

Marijuana Pre-Screening & the Safety Risk Dilemma for Contractors

By Kim DiMatteo, DiMatteo Group



The rules are changing when it comes to recreational and medical marijuana use and it's turning HR departments all over the country upside down. From employee handbook adjustments to drug screen analysis – both random and before the hire – it's getting complicated.

Is it discriminatory NOT to hire someone because they screened positive for marijuana? In days past that was an easy answer, today not so much. The bigger issue is the conflict between state and federal legislation. The roll back of the 2013 Obama Cole memo that relaxed federal enforcement of marijuana laws put employers in a position of – “We just don't know where we stand legally.”

When our current unemployment rate sits at an all-time low, the New England market, where finding skilled talent is already tight, adding a zero-tolerance policy can deeply cut into your talent pool.

The rumor around the water cooler at many companies, seminars, and workshops is that the zero-tolerance days of old are diminishing.

Here are some sobering statistics:

According to the Substance Abuse and Mental Health Services Administration (SAMHSA) in 2016 28.6 million people aged 12 or older (yes age 12), used an illicit drug in the past 30 days. At the date of the study that corresponds to 1 out of every 10 Americans, but can be as high as 1 in 4 for young adults aged 18-25, who are often a prime pool for seasonal workers, apprentices, and laborers. If you have 10 employees in that age range, chances are 2 of them would not pass a drug test.

What's driving those statistics? Marijuana and the use of prescription pain meds that turn into an ugly overuse and addiction. The opioid crisis is not going anywhere soon.

As of this writing, 30 states and the District of Columbia have laws broadly legalizing marijuana in some form or another. 8 of which, plus the District, have the most expansive laws legalizing marijuana for recreational use.

The Safety Risk Dilemma

The odds of having a pre-hire or post-hire drug screening showing a positive ding is not IF, it's WHEN. It's the reality of our workplace now. Determining if an employee is a safety risk is obviously the reason drug testing is so important, and as we all know those with drug and/or alcohol issues tend to have attendance issues and force a high turnover in the labor force.

The legal liability for the employer when it comes to discrimination is real, and according to the American Bar Association

(ABA), courts are ruling in favor of medical marijuana users versus siding with employers.

The ABA further noted that companies who have locations in multiple states, need to be aware of the varied rules of those jurisdictions.

Is it an impossible situation for employers? In my opinion, for many it is. While employers need to strive to obey local drug use laws to avoid a discrimination suit, they also need to abide by federal safety laws and OSHA regulations that require the employer to offer a safe work environment. Where is the line drawn? Can someone who is using marijuana for medical and/or recreational reasons operate machinery safely? Climb ladders safely? Be at 100% to support their fellow co-workers in risky work environments?

Darryl G. McCallum of Baltimore MD, co-chair of the Programming Subcommittee of the Section of Litigation's Employment & Labor Relations Law Committee², noted that he feels claims will arise against an employer if a safety issue involving a medical marijuana user occurs in the workplace and it is later revealed that the employer was aware that the offending employee had failed a drug test at the onset of employment. If they didn't hire, they could be open for a discrimination lawsuit. Either way, the employer is at risk for litigation.

The answer? Stringent safety protocols, checklists, and eagle eye management. I'm not disputing that there is a place for medical marijuana use; the medical community has shown amazing results for a variety of conditions and diseases. My concern lies with my clients and protecting their assets, ensuring safe work environments, all while allowing them to have an inclusive hiring practice. We indeed live in a very litigious society and the need to be aware of the “What-if's” is important. Protecting yourself from discriminatory lawsuits begins at the hiring desk, we all know that. We aren't wizards, we can't foresee the future. I can promise you that protecting yourself with ample Employment Practices Liability Coverage is no longer an option, it's a necessity.

What will the future hold? Again, I can't see into the future but I don't anticipate this issue going away. Those of us deeply embedded in the construction industry simply need to be aware, hyper-focused on policy, process, and procedure to ensure our teams are safe and we remain compliant both on a state and federal level. Only time will tell.

(1,2 source American Bar Association. “Litigation News”, March 15, 2018 “Trend in Medical Marijuana Suits Favors Employees”. Author, C Thea Pitzen)

For more information contact Kim Marie DiMatteo, DiMatteo Group 203-924-5429. ■