

Weed in the Workplace

Employers hold the cards in setting rules on recreational marijuana use. Local attorneys say clear-cut policies are key.

By TIM FERAN

After a majority of Ohioans voted to legalize recreational marijuana in 2023, it may have seemed as if employers were going to see their previous policies regarding cannabis in the workplace go, well, up in smoke.

But three years and some controversial legislation later, employers are being told that they “can pretty much do what they want,” says Bill Nolan, a partner at Barnes & Thornburg who advises clients on a range of workplace issues.

Nolan is one of many local attorneys keeping track of the fast-changing legal landscape pertaining to marijuana, which gained some extra guardrails following the passage of Senate Bill 56. Provisions of the legislation, which took effect in March, include dispensary limits, tax reallocation and a ban on the sale of most hemp-based products and THC drinks.

Jennifer Edwards of Porter Wright Morris & Arthur is co-chair of the firm’s Labor and Employment Department. She agrees that even though there have been rapid changes, employers still have a free hand in how they want to deal with marijuana use by employees.

After Ohio legalized marijuana for medical purposes in 2016, “many employers implemented policies relating to medical marijuana,” Edwards says.

While some employers are changing how they enforce those policies now that recreational marijuana



Photo by Getty Images/Jacob Wackerhausen

“Once marijuana became legal in Ohio, a number of employers made the difficult decision to remove it from testing screens.”

Jan Hensel, partner at Dinsmore & Shohl

usage is legal, “others are revising their policies to address *any* marijuana usage,” she says. “Still other employers are maintaining strict drug-free workplace policies.

“Any of these approaches is legal in Ohio,” Edwards says.

“The advice we’re giving clients is to ‘follow your policy,’” says Todd Palmer, a partner and co-chair of the labor and employment practice group at Calfee.

Nolan advises employers to tread carefully if they plan to make policy changes. “I always encourage employers to talk to us before they take action,” he says.

Jan Hensel, a partner at Dinsmore & Shohl who works in all aspects of employment law, agrees. “Every time I have a conversation about medical marijuana, we talk about Ohio law,” she says. Ohio law “gives employers all the rights and employees none of the rights.”

“One telling sign of that is that the relevant chapter of the Ohio Revised Code has a section entitled ‘Rights of Employer,’” Palmer says. “There is no corresponding section on ‘Rights of Employee.’”

Even so, a tricky part of workplace policy is the fact that laws differ from state to state, as well as at the federal level, says Dan Zinsmaster, a partner at Dinsmore & Shohl who counsels clients in the areas of cannabis and medical marijuana. “It’s all over the map,” he says. “It changes over time, so hold on to your hat. It’s a wild ride.”

As a result, businesses with operations in multiple locations may have a patchwork of policies to stitch together. “Yes, I’m tearing my hair out,” Nolan says. “Since COVID, even small companies might have employees working in different states, so they can be looking at multiple state laws. So do you take the strictest state and apply that law to everyone? And do you apply that to drug testing, too? It’s not so simple.”

Drug testing is another area in which employers pick and choose how strict—or lax—they want to be. “As a practical matter, once marijuana became legal in Ohio, a number of employers made the difficult decision to remove it from testing screens,” Hensel says. “We’ve heard that from the construction industry.”

“More and more [in building trades] are not including testing,” Nolan says, “because they can’t find enough employees” if they prohibit use of recreational marijuana.

Even trickier are situations where an organization has numerous job classifications. “You can have a completely different standard at a hospital, for instance, for physicians than you have for the janitorial staff,” Hensel says.

Companies that have federal grants or contracts, on the other hand, are nonnegotiable and “must maintain a drug-free workplace policy as a prerequisite for earning the grant or contract,” Edwards says.

An important consideration—for employers and employees—is the difference between medical marijuana use and recreational use. “If it’s medical, it’s a controlled drug,” Zinsmaster says. “In that realm, it’s no different for employees than having Adderall for ADHD. While an employer can’t be forced to accept staff using medical marijuana, the more clear your expectations are, the better to get in front of those issues. It’s evolving constantly. What will it be in five years? You never know.”

“I tell employers to be careful if someone has a medical marijuana card,” Nolan says. “You could get into disability discrimination issues. It’s a close call.”

Employees who use marijuana, whether medical or recreational, and show up to work impaired present other problems. “You can certainly prohibit its use in the workplace,” Nolan says. “But the trickier part is you can’t be under the influence. My understanding is that marijuana stays in your system for a while,” so an employee could test positive and not be impaired.

“A large number of people I advise work in HR, and they want formulas,” Nolan says, for what amount of marijuana indicates impairment. “But you don’t have one.”

As a remedy, Nolan advises those companies that, “You can regulate behavior. So if something’s not right, if the employee smells of it, if they’re not performing, you can test them and you can get rid of them.”

It’s similar to long-standing policies about alcohol usage, attorneys say.

“I still advise most employers to have some sort of policy about how they will handle employee intoxication during working hours,” Edwards says.

Tim Feran is a freelance writer.

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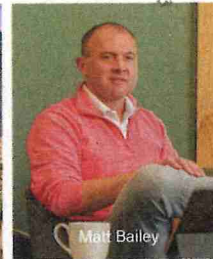
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