MARIJUANA IN THE WORKPLACE

By Steven W. Suflas and Christopher J. Kelly[1]

INTRODUCTION

Legalization of both medical and recreational marijuana is a trend spreading across the country. The marijuana industry is fast growing, with a significant effect on individuals and businesses alike. Colorado is at the forefront of these issues nationally.

While some employers may have concerns about bad behavior by employees who use marijuana, an increasing number of states have stepped in either through legislation or court decisions to require employers to accommodate medical marijuana use in the workplace. These changes present several potential legal questions: What sort of marijuana uses need to be accommodated? Is marijuana testing permitted? Will permitting employee marijuana use put state or federal licenses or contracts at risk? The answers to these questions vary from state to state, and sometimes city to city, presenting significant and often unanticipated legal challenges.

This article will discuss the methods by which states have chosen to legalize marijuana, the federal government's approaches to legalization, the protections employees who use have both from disability discrimination and to be accommodated under state and federal law, and the sorts of testing are legally and practically possible.

STATUS OF MARIJUANA LEGALIZATION

State Legalization of Marijuana

Following Colorado's lead, a majority of states and the District of Columbia[2] have enacted laws that permit patients suffering from debilitating illnesses to access medical marijuana. Employers often have questions about these laws, especially because federal law continues to

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[2] The following states have passed medical marijuana laws: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Washington, West Virginia.

bar marijuana use, distribution, and possession for any reason. Several states[3] have enacted narrower medical marijuana laws, allowing only for the use of a low-THC form of cannabis known as cannabidiol. As of May 2019, only eleven states[4] do not have any medical marijuana laws in place.

Each state has its own system for regulating medical marijuana use, but there are some commonalities. Most allow access only through a medical marijuana registration or identification card. In general, these cards permit a patient to seek physician authorization to then obtain, use, and possibly grow marijuana for medicinal purposes. Cards are generally issued by state government, require payment of a fee, and are valid for one year.

Most state laws carve out certain exemptions, allowing employers to prohibit use on premises and on-the-job intoxication. However, those exemptions have not uniformly protected employers facing litigation.

A few states, while authorizing termination or discipline for marijuana use, intoxication, or impairment, prohibit discrimination against individuals based on their having medical marijuana registration cards. Because most medical marijuana laws are relatively new, only a few states have had an opportunity for judicial interpretation, meaning there is little legal guidance. For example, Nevada and New Jersey courts have provided unclear and somewhat contradictory administrative and judicial guidance on their respective medical marijuana laws.

In addition to the expansion of medical marijuana, ten states,[5] including Colorado, currently have laws authorizing recreational use. None of those recreational marijuana statutes in these states contain employment protections for users, and none have limited an employer's right to enforce a zero-tolerance marijuana policy.

Federal Laws Regarding Marijuana Use

Under the federal Controlled Substances Act ("CSA"), the use, possession, and sale of recreational and medical marijuana remains illegal. The CSA classifies marijuana, in all of its forms, as a "schedule-one" drug, *i.e.* one that has no recognized medical use and that has a high potential for abuse (*e.g.*, heroin, lysergic acid diethylamide ("LSD"), and methylenedioxymethamphetamine ("ecstasy")). *See* 21 U.S.C. § 812(b)(1) and (c).

While the Federal government had previously taken a limited role in enforcing these marijuana laws in states that have legalized its use, on January 4, 2018, Attorney General Jeff Sessions rescinded guidance issued by the Department of Justice ("DOJ") in 2013 and declared that marijuana activity is a serious crime. The Attorney General's one-page memorandum did not order the DOJ to take any specific action, but instructs federal prosecutors to "weigh all relevant considerations" in deciding which cases to prosecute. *See* Office of the Att. Gen. Mem., ***Marijuana Enforcement*** (Jan. 4, 2018). Effectively, this puts marijuana possession and use on equal footing with all other crimes where prosecutors have discretion, but does not necessarily require that

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[3] The following states have limited use laws, allowing for cannabidiol only: Georgia, Indiana, Iowa, Tennessee, Virginia, Wisconsin.

[4] The following states do not have medical marijuana laws: Alabama, Idaho, Kansas, Kentucky, Mississippi, Nebraska, North Carolina, South Carolina, South Dakota, Texas, Wyoming.

[5] The following states have recreational marijuana laws in effect: Alaska, California, Colorado, District of Columbia, Maine, Massachusetts, Nevada, Oregon, Vermont, and Washington.

increased enforcement will follow. Colorado's new U.S. Attorney, Jason Dunn, has publicly stated that he agrees with this step, but "[t]he jury is still out on what kind of enforcement policy that creates."

