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Reefer Madness: What Employers Need to Know About Medical Marijuana and Drug Testing Under Washington Law

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In 1998, Washington voters approved the Medical Use of Marijuana Act ("MUMA"). MUMA provides a defense from criminal prosecution for physicians who prescribe medical marijuana and for patients who use prescribed medical marijuana. MUMA's only reference to "employment" as the law was originally drafted, stated: "Nothing in this chapter requires any accommodation of any medical marijuana use in any place of employment . . . ." In 2007, the Washington legislature amended MUMA, clarifying that nothing in the law required "accommodation of any *on-site* medical use of marijuana in any place of employment . . . ." The legislature's amendment opened the door to a claim that MUMA was intended to accommodate *off-site* use of medical marijuana that did not impact an employee's job performance—or at least that was the argument heard recently by Washington's Supreme Court.

MUMA and Marijuana Use by Employees. In ***Roe v. TeleTech Customer Care Management (Colorado) LLC***, __ Wn.2d __ (June 9, 2011), the Washington Supreme Court considered whether MUMA provided for a claim against an employer who discharged an employee for medical marijuana use.

Jane Roe, who used an alias because marijuana use remains illegal under federal law, sued TeleTech for terminating her employment after she failed a drug test required by TeleTech's substance abuse policy. She alleged that she had been wrongfully terminated because her marijuana use was "protected" by MUMA. The trial court disagreed and dismissed Roe's claims on summary judgment, and the Washington Court of Appeals affirmed the dismissal.

On appeal, the Washington Supreme Court affirmed the decisions of the lower courts and held that MUMA does not protect medical marijuana users from adverse hiring or disciplinary decisions based on an employer's drug testing policy. Specifically, the court found that MUMA neither provides a private cause of action for an employee who uses medical marijuana, nor creates a public policy that would support a claim for wrongful discharge.

Drug Testing in the Workplace. While *TeleTech* is a victory for employers, it is also a good reminder to carefully consider both the substance and implementation of any drug and alcohol testing policy.

Both the Washington Law Against Discrimination ("WLAD") and its federal counterpart, the Americans With Disabilities Act ("ADA"), allow for drug and alcohol screening tests. Indeed, employers have many good reasons to adopt policies in this area, such as safety and health concerns, legal requirements including federal laws prohibiting the possession and use of illegal drugs, and liability for injuries and accidents as a result of employees who are under the influence of illegal drugs or alcohol at work.

Under the WLAD and ADA, employers should not require any pre-employment medical screening (including drug and alcohol testing) until prepared to extend a conditional offer of employment, *i.e.*, you are ready to hire the individual subject to a negative drug test. Also, all applicants for specific jobs (decided on in advance) who are conditionally offered employment should be tested to guard against any claims of discrimination. In addition, because of constitutional privacy concerns, public employers should limit pre-employment screening to applicants for positions that genuinely implicate public safety.

With respect to drug and alcohol testing during employment, Washington law, and federal law for the most part, are silent on the circumstances under which a private employer can engage in drug screening. Neither the WLAD nor ADA recognize the current use of illegal drugs or being under the influence of alcohol at work as a disability requiring reasonable accommodation. Non-union private employers may therefore generally test their employees in accordance with appropriately-adopted drug testing policies. Employers who opt for testing and screening generally adopt some form of random screening, regular workplace screenings of groups of employees, and/or screening based on a reasonable suspicion that a particular employee is under the influence of drugs or alcohol at work. Whatever model an employer adopts, should ensure that the policy is announced, consistently applied, and fits its particular circumstances (for instance, some employers are required to engage in drug and alcohol screening based on their particular industry). Private employers who are also federal contractors may face more onerous requirements for adopting drug screening and testing procedures in order to comply with contract requirements and applicable executive orders.

Unionized and public employers face a different set of challenges. Prior to implementing any drug and alcohol screening policy, unionized employers should attempt to negotiate with the union the terms of the policy and how it will be implemented. A private sector employer's failure to do so will likely result in an unfair labor practice charge being filed with the National Labor Relations Board. If the parties reach an impasse, the employer can implement the program. The Washington Public Employment Relations Commission also has ruled that drug and alcohol testing is a mandatory subject of bargaining for public employers. In addition, public employers in Washington will generally need reasonable suspicion before engaging in post-employment screening of employees, unless the position genuinely involves public safety.

Employers may also want to consider adopting a substance abuse program as a part of any screening policy. Although such programs are not mandatory, they give employers the option of showing compassion to those who admit they need help, while preserving the employer's ability to maintain a safe workplace.

Renewed Legislative Efforts. The last word on marijuana at the state level may come from Washington's voters. Two initiatives, currently in the signature-gathering phase, aim to legalize and regulate the possession and use of marijuana by individuals, regardless of medical need. One of the initiatives has the backing of the Seattle City Attorney, a former U.S. Attorney and a former President of the Washington State Bar Association. Although it is unclear whether either initiative will garner enough support to be considered by Washington's voters or the legislature, any decriminalization of marijuana at the state level will certainly be accompanied by renewed efforts to curb an employer's ability to take adverse action based on an employee's possession or use of marijuana outside of the workplace.