time

DRUG TESTING

Employee Privacy Expectations

- In determining whether an employee's expectations of privacy were violated, courts have utilized the following factors:
  - Notice of testing policy. Smith v. Fresno Irrigation District, 84 Cal. Rptr. 2d at 785 (employee's expectation of privacy diminished when employer informed employees in advance) of drug testing policy's implementation and provided a six month grace period in which employees could seek substance abuse treatment and counseling without any termination consequence);
  - Notice on the job application. McKenzie v. Jackson, 152 A.D.2d 1, 547 N.Y.S.2d 120 (1989), aff'd, 75 N.Y.2d 995, 556 N.E.2d 1072, 557 N.Y.S.2d 265 (1990); Dozier v. New York City, 130 A.D.2d 128, 519 N.Y.S.2d 135 (1987)

DRUG TESTING

Employee Privacy Expectations

- Rules and regulations relating to the employee's health and fitness to perform their jobs. Doe v. City and County of Honolulu, 8 Haw. App. 571, 816 P.2d 306 (1991); and
- Regulation by governmental entities. Knox, 158 F.3d at 382 (holding that the field of education is highly regulated).

DRUG TESTING

Reasonable Suspicion Testing

- The U.S. Supreme Court has held that for a search to be "reasonable" under the Fourth (4th) Amendment, it must be based upon "individualized suspicion of wrongdoing."
- The standard for conducting such a search need not meet the "probable cause" standard that is imposed upon law enforcement officials, nor are government officials required to obtain a search warrant for a drug test to be considered reasonable for constitutional purposes.

DRUG TESTING

Reasonable Suspicion Defined

- The Ohio Administrative Code (OAC) defines "reasonable suspicion" as *"based upon objective facts or specific circumstances found to exist that present a reasonable basis to believe that an employee is under the influence of, or is using or abusing, alcohol and/or other drugs. Examples of reasonable suspicion shall include, but need not be limited to, slurred speech, disorientation, and abnormal conduct or behavior."* O.A.C. §123:1-76.10(B).

DRUG TESTING

Among the factors that may affect the reasonableness of the suspicion are:

- The nature of the tip of information
- The reliability of the informant
- The degree of corroboration
- Other facts contributing to suspicion or lack thereof.

Copeland v. Philadelphia Police Department, 840 F.2d 1139, 1144 (3rd Cir. 1988) (cited with approval in the 2nd Circuit); George v. Department of Fire, 637 So. 2d 1097, 1101 (La. App. 1994); Caldwell, 250 N.J. Super. at 609, 595 A.2d at 1126.

QUESTIONS

CLEMANS·NELSON & ASSOCIATES, INC.

1.800.282.0787
www.clemansnelson.com
Akron | Cincinnati | Dublin | Lima