Justice Department reverses course on marijuana enforcement: What it means for employers

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Attorney General Jeff Sessions recently issued a guidance memorandum rescinding several Obama-era Justice Department memoranda regarding federal marijuana enforcement.

The Sessions Memo did not in any way change federal law – the use, sale, and distribution of marijuana has been continuously illegal under federal law since 1970. It did, however, change Justice Department guidance regarding *enforcement* of that law. For North and South Carolina employers with Drug-Free Workplace policies, this change should have little substantive impact. It could, however, be misconstrued by employees, and the memo highlights several other important considerations for employers.

Controlled Substances Act

Vowing to once-and-for-all win the "war on drugs," Congress passed (by a 396-7 margin) and President Nixon signed the Controlled Substances Act of 1970 (CSA). The CSA established federal drug control policy and, among other things, created five "schedules" or "classifications" for regulating substances. Each substance is "scheduled" on a 1 to 5 scale, based on a list of varying qualifications. Schedule 1 (the highest) contains the most tightly regulated substances, because they have a "high potential for abuse" and "no currently accepted medical use in treatment in the United States." Marijuana was classified as Schedule 1 on Day 1. Although Congress subsequently gave the Drug Enforcement Administration (DEA) power to move substances down the list, or even remove them entirely, the DEA has never proposed – let alone sanctioned – any shift on marijuana. So marijuana remains a Schedule 1 substance, and its possession, use, manufacture, sale, and distribution remain prohibited by federal law.

Public Opinion Shift

According to Gallup, public opinion on drug use generally, and marijuana specifically, has changed drastically since 1970. For example, when the

CSA became law, only 12 percent of Americans thought marijuana should be legal, and 88 percent denied (to a confidential pollster) having even *once* sampled it. By 1995, support for legalization reached 25 percent. In 2017, support reached an all-time (and likely rising) high of 64 percent (with 45 percent admitting they have tried it).

"Laboratory of Democracy"

Supreme Court Justice Louis Brandeis coined the phrase "laboratory of democracy" to describe how a state may, if its citizens choose, serve as a laboratory to try novel social and economic experiments without jeopardizing the rest of the country. In 1996, 55 percent of California's citizens voted to do just that, passing a ballot measure legalizing medical marijuana under state law. Perhaps most notably, in 2012 Colorado and Washington became the first states to legalize "personal and recreational" marijuana use. Today, 28 states and the District of Columbia permit some form of legal marijuana use, including eight that allow recreational use.

Cole Memo

A conflict between federal and about 20 state laws prompted President Obama to action but, faced with a combative Congress, he was not able constitutionally to end the federal marijuana prohibition. Nevertheless, by way of executive order, he had the Justice Department review its enforcement policies.

Not surprisingly, this review culminated in several official memoranda, most importantly the August 2013 Cole Memo, in which Deputy Attorney General James Cole advised federal law enforcement personnel – *i.e.*, the DEA and local U.S. Attorneys – that the government should basically "back off" marijuana arrests and prosecutions in marijuana-friendly states. Additionally, Congress used its power of the purse to prohibit the Justice Department from spending funds prosecuting medical marijuana providers and patients.

This policy likely led many states to consider the matter closed. Although marijuana was still technically illegal nationwide, states felt free to legalize it.

Enter Attorney General Jeff Sessions

Because the Obama-era policy was just that – a policy, not federal law – the next President and his Attorney General were free to change it. On the campaign trail, then-candidate Donald Trump seemed supportive of marijuana legalization. However, Attorney General Sessions is not. A former U.S. Attorney himself, Sessions has at various times referred to marijuana as "a real danger" that "should be not legalized." More recently, he stated that "good people don't smoke marijuana." In April 2017, when Sessions ordered his Justice Department to review Obama-era memos, specifically including the Cole Memo, the outcome was not surprising.

On Jan. 4, 2018, only days after California's recreational marijuana law went into effect, the Justice Department issued the Sessions Memo, which revoked the Cole Memo and ordered federal officers to return to "well-established prosecutorial principles" and use "investigative and prosecutorial discretion" when deciding whether to enforce federal marijuana laws.

The Sessions Memo is not a crackdown and, by itself, does not carry the force of law (neither did the Cole Memo). However, it does return to federal law enforcement officers (i.e., the DEA) the discretion to enforce the law, as it is written, anywhere in the United States. In short, it leaves those in marijuana-legal states uncertain about where they stand.

Effect on Employers

Employers will not likely suffer major direct effects from the Sessions Memo. In states where marijuana is currently illegal – such as North and South Carolina – nothing has changed. In states where it is legal, federal authorities may begin prioritizing enforcement again or they may continue with an unwritten policy of non-enforcement. Consequently, results may vary.

Therefore, employers need not immediately change their overall approach. Companies with zero-tolerance or some-tolerance policies may leave them in place. Regardless, however, having a written policy will help ensure that all approaches are even-handed and administered without discrimination. Additionally, employers can take this opportunity to issue a new policy that complies with recent Occupational Safety and Health Administration rules regarding employee drug testing.

Employers should also consider discussing reasonable accommodations for medical marijuana use. Although most courts have held that employers need not accommodate medical marijuana, some have indicated that reasonable accommodations may be appropriate in at least some instances.

Conclusion

As demonstrated by Gallup's ongoing polls, public opinion on this issue is evolving rapidly. Courts and legislators are also watching closely. For example, the South Carolina General Assembly seriously debated a medical marijuana bill just last term, and California's Attorney General indicated last week he will sue the federal government in response to the Sessions Memo.

If an employee asks for an accommodation, if you need a Drug-Free Workplace Policy, or if you have any other questions regarding drugs and the workplace, please contact any member of the Nexsen Pruet Employment and Labor Law team.
