

What Employers Need to Know as More States Approve Recreational and Medical Marijuana

In the words of country music legends Willie Nelson and Merle Haggard it appears the country is going to pot, or more accurately for pot. In Tuesday's voting, three more states passed laws permitting recreational marijuana while another three voted to legalize it for medical use. This brings the total number of states that have recreational pot to seven (Oregon, Colorado, California, Washington, Alaska, Massachusetts, Nevada and D.C.) and 28 States that have legalized pot for medical use (now including Florida, North Dakota and Arkansas). We are still waiting to hear from Maine, a state which also voted on whether to legalize it for recreational use (and the yes votes appear to be leading there).

Now, with the majority of states having marijuana legal either medically or for recreational use the questions is will the federal law catch up with it, as it is currently banned under federal law. President Obama said just before the election that if these states voted yes on marijuana it would likely be the tipping point for a change on the federal level. This comment was made by the soon to be former president with the belief that his party's nominee, Hillary Clinton, would have been elected. With President-Elect Donald Trump there is more uncertainty about how he will view the issue. To that end, it is widely believed that either former New York Mayor Rudolph Giuliani or current New Jersey Governor Chris Christie will be top choices for Attorney General in the Trump administration, neither of whom favor legalizing marijuana. However, the current president-elect seems to be a populist candidate and has not definitively weighed in on the topic and may side with what appears to be the will of the people.

What is notable about a lot of the states that have passed such laws is that it has come about on a bipartisan basis. Furthermore, a federal bill that has been languishing in the House of Representatives for a year now, The Carers Act, was proposed by three prominent senators from both parties, Rand Paul (R-KY), Cory Booker (D- NJ) and Kirsten Gillibrand (D-NY). This bill would end the federal ban on marijuana and re-schedule it to a Schedule 2 drug under the Controlled Substances Act.

Regardless of whether the federal government changes the law, or continues to ignore the current law, it will remain an issue for employers and insurance carriers around the country. Notable for employers with the recent passing of the laws around the country, in California and Nevada, employers have the right to enforce rules about how their employees use marijuana, while in Massachusetts, the ballot measure states that employers will be permitted "to prohibit the consumption of marijuana by employees in the workplace." All of this needs to be clarified and discussed with counsel, as have all of the existing states laws. To date, courts around the country have held in favor of employers when sued by an employee who is using marijuana legally under the state's law. However, it is very possible that this could change now with a clear majority of the country legalizing the drug.

Comment: What do employers need to do in light of all of this? They need to ensure a safe work environment while also trying not to violate their employees' rights in the process. Things that employers should do to make sure they are operating within their states laws are: Know your law; Know your obligations; Have very clear drug policies; Know your rights; and Make sure your employees know your policies and understand them.

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