

Implications of Medical Marijuana in the Workplace



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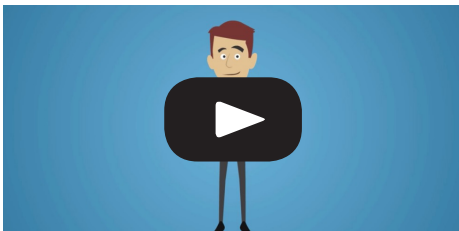
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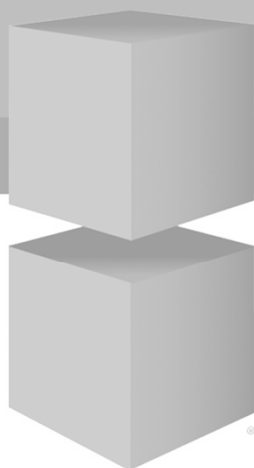
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Implications of Medical Marijuana in the Workplace



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Overview

- State laws and case law interpretations of same
- Drug testing and implications of positive tests
- Duty to accommodate under the ADA
- Disciplining employees for medical marijuana use

Origins of Reefer Madness

- The Marihuana Tax Act of 1937
 - Required growers, buyers, and users of marijuana to register and file certain reports along with paying a tax
- Reefer Madness film (1938)
 - Portrayed the dangers of marijuana use
 - Used to support anti-marijuana message

States Legalize Medical Marijuana

- Currently, 23 states and the District of Columbia have passed laws dealing with medical marijuana
- Laws vary by state, including the protection provided by same
- Likely will be more states addressing this issue following the recent trends including the legalization of recreational pot in Colorado, Washington, Oregon and Alaska (District of Columbia still needs Congressional approval)

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Statistics on Use of Medical Marijuana

- Not all states require registration
 - California registration is voluntary
- Through Fiscal Year 2014/2015, California's voluntary Medical Marijuana Program has issued approximately 78,000 ID cards to medical marijuana patients and caregivers

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Statistics on Use of Medical Marijuana (cont.)

- As of December 2014, approximately 69,000 patients and 34,000 caregivers are part of the Oregon Medical Marijuana Program (approximately 1,000 applications denied/rejected January 1, 2014 through December 31, 2014)
- For fiscal year 2014, a total of 116,981 applications filed for medical marijuana registry identification cards with the Michigan Medical Marijuana Program
 - Severe and chronic pain was by far the most frequent condition identified in the applications

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Citations To State Laws

- Alaska – Medical Uses of Marijuana for Persons Suffering from Debilitating Medical Conditions Act – AS 17.39.010 *et seq.*
- Arizona – Arizona Medical Marijuana Act – A.R.S. § 36-2801, *et seq.*
- California – Compassionate Use Act of 1996 - Cal Health & Saf Code § 11362.5 *et seq.*
- Colorado – Colo. Const. Art. XVIII, Section 14
- Connecticut – Conn. Gen. Stat. § 21a-408, *et seq.*

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Citations To State Laws (cont.)

- Delaware – Delaware Medical Marijuana Act – 16 Del. C. § 4901A, *et seq.*
- Hawaii – HRS § 329-121, *et seq.*
- Illinois – Compassionate Use of Medical Cannabis Pilot Program Act – 410 ILCS 130/1, *et seq.*
- Maine – Maine Medical Use of Marijuana Act – 22 M.R.S. § 2421, *et seq.*
- Massachusetts – 2012 Mass. ALS 369
- Maryland - Natalie M. LaPrade Medical Marijuana Commission - HB 881 / SB 923

Citations To State Laws (cont.)

- Michigan – Michigan Medical Marijuana Act – M.C.L. § 333.26421, *et seq.*
- Minnesota - Medical Use of Cannabis Act - S.F. 2470
- Montana – Montana Marijuana Act – 50-46-301, MCA, *et seq.*
- Nevada – Nev. Rev. Stat. Ann. § 453A.010, *et seq.*
- New Hampshire – RSA 126-X:1, *et seq.*
- New Jersey – New Jersey Compassionate Use Medical Marijuana Act – N.J. Stat. § 24:6l-1, *et seq.*

Citations To State Laws (cont.)

