

THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER

HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES

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MEDICAL MARIJUANA KEEPS GROWING!

In November 2000, Colorado voters passed Amendment 20 to the State Constitution allowing patients to obtain and use marijuana for medical purposes by getting a state registry identification card. This requires completing an application, paying a \$90 fee, and getting a doctor's certification that the individual has a debilitating medical condition that may benefit from its use.

The Colorado Department of Public Health and Environment reports that for the past nine years, 13,000 patient applications were received. But now, the Department is receiving an average of 400 requests for cards each day. This 10,000% increase in potential card carrying users of medical marijuana has impacted and will continue to impact employers, especially those who drug test. What can an employer do about medical marijuana users in the workplace?

Initially, it should be understood that while Amendment 20 de-criminalized use of medical marijuana under Colorado law, it expressly provides no protection to users from sanctions by their current or potential employers for testing positive or using marijuana in the workplace.

Another state statute that protects employees from being terminated for off-the-job legal activities does not save the medical marijuana user either, because possession and use of marijuana is still illegal under federal law. Colorado courts have yet to rule on any case claiming wrongful refusal to hire or termination against an employer because of medical marijuana use. But other states' courts who have considered the issue have generally rejected such claims. Again, this is because the activity is still illegal, federally speaking. Users can be disciplined or terminated even if the employer can not prove that the individual was using marijuana at work.

What about an employee who is injured on the job and tests positive for medical marijuana? Will this affect workers' compensation benefits? Possibly. Colorado law reduces an employee's wage-loss benefits under workers' compensation by 50% if the injury results from the presence of "not medically prescribed controlled substances" in their system at the time of the injury. Because of its federal illegality, physicians can not prescribe marijuana, so it is not considered a "medically prescribed controlled substance," even though a physician might sign a letter (in a store parking lot for \$300) in support of the State issuing his patient a card permitting marijuana use for medical purposes. Thus, loss of workers' compensation benefits is a risk medical marijuana users face.

Finally, the Americans with Disabilities Act (ADA) does not protect individuals who are currently using illegal drugs. Therefore, the employer does not have to reasonably accommodate a disability by allowing the use of medical marijuana.

All that being said, an employer could have liability under the ADA or state anti-discrimination laws if the medical marijuana user is fired because the employer perceives him as disabled or treats him differently than other marijuana users who are not disabled. Uniformity in application of rules against marijuana use is crucial! So, before refusing to hire or terminating because of medical marijuana use, question whether you have treated or would treat other users the same. For example, if the company gives others a second chance to pass the drug test, then the proper response is to also give medical-marijuana users a second chance.

CONGRESS EXPANDS THE FMLA FOR MILITARY FAMILIES AGAIN

When Jimmy said he needed the next 6 months off to care for his cousin who is having back surgery, you thought he was joking. Not so! Jimmy is his cousin's designated "next of kin" and, even though his cousin has been out of the military 4 years, since he sustained the back injury, Jimmy may be entitled to up to 26 weeks of FMLA as the Act was recently amended.

On October 27, 2009, Congress signed "The Supporting Military Families Act," expanding the FMLA for military-caregiver leave and qualifying-exigency leave. The Act accomplishes the following:

- a. Employees are entitled to take military caregiver leave to care for family members who were injured on active duty in the military for **up to five years** after their separation from military service. Previously, military caregiver leave was available only to care for injured family members who are still in the military.
- b. Military caregiver leave is allowed when the family member suffered from a preexisting serious injury or illness that was **aggravated by active duty** service in the military. Before, there was no provision allowing leave for aggravation of preexisting injuries.
- c. The qualifying exigency leave provisions now apply to family members of someone in the regular armed forces who is called to go to a foreign country. Before, this type of leave was limited to family members of persons on active duty in the National Guard or military reserves. The requirement that service members be called to active duty "in a foreign country" replaces the current requirement that they be called to active duty "in support of a contingency operation."

Under the FMLA, military caregiver leave can be taken by the spouse, parent, child, or next of kin of the injured military person. The leave period for this purpose is up to 26 weeks in a year. Leave for qualifying exigencies is only 12 weeks in a 12-month period, the same as for other types of FMLA leave.

This Amendment is effective immediately and handbook policies on FMLA should be revised accordingly.

“PLEASE DESCRIBE YOUR REFRIGERATOR”

The goal when interviewing applicants is to determine who is the best person for the job without violating the numerous laws governing the employment relationship; without creating unnecessary contractual obligations for the employer; without unreasonably invading the applicant’s privacy rights; and, without setting the stage for a negligent hiring claim. Further, when interviewing applicants it is important that employers not ask questions that seek information about prohibited areas of discrimination (e.g., sex, race, religion, national origin, disability, age, sexual orientation, genetic information). Even if the interviewer has no intention of using the response to a question about the person’s protected status to unlawfully discriminate, the fact that the question was asked creates an appearance of unlawful intent.

