Rhode Island Employers can No Longer Discipline Employees for Out-of-Work Recreational Weed Use

By Alicia Samolis and Michael Gamboli

Pursuant to the new law legalizing recreational marijuana in Rhode Island, private employers are now prohibited from firing or taking other disciplinary action against an employee for recreational marijuana use outside the workplace. The narrow exceptions to the prohibition are as follows:

- Employees cannot be "under the influence" at work. However, it would be unlikely that an employer could show an employee was high at work absent direct observation of ingestion of marijuana or an admission by the employee. The law states that the presence of cannabis metabolites in the system (i.e., a positive marijuana drug test) does not show the employee was "under the influence" and a different Rhode Island law severely limits post-employment drug testing altogether. While an employer could try to assess whether an employee is high based upon symptoms (e.g., bloodshot eyes and slow response time), there would be real legal risk in taking adverse action against the employee if an employer knew the employee used marijuana outside of work. This is because a fact finder may reasonably conclude it was the knowledge of the protected out-of-work conduct that led to the discipline, not the alleged symptoms which could have been caused by various factors. A better practice for employers who are faced with an employee who seems to be under the influence would be to discipline the employee for the unprofessional symptoms observed (e.g., giving the warning for giggling uncontrollably in a meeting without reference to the assumed causation).

- There is an exception for employers who would lose funding or licensing under a federal law, regulation or contract. This would not apply to many federal contractors, as those subject to the Drug Free Workplace Act would not lose funding or licensing if they do not impose discipline for recreational marijuana use.

- Employers may implement a policy against the ingestion of marijuana within twenty-four (24) hours of a shift or assignment if the employee is in a position that is hazardous, dangerous or essential to the public welfare. Similar to the exception for allowing discipline for employees "under the influence" of marijuana, it would be difficult for an employer to know that an employee violated such a policy.

- Employers may continue to discipline and terminate employees for recreational marijuana use if specifically agreed to in a collective bargaining agreement.

Normally an at-will employer in Rhode Island can discipline or terminate an employee for legal, out-of-work conduct. For example, employers are free to fire an employee for rooting for the opposing sports team, drinking alcohol, going to yoga, or engaging in other conduct unrelated to a protected characteristic. As a result of the new law, Rhode Island joins a limited number of states that not only legalized marijuana but also have made recreational marijuana use a protected activity.

The law does not create a new private cause of action, enforcement mechanism or contain penalties for a violation of this section. Rhode Island also does not recognize a cause of action for wrongful termination and historically has rejected attempts to challenge terminations through non-statutory causes of action in the at-will employment context. However, a Rhode Island court may very well read a cause of action into the statute, as the Superior Court did in the similar medical marijuana card context in *Callaghan v. Darlington Fabrics Corporation*. However, even if an employee was successful, the employee would not be able to recover their attorneys' fees or receive damage multipliers common to other wrongful termination claims. Despite this, employee-side attorneys will be eager to file lawsuits under the new law given that such cases will undoubtedly

receive widespread publicity.

The change in the law also makes claims under the Rhode Island Whistleblower Protection Act more likely. Employees disciplined for recreational marijuana use, as well as their friends and even supervisors, will be far more likely to raise their belief the discipline is illegal, setting the employer up for a retaliation claim under the Act.

Employers still can legally limit discussions of recreational marijuana use in the workplace, prohibit employees from coming to work smelling like recreational marijuana and hold employees to performance and professionalism standards. Employers are not required to inform employees of their right to use recreational marijuana outside the workplace.

Businesses facing an employee discipline issue involving recreational marijuana use are encouraged to contact their employment law counsel prior to taking adverse action.

Partridge Snow & Hahn attorneys Alicia Samolis and Michael Gamboli of the Employment & Labor Practice Group are ready to answer any questions about this recent decision. For additional information and resources visit the firm's website at www.psh.com.

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