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STEWARDS CORNER

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MARIJUANA, SAFETY, AND FAIRNESS: PART 2

This article continues last month's overview of marijuana as a workplace issue. In particular, we review how arbitrators have ruled on the topic.

In November of 2023, the Labor Arbitration Institute published two questions that were asked at a recent conference. One of New York State's leading arbitrators in cases involving marijuana and drug testing was present and answering questions; remember, this is one arbitrator in one state, but the answers are interesting. **Note: New York legalized recreational marijuana use in 2022.**

Can Employers Make Rules Limiting Recreational Use?

The first employer wanted to know if a rule prohibiting employees from using marijuana for recreational reasons off-the-job would be considered reasonable. This is a question that arises when a contract limits the employer's ability to implement policies unilaterally by a reasonableness standard. The employer's motivation is that they don't want employees showing up with marijuana in their system.

The arbitrator responded, "*no*," indicating that they would not uphold the rule, and went on to say, "*What an employee does on his own time is none of the employer's business*." For a worker's off-duty, off-premises conduct to be relevant, the employer has to show "**nexus**" That means that there has to be some "connection" between the employee's off-duty conduct and the workplace.

Rules or procedures for testing and discipline are more likely to be upheld if bargained. The arbitrator gave the example of contract language stating that if workers test above a certain threshold, they will be discharged. "*When the parties negotiate that, they have told me that any test result above the limit will be just cause for discharge. I uphold those discharges*."

The arbitrator also said that in their view state and federal laws are unimportant, "*What matters is whether the employee is impaired*."

How can an employer prove impairment?

The second question related to how the employer can prove impairment. The arbitrator responded: "T*hat has to be shown by the people who observed the grievant. I have reinstated employees who have tested above the limit because the employer did not give me evidence of how they were unable to do their job*."

Basically, the employer needs to have evidence that the worker was impaired while working. For example, managers who can "*testify that the grievant had glassy eyes, slurred speech, listlessness, inattention to work, or some uncharacteristic behavior.*"

These observable symptoms give an employer "*reasonable suspicion,*" a standard that can be bargained for to determine when a worker can be forced to submit to drug testing. The arbitrator also said they take in to account the nature of the employee's job and its safely requirements.

For example, in a recent arbitration, an arbitrator found that an employer did not have "*reasonable suspicion*" to test a worker who refused to take an alcohol/substance abuse test after he refused a work assignment because he claimed he was too sick to do it. [*United Parcel Serv., 126 LA 1088 (Draznin, 2009)*.] The employee's supervisors had cited withdrawal, anxiety, and moodiness as reasons to test the employee, but the arbitrator rejected those grounds as insufficient to provide reasonable cause.

The arbitrator construed that this did not meet the provision outlined in the collective bargaining contract, which stated that:

"*[r]easonable cause is defined as an employee's observable action, appearance, or conduct that clearly indicates the need for a fitness-for-duty medical evaluation.*"

The arbitrator clarified, "*Reasonable cause to challenge the fit-for-duty of an employee mandates that the observable action, appearance or conduct provide clear indication that there is a question whether the individual can continue to work in the state she or he is in.*"

"*Reasonable suspicion*" also cannot be based on a worker's history of drug use. So, where an employer tried to say they had "*reasonable suspicion*" based on a worker having been caught smoking marijuana in a plant four years earlier, the arbitrator ruled that this in insufficient. [*Packaging Corporation of America, 120 LA 634 (Sugarman, 2004)*.]

Another arbitrator found that an employer unlawfully discriminated against a worker by requiring them to submit to drug test on day of an in-plant injury, where on other occasions workers were permitted to be tested at a later date. [*Munster Steel Co., 108 LA 597 (Cerone, 1997)*.] In that case, the uneven application of the policy undermined the employer's just cause defense.

These cases show that Just Cause and industrial due process principles apply in marijuana-related grievances and arbitrations. Through bargaining we can create protections for employees who avail themselves of medical or recreational marijuana off-duty.

Conclusion

Under federal labor law, drug-testing is a mandatory subject of bargaining, meaning that an employer must bargain over it. Because drug-testing is subject to bargaining, we can request A LOT of information about it, which can have many advantages.

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Unions can demand information about: the purpose of the proposed policy and basis for the employer's belief that the policy will promote that asserted purpose; record keeping and privacy aspects of the proposal; circumstances that would trigger testing under the policy; the kinds of drugs for which tests will be used and how positive tests will be determined; rehabilitation opportunities; and past experiences of testing at the facility, among many more subjects.

We can bargain for language that requires visible symptoms of impairment be independently observed by two members of management prior to testing so as to reduce the risk of bias. We can also demand that as a prerequisite to testing the employer notify a union representative and ensure access to union representation in the event the employee desires such representation.

We can ensure that employees have access to an employee assistance program either voluntarily in lieu of testing or after receiving an initial positive test. Drug-testing policies should facilitate support for employees that need it.

Last, as a reminder, **please contact your staff rep who can help you get advice from the USW legal department should you need assistance dealing with drug-testing issues in grievance processing or bargaining**. And, if you know a member who needs help with drug related issues, staff reps can also get information about programs to help those struggling with addiction.

Good Advice From Your Fellow Steelworkers

Whether you're a new officer, griever, or seasoned veteran, here are some tips from your siblings in the USW Leadership program to keep in mind as you begin a new term. They will help you lead effectively, communicate clearly, and build solidarity in your workplace and community.