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"Clearing the Smoke on Medical Marijuana in Employment"

I. History of the Legalization of Marijuana

Federal law criminalizes marijuana, medicinal or otherwise.

Pursuant to federal law, the Controlled Substances Act of 1970 categorizes marijuana as a Schedule I controlled substance. Under such a classification, marijuana is not only illegal, it is prohibited from medical prescription. Other Schedule I drugs include heroin, LSD, and MDMA. Conversely, cocaine is a Schedule II drug and is subject to less stringent restrictions. The common denominator of Schedule 1 drugs is that they have the highest potential for abuse and have no currently-accepted use for medical treatment, and lack acceptable safety for use under medical supervision. It is with this backdrop, and associated tension, that the following state law and Court decisions should be considered.

Attitudes about Medical Marijuana begin to change

In May 1985, the Federal Drug Administration (FDA) approved the use of Marisol, the trade name for dronabinol, a synthetic form of delta-9-tetrhydrocannabinol (THC), one of the prime psychoactive components of marijuana. It was originally approved for nausea and vomiting associated with chemotherapy, and later approved for treatment of control over weight loss for patients with anorexia and AIDS. There was debate throughout the 1980s and 1990s about rescheduling marijuana as a Schedule II drug; however, it never occurred.

California leads the way

In 1996, California became the first state to legalize medical marijuana. Fifty-six percent of voters voted for this initiative. However, its statute, which was later used as a model by other states, did not specifically address employment. In 1998, Alaska, Oregon, and Washington follow California's lead and legalized medical marijuana. Similarly, just over 50% of the voters in those states approved the legalization of medical marijuana. Maine followed suit in 1999 with 61% of voters approving. In 2000, Hawaii, Colorado, and Nevada followed suit. By 2015, 23 states had legalized marijuana.

Department of Justice's Position, a Moving Target

Then, in October 2009, the Department of Justice, in what is referred to as the "Ogden memo," announced that it would take a "laissez-faire" approach to individual marijuana prosecutions in those states that actively regulated the substance and instead focused its efforts on drug trafficking and keeping it out of the hands of minors. In May 2011, letters were sent to states that legalized marijuana, threatening to prosecute those who implemented cultivation and distribution programs.

II. Laws and Court Holdings in Employment Context

Is Medical Marijuana Use Protected Under the ADA?

The U.S. Court of Appeals for the Ninth Circuit ruled that it is not protected.

James, et al. v. City of Costa Mesa, et al.
U.S. Court of Appeals – Ninth Circuit (November 2012 - cert denied May 2013)

The plaintiffs were disabled California residents who were prescribed medical marijuana under California law to treat their pain. The plaintiffs obtained medical marijuana through collectives located in Costa Mesa and Lake Forest, California. These cities took steps to close marijuana dispensing facilities operating within their boundaries. The plaintiffs were concerned about the possible shutdown of the collectives they relied upon to obtain their medical marijuana, and filed suit in federal district court alleging the cities violated Title II of the ADA, which prohibits discrimination in the provision of public services.

The district court denied the plaintiffs' request for a preliminary injunction ruling that the ADA does not protect against discrimination on the basis of marijuana use, even medical marijuana use supervised by a doctor in accordance with state law, unless that use is authorized by federal law. The U.S. Court of Appeals affirmed holding that the ADA defines "illegal drug use" by reference to federal law rather than state law, and federal law does not authorize the plaintiffs' medical marijuana use. Therefore, the plaintiffs' medical marijuana use was not protected by the ADA.

Can an employee, who is registered to use medical marijuana, be discharged for violating an employer's drug free or zero-tolerance policy, when the employee never possessed or was under the influence of medical marijuana at work, and only used it in his or her home outside working hours?

Most states have not addressed this issue; however, several states have ruled yes when there is no specific protection for card-holders in the individual state statute.

Coats v. Dish Network, LLC
Colorado Supreme Court (June 2015)

The plaintiff was a quadriplegic who used medical marijuana to calm muscle spasms. He was a customer service representative for the defendant and never used, and was never under the influence of medical marijuana, while at work. The plaintiff was terminated after he tested positive for THC in violation of the defendant's drug policy.

The plaintiff sued under Colorado's Lawful Use Statute which prohibits an employer from discharging an employee for "engaging in any lawful activity off the premises of the employer during non-working hours." In reviewing the Lawful Use Statute, the Colorado Supreme Court held the term "lawful" to mean "that which is permitted by law" or "that which is not contrary to, or forbidden by law." It emphasized that the Lawful Use Statute did not limit the term "lawful" to only that allowed under state law, but that it also encompassed what is "lawful" under federal law as well. Marijuana is illegal under federal law, without any exception for medicinal purposes, or any express allowance for a state to legalize it for any such purpose. The Colorado Supreme Court ruled that medical marijuana was not a "lawful" activity under the Colorado Lawful Use Statute and the plaintiff was not protected from termination.

Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.
Oregon Supreme Court (April 2010)

The plaintiff was hired as a temporary drill press operator with the prospect of becoming a permanent employee dependent upon performance and available work. The plaintiff was required to undergo a drug test before he could be hired as a permanent employee. The plaintiff used medical marijuana because of nausea, severe stomach cramps and vomiting, but never told his employer when he was hired. He also never submitted to a drug test as a temporary employee. During his employment, the plaintiff used medical marijuana one to three times per day, but never used it while at work or on his employer's property, nor did his employer ever suspect that he was using marijuana. The plaintiff eventually told his supervisor that he used medical marijuana and asked whether it would affect his chances of permanent employment. A week later, he was terminated.

The Oregon Supreme Court ruled that an employer is not required to accommodate an employee's use of medical marijuana, even though the Oregon Medical Marijuana Act authorizes such use, because federal law expressly prohibits it. The protections of Oregon's anti-discrimination statute were also inapplicable because the plaintiff was terminated for using illegal drugs.

Ross v. Ragingwire Telecommunications, Inc.
Supreme Court of California (January 2008)

The plaintiff was recommended medical marijuana in accord with California's Compassionate Use Act due to strain and muscle spasms in his back. Based upon his condition, the plaintiff was a qualified individual with a disability under California's

disability statute and received governmental disability benefits. The defendant offered the plaintiff a job as a lead systems administrator and required him to take a drug test. Before taking the test, the plaintiff gave the testing clinic a copy of his physician's recommendation for marijuana. The plaintiff was later terminated because he tested positive for THC, a chemical found in marijuana. The plaintiff filed suit alleging the defendant violated California's anti-discrimination statute and that it failed to make reasonable accommodations for his disability.

The Supreme Court of California ruled that the Compassionate Use Act gives a person who uses marijuana for medical purposes on a physician's recommendation a defense to certain state criminal charges involving the drug, but federal law prohibits the use and possession of the drug, even by medical users. Plaintiff failed to state a cause of action for disability-based discrimination under California law. Nothing in the Compassionate Use Act suggested voters intended the measure to address the respective rights and duties of employers and employees. The Supreme Court of California ruled that under California law, an employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions.

III. Anti-Discrimination Language in Medical Marijuana Statutes

At least nine states (Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, and Rhode Island) have included specific anti-discrimination provisions in their respective medical marijuana laws. These statutory protections generally fall into two categories: (1) protections based upon cardholder status alone (e.g., CT, IL, ME, RI) and (2) duel protection for card holder status and a failed drug screen (e.g., AZ, DE, MN.) For example, Connecticut's anti-discrimination provision provides protection based upon status, while Arizona's provision provides duel protection. The provisions read as follows:

Connecticut

> No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver ... Nothing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours.

Arizona

> Unless a failure to do so would 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 imposing any term or condition of employment or otherwise penalize a person based upon either:

1. The person's status as a cardholder.
2. A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.

Importantly, none of these provisions require that an employer permit an employee's drug use during working hours and most waive the anti-discrimination provision if declining to follow it is required by federal law or required to obtain federal funding. Additionally, these statutes all have various exceptions, discussed below.

A. Site-Specific Restrictions

Many of the state statutes provide limitations on the ability to use medical marijuana in particular buildings and public spaces such as schools and public transportation. Some laws go as far as allowing employers to prohibit medical marijuana on the worksite.

Arizona, Delaware, Maine

Possessing and/or use of medical marijuana is prohibited: on a school bus; on the grounds of a preschool, primary, or secondary school; or in a correctional facility. Smoking medical marijuana is also prohibited while using public transportation or in any public place. (Maine has an exception for school buses and schools in which a minor patient is enrolled, as long as certain additional factors are satisfied.)

Connecticut

Ingestion of marijuana is prohibited in a motor bus, school bus, or any moving vehicle; in the workplace; on school grounds; in any public place; or in the presence of a person under the age of 18.

Illinois

Possessing and/or use of medical marijuana is prohibited: in a school bus or any vehicle; on the grounds of a preschool, primary or secondary school; in a correctional facility, in a private residence used to provide licensed child care or similar social services and in public places where an individual could reasonably be expected to be observed by others. The law also makes clear that nothing in the act shall prevent a private business, university, college or other institution of post-secondary education from restricting or prohibiting the use of medical marijuana on its property.

New York

New York prohibits vaporized consumption in public places, which includes places of employment, and generally prohibits all consumption in motor vehicles. Of note, New York's law prohibits the smoking of marijuana.

B. Profession-Specific Restrictions

General profession-specific restrictions are common, especially if the use could possibly result in injury to others.

