

Mary Jane and the Remote Workplace

Article By:

Leonora M. Schloss

As shelter in place orders were rolled out in California, many businesses transitioned their workforce to remote work for the first time. Employers had to determine how to track hours worked or what qualified as a business expense. However, other unique questions arise with a remote workforce, such as how to handle employees using marijuana while working from home.

Over a decade ago, when California passed the Compassionate Use Act, an employee questioned an employer's right to prohibit marijuana use. The California Supreme Court in *Ross v. Ragingwire* held the employer need not accommodate medicinal marijuana use, irrespective of the Compassionate Use Act of 1996. *Ross* reasoned that since the California Fair Employment and Housing Act (FEHA) does not require employers to accommodate illegal drug use, the employer could lawfully deny employment to individuals using medical marijuana, which remains illegal under federal law.

More recently, in 2016 California legalized marijuana for recreational use, which further complicated employee marijuana use at work. Despite the change in marijuana's legal status, the law reiterated that an employer could have a policy against the use of drugs while working or at the workplace.

While the law permits employers to prohibit drug use at work, now a large portion of workers are working remotely. Unfortunately, the lines for employees may be blurred since they are in their own homes (and many people seem to need a little extra help getting through this pandemic).

Employers should remind employees that during working hours, the expectation is that employees will comply with all policies of the company, including drug and alcohol policies. If the company does not have a drug and alcohol policy, it may want to include information prohibiting the use of drugs and alcohol while performing work in a remote work agreement or work from home policy.

If a manager or supervisor suspects that an employee is using marijuana or other drugs while performing work for the company, the supervisor should be instructed to reiterate the company's policies.

The more difficult aspect of a remote workplace is handling an employee who is clearly under the influence while working, such as appearing intoxicated at a video conference. In California, an employer can only request an employee undergo a drug test under limited circumstances, including if there is reasonable suspicion that the employee is under the influence. While there may be sufficient

evidence to request a drug test, due to concerns surrounding COVID-19 including overwhelmed medical providers, an employer will need to more carefully consider whether to insist an employee submit to a drug test at this time. Similarly, as some employers are actually hiring new employees during COVID-19, they too may wish to consider whether to postpone typical post-offer, pre-hire drug tests until the current health crisis has calmed down. Of course, drug tests are still necessary for employees in safety-sensitive positions, but they typically are not working remotely.

If an employee voluntarily requests leave for drug rehabilitation, assuming the employer's workforce is over 25 employees, the employer should grant the leave pursuant to California Labor Code Section 1025, unless the leave would result in an undue hardship. Other leaves may also apply, so employers should consult with their Jackson Lewis attorney. However, of note, all the new COVID-19 California Paid Sick Leaves are limited to either actual COVID-19 diagnosis or exposure, caring for family, or childcare issues only. As such there will be no need to grant paid sick leave to an employee who claims pandemic stress-induced drug use.

Employers should also be cautious that they are not overstepping into trying to control an employee's lawful off-duty activities. This may include, for instance, seeing social media posts from employees using marijuana at home. Unless it's clear from the post that the marijuana usage occurred during working hours, employers should refrain from taking any action.

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