TESTING ISSUES

Federal Restrictions on Employee and Applicant Drug Testing

Drug testing is largely regulated by state law. However, employers must also comply with the Americans with Disabilities Act ("ADA"), which is the primary federal statute governing drug and alcohol testing.

Federal law gives employers the latitude to maintain a workplace free of alcohol and illegal drugs, neither requiring nor preventing employers from testing their employees. Federal law also makes no distinction between marijuana and any other schedule-one drug. Therefore, the ADA permits, but does not require, that employers test employees and applicants for marijuana. *See* 42 U.S.C. § 12114(d), 29 C.F.R. § 1630.16(c)(1).

Because drug and alcohol testing may reveal an employee or applicant's legitimate medical use of controlled substances resulting from a disability, employers must carefully conform their testing programs to the ADA's constraints.

It is clear that individuals "currently engaging in the *illegal* use of drugs" – including marijuana – are *not* protected under the ADA. Therefore, employers may adopt reasonable policies/procedures to ensure that employees are not engaging in the "illegal use of drugs." The ADA only protects recovering addicts who are not currently using illicit drugs.

Under the ADA, employers may both test employees for marijuana and take adverse employment actions, up to and including termination, even if the employee has a medical marijuana prescription that is valid under state law. Further, unlike with other medical testing under the ADA, the test need not be job-related or consistent with business necessity.

However, the ADA prohibits employers from discriminating against employees and applicants based on their disability. Because drug and alcohol testing may reveal an employee or applicant's disability, employers must carefully conform to the ADA. Further, the EEOC has stated that while medical marijuana use is not protected under the ADA, discipline and termination based on positive drug tests or other indicia of marijuana use will be scrutinized to determine if they are a pretext for discrimination based on the employee's underlying disability.

The ADA and certain states allow employers to test for unlawful drugs before employment begins. However, employers still must take precautions when administering pre-offer drug tests to ensure that they are narrowly-tailored and ADA compliant. *See EEOC v. Grane Healthcare Co.,* 2 F.Supp.3d 667 (W.D. Pa. 2014).

With respect to the application process, employers may ask applicants if they are currently using illegal drugs. However, employers must keep in mind that questioning applicants about whether they have a *history* of using illegal drugs may run afoul of the ADA if done prior to a conditional offer of employment.

Since no one can lawfully prescribe marijuana under federal law, the ADA does not generally require that employers keep confidential the fact that an employee or applicant tested

positive for marijuana, even if they had a prescription. However, the employer must maintain the confidentiality of the results of an employee's marijuana test (or any other drug test) if the results reveal: (i) the presence of a drug that can be lawfully prescribed under both federal and state law; (ii) the employee's genetic information, disability, or other medical information. Given the possibility that this protected information may be included in the test results and that other state law protections may apply (such as common law defamation), employers should consider keeping *all* drug test results confidential and separate from employee personnel files in the same manner it does other medical records.

State Law Restrictions on Employee and Applicant Drug Testing

State laws differ about whether an employer can discipline, fire, or refuse to hire based on a positive drug test resulting from marijuana use that is legal in the jurisdiction. For example, Delaware and Minnesota statutes specifically ban discrimination against employees or applicants on the sole basis of their status as qualifying patients or because of positive drug tests. *See* 16 Del. C. § 4903A(a)(3), and Minn. Stat. §§ 152.22 *et seq*. However, at least one federal appellate court has held that an employer did not violate state medical marijuana law, public policy, or disability accommodation laws when it discharged an employee who tested positive for drugs because of authorized medical marijuana use. *See Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012).

Some state laws also limit an employer's ability to conduct drug testing at all. New Jersey courts have held that a right of privacy under the State Constitution may prohibit random drug testing of current employees, except those in "safety sensitive positions." *See Hennesey v. Coastal Eagle Point Oil, Co.*, 129 N.J. 81 (1992). More recently, New Jersey Amended its Compassionate Use of Medical Cannabis Act ("CUMCA") on July 2, 2019 to require that employees be permitted to present a medical explanation and supporting documentation if they fail a drug test because of a positive result for cannabis. New York City recently adopted an ordinance that prohibits conditioning employment on passing a drug test for tetrahydrocannabinols or marijuana, except for positions involving child care, a commercial driver's license, or where required as a condition of a federal grant. Starting on January 1, 2020, Nevada will also prohibit refusing to hire[6] based on a positive test for marijuana usage, subject to limited exceptions, including where testing is required by Federal or State law.

