Higher Conflict and Controversy: A blog series on medical and recreational marijuana in the workplace - PART 4

By Michael H. Weier • December 5, 2014

I had the privilege to speak in April 2013 at the Washington Self-Insurers Association Annual Meeting[1] and in November 2014 at the Oregon Workers' Compensation Educational Conference[2] regarding legalization of medical and recreational marijuana in the Pacific Northwest workplace. This blog is the fourth and final installment in a series of articles based upon my presentations.

Marijuana in Employment

Let me begin the final part of this blog series by stating the obvious: There is no constitutional right to use marijuana in the workplace. Unlike race, national origin, religion, gender and most recently sexual orientation and identity, the *cannabis connoisseur* is not a class of persons protected by federal or state constitutions. To the contrary, federal law, in at least two circumstances, expressly prohibits marijuana use in the workplace.

The Drug Free Workplace Act of 1988[3] declares that companies that contract with the federal government or those who receive federal grants must prohibit marijuana and other drugs in their workplaces.

Similarly, the federal Omnibus Transportation Employee Testing Act of 1991[4] and the subordinate guidelines[5] bar marijuana use in "safety-sensitive transportation jobs. Pilots, long-haul truck drivers, subway and railway workers and pipeline workers are expressly prohibited from smoking pot or consuming hemp-laced brownies in the workplace.

The* cannabis connoisseur *is not a class of persons protected by federal or state constitutions

Notwithstanding federal laws that declare marijuana an illegal substance and prohibit its use, employers should be mindful of various laws that may have an impact upon employment decisions with regard to the employee who uses marijuana. The Rehabilitation Act of 1973,[6] Americans with Disabilities Act of 1990 (ADA) and the Americans with Disabilities Amendments Act of 2008 (ADAAA),[7] the

Continued

Reinisch Wilson Weier PC
LAW OFFICES

PORTLAND: 10260 SW Greenburg Rd., Suite 1250, Portland, OR 97223 • T 503-245-1846 / F 503-452-8066
SEATTLE: 159 South Jackson Street, Suite 300, Seattle, WA 98104 • T 206-622-7940 / F 206-622-5902
www.rwwcomplaw.com

Michael H. Weier is firm President and Managing Partner at Reinisch Wilson Weier PC. He may be reached at 503.452.7268 or michaelw@rwwcomplaw.com.

Washington Law Against Discrimination (WLAD),[8] and the Oregon Equality Act[9] each require employers to reasonably accommodate the disabilities of individuals with regard to employment opportunities.

Subsequent to passage of the ADA in 1990, what constitutes a disability has become more expansive. The ADAAA expressly declares "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[10] The federal law also proclaims that the definition of disability should be interpreted in favor of broad coverage of individuals.[11] Accordingly, if a worker alleges use of marijuana for medical purposes, an employer may be required to engage in an interactive process to assess whether a workplace accommodation is necessary. That is not to say an employer must accommodate drug use in the workplace. However, the employer and worker may be obligated to meet and discuss the issue to determine whether a reasonable accommodation may be made for an alleged disability.[12]

The Family Medical Leave Act (FMLA),[13] Washington State Family Lease Act (WaFLA),[14] Oregon Family Medical Leave (OFLA),[15] Occupational Safety & Health Act of 1970 (OSHA),[16] Washington Industrial Safety & Health Act (WISHA),[17] Oregon Safe Employment Act (Oregon OSHA),[18] Fair Labor Standards Act of 1938 (Washington FSLA)[19] and numerous other employment laws and labor regulations may be implicated should an employee use marijuana.

Employers must find the proper balance between ensuring a safe and healthful workplace versus reasonably accommodating an employee's disability. Personal use of marijuana may now be a right in the Pacific Northwest; however, the workplace is not a safe haven to smoke pot.

Employers are well-advised to review their respective collective bargaining agreements (CBA) and employment policies. A CBA or employee handbook may require modification. A policy that prohibits *illegal* drugs may be obsolete now that Washington and Oregon have legalized use of marijuana. Employers should provide a clear explanatory statement and an unambiguous policy in order to defend against marijuana use and its effects in the workplace. ■

---

[1] *High Conflict and Controversy: Medical and Recreational Marijuana in Washington,* WSIA Annual Meeting, Wenatchee (May 9, 2013)

[2] *Higher Conflict and Controversy: Recreational Marijuana in Oregon,* OR WCD Educational Conference, Tigard (November 14, 2014)

[3] 41 U.S.C. § 81

[4] 49 U.S.C. § 5531

[5] 49 C.F.R. §§ 40, et seq., 382 et seq., 392, et seq.

Continued

[6] 29 U.S.C. § 701

[7] 42 U.S.C. § 12101, et. seq

[8] Ch. 49.60 RCW

[9] ORS Ch. 659A

[10] 42 U.S.C. § 12101(2)(b)(5)

[11] 42 U.S.C. § 12101(2)(b)

[12] *See, Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir.2000),* ("The interactive process is a mandatory rather than a permissive obligation . . . . Both sides must communicate directly, exchange essential information and neither side can delay or obstruct the process.") *Rev'd on other grounds, 535 U.S. 391 (2002).*

[13] 29. U.S.C. § 28

[14] Ch. 49.78 RCW

[15] ORS Ch. 659A, § 50, et seq.

[16] 29 U.S.C. § 561, et seq.

[17] Ch. 49.17 RCW

[18] ORS Ch. 654

[19] 29 U.S.C. § 201, et seq.