- New Mexico – Lynn and Erin Compassionate Use Act – N.M. Stat. Ann. § 26-2B-1, *et seq.*
- New York – Compassionate Care Act – Assembly Bill 6357
- Oregon – Oregon Medical Marijuana Act - ORS § 475.300, *et seq.*
- Rhode Island – Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act - R.I. Gen. Laws § 21-28.6-1, *et seq.*
- Vermont – 18 V.S.A. § 4472, *et seq.*

Citations to State Laws (cont.)

- Washington – Medical Use of Marijuana Act – Rev. Code Wash. § 69.51A.005, *et seq.*
- Washington, D.C. – Legalization of Marijuana for Medical Treatment Initiative Amendment Act of 2010 – D.C. Code § 7-1671.01, *et seq.*

Michigan Medical Marihuana Act

- *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914 (W.D. Mich. 2011)
- Prior to this ruling, assumed MMMA applied to private employers
- However, judge concluded that MMMA does not regulate private employment
- Judge interpreted the language of the statute as not intending to impact private employment
- MMMA meant to act as a potential defense to criminal prosecution or action by the state

Michigan Medical Marihuana Act (cont.)

- Language in MMMA appeared to apply to disciplinary actions taken by private employers
- Prohibits “civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act”
- Judge determined that “business” modifies “licensing board or bureau” and does not stand alone
- Nothing in the MMMA that demonstrates an intent to change at-will employment in Michigan

Michigan Medical Marihuana Act (cont.)

- Additional language appeared to support application to private employment
- Nothing requires “[a]n employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana”
- Judge refused to apply a negative inference to this provision

Michigan Medical Marihuana Act (cont.)

- *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012)
- Affirmed the ruling of the District Court
- MMMA does not regulate private employment
- Thus, no protection from discharge despite being a registered user
- In 2014, Michigan Court of Appeals held that discharge for positive drug test based on medical marijuana does not bar unemployment benefits under Michigan law (*Braska v. Challenge Mfg. Co.*, 2014 Mich. App. LEXIS 2112 (Mich. Ct. App. Oct. 23, 2014))

Washington State Medical Use of Marijuana Act

- *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 257 P.3d 586 (2011)
- Washington Supreme Court concluded that “MUMA does not prohibit an employer from discharging an employee for medical marijuana use, nor does it provide a civil remedy against the employer”

Washington State Medical Use of Marijuana Act (cont.)

- Court rejected claim for wrongful termination in violation of public policy
- Act provides, “[n]othing in this chapter requires any accommodation of any on-site medical marijuana use in any place of employment”
- No protection even for use outside of workplace

Washington and Colorado

- On November 6, 2012, voters in both states voted to legalize recreational use of marijuana
- Employers continue to wait for guidance from the courts as to impact of same
- Colorado began allowing the sale of recreational marijuana in January 2014
- Washington sales began in July 2014

Colorado (cont.)

- Amendment 64 specifically provides the following guidance for employers:
 - “Nothing in this section is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.”
- In December 2014, Nebraska and Oklahoma filed suit against Colorado regarding Amendment 64

Colorado (cont.)

- *Coats v. Dish Network*, 303 P.3d 147 (2013)
- In January 2014, the Colorado Supreme Court agreed to review the Court of Appeals' decision in favor of the employer
- The Court of Appeals analyzed the relationship between Colorado's medical marijuana law and Colorado's Lawful Activities Statute

Colorado (cont.)

- The Lawful Activities Statute prohibits employers from taking adverse employment actions against employees who engage in lawful activities outside of work
- The Court of Appeals concluded that since marijuana use remains unlawful under federal law (for medical purposes or otherwise), off duty medical marijuana use is not protected as "lawful activity" under Colorado's Lawful Activities Statute

Colorado (cont.)

- Thus, employers in Colorado can lawfully discharge employees for off duty use of medical marijuana
- Case provides guidance for employers in other states dealing with similar life-style laws and medical marijuana (*i.e.*, Illinois)
- However, will need to keep a close eye on whether the Colorado Supreme Court decides to reverse course

Oregon Medical Marijuana Act

- *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Ore. 159 (2010)
- Oregon Supreme Court concluded that employers are not required to accommodate employees who are using medical marijuana under the OMMA
- Federal law preempts the OMMA
- Employer at issue discharged the employee for engaging in illegal drug use and thus, OMMA did not apply

Oregon Medical Marijuana Act (cont.)