Practical Limitations of Testing and Off-Duty Use

There are also significant practical limitations on marijuana testing. Test results may register as positive for days or even weeks after an employee has used marijuana, so testing will not clearly indicate either current use or current impairment. This can cause difficulties for employers in states like Arizona, which require employers to have evidence of impairment at work. *Whitmire v. WalMart Stores, Inc.*, 359 F. Supp. 3d 761 (D. Ariz. 2019). Not all states follow Arizona's off-duty use rule though.

In Massachusetts, an employee's use of medical marijuana outside of work may be required as a reasonable accommodation notwithstanding an employer's drug-free workplace policy. *Barbuto v. Advantage Sales and Marketing*, 148 F. Supp. 3d 145 (D. Mass. 2015).

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[6] Interestingly, Nevada's law only applies to refusals to hire, so it is possible that an employee could still be terminated based on a positive marijuana test later in their employment.

Delaware prohibits an employer from discriminating against a person in any condition of employment based on the person's: (i) status as a medical marijuana cardholder; or (ii) positive drug test for marijuana components or metabolites (unless the marijuana was ingested while at work or the employee was working while under the influence). *See* 16 Del. C. § 4905A(a)(3). The only exception is where the employer would lose a monetary or licensing-related benefit under federal law if it did not discriminate against the employee.

Pennsylvania similarly restricts an employer from discharging, discriminating, or retaliating against an employee based solely on the employee's status as a medical marijuana user. *See* PA Stat. Ann. tit. 35 § 10231.2103(b). But Pennsylvania employers are not required to accommodate use of medical marijuana in the workplace and may prohibit a medical marijuana user from "performing any duty which could result in a public health or safety risk while under the influence of medical marijuana." *Id*. at § 10231.510.

On the other hand, the Colorado Supreme Court has held that an employer may terminate an employee for off-duty use. In *Coats v. Dish Network, L.L.C*, a licensed medical marijuana user claimed he never used or was under the influence at work. Nevertheless, he was fired for violating the employer's drug policy after failing a random drug test. The question before the court was whether Colorado's "lawful activities" statute protected the employee from being discharged for lawfully using medical marijuana while off-duty. The Court held that the employer did *not* violate state law by terminating the employee, because medical marijuana use is not a lawful activity under federal criminal law, and Colorado does not distinguish between lawful activities under state or federal law. *Coats v. Dish Network, L.L.C*., 215 CO 44 (2015).

ACCOMMODATIONS

Accommodations under the ADA

In addition to the general prohibition on discriminating against qualified individuals with a disability, the ADA also requires employers to reasonably engage in an interactive process with a disabled employee and provide reasonable accommodation. However, employers need not accommodate employees using marijuana under the ADA, regardless of whether the employee has a medical marijuana prescription. As noted above, active marijuana users, including patients with medical marijuana prescriptions, are deemed "current" drug users under the ADA. Therefore, they are neither (1) qualified individuals with disabilities" under the ADA, nor (2) entitled to reasonable accommodations. *See* 42 U.S.C. § 12112(b)(5)(A), 29 C.F.R. § 1630.3(b).

However, employers may have to provide a reasonable accommodation to an employee who is not a current user and is recovering from addiction. An employee who is recovering from addiction to marijuana, like any other drug, may be an "individual with a disability" under the ADA.

Accommodations under State Anti-Discrimination/Accommodation Laws

Unlike Colorado, many state medical marijuana laws[7] contain specific anti-discrimination provisions that address employer obligations. These statutes typically prohibit discrimination based on status as a medical marijuana user, but either do not require an employer to

[7] The following state medical marijuana laws with anti-discrimination provisions: Arkansas, Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Oklahoma, Pennsylvania, Rhode Island, West Virginia.

accommodate marijuana usage at all, or do not require an employer to accommodate usage while at work. These laws generally allow employers to ban use of medical marijuana on site or refuse to accommodate medical marijuana users by ignoring a positive test result. It is important to check the requirements of each state's unique statute.

In New York, being a certified medical marijuana patient qualifies as a "disability" under the state human rights law. It is an unlawful discriminatory practice for an employer to refuse to provide reasonable accommodations to the known disabilities of an applicant or employee in connection with a job sought or held. However, the medical marijuana law does not prohibit an employer from enforcing a policy prohibiting employees from performing employment duties while they are impaired, nor does it require an employer to do anything that would put it in violation of federal law or cause it to lose a federal contract.