So, don’t ask a female applicant, “How are you going to fit in with our predominately male work force?” Or the 60 year old, “Haven’t you saved enough to retire yet?” To avoid inadvertently stepping into deep do-do, an interviewer should develop an outline of questions to discuss that are the same for each candidate for the position. Every company’s needs are different, but a good basic strategy is to ground the interview in questions about job qualifications, past job experience and performance, then add questions aimed at evaluating the applicant’s practical decision making.

Initially, the interviewer should strive to develop a rapport with the candidate by asking something simple and non-threatening like “wow, can you believe how much snow we got last week?” or “was your Sunday ruined by the

Broncos, too, or did you go skiing instead?” This will make the applicant feel at ease, which will allow you to solicit better, and more honest, information later in the interview. Of course, such ice-breaking questions should stay away from questions that will, initially, alienate the candidate or put them on the defensive like “can you believe President Obama is putting more troupes in Afganistan when any idiot knows we’re not going to win this war?”

After these initial questions, the interviewer should focus on getting a clear picture of the candidate’s past performance and how the candidate feels about the job and the company. For example, ask the applicant to “describe a time that you overcame a major obstacle at work” or to “tell me about a time when you performed some duty at your current job that was well received and the reason for that reception.” Pay particular attention to certain intangibles. It’s true that some people are better at performing in interviews than they are on the job. And it could be a red flag if your candidate continually describes being the hero or victim in their current or past jobs. This could indicate that you’re not getting the whole story.

Have the candidate’s completed application form in hand and ask questions about responses to questions on the form. If, for example, the applicant checked “Yes” next to the box asking “Have you ever been convicted of a crime?” follow up with probing questions about this critical admission.

With respect to your company, be sure that you ask the applicant what interests them in the position. Often questions like, “but enough about you, what do you think about us?” will show if the applicant understands your company’s goals and mission and will also show whether the applicant has done his or her homework. Other questions

like, “where do you think this company should be in ten years?” or “what’s your opinion of our new product line?” will help you measure how the candidate will fit in with the company’s values and culture.

Next, the interviewer should focus on the candidate’s judgement and decision-making skills. For example, interviewers often ask candidates to “imagine that we’ve hired you. What’s the most important thing on your to-do list on the first day of work?” or “what would you do if you got behind schedule with your part of the project” as a way to determine how the candidate will perform the job day-to-day.

Finally, many interviewers like to throw in the occasional oddball question to determine how the candidate deals with surprises. Questions like “how do you think they get that cream filling in Twinkies?” or “describe your refrigerator” will require the candidate to ad-lib instead of just reciting well-rehearsed answers. This could give you insight into the candidate’s personality, inventiveness, and sense of humor. So long as the answer isn’t too short, too long, or too rude, virtually any response is a good one. But pay attention to attitude, the way the candidate approaches the problem, and the ease or difficulty they have in coming up with a response.

Of course, in the end, picking the right candidate from interviews often mirrors the mantra, “it’s better to be lucky than good.” Sometimes candidates who interview well turn out to be poor employees and visa-versa. But certain responses are red flags. An MSN Career Builder’s article cited these responses to mundane questions that indicated lack of common sense:

Q. Do you have any questions of us?

A. Yes. When you do background checks on candidates, do things like public drunkenness arrests come up?

Q. Can I get you anything before we start?

A. May I have a cup of coffee? I think I may be a little drunk from last night.

This goes to show that the question need not be clever to draw a telling response.

NEW REGS FOR THE ADA

On September 23, 2009, the EEOC published proposed regulations to implement the ADA’s amendments to the ADA that dramatically broaden the scope of what is a “disability” under the ADA. Pretty much, if there is something physically or mentally wrong with you, except poor vision that is corrected by eye glasses or contacts, you may be disabled.

Major Life Activities. The ADA provides a non-exhaustive list of major life activities and includes “major bodily functions” for the first time. The proposed regulations add a few other major life activities that are not specifically mentioned in the ADA (sitting, reaching, and interacting with others), and they suggest that particular impairments have such a strong link to major bodily functions (cancer, HIV, diabetes, sickle cell disease) that those impairments will almost certainly be considered disabilities under the ADA.

In fact, the regulations identify examples of several impairments that will consistently meet the definition of “disability.” These include: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use

of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia. This is a non-exclusive list and other impairments could consistently qualify as a “disability.”