- Court specifically noted that Washington and California do not require accommodation of off-duty use of medical marijuana
- No need for employers to engage in the interactive process regarding use of medical marijuana
- Voters in November 2014 approved recreational marijuana in Oregon, Alaska and District of Columbia
 - As noted earlier, District of Columbia vote needs Congressional approval

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California Compassionate Use Act of 1996

- *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal. 4th 920 (2008)
- California Supreme Court concluded that the operative provisions of the CUA do not speak to employment law
- No duty to accommodate marijuana use even if at home
- Even if no impact on job duties or performance

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California Compassionate Use Act of 1996 (cont.)

- Failed to state a claim under the California Fair Employment and Housing Act for disability discrimination
- California employers have the right to enforce pre-employment drug screen programs, without exceptions for drugs taken for legitimate medical reasons
- Likely would be expanded outside of pre-employment drug screening

California Compassionate Use Act of 1996 (cont.)

- *James v. City of Costa Mesa*, 684 F.3d 825 (9th Cir. 2012)
- The ADA does not protect an employee using medical marijuana, even if the individual is using medical marijuana under the supervision of a doctor and in compliance with state law
- “Individual with a disability” does not include an individual who is currently engaging in illegal drug use.

Maryland - Natalie M. LaPrade Medical Marijuana Commission

- Approved in April 2014
- Establishes a medical marijuana commission
- Law does not specifically address impact on employers (*i.e.*, no specific prohibitions)
- The commission issued proposed regulations on January 23, 2015
 - Public comments accepted through February 23, 2015

Maryland - Natalie M. LaPrade Medical Marijuana Commission (cont.)

- Medical marijuana likely will be treated like other states without specific protections (such as Michigan, California and Oregon)
- Courts in states without specific protections have repeatedly refused to protect applicants/employees that test positive (even for use outside of work)

New York – Compassionate Care Act

- Governor Cuomo signed the bill in July 2014
- While bill took effect immediately, 18 month time frame for implementation of the new law
- Certified medical use does not include smoking
- Commissioner will determine permissible forms

New York – Compassionate Care Act (cont.)

- Section of law title “Non-Discrimination”
- “Certified patients” deemed “disabled” under the New York Human Rights Law
- The underlying condition likely would have been a disability under the amendments to the ADA anyway
- However, the Act takes away any dispute over whether the certified patient is disabled

New York – Compassionate Care Act (cont.)

- Does not bar enforcement of an employer’s policy prohibiting an employee from performing his/her job duties while impaired by a controlled substance
- Like many other state laws, the New York Act does not define “impaired”
- Impaired analysis will need to focus on behavior

New York – Compassionate Care Act (cont.)

- Does not require any person or entity to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding
- Employers will still be able to comply with federal laws requiring a drug free workplace

Minnesota - Medical Use of Cannabis Act

- Offers most protection for employees of any of the medical marijuana laws passed in 2014
- Like New York's law, the Minnesota Act prohibits smoking of medical marijuana
- Use limited to liquid, pill, vaporized delivery method and any other method approved by the commission, excluding smoking

Minnesota - Medical Use of Cannabis Act (cont.)

- Unless a failure to do so would violate federal law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon either of the following:

Minnesota - Medical Use of Cannabis Act (cont.)

- (1) the person's status as a patient enrolled in the registry program under sections 152.22 to 152.37; or

- (2) a patient's positive drug test for cannabis components or metabolites, unless the patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment.

Minnesota - Medical Use of Cannabis Act (cont.)

- Fails to define "impaired"
- Similar language as in laws in Delaware and Arizona regarding providing protection for testing positive
- Employers in Minnesota will need to adjust their drug testing policies regarding medical marijuana

States With Employment Protections For Medical Marijuana

- Greatest protections – Delaware, Arizona and Minnesota – Positive drug tests not enough
- Each of these states have language that prohibits a positive drug test from being the basis for adverse action

States With Employment Protections For Medical Marijuana (cont.)

