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Don't mean to harsh your mellow, but … contractors and the Drug-Free Workplace Act

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Eight states[1] and the District of Columbia now have laws that permit recreational possession and use of marijuana. Government contractors with offices, employees and/or agents in these jurisdictions are well aware of the ongoing conflict between those laws and federal laws and regulations that prohibit contractors and their employees from, among other things, possessing, distributing or using drugs.

At the federal level, cannabis remains a Schedule I drug under the Controlled Substances Act, 21 U.S.C.A. § 812(c), which governs the manufacture and distribution of drugs and criminalizes the possession and distribution of scheduled drugs.

In addition to the CSA, federal contractors are subject to laws and regulations that require them and their employees to refrain from possessing, distributing or using drugs, or committing any drug-related crimes.

Employers must continue to make employees aware of the discrepancies between state and federal law because certain activities remain prohibited even within the geographical bounds of the states and cities that permit recreational drug use and possession.

For example, it is illegal to possess or use marijuana on federal property in states that have decriminalized marijuana use. In the District of Columbia, roughly one-quarter of the city is impacted by this prohibition.

DRUG-FREE WORKPLACE ACT

The Drug-Free Workplace Act of 1988, 41 U.S.C.A. § 8102(a), requires federal contractors to abstain from, and prohibits employees from engaging in, the "unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance" in a contractor workplace. "Workplace" includes any location that is "for the performance of work done in connection with a specific contract or grant." 41 U.S.C.A. § 8101(a)(5).

Even though some states have enacted laws that permit marijuana use and possession, any company that receives a federal contract or grant must institute and maintain a drug-free awareness program. The program must inform employees about the prohibitions and penalize them for DFWA violations.

As discussed more thoroughly below, designated penalties should include termination from employment or the contractor may require the employee's satisfactory participation in a drug-abuse assistance or rehabilitation program. 41 U.S.C.A. § 8104. Federal Acquisition Regulation subpart 23.5 implements the prohibitions of the DFWA, and the subpart's implementing clauses are incorporated into government contracts. FAR 23.505; 52.223-6.

PENALTIES FOR DFWA VIOLATIONS

The DFWA does not impose specific penalties against employees who violate the act. Rather, the act penalizes contractors in an effort to incentivize employees to make a good-faith effort to continue to maintain a drug-free workplace. 41 U.S.C.A. § 8102(a)(1)(G).

The contractor is responsible for ensuring that its employees comply with the DFWA's requirements, and agencies are tasked with determining whether "the contractor has failed to make a good-faith effort to provide a drug free workplace." 41 U.S.C.A. § 8102(b)(1)(B).

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Penalties imposed against employees must be harsh enough to deter behavior that could frustrate compliance with the act because corporate violations of the DFWA can result in delayed contractual payments, contract terminations and administrative penalties including suspension or debarment from participation in federal contracting. 41 U.S.C.A. §§ 8102(b), 8103(b); FAR 9.406-2(b)(1)(ii).

Additionally, repeated criminal offenses by a contractor's employees can serve as a basis to find that the contractor lacks present responsibility to contract with the government.

A state's decision to legalize the recreational use and possession of marijuana does not supersede federal criminal drug statutes or

DFWA requirements. It remains a federal crime to, among other things, use or possess cannabis.

A "conviction" under the DFWA is "a finding of guilt (including a plea of nolo contendere), an imposition of a sentence, or both, by a judicial body charged with the responsibility to determine violations of federal or state criminal drug statutes." 41 U.S.C.A. § 8101(a)(3).

Convictions for misdemeanors and minor offenses are treated the same as convictions for drug-related felonies, and all convictions are considered when agencies assess whether the contractor has met its burden to make a good-faith effort to provide a drug-free workplace.

Contractors and grant recipients must notify contracting agencies within 10 days of receiving notice of violations of the DFWA. 41 U.S.C.A. §§ 8102(a)(1)(E), 8103(a)(1)(E). The failure to report violations can serve as a basis for suspension or debarment. 41 U.S.C.A. §§ 8102(b)(1)(A), 8103(b)(1)(A).

SECURITY CLEARANCES

Recreational drug use can also serve as the government's basis to deny or revoke a security clearance. Access to classified information should be granted to individuals only if doing so is clearly consistent with the national interest. *See* 50 U.S.C.A. § 3341 et seq.[2]

Individuals who are granted access to classified information after undergoing the requisite background checks are required to continue to behave in a manner befitting an individual who is entrusted with access to classified information.

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The statutory scheme imposes "limitations" on the government's ability to grant security clearances and prohibits the grant of a clearance to "an unlawful user of a controlled substance or an addict." 50 U.S.C.A. § 3343. "Controlled substance" is defined to include drugs listed in Schedule I of the CSA.

The government also publishes 13 adjudicative guidelines that apply to all people being considered for initial and continued access to classified information.[3] The guidelines help the government and its investigators determine whether an individual should obtain access to, or continue to have access to, classified information.

Decision makers consider national security interests and undertake a common sense review of the person's overall trustworthiness, based on behavior as revealed by various sources or disclosed in application forms.

The government often cites Guideline H — Drug Involvement — to justify the revocation of an individual's security clearance. This guideline states that, among other things, drug abuse, illegal drug use, dependence, possession, cultivation or manufacture are conditions that raise security concerns and justify the denial of a security clearance.

According to the guidelines, drug use or misuse raises questions about a person's reliability and trustworthiness because it may impair judgment.

The Defense Office of Hearings and Appeals is the administrative tribunal charged with resolving appeals from individuals who have had their clearance revoked. In 2016 alone, it considered at least 93 appeals in cases involving security clearances that were either revoked or denied due to drug involvement.

Accordingly, even if it is permissible under state law, using or possessing marijuana may jeopardize an individual's ability to access classified information, and such access is a requirement for certain federal contracting positions.

PRACTICAL MITIGATION TIPS

Information is perhaps the single most important component of an effective drug-free workplace compliance program. The liberalization of drug laws in various jurisdictions that serve as hubs for government contracting activities only heightens the importance of education for a contractor's workforce.

Contractors with offices in states that permit recreational drug use and possession need to adopt, implement and routinely review their drug-free workplace policies and training materials. Most violations occur because employees are unaware of federal criminal laws and the nuances that could give rise to a drug-related conviction.

Compliance may also require contractors to oversee their relationships with independent contractors and subcontractors. Informing subcontractors about the DFWA and other drug-related requirements by including the applicable regulatory clauses (i.e., FAR 52.223-6) in all agreements is the first step toward ensuring subcontractor compliance.

A close working relationship and continued oversight will allow contractors to identify problems with the subcontractor or its employees early and avoid violations of laws like the DFWA — and any resultant performance problems.

NOTES

[1] The states that permit recreational marijuana use are Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon and Washington.

[2] Numerous presidents have signed executive orders establishing and revamping parts of the program(s) governing the designation, handling and disposal of classified information.

[3] Security Executive Agent Directive 4 – National Security Adjudicative Guidelines, U.S. DEP'T OF STATE (June 8, 2017), http://bit.ly/2lPcnR5.

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