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Marijuana Legalization Creates Risks For Gov't Contractors

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On Feb. 26, 2015, Washington, D.C., joined the states of Alaska, Colorado, Oregon and Washington, and became the most recent jurisdiction to legalize the recreational use of marijuana. Missing from the news, however, is that a huge percentage of the population in Washington, D.C. are federal contractors who still face catastrophic penalties for violating laws that prohibit drug use by federal contractor employees notwithstanding the recent legalization efforts.

Current Restrictions

The Drug-Free Workplace Act requires federal contractors to prohibit the "unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance" by employees in their workplace as a condition of employment. See 41 U.S.C. § 8102(a). A "workplace" is the site of an entity "for the performance of work done in connection with a specific contract or grant ... at which employees are prohibited from engaging in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance." 41 U.S.C. § 8101(a)(5).

Under the Drug-Free Workplace Act, a contractor cannot be considered a responsible source "for the purposes of being awarded a contract for the procurement of any property or services of a value greater than the simplified acquisition threshold." Id.[1] Federal contractors are required to establish drug-free awareness programs that implement these restrictions, including establishing policies that penalize violations. Additionally, if employees are found in violation of these restrictions, federal contractors must either impose sanctions on employees up to and including termination from employment or require the employee's satisfactory participation in a drug abuse assistance or rehabilitation program. 41 U.S.C. § 8104.

Federal grant recipients are subject to these same restrictions. Id. at § 8103(a). Individuals that are not companies cannot receive federal contracts or grants under the law unless they agree not to "engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance" throughout the performance of the contract or grant. Id. at §§ 8102(a)(2), 8103(a)(2).

Marijuana is currently listed as a Schedule I controlled substance. 21 U.S.C. § 812(c). The prohibitions of the Drug-Free Workplace Act are reflected in Subpart 23.5 of theFederal Acquisition Regulation, and are

incorporated into all government contracts. See FAR § 23.505.

Penalties for Violations

Contractors found in violation of the Drug-Free Workplace Act can be subject to steep penalties, including suspension or debarment for up to five years from federal contracting. See 41 U.S.C. §§ 8102(b), 8103(b); FAR § 9.406-2(b)(1)(ii). Additionally, contractors or grant recipients found to be in violation of the Drug-Free Workplace Act can have contract payments suspended, and have their existing contracts terminated. 41 U.S.C. §§ 8102(b)(1), 8103(b).

Nothing in the Drug-Free Workplace Act mandates specific penalties for employees who violate the act, but the law does require contractors to make "a good faith effort to continue to maintain a drug-free workplace." 41 U.S.C. § 8102(a)(1)(G). Accordingly, penalties for employees must be harsh enough to have some deterrent effect, and probably cannot amount to a mere slap on the wrist for violations, especially if violations are recurring.

Moreover, contractors and grantees should be aware that these penalties can be imposed when the agency determines that "the number of employees of the contractor who have been convicted of violations of criminal drug statutes for violations occurring in the workplace indicates that the contractor has failed to make a good faith effort to provide a drug free workplace." See, e.g., 41 U.S.C. § 8102(b)(1)(B). In other words, the sheer number of convictions alone can indicate a failure of the good faith duty. This raises several issues for contractors.

First, although some jurisdictions have legalized recreational marijuana, federal criminal statutes remain in effect, and presumably these statutes can be violated in a variety of ways by employees regardless of state legalization efforts. For example, Maryland and Virginia have not yet legalized marijuana, and so a careless Virginia employee who travels into the District of Columbia to engage in recreational marijuana use, but then travels across state lines to his workplace while still in possession of marijuana may be convicted under state statutes in Maryland and Virginia, as well as federal possession and trafficking statutes.

Second, even where recreational marijuana use has been legalized, not all activities are legal. For example, in the District of Columbia, it is still illegal to possess or use marijuana on federal property — which comprises roughly one quarter of the land in D.C. It is also illegal to smoke marijuana in public, grow more than three mature marijuana plants at one time, possess more than two ounces of marijuana, or sell marijuana at all. See Initiative 71, Section 2 (amending D.C. Law 4-29; D.C. Official Code §48-904.01). To the extent that any of these prohibited activities occur in a contractor employee's workplace, they would violate the Drug-Free Workplace Act. Unwary employees could easily find themselves in violation of the Drug-Free Workplace Act by, for example, smoking marijuana before or during work and arriving at the workplace still under the influence of the drug, or by being found to be in possession of less than two ounces of marijuana at a government agency's security checkpoint, even though such possession would be legal elsewhere in the district.

Third, there is no distinction in the Drug-Free Workplace Act between felony and misdemeanor convictions — a "conviction" is simply defined as "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." See 41 U.S.C. § 8101. This means that employees who are convicted of minor offenses still count toward the total number of convictions that can result in a determination that the contractor or grantee is not making a good faith effort to comply with the law.

Additionally, contractors and grantees must remember that the Drug-Free Workplace Act requires them to notify the contracting agency within 10 days of receiving notice of violations of the law. 41 U.S.C. §§ 8102(a)(1)(E), 8103(a)(1)(E). A failure to report can also subject a contractor or grantee to suspension and debarment. 41 U.S.C. §§ 8102(b)(1)(A), 8103(b)(1)(A).

Mitigation Measures

Several of the jurisdictions that have recently legalized marijuana — specifically, the District of Columbia, Colorado and Washington — are also hubs for federal contracting. Employees who carelessly engage in recreational marijuana use can easily run afoul of federal law and subject contractors to harsh consequences. Accordingly, employers should immediately remind employees of these restrictions to avoid violations and penalties. Employers should also carefully review any anti-drug workplace policies to determine whether they are compliant with state and federal laws, including the Drug-Free Workplace Act.

Furthermore, prime contractors should review their contracts to determine whether the Drug-Free Workplace clause at FAR § 52.223-6), or any agency equivalent clause like DFARS 252.223-7004, is included as a required flow-down to subcontractors. If so, the subcontractors must also be made aware of their continuing obligations under the Drug-Free Workplace Act. Subcontractors have no privity of contract with the government, but if the Drug-Free Workplace clause is a required flow-down, there is the possibility that the government could seek to impose penalties on the prime for violations if the government perceives that the prime is not taking adequate precautions to ensure compliance by the subcontractors, and is therefore not making a good faith effort to comply with the law. Additionally, subcontractors could likely still face suspension or debarment from federal contracting for failing to comply with the mandatory flow-down even if they are not in direct privity with the government.

Conclusion

As the effort to legalize recreational marijuana use in the District of Columbia shows, these efforts are still contentious even though they often enjoy popular support. For example, in the district, a small segment of Congress attempted to derail the legalization effort. Though legalization ultimately went forward, and appears to be advancing in other states, there has not yet been a strong push to decriminalize marijuana at the federal level. Accordingly, the disconnect between federal and state law will continue to impact federal contractors and grantees for the foreseeable future, and contractors and grantees should take special care to ensure that they warn employees about their legal requirements.

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[1] The law does not apply to contracts for the procurement of commercial items.
