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Effects of Recreational and Medical Marijuana in the Workplace

I. The State of the Law

Widespread Legalization

Across the country, states are decriminalizing both medical and recreational marijuana. Different states have created different regulatory frameworks, but from a macro perspective, there is a clear trend towards elimination of both the legal consequences of marijuana use and the stigma surrounding it. Looming over state decisions on legalization is the continued federal illegality of all marijuana activities. The federal Controlled Substances Act classifies marijuana as a Schedule 1 drug, and makes the possession, cultivation, use, or sale of marijuana a federal crime. The prickly federalism issues presented by the conflicting state and federal laws are a subject for another conference—for now, it is enough to understand that marijuana use by employees constitutes a federal crime regardless of any state law legalizing the drug.

Federal Approach to Enforcement of Marijuana Laws

In recent years, the federal government has taken a more relaxed stance towards medical marijuana use. The Department of Justice has issued guidance indicating that its various branches should only enforce the Controlled Substances Act's marijuana provisions in states that have legalized medical marijuana if the state is inadequately regulating the industry. Additionally, Congress has included a provision in the last two budget bills preventing the DOJ from spending any of its appropriations budget on medical marijuana prosecutions in states that have enacted medical marijuana laws. These discretionary enforcement decisions are subject to change at the whim of the new administration, which has indicated a desire to intensify marijuana enforcement. Additionally, an executive decision not to enforce certain laws does not change the fact that marijuana possession and use remains a federal crime.

II. Marijuana in the Workplace

Workplace Drug Policies

Most employers have an explicit drug policy laid out in their employment agreements. The core tenet of these policies is often “zero tolerance”—a blanket prohibition on the use of any controlled

substances while at work. This policy remains an option for employers, but it is important to note that it should likely only be applied where employees are under the influence of marijuana at work. Prohibiting off-site medical marijuana use could create liability under the Americans with Disabilities Act and similar state equivalents.

Drug Testing

Many employers implement drug testing programs in an effort to ensure a drug-free workplace. Outside of certain regulated industries, employers may need to account for medical marijuana regulations in states where they do business. The Americans with Disabilities Act may require employers to accommodate employees who have been diagnosed with certain illnesses and prescribed medical marijuana to treat them. While employers are still entitled to implement a drug-free workplace, they may not be able to discipline employees for off-site medical marijuana use. Any testing program would have to account for these concerns.

Fair Implementation of a Drug-Free Workplace Policy

Whatever policy an employer chooses to implement, the most important thing is to ensure that any discipline for drug use is handed down using a transparent and fair process. Employers should clearly articulate their policies and administer them consistently. In order to avoid potential civil liability, a policy should seek to keep drug use out of the workplace rather than to prevent the use of medical marijuana by employees when they are off the clock.

Federal Law as a Defense to ADA Claims

In disability lawsuits relating to an employer's drug policy, an employer's strongest defense will be that the conduct they have prohibited is illegal under federal law. The Americans with Disabilities Act requires employers to make "reasonable accommodations" for disabled employees. There is a strong argument to be made that allowing an employee to break federal law is not a "reasonable accommodation." Still, the best way to circumvent this issue is to limit a drug policy to prohibiting employees from being under the influence on-site, rather than prohibiting employees from ever using medical marijuana.

Recreational Marijuana

The concern over civil liability for employers stemming from Drug-Free Workplace policies only exists in the realm of medical marijuana. Whether a state legalizes recreational marijuana or not, there is nothing preventing an employer from issuing a blanket ban on recreational marijuana use for its employees.

III. The Effect of Medical Marijuana on Insurance Adjusters

As more and more states decriminalize the use of medical marijuana, problems stemming from overbroad workplace drug policies could become more frequent. From an insurance adjuster's perspective, this means that the laws of states where employers do business need to be a factor in deciding whether and how to insure them. Employers operating in multiple states must have flexible drug policies that comply with any and all laws in each of the states in which they operate. These

problems are easy to navigate with the proper foresight, but without that foresight the issues can become thorny. Investigating state laws and ensuring that employers have a proper drug policy are crucial when looking to insure them.