

LEGAL RECREATIONAL AND MEDICAL MARIJUANA: IMPACT ON THE WORKPLACE

The proposal to legalize recreational marijuana passed via the ballot in Michigan recently. Michigan is the tenth state to legalize recreational marijuana. The ballot proposal outlined the key provisions for legal recreational marijuana:

- Marijuana sales will be regulated, just like alcohol. It would be illegal for anyone under 21 to buy or use marijuana. The state would license marijuana retailers and growers. Landlords, leaseholders, and business owners would be able to prohibit smoking marijuana on their premises. It would also remain illegal to smoke marijuana in public or operate a vehicle under the influence of marijuana; however, there are no definitive tests to measure effectively whether a driver is high or not.
- Anyone over the age of 21 is allowed to “possess, use, transport, or process 2.5 ounces or less of marijuana or 15 grams of marijuana concentrate.” It is also legal

to “share or transfer without payment” up to 2.5 ounces of marijuana to anyone else over 21 years old. People are also able to grow up to 12 marijuana plants, and store up to 10 ounces from those plants in locked containers at home.

- The State of Michigan will assess a 10 percent sales tax on marijuana sold in the state.
- The State of Michigan will not pardon anyone previously convicted of illegal possession of marijuana.

Employers probably have questions about how legalized recreational marijuana may affect their workplace. First, marijuana is still illegal under federal law. It is a Schedule 1 drug under the federal Controlled Substances Act of 1970. However, many states have legalized marijuana use for medical purposes and ten states have legalized recreational use. Despite state law, employers can maintain a drug free workplace.



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Continued on Page 2

They do not have to allow or tolerate drug use or intoxication at the workplace.

It is important to have clear and consistent drug use and testing policies in your organization. A zero tolerance policy means a positive test automatically results in termination. Some employer policies are less stringent. Many require those with a positive test to undergo treatment but allow an employee to return to work afterwards. Workplace drug use and testing policies are highly regulated. Your organization should always ask your lawyer to review these policies to make sure they do not violate state or federal law.

With so many states legalizing medical and recreational marijuana use, some employers are reconsidering testing for marijuana. Employers should take care. Marijuana remains a mind-altering substance and Schedule 1 drug under federal law. One of the challenges of testing for marijuana use is that THC remains in the system long after the impairment ends. For example, an employee can test positive for THC but have no impairment issues. Unlike alcohol (where a blood alcohol level of .08 is considered impaired), there is no equivalent measure of impairment with THC. Both the National Highway Traffic Safety Administration and the National Institute on Drug Abuse have stated that blood tests for marijuana impairment are unreliable. No reliable measure to determine marijuana impairment exists.

Since medical and recreational marijuana is legal in Michigan, employers may decide to establish standards for marijuana intoxication, rather than automatically disciplining employees if

DID YOU KNOW

The top five common cost management techniques employer health plans use:

- Case Management (70%)
- Prior authorization/utilization management (65%)
- Health care claims utilization analysis (61%)
- Nurse advice lines
- Telemedicine (54%)

Source: 2018 Employee Benefits Survey, International Foundation of Employee Benefit Programs

they test positive for THC. This policy may be more workable. The Substance Abuse and Mental Health Services Administration (SAMHSA) and European agencies found a cut-off threshold of 50 ng/mL was consistent with recent or heavy cannabis abuse. Lower concentrations of THC can indicate occasional use, a carryover period or probable cannabis exposure. If an organization adopts this cut-off level, it must be applied consistently and regularly for all employees.

Another concern with medical marijuana use is the possible need to accommodate employees under the Americans with Disabilities Act (ADA). The ADA does not require an employer to accommodate unlawful drug use. Again, although marijuana use may be legal at the state level, it is still illegal under federal law. However, you should work with employees who request an accommodation for medical marijuana use. Under the ADA, employers must reasonably accommodate qualified disabled employees unless doing so would cause the employer an undue hardship. Any request for a reasonable accommoda-

tion should trigger an interactive process with the employee to determine:

1. Whether the employee or applicant can perform the essential functions of the job with a reasonable accommodation
2. What the employee's needs are, and which accommodations would be necessary.

If the employee's physician considers medical marijuana the most effective treatment, a possible reasonable accommodation would be a waiver of your drug policy related to marijuana. However, if the employee is in a safety-sensitive position, making that accommodation may cause an undue hardship and that may allow you to deny the request.

The ADA does not protect medical marijuana use, but this provision is being challenged at the state level. For example, in July 2017, the Massachusetts Supreme Judicial Court held in *Barbuto v. Advantage Sales and Marketing* that an employee fired after

testing positive for marijuana could proceed with a “handicap discrimination” claim under the Massachusetts Fair Employment Practices Act.

