

DWD Issues Marijuana Guidance for Employers

The shifting landscape of marijuana laws around the country leaves no shortage of questions for businesses and individuals not only in the states where some level of legalization has occurred, but of course in bordering states as well. Though marijuana remains illegal in Wisconsin as a matter of federal and state law, more than ten states now have broadly legalized the use of marijuana for recreational use under state law, including our neighboring states of Michigan and Illinois. Recognizing this, the Wisconsin Department of Workforce Development recently issued guidance to employers on workplace policies that restrict employee use of marijuana and other drugs.

In that guidance, titled “Wisconsin Employers and Marijuana,” the DWD notes at the outset that changes in other states’ laws have little legal effect on Wisconsin employers’ rights. For example, Wisconsin employers can still restrict possession, distribution and use of marijuana in the workplace. Employers also can prohibit employees from working while under the influence. However, the DWD recommends that such policies be put in writing, clearly communicated and consistently enforced.

The DWD also notes that while Wisconsin law prohibits employment discrimination based on the use of lawful products, marijuana remains illegal throughout the United States as a matter of federal law. Consequently, employment actions based on an employee’s marijuana use would not constitute “lawful products” discrimination.

The DWD cautions, however, that there are a few areas where Wisconsin employers could encounter legal pitfalls. First, employers may not discriminate based on arrest and conviction records, including marijuana-related arrest and conviction records. So, for example, refusing to hire an individual due to a marijuana-related arrest normally would constitute illegal discrimination. Second, it is important for employers to distinguish between illegal drug use

and addiction, because addiction is a protected disability under state and federal law. Employers may not refuse to hire or take adverse employment action against an individual based on addiction disability. Most employers also must reasonably accommodate the disability, for example, by permitting the employee to take time off for treatment. Third, the guidance notes that if an employee uses medical marijuana (which is legal in several surrounding states), a Wisconsin employer may enforce workplace policies, but should at the same time accommodate the underlying disability.

Finally, the guidance emphasizes that it is up to individual employers to determine the scope of policies on marijuana use by employees and how to enforce them. The DWD observes that different employers may wish to take different approaches. For example, some employers may adopt “zero tolerance” policies for use of marijuana for safety-related reasons. Other employers may find that “zero tolerance” is neither practical nor desirable given the increasing normalization of marijuana use. In such cases, employers may be best off focusing on whether the use of marijuana impacts the individual’s ability to fulfill job duties, rather than focus on use alone. As always, if you or a client have a question about the intersection of marijuana and the workplace, you should consult competent counsel before taking action.



> **Josh Johanningsmeier**
IIAW General Counsel