



Memorandum

To: Valdez City Council

From: Tim James, Human Resources Director

Date: April 7, 2017

Re: Report on Controlled Substance Policy

At the request of the Mayor, the City Manager, and members of the Employee Relations Team, I have been researching the Controlled Substance Policies of municipalities in states that have legalized cannabis. I have contacted the following municipalities:

Washington: Seattle; Bremerton; Anacortes; Pullman; Tumwater; Chelan.

Colorado: Breckenridge; Aurora; Telluride; Aspen; Steamboat Springs; Gunnison.

Alaska: Palmer; Wasilla; Cordova; Anchorage, Homer, Petersburg, Ketchikan, Nome.

Each of the municipalities I have contacted not only comply with the 1988 Federal Drug-Free Workplace Act in order to qualify for federal grants of any amount or federal contracts over \$100,000.00, they also expand compliance with that legislation to apply to all city employees and not just those working in any capacity on projects funded by a federal grant or contract. I, not only reviewed policy for each of the listed municipalities, I spoke with Human Resource personnel or city administrators to inquire as to the reasons for going to a drug free workplace. Every single person I spoke to referred to compliance for access to federal funds and then spoke to the fact that their municipality had been a drug free workplace prior to the state passing legislation legalizing marijuana and the choice had been made to retain that policy in order to provide a drug-free, healthful and safe workplace. Most of the communities do not recognize medical marijuana use as acceptable and include it as being covered under their drug-free workplace policy. Many

municipalities speak to disciplinary action for a first offense up to and including termination. Some of the municipalities have a “second chance option” providing the employee voluntarily seeks treatment for a substance abuse problem through an Employee Assistance Program (EAP) or referral to a substance abuse professional by the municipality. However, those communities do not hesitate to take disciplinary action up to and including termination should the employee not access the offered EAP or complete a drug treatment program or if the employee tests positive for marijuana again after the completion of an offered program.

The Society for Human Resource Management (SHRM) just released a report stating that 7 percent of State of Colorado employers have dropped pre-employment testing for marijuana while another 3 percent have removed testing for marijuana from all employment drug testing according to the results of a December 2016 survey by the Mountain States Employers Council based in Denver, CO. The same survey states that 10 percent of employers in Denver and Boulder 9 percent of employers in Pueblo have dropped marijuana from pre-employment drug testing. Companies from Maine and Massachusetts, where recreational marijuana is legal, are also no longer pre-employment drug testing for marijuana. However, all of the companies cited are in the private sector and do not access federal grants or contracts and, as such, have no need to comply with the 1988 Federal Drug Free Workplace Act. The same SHRM report goes on to state that companies not pre-employment testing applicants for the presence of marijuana or not testing employees for marijuana for reasonable suspicion or post-accident are in the minority and that the majority of companies, even in the private sector, are “staying the course and drug-testing candidates as well as employees.” The report recommends that “employers continue to reserve the right to test for marijuana along with alcohol, prescriptions drugs and illicit drugs, given the employers obligation to ensure a safe workplace.” Although marijuana is legal for recreational use in Alaska, the drug remains illegal under federal law and employers have the right to test for its presence.

For the City of Valdez as an employer, it appears that if there is going to be any give, it should be at the pre-employment stage with the noted exceptions of safety-sensitive positions or positions mandated to be tested such as positions requiring a CDL. The same SHRM report advises that upon considering jobs for their safety-sensitive nature, employers are cautioned to carefully consider how testing procedures are applied. If we go by position classification (i.e. safety sensitive) are we being consistent or is there potential for disparate treatment. SHRM advises avoiding that and conducting a benign testing program where we test consistently across the organization to mitigate costly litigation from, not only employment lawsuits, but also from workplace accidents and injuries. SHRM is also recommending that in states where recreational marijuana use has been legalized that companies develop a comprehensive and legally acceptable drug policy that clearly addresses decriminalized marijuana use that specifically states the organization’s position regarding marijuana and clearly defining job expectations from the beginning to eliminate any surprises for employees. Testing procedures should be specific and detailed as well. The report recognizes the difficulty in identifying what constitutes impairment when testing for marijuana and advises the most advisable course of action presently available is a drug free workplace policy. The report advises carefully

watching the development of state laws and to refrain from taking adverse action or imposing disciplinary consequences without consulting legal advice in this rapidly changing arena. The final advice in the SHRM report is to clearly state that the company will not accept a medical marijuana, marijuana extract, or recreational marijuana explanation for a positive drug test even where permitted by state law because such use is in violation of Schedule 1 of the federal Controlled Substance Act.

The purpose of this report is neither to recommend a drug free workplace or a zero tolerance policy nor to propose that the City of Valdez create a more tolerant policy toward the use of marijuana since it's legalization in our state. Neither approach is going to create a less complicated policy. This report is to answer the request for a more thorough examination of what municipalities in other states who have legalized the use of marijuana are doing and to ask for guidance from the Valdez City Council as we move forward in the development of our policy as to which direction they would like us to go. We can continue to research and debate this issue ad infinitum but there are no clear answers. That is, in my opinion, why all of the municipalities in states that have legalized marijuana that we have contacted have, in the end, elected to remain drug-free workplaces.

As a final note, when I questioned the municipal officials what their response was when asked by staff why they could not partake of marijuana in their free time when it was legal in their state, the response was, across the board something along the lines of the following: "You can, you roll the dice, you take your chance." "Just be smart and don't come to work clearly impaired."