

WHEN BUDDING ISSUES ARISE IN THE WORKPLACE

Attorney **Susan M. Cirilli** addresses the potential claims and defense that arise from the situation of an employee returning to work under the influence of marijuana in this Litchfield Alert.

What do you do when an Employee shows up to work reeking of marijuana? As an Employer, what can you do? Below is some guidance on how to handle this heady situation. These situations raise issues on both the state and federal levels.

An Employer is well within its right to meet with the Employee and have him/her present for a drug test. An Employer may discipline or terminate this Employee should s/he fail to pass or refuse to present for the drug test.

Pennsylvania Law: Medical Marijuana

An Employee may reference having a medical marijuana card. However, it is irrelevant whether the Employee has a card that certifies the use of medicinal marijuana, for two reasons: 1) the law prohibits that medical marijuana be smoked; and, 2) even if the Employee has or had a medical marijuana card, Employers are still allowed to prohibit drug use in the workplace.

1. Medicinal Marijuana Cannot be Smoked

Pennsylvania regulations relating to medical marijuana prohibit smoking the drug. The regulations explicitly state the forms of the drug that the Employee may utilize, and smoking is not one of them. Thus the Employee's anticipated argument of having a medical marijuana card is null.

2. Pennsylvania Law Does Not Require Employers to Accommodate Individuals with a Medical Marijuana Card

Worth noting is the **Pennsylvania State Statute** instructing that an Employer is prohibited from discharging an Employee solely on the basis of that Employee being certified the use marijuana. While the Employer cannot discriminate on the basis of having a medical marijuana card, the Employer has absolutely no obligation to accommodate the Employee for the use of marijuana. The Statute expressly states that ... "[n]othing in this act shall require an Employer to make any accommodation of the use of medical marijuana on the property or premise of any place of employment."

Employers do not have to accommodate or tolerate the use of marijuana at the workplace or an employee that is under the influence of the drug.

The Statute further ensures that the laws allowing for medical marijuana:

... "in no way limit an Employer's ability to discipline an Employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the Employee's conduct falls below the standard of care normally accepted for that position."

Again, Employers are well-within their rights to discipline the subject Employee. As explained below, Employers are well within their rights to terminate the Employee as well.

Federal Law

1. The Employee is Not a Qualified Individual Under the ADA

Should the Employer decide to take an adverse employment action against the Employee for drug use, the Employee has no claims under the **Americans with Disabilities Act** ("ADA") **Section**

12114(a). The Employer may suspend the Employee until the results of the drug test come back, and upon receipt of a positive test result, the Employer may terminate the Employee.

In order to bring a cause of action under the ADA, the individual must be “qualified.” The ADA is explicit that a “qualified individual” under the statute **does NOT** include, “any Employee...who is currently engaging in the illegal use of drugs.”

2. Employers Can Prohibit Drug Use

The ADA expressly allows businesses to prohibit drug use in the workplace, and prohibit Employees being under the influence of an illegal substance. The ADA explicitly allows for a covered entity to, 1) prohibit the illegal use of drugs in the workplace; and, 2) require that all Employees not be under the influence of alcohol or engaging in the illegal use of drugs in the workplace.

At the present time, with the facts in our purview, the subject Employee has no claim or potential claim under the ADA.

Unemployment Compensation

Should the Employer decide to terminate an Employee for a positive drug test or suspend the individual pending the results of the drug test, the Employee is ineligible for unemployment compensation. Pennsylvania Unemployment Compensation, **Section 802(e)** explicitly states an Employee shall be:

... “ineligible for compensation for any week, in which his unemployment *is due to discharge or temporary suspension from work due to failure to submit and/or pass a drug test conducted pursuant to an Employer’s established substance abuse policy, provided that the drug test is not requested or implemented in violation of the law or of the collective bargaining agreement.*”

As seen above, an Employer can discharge an Employee for failure to “submit and/or pass a drug test conducted pursuant to an Employer’s established substance abuse policy...” Courts have indicated that in order to render an Employee ineligible, the Employer must “establish that is adopted a substance abuse policy and that the Employee failed a test pursuant to that policy.” This language insinuates that the drug policy should mention drug testing.

Common Law Cause of Action

The last cause of action that the Employers must consider is the common law cause of action of Tortious Interference with the Employee’s Privacy. When dealing with this tort in the context of private Employer drug testing, Courts implement a balancing test. The Court will balance the Employee’s privacy interests against the Employer’s interest in maintaining a drug-free workplace in order to determine whether a reasonable person would find the Employer’s program highly offensive.

Thus, if the Employee refuses to present for the drug test, claiming that the process is a Tortious Interference with his Privacy, then the Court will employ the above referenced test. The Employer must present: 1) the Employer’s interest in maintaining a drug-free workplace; and, 2) evidence relating to the reasonableness of the drug testing procedure.

Things to Consider

1. Make sure that your handbook has a drug testing policy.
2. Make sure that your drug testing procedure is reasonable.
3. Utilize a drug testing facility that is licensed with the state.
4. Pay the Employee for the time it takes to present for the drug test.

If you have any questions regarding drug use in the work place, or any other issues involving your employees, Litchfield Cavo attorneys are ready to help.