Arizona, Delaware, Maine, and Rhode Island

These states prohibit any person from using medical marijuana if the undertaking of any task under the influence would constitute negligence or professional malpractice. Maine also includes the prohibition if the undertaking of any task under the influence would violate any "professional standard."

Illinois

Illinois prohibits any person from using medical marijuana if the undertaking of any task under the influence would constitute negligence, professional malpractice, or professional misconduct. Illinois singles out specific professions and is the only law that specifically targets certain primarily public sector employees. Under its law, active duty law enforcement officers, correctional officers, correctional probation officers, and firefighters are prohibited from using medical marijuana. The use of medical marijuana is also prohibited by a person who has a school bus permit or a Commercial Driver's License.

C. Transportation (Passenger, Driver Under Influence)

Most states have provided limitations on the ability of drivers and those operating motor vehicles from operating under the influence of medical marijuana.

Driving Under the Influence Level for Marijuana

Drivers in Colorado are considered impaired if their blood test shows a level of THC of 5 or more nanograms per milliliter.

Arizona, Illinois, Delaware, Maine, and Rhode Island:

Prohibit the use of medical marijuana while operating, navigating or being in actual physical control of any motor vehicle, aircraft, or motorboat while using or under the influence.

D. Opt-out Provisions

As mentioned above, most states with anti-discrimination provisions include a caveat if complying with the state law would violate federal law or cause any employer to loss federal funding.

Minnesota

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…

Illinois

Illinois' language is perhaps the narrowest, providing an opt-out for zero-tolerance workplaces. Illinois' statute provides that "[n]othing prohibits an employer from enforcing a policy concerning drug testing, zero-tolerance, or a drug-free workplace provided the policy is applied in a non-discriminatory manner. The act further provides that an employer is allowed to discipline a medical-marijuana cardholder for violating a company drug policy.

IV. Current Issues to Address for Risk Managers, Counsel, and Claims Professionals

A. Reasonable Accommodations

Nevada and New York

Both Nevada's and New York's statutes include provisions that require employers, in certain instances, to provide a reasonable accommodation to employees covered by the Acts. In fact, New York's provision explicitly states that covered employees shall be deemed to have a "disability" under New York's Human Rights Law, which protects against many forms of discrimination. The exact implications of these provisions have yet to be seen, as the laws in Nevada and New York are both in their infancy. Nevertheless, neither statute appears to require that an employer allow the use of medical marijuana in the workplace or allow the employee to work while impaired. In fact, New York's law specifically states that it does not "bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance."

Rhode Island

Rhode Island's law explicitly states that nothing in the statute should be construed to require that an "employer accommodate the medical use of marijuana in any workplace."

B. Conflict with Positions of Other Federal Agencies

Department of Transportation (DOT)

The Department of Transportation's (DOT) Drug and Alcohol Testing Regulation (49 CFR Part 40.151e) does not authorize "medical marijuana" under a state law to be a valid medical explanation for a transportation employee's positive drug test result. The DOT regulates safety sensitive transportation employees – pilots, school bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire-armed security personnel, ship captains, and pipeline emergency response personnel, among others.

Drug Free-Workplace Act 1988(41 U.S.C. 81)

This law requires some Federal contractors and all Federal grantees to agree they will provide drug-free workplaces as a condition of receiving a contract or grant from a Federal Agency. The impact of this law is more likely than other potential federal laws to be addressed in individual state statutes.

Occupational Safety and Health Administration

Under the Occupational Safety and Health Act, employers have a general duty to provide a safe work environment. If a worker is allowed to operate machinery as part of his/her position while under the influence of marijuana, there is a potential for that person to be a hazard to him/herself and others, which could lead to workplace injuries.

C. Personnel Policies and Workplace Checklist

1. Zero Tolerance Policies
2. Reasonable Accommodations
    a. Required in Nevada and New York
    b. Not required but want to engage in the interactive process
    c. Not required and do not intend to engage
3. Drug Testing
    a. Continue drug testing?
    b. Timing of drug testing (post-offer, post-accident, random, only for certain positions, ability to test in the public sector)
4. Whether to allow medical marijuana possession and/or use on the worksite or during working hours

5. Updating Personnel Policies and Rules on Medical Marijuana – including interplay of intermittent FMLA leave for medical marijuana purposes.
6. Clearly defining "impairment" with respect to off-duty use
7. Identifying any "safety sensitive" positions in which the employee cannot use medical marijuana
8. Communicating Personnel Policies on Medical Marijuana to employees
9. Training managers and supervisors on Medical Marijuana policies

D. Minimizing Exposure over Medical Marijuana Discrimination Claims

1. Document, Document, Document
2. Clear policies and communication
3. Determination if underlying condition constitutes a "disability"
4. Are claims for discrimination under state law subject to fee-shifting?