- More limited protections – Connecticut, Illinois, Maine, New York and Rhode Island
- Prohibitions against adverse action solely because the employee is a card holder
- Employers can still discipline employees for being under the influence at work

Extract With Low Levels Of THC

- States that have yet to legalize medical marijuana on a more wide scale level have been willing to permit limited use of low level THC marijuana (with high levels of cannabidiol (“CBD”))
- For example, Florida and Mississippi both passed laws in 2014 regarding low level THC marijuana

Extract With Low Levels Of THC (cont.)

- Proponents of low THC marijuana have argued that it helps children with seizure disorders
- Topic of “Charlotte’s Web” strain of marijuana covered by Sanjay Gupta on CNN

Marijuana and Federal Law

- Marijuana remains on Schedule I of the Controlled Substances Act
- *Gonzales v. Raich*, 545 U.S. 1 (2005)
- Possession of marijuana is illegal under the CSA even if for medical purposes
- Rejected claim that California's CUA protected individuals from application of the CSA under federal law

Marijuana and Federal Law (cont.)

- Drug-Free Workplace Act
 - Employers that are federal contractors or grantees are required to adhere to this Act
 - Use or possession of marijuana is specifically prohibited by the Act
 - Requires good faith effort to maintain a drug-free workplace
 - Requirements of Act “co-exist” with state and local laws

Marijuana and Federal Law (cont.)

- In 2009, 2011 and 2013 DOJ issued guidelines to prosecutors in states with medical marijuana laws
- Enforcement priorities include:
 - Preventing distribution to minors
 - Preventing revenue going to criminal enterprises
 - Preventing distribution to states where medical marijuana is still illegal
 - Preventing drugged driving
- “Cromnibus” spending bill passed in December 2014 includes provisions prohibiting use of federal funds by the DOJ to interfere with state medical marijuana laws
 - Also provides language regarding D.C. initiative

Marijuana and Federal Law (cont.)

- Department of Transportation
 - Issued notice in response to DOJ Guidelines
 - “The Department of Transportation’s Drug and Alcohol Testing Regulation – 49 CFR Part 40, at 40.151(e) – does not authorize ‘medical marijuana’ under a state law to be a valid medical explanation for a transportation employee’s positive drug test result.”

Marijuana and Federal Law (cont.)

- Drug Enforcement Agency
 - In April 2013, the DEA updated its own position on marijuana
 - Smoked marijuana is not medicine
 - Marijuana is dangerous to users and non-users
 - Despite the DOJ's guidelines from 2009, 2011 and 2013, federal government has not relaxed its policy on "medical marijuana"

Marijuana and Federal Law (cont.)

- Department of the Treasury Guidance – February 14, 2014
- Issued rules that could make it easier for banks to do business with marijuana dispensers
- In separately issued guidance, the DOJ told U.S. attorneys not to pursue banks that do business with legal marijuana dispensers as long as the dealers adhere to the August 2013 guidelines

Drug Testing & Positive Tests Results

- Many employers maintain drug testing policies for job applicants and/or following workplace injuries
- Concern arises when applicant/employee tests positive based on legal use of medical marijuana
- Is the applicant/employee protected?

Drug Testing & Positive Tests Results (cont.)

- In the majority of cases, the answer is “no”
- Most states do not require accommodation of use of medical marijuana, even if off-duty (however, see Delaware, Arizona and Minnesota laws)
- Additionally, employers may want to consider whether drug testing is really necessary for particular positions

Drug Testing & Positive Tests Results (cont.)

- Does the position deal with safety (*i.e.*, hi-lo driver vs. receptionist)?
- How reliable is your test (blood vs. urinalysis vs. hair)?
- Most available testing can only say that marijuana was used in the past, not whether the applicant/employee is currently under the influence

Drug Testing & Positive Tests Results (cont.)

- Employers not required to allow employees to work “under the influence” (even in Delaware, Arizona and Minnesota)
- However, unlike with alcohol, harder to determine what it means to be “under the influence”
- Is someone who smoked pot 2 weeks ago still “under the influence” today?

