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DOJ Marijuana Memo Goes Up in Smoke – Should Companies Inhale or Exhale?

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On January 4, Attorney General Jeff Sessions rescinded Obama-era guidance outlining the federal policy of non-interference with state-run marijuana programs. The Attorney General's actions have rocked the cannabis industry. But for now, companies and employers can breathe easy.

Marijuana remains illegal under the Controlled Substances Act, a federal law that classifies across five "schedules" any substance capable of interacting with the human body. Schedule 1 substances have a high potential for abuse and no currently accepted medical use, while Schedule 5 substances have a low potential for abuse and a currently accepted medical use. Marijuana has always been a Schedule 1 substance, along with heroin, LSD, and ecstasy, for example. As a Schedule 1 substance, under federal law, possession or use of marijuana for any reason is strictly illegal.

Nevertheless, as of this writing, at least 29 states and the District of Columbia have approved the use of marijuana for medical and/or recreational use. Still, other states and municipalities have decriminalized possession of marijuana, or now allow those criminally charged with possession to assert medical necessity as a defense to prosecution.

Under the Obama administration, a number of guidance memos were distributed throughout the Department of Justice. These memos culminated with the "Cole Memo," authored by Deputy Attorney General James Cole. The Cole Memo provided guidance on marijuana enforcement "in light of state ballot initiatives to legalize under state law the possession of small amounts of marijuana and to provide for the regulation of marijuana production, processing, and sale." In short, the Cole Memo directed a more hands-off approach in "jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale and possession of marijuana." The Cole Memorandum was comprehensive in that it applied to "all federal enforcement activity, including civil enforcement, criminal investigations and prosecutions, concerning marijuana in all states."

The Cole Memo largely relegated marijuana control and enforcement to the states. It has been the de facto policy of the federal government since 2013. On January 4, Attorney General Jeff Sessions rescinded the Cole Memo and the guidance memos related to it. This signaled the DOJ's intent to prosecute marijuana-related activities in states that have legalized it.

The DOJ may have signaled its intent, but it still must get past Congress. Though Congress has failed to pass legislation regarding the Controlled Substances Act, it has addressed marijuana in a budgetary amendment. The amendment, now known as the Rohrabacher-Blumenauer Amendment, forbids the DOJ from using federal funds to prosecute marijuana-related activities in states allowing medicinal marijuana. In practice, this covers all states in which marijuana is legal as any state allowing recreational marijuana also allows medicinal marijuana, at least for now. The Amendment has been continuously adopted since 2014. It next expires on January 18, along with all other federal funding.

The Rohrabacher-Blumenauer Amendment only governs federal funding and, in turn, whether the DOJ can prosecute marijuana-related activities. Without question, marijuana remains illegal under federal law. For this reason, employers largely have the information they need to make workplace decisions.

Marijuana use or possession in the workplace remains grounds for disciplinary action, up to and including immediate termination. Employers are also free to maintain zero-tolerance drug-free workplace policies. How those policies are applied, however, may depend on the specifics of a relevant state's marijuana law or program.

Also, generally speaking, employers do not have to accommodate marijuana use. Federal courts addressing the issue have all concluded that marijuana use is neither protected by the Americans with Disabilities Act nor a reasonable accommodation under it. Certain states, however, have reached a different conclusion, for example, Connecticut and Massachusetts. Accommodation decisions need to be closely examined in any state with a marijuana law or program. Moreover, any request for accommodation – reasonable or not – may trigger traditional obligations under the ADA, such as engaging in the interactive process or the Family Medical Leave Act.

Until the possession and use of marijuana is settled at the federal level, companies and employers are stuck between the federal and state conflict. While workplace decisions are typically governed by federal law, no court or agency has provided the answer to every question or situation. When confronted with a marijuana-related issue in the workplace, employers need to proceed with caution. If you are operating in a state with a marijuana law or program, there are additional steps to take, such as updating job descriptions and workplace policies. By doing so, companies and employers are better positioned to defend against state law claims. If you have any questions or would like more information on the topics discussed, please contact the author, Zachary Busey, or the Baker Donelson attorney with whom you regularly work.