In allowing the employee’s discrimination claim to go forward, the court expressly rejected the employer’s argument that, because marijuana is illegal under federal law, requiring an employer to accommodate medical marijuana use is, therefore, also unreasonable. Instead, the court held that, at a minimum, the employer was obligated to consider the employee’s ongoing medicinal marijuana use before terminating her employment. The court did not rule out the possibility that accommodating medicinal marijuana use could pose an undue hardship, leaving that issue open for the employer to consider at a later date.

Since medical and recreational marijuana use is legal in Michigan, organizations should review their workplace policies. It should be clear that even though marijuana is legal in the state, it is not permitted in the workplace. Expect more and more employees to question your policies as more and more states legalize recreational marijuana. MMA

HEALTH AND HEALTH PLAN COMMUNICATION

Most employers spend significant time and energy explaining their health plans during open enrollment. Many employees, however, still find it difficult to understand the basic concepts of their coverage or even their own health. An Accolade study from 2016 illustrates this point:

- 32 percent of all employees feel uncomfortable when they try to navigate medical benefits and the health care system
- 56 percent of employees under age 30 feel uncomfortable when they try to navigate medical benefits and the health care system

It makes sense. Although most employees value health benefits, they do not understand them. They learn about these benefits and how they work only when they have a major health issue. Often, because they don’t understand the plan, they misuse health plan resources and face unexpected out-of-pocket expenses.

Employers trying to help employees clearly understand their health plan options often choose the worst time to tackle this issue: open enrollment. According to the *Madison State Journal*, 86 percent of workers spend less than two hours reviewing their choices or learning about tools to help them lower costs. Employees are concerned only with how to enroll in and how much they must pay for their health plan. Perhaps, employers should start to explain their health plans regularly. Employees who understand their health plans make better choices at open enrollment.

Communication should be year round. Begin by explaining the importance and value of your health plan. Providing examples for different generations in your workforce will help. It is astounding to think that most people understand their car insurance and its value more than they understand their health insurance. Instead of focusing on the mechanics, focus on the value. For your younger generation, explain the health plan benefits for prenatal care, childbirth and preventive baby care. Although the employee may reach the out-of-pocket maximum, the average

Continued on Page 4

YOUR QUESTIONS

Q: We have an employee whose spouse lost coverage under her employer’s health plan. The employee informed us within the thirty days required. He also wants to switch from our HMO plan to our CDHP option when he adds his wife to his coverage. I know he can add his wife to the plan, but I did not think he could change his coverage options. Can he change plan options?

A: This situation confuses most HR professionals. Section 125 rules and HIPAA’s special enrollment rules apply to this situation. HIPAA special enrollment rights allow the spouse to enroll in coverage. These rules also allow employees to change the health plan option whenever they add coverage as result of a HIPAA special enrollment right. Section 125 also allows changes to pre-tax contributions for any changes in HIPAA permitted special enrollment rights. To answer your question, the employee can add his spouse and change his health plan option.

TREND TIDBITS

- \$ Average monthly cost for PPO plans increased in 2018 - single rate increased to \$562 and family rate increased to \$1,666. This represents just over a 4% increase for single coverage and just over a 6% increase to family rates.
- \$ Average monthly cost for HMO plans decreased slightly in 2018 - single rate decreased to \$465 and family rate decreased to \$1,357. This represents just over a 1% decrease for single coverage and about half a percent decrease to family rates.
- \$ Average monthly cost for CDHP plans with HSAs increased in 2018 - single rate increased to \$510 and family rate increased to \$1,452. This amount includes the funded HSA contribution. This represents about a 3.5% increase for both single and family coverage.
- \$ Average monthly cost for CDHP plans without HSA funding increased in 2018 as well - single rate increased to \$459 and family rate increased to \$1,352. This represents about a 4.5% increase for single coverage and about a 5.5% increase to family rates.

Source: 2018 Southeast MI Mid-Market Group Benefits Survey, Marsh & McLennan Agency Michigan

cost for prenatal care and birth is just under \$9,000 according to *Parents Magazine*. This amount does not even reflect the costs of complications. Include any special programs your organization or the health plan offers for new mothers. For older employees, use cancer treatment as an example. This information will help employees become aware of and understand their health benefits.

You should also spend time explaining health insurance terminology. Very few Americans can correctly define *deductible*, *copay* or *coinsurance*. Employees don't understand how these benefits work. If your employees can see its value, they may be more inclined to learn about the actual mechanics of how insurance works. Although it is important, the topic is not super exciting. Try to explain it clearly and concisely using a variety of media.

Once your employees understand the basics, your organization should create information campaigns to explain how to work with

the health care system. These could be simple missives on how to speak with a doctor. For example, you could include a communication piece with these simple questions to ask:

- Are there any side effects to the prescription drugs you are recommending?
- How quickly should my symptoms go away after the treatment you prescribe?
- Will any new medications interact with the current medications or supplements I take?

