

MEMORANDUM

TO: Michigan Employers
FROM: Steven J. Fishman
DATE: October 7, 2008
SUBJECT: Will Michigan Workplaces Go a Pot?

Michigan voters will decide on November 4 a State ballot proposal which seeks to legalize the medical use of marijuana. Disguised as a compassionate law to aid serious debilitating medical conditions, the proposed law, when viewed in detail, actually permits marijuana use in, among other places, the workplace. All the employee needs is a doctor's statement that the employee "is likely to receive... benefit from the medical use of marijuana to treat or alleviate ... debilitating medical condition or symptoms". Section 3(I).

Qualifying as a "debilitating medical condition" is the low threshold of any "medical condition or its treatment that produces ...severe and chronic pain...[or] nausea...[or] muscle spasms..." Section 3(a)(2). Employers are all too familiar with the asserted disability claims by employees of pain, nausea, or spasms, which can, under this ballot proposal, lead to physician excused use of marijuana in the workplace.

Armed with the doctor's statement, the employee can grow and use marijuana, and they, their "primary caregiver", and providers of pot paraphernalia, are free from any "prosecution...civil penalty or disciplinary action..." Section 4(a),(b),(g). Masked as a step in the process of legalizing marijuana, the ballot proposal assumes, without scientific support, that the medical use of marijuana is critical for various debilitating medical conditions.

There is no scientific evidence that smoked marijuana is a safe and effective medicine. Nor has the FDA approved marijuana or any smoked delivery system as a medicine. Contrary to available FDA approved prescribed medicines, how are employers to monitor use of marijuana for medical purposes? There is no FDA control on the use of marijuana, whether smoked or otherwise ingested, with no directives on quantity, frequency, duration, time, or method of administration.

Smoking is a crude delivery system which leaves undetermined the dose inhaled, the strength of the dose necessary, and is really no different than the use of tobacco in the workplace. Others are affected. The side effects of harmful chemicals and carcinogens are byproducts of

smoked marijuana which create new health problems for employers in the face of tobacco free initiatives.

Rather than scientifically based, such as FDA approved medicines, the ballot proposal is politically based. While there are serious unanswered questions on the scientific support for the medicinal use of marijuana, there is no question that marijuana use is intolerable in the workplace.

Marijuana possession and use is illegal under Federal law, and not ADA protected. As with other controlled substances, marijuana has a profound effect on the workplace safety, accidents, lost time, productivity, absenteeism, insurance costs, and loss of good will. There is no argument that marijuana use can affect short-term memory, attention, alertness to danger, motor skills, and reaction time.

Workplaces exposed to marijuana use will face increased liability. Cases make clear that employees unfit to work are also unfit to drive. Once the employer asserts control over the workplace situation, to remove the unfit employee, there is a duty of care to prevent that unfit employee from endangering the general public. If the unfit employee is allowed to drive home, and causes an accident, which injures or kills another person, the employer is exposed.

Discipline or termination of a marijuana abusing employee has been consistent with the requirements of Federal law, and well within the employer rights. 20 years ago the *Carondelet Coke* landmark arbitration decision sustained the employer's right to discharge a marijuana abusing employee protected by a factory labor contract "...to safeguard the safety and health of its employees and to protect its plant and equipment...[from] employees under the influence of illegal drugs which can affect alertness and fitness for safe work."

What choices are left to the employer by the ballot proposal? Can employers enforce zero tolerance drug policies? While there is no requirement in the ballot proposal that employers tolerate workplace ingestion or working under the influence of marijuana, disciplinary action is specifically prohibited. If the problem employee is under the influence of marijuana affecting the employee's "alertness and fitness for safe work", what is the alternative short of discipline? For how long must the employer and the Michigan public tolerate the marijuana using employee who claims medical benefit from use?

We regularly counsel employers on various workplace issues including compliance with federal and state labor and employment laws. Workplace drug prevention is among the top 10 "hot button" items for employers, based on a survey of calls for help to our office. Just e-mail me for a copy of our latest top 10 list of hot button of workplace issues.

Michigan already ranks number 1 with the highest unemployment rate, the absence of job growth, and being among the least attractive states for business. Michigan can ill afford having its workplaces go to pot.



***Steven J. Fishman** is chair of the twenty-member Workplace Law Practice Group at Bodman LLP, one of Michigan's largest business law firms with 150 attorneys in five offices throughout the state. He has more than forty years of experience in all facets of labor and employment law, representing management exclusively. Mr. Fishman served as a trial attorney with the Pittsburgh Region of the NLRB, was associated with a large Chicago law firm's labor and employment practice group, was in-house labor counsel to a Detroit based Fortune 500 manufacturing business, and headed up his own labor and employment boutique law firm, The Fishman Group, with clients throughout the Country. Mr. Fishman is a frequent speaker to management groups, such as the Society for Human Resource Management, Michigan Bankers Association, various Health Care trade groups, and the Michigan Chamber of Commerce, on finding creative, business-oriented solutions to workplace legal problems. Mr. Fishman serves the Michigan Chamber of Commerce as its Special Labor and Employment Counsel and writes a monthly column for its business magazine, Michigan Forward, on emerging workplace law issues. Mr. Fishman can be reached by telephone at 248-743-6070 or by email at sfishman@bodmanllp.com.*