

***Third Thursday* –Crowell & Moring’s Labor & Employment Update**

January 22, 2015

The webinar will begin shortly. Please stand by.

Today's Presenters



Tom Gies



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Medical and Recreational Use of Marijuana And Employer Drug Testing Programs



Today's Discussion

- State Law Initiatives
- Federal Law Enforcement Issues
- Employer Responses

“You don’t need a weatherman to know which way the wind blows.”

Subterranean Homesick Blues

– Bob Dylan, 1965

State Medical Marijuana Laws

- Decriminalization of medical use of marijuana
- States legalizing marijuana for recreational use

Statutes Specifically Prohibiting Discrimination Against Lawful Medical Marijuana Users

- Delaware, Arizona and Minnesota (July 2015)
- Connecticut
- Maine
- Rhode Island
- New York (2014)
- Illinois (2014)

Americans with Disabilities Act

- Definition of 'qualified individual' 42 U.S.C. § 12102(1)(A)
- 'Current Illegal Use' exception 42 U.S.C. § 12210(a)
- 2008 amendments and 2011 regulations

Americans with Disabilities Act

- ADA authorizes the prohibition of illegal drug use in the workplace.
 - “Illegal use of drugs means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional. . . .” 42 USC 12210(d)(1).

Federal Government Drug Testing Rules

- Drug Free Workplace Act
 - Applies to federal contractors or grant recipients
 - Does not require drug testing
 - Requires discipline or substance abuse assistance for criminal drug *convictions occurring in the workplace*
- DOT regulations
 - Rejects DOJ's non-enforcement position

State Disability Acts

- Substantive Requirements
 - Federal ADA is the model
- Current Illegal Use addressed in various ways
 - Washington approach

State “Lawful Conduct” Laws

- Laws protecting lawful use of “consumable products”
 - Early laws focused on tobacco use (e.g., Kentucky)
 - Others define lawful products more broadly (e.g., Illinois, North Carolina)
- Broad statutory protection for lawful off-duty conduct
 - New York, Colorado, California

State “Lawful Conduct” Laws (cont)

- California Labor Code Section 96(k)
 - Covers claims for reinstatement and lost wages resulting from discipline for lawful off-site, off-duty conduct
 - Unlikely to support a claim by employee that tests positive for lawful medical marijuana use

Tension Between State and Federal Law

- Federal Controlled Substances Act vs. State Marijuana laws
- Definition of “illegal drug use” under state law
- Explicit prohibitions on discrimination in state medical marijuana laws

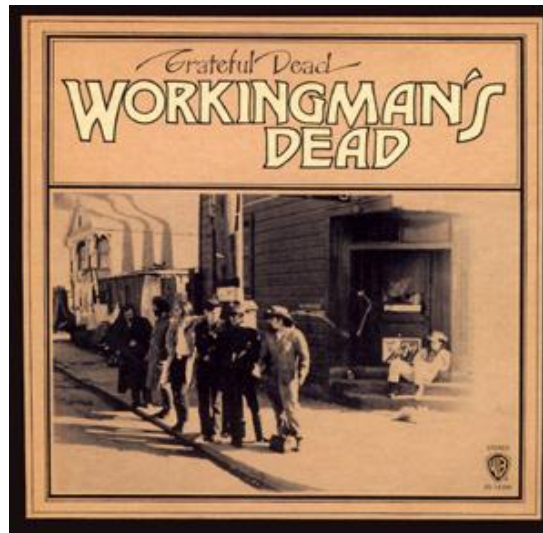
Recent Cases Addressing the Conflict

- *Ross v. Ragingwire*
- *James v. City of Costa Mesa*
- *Roe v. TeleTech*
- *Casias v. Wal-Mart Stores*
- *Coats v. Dish Network*

What Employers Should Do Now

- Review applicable state law
- Establish substance abuse/drug testing policies
- Review existing policies
- Conduct Training

What a long, strange trip



Selected Authorities

Statutes

- Controlled Substances Act, 21 U.S.C. 812(b)-(c).
- Drug-Free Workplace Act of 1988, 41 U.S.C. 81

Cases

- *Kosmicki v. Burlington Northern & Santa Fe Ry. Co.*, 545 F.3d 649, 650 (8th Cir. 2008)
- *Curry v. MillerCoors, Inc.* No. No. 12-cv-02471-JLK (D. Colo. Aug. 212, 2013)
- *Coats v. Dish Network*, 303 P.3d 147 (Colo. App. 2013)
- *Casias v. Wal-Mart Stores*, 695 F.3d 428 (6th Cir. 2012)

Selected Authorities (cont.)

- *Braska v. Challenge Manufacturing Co.*, ___ Mich. App. ___ (October 23, 2014).
- *Roe v. TeleTech Customer Care Mgmt.*, 257 P.3d 586 (Wash. 2011)
- *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200 (Cal. 2008).
- *Johnson v. Columbia Falls Aluminum Company, LLC*, 2009 WL 865308 (Mont. 2009)
- *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010).

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