In contrast, the list of impairments that do not qualify as a “disability” on a consistent basis is very short. The examples listed are such temporary, non-chronic impairments of short duration with little or no residual effects as the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely.

Substantially Limits. Under the proposed regulations, no longer must an impairment prevent or significantly restrict an individual from performing a major life activity. Instead, the determination of whether an individual is experiencing a substantial limitation in performing a major life activity will be a common sense assessment based on comparing an individual’s ability to perform a specific major life activity with that of most people in the general population.

The regulations also discuss how to deal with mitigation measures. Consistent with the ADAAA, the positive effects of mitigation measures (other than ordinary eyeglasses or contact lenses) must be ignored in determining if an impairment substantially limits a major life activity. So, whether one uses a wheelchair, hearing aids, takes medication, etc., does not factor in to whether than individual is disabled. Mitigating measures can be taken into account in determining issues of reasonable accommodation and direct threat. Of course, the negative effects of

a mitigating measure (like medication side effects) may render someone “disabled.”

No longer must an impairment prevent someone from working in a broad range or class of jobs to substantially limit “working.” Working is substantially limited when an individual’s ability to perform, or to meet the qualifications for, a “type of work” is impaired.

“Regarded as.” Under the regulations, one plus for employers is that they have no obligation to provide a reasonable accommodation to an individual who only meets the “regarded as” definition of disability and is not actually disabled.

What Happens Now? The EEOC will evaluate comments and make revisions to the proposed regulations in response to those comments. Final regulations will likely come out sometime next summer. Nevertheless, any claims filed under the ADA for actions taken after the ADAAA’s enactment will be judged under the ADAAA’s amendments to the ADA, with or without final regulations. Basically, the focus is no longer on whether someone is disabled, but did the employer know of the impairment and take reasonable steps to accommodate; or did the employer perceive the individual as disabled and discriminate against him or her based on that perception when the individual was otherwise qualified for the job?

MINIMUM WAGE DECREASES!

On January 1, 2010, the minimum wage in Colorado will go from \$7.28 per hour to \$7.25, which is the current federal minimum. This is HISTORIC! Never before has the Employer’s Advisory seen the minimum wage go down. We’re betting we never see it again.

Q & A

Q. We have an employee who is going to have an operation and will be out for a few weeks. He will not be eligible for FMLA on the scheduled date of the operation because he will not have worked for us 12 months. His anniversary is 3 days after the operation date. Does he get FMLA?

A. His first 3 days of absence will not be covered by FMLA, but as of his anniversary date, assuming that he otherwise qualifies for FMLA, his FMLA will start. His job and insurance benefits are not protected by the FMLA for the 3-day non-FMLA period. However, if he has other accrued leave, such as vacation or sick leave that will cover the period he should be allowed to take these leaves. He can be required to fulfill the requirements for requesting such non-FMLA leave as a condition of granting the leave.

Q. How do we withdraw an offer of employment because of a criminal background check showing a felony?

A. Hopefully, you advised the candidate initially that the offer was contingent on the results of a criminal background check and got written authorization for the background check. In compliance with the Fair Credit Reporting Act, you must now notify the candidate that you “intend” to make an adverse employment decision based on the background report. Provide a copy of the report, the name, address and telephone number of the agency that prepared the report; advise the candidate that the agency did not make the decision to take an adverse action, and is not able to

explain why the decision was made. Also, advise that the candidate has the right to obtain a free disclosure of their file from the agency if requested within 60 days, and may dispute directly with the agency the accuracy of any information. Finally, you must provide the candidate with “A Summary of Your Rights” published by the Federal Trade Commission. Employers can be fined up to \$2,500 for each knowing violation of the FCRA and be sued civilly by the affected candidate for actual damages and attorneys fees.

Q. An employee announced that she carries a loaded pistol in her purse for protection. When we told her she couldn't bring it to work, she showed us her permit to carry a concealed weapon and said it was her legal right to have the pistol with her at all times and she will sue us if we interfere with this right. What can we do?

A. Colorado's concealed weapon permit law provides that it does not limit, restrict or prohibit private employers from banning carrying weapons at work. So long as you enforce your rule against weapons uniformly, you can terminate the employee for insubordination if she violates your instruction. CRS §18-12-214(5).

Q. Does absence due to a drinking binge following our Christmas party qualify for FMLA leave?

A. No. While absences for treatment of alcoholism are covered, absences caused by the use of alcohol are not. 580 F.3d 781; 29 U.S.C.A. § 2615(a)(1).