You should also offer information on the benefits that will help when health care issues arise. Most plans offer telehealth resources. Explain how these plans work to save time and money. Send reminders about the value of telehealth. Most health plans have transparency tools and other tools to help employees use the plan effectively. Again vary the media and use short, direct communication. Varying media is

critical to catching employees' attention. Try texts, videos, emails, posters and slides on a company monitor. Use infographics and color to draw attention.

For employers, communication should be a year round event. It does not need to generate significant work. Use the resources your vendors offer. Many vendors offer free communication materials and professionally-developed campaigns. Use your internal communications department to help vary your communication efforts.

Finally, repeat your messages. Not all employees see or pay attention to a specific message the first time. It is okay to reuse effective communication pieces. To reach employees, you need to send them the message when they are ready to pay attention.

Continued on Page 5

Most employers still view open enrollment as the main time of year to explain benefits. Plan and contribution changes seem to garner the most attention at open enrollment. Because these issues are the focus of open enrollment, any other key messages will be lost. Beginning in 2019, set a goal to inform your employees about other health plan benefits and programs during the year. Build a

plan to explain the basics, the value and the ways to use the health care program effectively. Remember to vary media and make messages short and direct. Releasing focused key messages throughout the year makes it more likely you will reach employees.

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Continued on Page 6

Technical Corner

CYBERSECURITY AND HUMAN RESOURCES

Many organizations consider cybersecurity to be just an IT responsibility. While IT does protect internal and external data systems from technical issues, HR handles the majority of education and integration throughout an organization. For that reason, cybersecurity should be the combined responsibility of the IT, HR and even risk management departments.

It is rare that a cyber threat is strictly a systems issue. Very often breaches occur because of an employee's actions. Many cybersecurity vulnerabilities can be avoided with a well-trained workforce and HR usually conducts training.

For example, common cyberattacks can be launched:

- When employees click on email attachments from someone they don't recognize and, sometimes, even when they do recognize the sender.
- An email that mirrors the look from a co-worker or supervisor with a link that asks the employee to log on

using a company user name or password.

- An email HR receives asking for sensitive employee data that seemingly comes from a legitimate source in the organization.

All of these attacks can leave sensitive employee data and employer systems vulnerable. IT may have protected your systems thoroughly from outside threats, but when employee actions invite cyberattacks into your systems, it is hard to protect data.

HR can help by creating a robust, cybersecurity training program working with IT and risk management within your organization. Training should occur with new hires, but it should also be an ongoing effort. Here are a few ideas to help train employees:

- Send a fake phishing email out – require employees who click on it to complete a quick refresher on the dangers of clicking on unknown links
- Send notices on specific malware concerns that employees should watch

for – and whom should they contact if they suspect they have received a phishing email or malware

- Have your systems prompt employees to update passwords and remind employees to keep their passwords secure

Encourage employees to seek help immediately if they have a cybersecurity concern.

HR departments need to be careful in their own area. Many cyberattacks target HR departments because they hold so much sensitive data. HR employees should always verify that upper management requested a report before they respond to a request for sensitive information.

In addition, organizations should consider encrypting emails and laptop computer hard drives. These steps secure data in an email or on a lost laptop. Finally, all employers should consider cybersecurity insurance. Your property and casualty consultant should be able to provide information on this important liability coverage.

LIABILITY LESSONS

IS YOUR ANTI-HARASSMENT POLICY UP TO DATE?

With all the discrimination claims after the recent barrage of harassment allegations against public figures, employers need to make sure they are prepared. At a minimum, your anti-harassment policy should be updated to make sure it covers all protected classes of employees!

Well-publicized and consistently enforced policies prohibiting workplace harassment should be in place. Employers should require prompt, impartial investigation of any harassment claims and take disciplinary action when necessary.

In recent years, federal and state court decisions have increased employer responsibilities when there is a harassment claim. It is, therefore, important to review your policies periodically with competent legal counsel to be sure they are up-to-date.

Too often employers consider only sexual harassment when they draft anti-harassment personnel policies. While sexual harassment is indeed a key element, the policy should also specifically ban many other forms of harassment as well. These forms include harassment based on religion, race, color, national origin, age, sex, height, weight, disability, marital status and other legally protected classes.

An anti-harassment policy should contain, at a minimum, the following elements:

- Statement that harassment will not be tolerated
- Clear definition of harassment (the prohibited conduct)
- Several possible ways to make a complaint, including bypassing a supervisor when necessary
- Procedures for immediate, thorough and impartial investigation
- Confidentiality guarantee to the extent possible
- Disciplinary action for substantiated complaints
- Policy banning retaliation
- Well-publicized information distributed to staff through the personnel manual or other method
- Periodic, mandatory, and well-documented staff and supervisor training



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