

HOSPITALITY LAW

Helping the Lodging Industry Face Today's Legal Challenges

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Changing marijuana laws pose problems for hospitality

Legislation surrounding the use of marijuana continues to evolve in the U.S., making employers second-guess workplace rules and question whether zero-tolerance policies could potentially violate disability laws. And hospitality employers located in states where the use of recreational or medical marijuana is legal also have to consider whether to allow the use of cannabis by guests.

Currently, nine states and the District of Columbia have legalized the adult use of recreational marijuana, and 30 states and Washington D.C. allow for medical marijuana usage for various medical conditions.

Michelle Lee Flores, a partner in the Los Angeles, Calif., office of Akerman, LLP, expects more states to allow marijuana use, in part because they see legalization as "a huge golden goose" that provides tax dollars and generates a significant number of jobs. However, marijuana remains illegal under federal law, leaving hospitality employers in those states in a difficult position.

"Employers are rightly so, and understandably so, concerned," she says. "They don't want to do something wrong."

With so much in limbo, Flores recommends that employers educate themselves about all the particular laws of their state — what the restrictions are for both recreational and medical use — and how these rules may relate to employees and guests. Although, under federal law, employers may still have a zero-tolerance policy, she recommends that employers in states that have legalized usage to evaluate those drug policies and they may wish to consider shifting the focus from zero tolerance for off-duty usage of marijuana to impairment at work by a controlled substance, similar to an employer's policy on alcohol use. She also urges employers with zero-tolerance policies to go through the interactive process prior to making a termination decision if an employee submits that she has a medical need for marijuana.

Louis J. Terminello, chair of the hospitality, alcohol & leisure industry group in the Miami office of GreenspoonMarder, LLP, says he advises clients in states that have legalized marijuana to balance out off-duty use by enforcing policies against being under the influence — ensuring that employees know that just because recreational use is legal in the state doesn't mean they can come to work high.

Flores says an updated code of conduct can also help define what will not be tolerated and may subject to employees discipline to manage, which in turn can "any misconception that if it's legal under state law, it's a free for all."

Another issue hotels may face in jurisdictions that allow recreational marijuana use is accommodating both clients who want to smoke marijuana at the hotels while respecting the rights of those who do not want to be exposed to the drug.

A hotel can restrict the smoking of cannabis on the property in its current non-smoking policy, which may forbid smoking tobacco indoors. But their current policy may not include language regarding vaping. Another potential complication with a non-smoking policy is if a guest claims that his marijuana smoking is for medical purposes related to a disability. Terminello says this type of situation could place a hotel uncomfortably close to infringing on a protected characteristic.

While Terminello says it will take a few court decisions to iron out the numerous questions that remain for hotels grappling with the changing legal landscape surrounding marijuana use, he says hotels in states with legalized marijuana could consider creating a smoking room, or designating a wing of the hotel as being cannabis friendly. "Hotels should take precautions to make sure they're not impacting the next client who may not be a marijuana smoker," he says.

Although states are slowly getting laws regarding cannabis use on the books, it will likely be some time before employers have definitive guidance. Colorado recently implemented a legal limit of five nanograms of active THC in whole blood for marijuana impairment — similar to a blood alcohol concentration test. And California has issued memorandum for safety officers, firefighters and other government workers in high-risk professions, noting that marijuana use remains illegal under federal law.

"We really are in uncharted waters," Flores says. "The legal landscape [for marijuana] is constantly changing." ■