The initial trend in court decisions in this area was to not require accommodation. In an early decision, a California court held that it was not a violation of public policy or state law to terminate an employee for a positive test for marijuana. *Ross v. RagingWire Telecomm., Inc.*, 174 P.3d 200 (Cal. 2008). Montana and Oregon courts also held that an employee's medical marijuana use need not be accommodated. *See Johnson v. Columbia Falls Aluminum Co.*, 213 P.3d 789 (Mont. 2009); *Emerald Steel Fabricators, Inc. v. BOLI*, 230 P.3d 518 (Or. 2010). The US Court of Appeals for the Sixth Circuit continued that trend, holding that an employer did not violate state law when it discharged an employee who tested positive for drugs, even due to the use of authorized medical marijuana. *Casias*, *supra*.

However, this trend has shifted recently. The first case to require accommodation came from Massachusetts. There, an applicant using medical marijuana accepted a job offer contingent on passing a drug test. Before the test, she voluntarily disclosed her medical marijuana use. One day after starting work, she was told that she had tested positive and was terminated. A federal district court held that the employee could assert claim for disability discrimination under the state's Fair Employment Practices Act. *Barbuto*, *supra*.

Following *Barbuto*, a federal court in Arizona addressed a case involving an employee who was a medical marijuana cardholder and claimed to smoke only before bed, but never at or before work. The employee tested positive for marijuana metabolites. The court held that Arizona's Medical Marijuana Act prevented an adverse employment action on that basis and that, in order to prevail, the employer needed to demonstrate through expert testimony that the employee was impaired while at work. The court found particularly significant that Arizona's statute specifically required employers to accommodate medical marijuana use. *Whitmire*, *supra.*

A federal district court in Connecticut has gone further, finding that a federal contractor who must comply with the federal Drug Free Workplace Act could still be required to accommodate an employee's medical marijuana usage. *Noffsinger v. SSC Niantic Operation*, 273 F. Supp. 3d (D. Conn. 2017). This was surprising, given that Connecticut's statute provided an exemption if the discrimination is "required by federal law or required to obtain federal funding." Conn. Gen. Stat. § 21a-408p(b). In that case, the applicant, who suffered from PTSD and was a registered medical marijuana user, received a job offer contingent on passing a drug test. She notified the employer that she was a registered user and would fail. When the test results came back, her job offer was rescinded. The court held that federal law does not preempt Connecticut's Palliative Use of Marijuana Act, which protects employees and job applicants from employment discrimination based on medical marijuana use as permitted under state law.

A Rhode Island court found that medical marijuana use is protected, even for applicants to non-employee internship positions. *Callaghan v. Darlington Fabrics*, 2017 R.I. Super LEXIS 88 (Sup. Ct. May 23, 2017).

New Jersey has conflicting case law on this issue. In *Cotto v. Ardagh Glass Packing Inc*., an employee was required to take a drug test after a workplace accident as a condition of continued employment. He revealed that he would fail the test due to medical marijuana use, after which the employer placed him on indefinite suspension until he could test negative. The federal court held that the decriminalization of marijuana did not shield employees from adverse employment actions in New Jersey, and that employers are not required to waive drug tests for narcotics prohibited under federal law. *Cotto v. Ardagh Glass Packing Inc*., 2018 U.S. Dist. LEXIS 135194 (D.N.J. Aug. 10, 2018). Later, New Jersey's state appellate court addressed the same issue and came to a different conclusion. *Wild v. Carriage Funeral Holdings, Inc.*, 458 N.J. Super. 416 (App. Div. 2019), *certif. granted* 2019 N.J. LEXIS 926 (2019). New Jersey's CUMCA had explicitly stated that the act did not require employers to accommodate medical marijuana users. N.J.S.A.24:6I-14. Notwithstanding that New Jersey statute, the Appellate Division held that CUMCA did not immunize employers from having to accommodate medical marijuana usage under the New Jersey Law Against Discrimination. Note that: Following that opinion, in early July of 2019, the legislature amended CUMCA, to remove the language exempting employers from accommodating medical marijuana and to explicitly prohibit employers from taking adverse action against an employee based solely on their status as a medical marijuana user.

CONCLUSION

The number of employees using medical marijuana will continue to grow, leading to more requests for accommodations for marijuana use in the workplace. Unfortunately, unless and until marijuana is legalized at the federal level or state marijuana laws become more uniform, employers will face a complicated and ever-changing landscape. For now, Colorado employers should exercise caution in handling employee testing and requests for accommodation where medical marijuana could be involved. Given the constantly evolving law in this area, when presented with situations involving marijuana testing, accommodation, or discipline based on marijuana use or test results, employers should carefully evaluate the applicable statutes and decisional law of the relevant jurisdiction and seek legal counsel as appropriate.