Must California Workplaces be 'Drug Free?'

By Holly Culhane

A good friend received a troubling inquiry the other day from a supervisor who works for a local nonprofit organization.

Clearly distraught, the caller wanted to know if California law mandated companies maintain drug-free workplaces. This seemingly simple question can be complex, so my friend asked for details and then sought my advice before responding to the caller.

The caller explained that the organization's top executive wants to hire a friend for a maintenance job. The applicant recently retired with a disability pension from another company.

The caller wasn't questioning how the applicant could be too disabled to work for one company, but be hired by another company to do the same work.

Instead, he was alarmed by the instructions that he had received from his boss to test the applicant multiple times until the applicant is able to pass a required pre-employment drug test. The organization's written policy is to routinely reject an applicant who tests positive the first time.

The applicant is a years-long medical marijuana user. As a result, the likelihood of a positive test result for drug use is high.

The easy way to answer the question would have been to point out the danger of inconsistency. All applicants should be treated the same way. Giving only one person multiple chances to pass a pre-employment drug test exposes the nonprofit organization to hiring discrimination accusations.

But that answer only addresses an important hiring technicality. It does not address the drug-free workplace question.

No doubt voters in some states, including California, have caused confusion in recent years. They have passed ballot initiatives legalizing marijuana use under their states' laws, while federal laws continue to ban the use. With federal and state officials conflicted over enforcing prohibitions, it stands to reason confusion would spill into the workplace.

In California, the more lenient view of marijuana use protects medical marijuana patients from criminal prosecution, but provides no protection on the job.

A landmark 2008 California Supreme Court decision involving a systems administrator for Sacramento-based Raging Wire Communications upheld the legality of drug testing and the firing of an employee for marijuana use. The court ruled that employers are not obligated to accommodate medical marijuana use – on or off the job.

Also likely to apply in the nonprofit's case is the federal Drug-Free Workplace Act of 1988, which requires employers who receive federal contracts or grants to enforce a drug-free workplace. California's Drug-Free Workplace Act of 1990 includes a similar requirement. Both apply to marijuana. Violating the acts can jeopardize a company's or nonprofit's income.

The employer also should consider liability. If an employee comes to work under the influence of any substance, including marijuana, and has a car accident, injures another employee or makes some critical mistake, the employer has the "deep pockets" and stands to pay the price of a lawsuit.

With the law still evolving on marijuana use for medicinal purposes, employers must tread carefully. Consult a lawyer and human relations specialist when disputes arise and drug use is confirmed. Enforcing a consistent, clear drug-free policy is a safe route to take.

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