Drug Testing & Positive Tests Results (cont.)

- Drug test policies, like other policies, must be uniformly applied
- Must have safeguards in place to prevent false positive tests
- Must still follow any applicable state laws regarding drug testing (*i.e.*, Iowa and Minnesota have detailed state laws dealing with employer drug testing)

Accommodation Under the ADA

- Use of “medical” marijuana raises potential concerns under the ADA
- Medical marijuana is intended to alleviate the symptoms of some underlying medical condition (*i.e.*, glaucoma, cancer, HIV)
- The ADA requires covered employers to engage in the interactive process regarding employee disabilities

Accommodation Under the ADA (cont.)

- Interactive process requires an individualized analysis of the essential functions of the specific job and the employee's specific restrictions
- While most states are not going to require the employer to accommodate the use of medical marijuana, there still may be a duty to accommodate the underlying medical condition
- New York is still an open question

Accommodation Under the ADA (cont.)

- For example, the employee who is going through chemotherapy and is using medical marijuana to help with a loss of appetite likely would not be protected from a zero tolerance drug policy (in most states)
- However, employer would still need to engage in the interactive process to determine if a reasonable accommodation is needed for the underlying cancer treatments (*i.e.*, time off for seeking treatment)

Accommodation Under the ADA (cont.)

- Even under the ADA, an individual who is “currently engaging” in illegal drug use is not protected
- While state law may have legalized the use of medical marijuana, federal law still considers the use of marijuana illegal, regardless of the reason for use
- No need to accommodate if causes a direct threat to the health or safety of other individuals in the workplace
- Must be a high probability of substantial harm

State Disability Laws

- In addition to the ADA, some states have their own disability laws that need to be considered regarding whether they are applicable to the use of medical marijuana
- For example, some state laws provide additional protections for prescription drugs
- New York’s law on “certified patients”

Discipline Decisions

- Make sure employment policies are clear and enforced
- Off-duty vs. on-the-job conduct
 - Various states treat an employer’s ability to punish for off-duty conduct differently
 - Some states like Colorado and Illinois have “lifestyle laws” that prohibit employers from taking disciplinary action based on lawful conduct outside of the workplace

Discipline Decisions (cont.)

- Union vs. Non-Union environment
 - Arbitrators often view off-duty misconduct differently than on-the-job misconduct
 - Whether there is an impact on work performance based on off-duty medical marijuana use will likely be important
 - Analyze language in the applicable collective bargaining agreement
 - Some collective bargaining agreements specifically address drug testing and consequences for positive tests

Discipline Decisions (cont.)

- Consider whether off-duty medical marijuana use truly impacts work performance
- Importance of documentation
 - Regardless of the reason for the discipline, still important to document decisions
 - Decisions should be made for legitimate, non-discriminatory reasons
 - Decisions should be consistent

Safety Concerns

- Occupational Safety & Health Act (“OSHA”) requires employers to provide a safe workplace
- Certain jobs are going to be more safety sensitive than others (i.e., hi-lo driver vs. receptionist)
- Potential liability issues for allowing employees to be under the influence at work even if for medical purposes

Considerations for States Prohibiting Discrimination for Medical Marijuana

- Make sure drug testing policies are narrowly tailored to the specific law of that state (*i.e.*, carve out use of medical marijuana in compliance with state law if necessary)
- Consider asking employees to provide documentation of authorized use prior to any drug test
- Focus on employee's conduct at work
- Seek legal counsel before taking action

Changes Likely Coming

- As more and more states consider the legalization of medical marijuana and/or recreational marijuana, there will be additional statutes or modifications to current statutes to consider
- Employers should be sure to keep an eye on any new laws regarding medical marijuana as well as any new case law interpreting same

Take-Away Points

- In most circumstances, no duty to accommodate use of medical marijuana, even if off-duty
- Employers can still prevent employees from working under the influence of medical marijuana
- Policies should specifically prohibit use of medical marijuana while at work or working under the influence

Take-Away Points (cont.)

- New court opinions and regulations will provide additional guidance regarding application of state laws
- As with all employment decisions, need to be consistent
- Evaluate whether your policies are necessary

Questions?

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Notes

