

## **TOOLBOX TALK #44**

### **MARIJUANA USE AT WORK – PART 1**

*As more and more states enact laws that decriminalize, and in some cases, legalize marijuana use, how does a contractor maintain a drug-free workplace?*

Contractors are increasingly frustrated by so-called marijuana reform legislation. More and more states are enacting laws that decriminalize, and in some cases, legalize marijuana use. Approximately 20 states now protect medical marijuana use to some extent. Half a dozen states (and that number is on the increase) now permit recreational marijuana use. Yet, marijuana remains a controlled substance illegal under federal law. One contractor recently raised the following questions:

- How do business owners maintain a zero-tolerance policy on drug and alcohol use?
- How can contractors maintain a drug-free workplace if their ability to conduct pre-employment and random drug testing is compromised by state legislation?
- What steps are contractors taking in states that have legalized recreational marijuana to find drug-free employees?
- How do contractors avoid wrongful termination litigation?

These are all good questions. Unfortunately there are not good answers for all of them.

#### **Recreational use**

So far, no state court system has refused to acknowledge an employer's right to prohibit impairment on the job. This means that contractors can drug test on a pre-employment and random basis and refuse to hire or terminate someone who is impaired by recreational marijuana use. This will likely continue to be the case as long as the federal government continues its current stand making marijuana a controlled substance with limited medical value. So, as a practical matter, building contractors should continue pre-employment and random drug testing even in states that have legalized recreational marijuana use.

One problem that may arise is determining "impairment". Here, contractors should work closely with their occupational medicine clinic. If at all possible, contractors should not make an impairment determination on their own, but instead, should rely upon an evaluation by a medical professional. This is also important because impairment and drug testing results do not correlate well. In other words, an individual may test positive for marijuana use days or even weeks after impairment. This makes it all the more critical for contractors to rely upon the independent "impairment" determination of a qualified medical professional. Not that this is only necessary in states that have legalized use of marijuana. In other states, building contractors can rely upon the drug testing results and make the decision not to hire or to terminate the individual.