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Legal Cannabis Use Needs Workplace Protections, Some States Say

By Stephen Joyce

Aug. 11, 2022, 4:00 AM

- State laws protect employees legally using cannabis
 - Multi-state employers face compliance challenges
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California legislators are primed to follow a few pioneering states when they decide whether to advance a bill granting employees statutory protections to use cannabis.

If the proposal becomes law, California will become the seventh state to protect adults who legally use cannabis from employer sanctions. An additional 15 states have narrower laws that protect medical marijuana patients from adverse treatment from employers for their legal use of cannabis, according to the National Organization for the Reform of Marijuana Laws.

Individuals can legally use cannabis in more than half of states but often can be fired if traces of cannabis are detected in their bodies, even though that detection doesn't prove current intoxication or impairment.

The push for new state laws comes in part from a tight labor market and efforts to increase equity in the workplace, as well as a diminished stigma for pot use, lawyers said.

"As long as the federal prohibition remains, you're going to see states, in my opinion, continue to enact legislation to protect employees and make sure they are not discriminated against because they're using cannabis," said Jonathan Robbins, a lawyer who leads Akerman LLP's cannabis practice. "It will continue. It has to," he said.

California offers one example of a legal gray areas around cannabis use. Voters through ballot initiatives legalized marijuana use for medicinal purposes in 1996 and for recreational purposes in 2016, but legislators haven't yet extended protections for employees who legally use cannabis. Instead, employers can still fire or refuse to hire individuals who use cannabis away from the workplace or off the job.

On Thursday, the California Senate Appropriations Committee will decide whether to move to the Senate floor legislation (A.B. 2188) making it illegal for an employer to discriminate against job applicants or existing employees because they legally consume cannabis.

Varying Laws

Connecticut, Montana, Nevada, New Jersey, New York, and Rhode Island have each enacted statutes limiting employers' ability to refuse to hire or take adverse action against workers for their off-duty recreational use of cannabis.

The employee protections have led some firms to question the benefits of testing for the presence of cannabis. Potential hires and employees, particularly younger workers, also are becoming more assertive about their working conditions, including a refusal to undergo drug testing, the lawyers said.

The state laws aren't identical, forcing multi-state employers to decide whether to implement one cannabis-use policy or tailor employee policies to individual jurisdictions.

In Connecticut, for instance, employers may prohibit employees or applicants from off-the-job cannabis if the employer has adopted a written workplace policy that prohibits the practice. The state also exempts manufacturing and health care companies from the law, allowing those industries to demand their employees forego recreational use of cannabis at any time.

In Rhode Island, employers may prohibit the use of cannabis within the 24-hour period prior to a scheduled work shift if employee duties are "hazardous, dangerous or essential to public welfare and safety."

Montana nonprofit organizations that discourage the use of one or more lawful products as one of its primary purposes or objectives can also ban employees from off-site cannabis use.

The New Jersey statute creates the position of a "workplace impairment recognition expert," a person certified by the state as being competent to evaluate if employees are impaired or intoxicated by cannabis on the job.

"It's not always feasible to have one policy," said Eric Berlin, a lawyer who leads the US and global cannabis teams at Dentons law firm. "The state laws are changing and evolving, and they're definitely headaches for employers. They have to deal with the interpretations of the laws as well," he said.

"With recreational marijuana it's certainly become more hazy how employers deal with these types of issues because there's no longer a bright line—either you're a medical-marijuana cardholder or you're not. Now, every employee is potentially protected in their use of marijuana," Duane Morris LLP employment lawyer Christopher Durham said in an interview.

Focus on Hiring

Actions aren't limited to states, although cities are focused more on the hiring process than on legal marijuana use by employees. The District of Columbia, New York, and Philadelphia are among the municipalities that have adopted rules prohibiting employers from requiring prospective employees to take a test to detect cannabis use before they can be hired.

Atlanta forbids employers from requiring prospective employees who aren't applying for safety sensitive positions to undergo a post-employment offer cannabis test, and Kansas City, Mo., made it illegal for employers to require applicants to test for the presence of cannabis as a condition for employment, even though it's still illegal to use cannabis for any reason in Georgia and Missouri.

Exceptions exist.

The New Jersey statute prohibits first responders from using cannabis on or off duty, and the Rhode Island law says protections don't apply when cannabis use by employees is prohibited by collective bargaining agreements. Other state laws ban employees with public-safety jobs from ever consuming cannabis.

Federal law also takes precedence in some instances. For example, federal contractors must insist on a zero tolerance drug-free workplace. Other employers are governed by federal regulations that prohibit cannabis use, such as the requirement that commercial truck drivers never consume cannabis.

Private Right of Action

Because these laws are so new, there's a dearth of case law on the topic and it's not clear how they'll be interpreted by state courts.

That could change quickly in states that allow employees to sue their employers.

"It's cheap enforcement. If I have a new law and want to enforce it, I can hire more assistant state attorneys general to prosecute and investigate and Department of Labor investigators to go knock on doors. Or I can say if you think your rights have been violated, go get a plaintiffs' lawyer and hire them on a contingency basis," Mark Neuberger, Foley & Lardner LLP employment lawyer, said in an interview.

Including a private right of action clause erases any uncertainty, or the need for judicial interpretation, about whether employees can file the discrimination cases, said Erin Bass, a Dentons partner focusing on labor and employment matters. Many earlier state laws providing employment protections to medical marijuana patients, including Pennsylvania's statute, were silent on that issue.

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