

Medical Marijuana and the Workplace Impact: Guidelines for Revising Employment Policies

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Abstract

With more states legalizing the use of medical marijuana, employers may have adjust their workplace policies to ensure that their employees are adequately protected while at the same time protecting the rights of those who have been prescribed marijuana. This is a challenge given the varying laws from state to state as well as the continued criminal prohibition on federal law. This articles reviews some of the early case law in this area and provides employers with some tips on how to address the issue of accommodating medical marijuana users.

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I. Introduction

The list of states passing medical marijuana laws continues to expand. Thirty-four states plus the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have adopted regulation legalizing marijuana or cannabis use to varying degrees. Ten states and the District of Columbia allow legal marijuana use for recreational purposes, while many others have reduced penalties for possession small amounts. Most states legalized marijuana through ballot initiatives, but some adopted it via legislature. Regardless of the method, the trend is likely to increase given the fact that a recent Gallup polls shows that 64% of Americans support legalization of marijuana. (Robinson, M., Berke, J., & Gould, S. (2018)).

Consumption continues to grow with 2017 sales nearing \$10 billion (Berke, 2017). Sales growth increased by 33% from 2016 to 2017. While that level of growth is not likely to continue, analysts predict annual sales approaching \$25 billion by 2021. States newly adopting legalized marijuana experience more rapid growth in the early years. This market growth continues to explode in spite of existing federal laws prohibiting medicinal and recreational marijuana. While Berke (2017, February 28) notes that current Attorney General Jeff Sessions opposes legalized marijuana, the Justice Department has given no indication of intent to prosecute states legalizing marijuana. However, the nature of the industry poses some interesting challenges for regulators and small businesses. For small business the challenges include, but are not limited to the following questions. Specifically;

- How will businesses navigate existing labor laws with respect to drug testing?
- How will legalized marijuana affect disability claims?
- How will legalized marijuana affect workers' compensation claims?
- What other safety issues emerge from legalizing marijuana?

These are just a few of the questions that have emerged due to the marijuana legalization trend. In the following sections, we discuss some relevant case law and address some of these issues with regard to small business concerns. We also develop a set of employee handbook recommendations that firms should consider and/or adopt. Ignoring the issues raised by marijuana legalization does nothing to mitigate risk. However, revisiting employment policies ensures everyone has a clear understanding of their rights and responsibilities.

II. Literature Review

The literature related to the business impacts of legalized marijuana is limited at this time due to the newness of the most state adoptions. For example, recreational marijuana did not become legal until Colorado passed legislation in 2012. The bulk of the business impacts of marijuana literature focuses on the tax treatment and banking regulations. One example (Taylor et al., 2016) looks at the accounting and financial effects of state inconsistencies in how recreational marijuana is treated from the perspective of a certified public accountant (CPA).

A few studies address the effects of marijuana legalization with regard to employment and labor laws. One study by Pastore, Contacos-Sawyer, and Thomas (2013) looks at the issue from the perspective of both employee rights and employer rights. According to their paper, and also Maurer (2012), the federal illegality of marijuana gives employers the right to ban marijuana use completely and adopt and enforce zero-tolerance policies. In spite of this right, Pastore et al. (2013) suggests that some employers adopt policies and make accommodations for employees with legitimate medicinal reasons to use marijuana. However, employers are not required to make these accommodations under ADA given the federal illegality of the drug. Employers must exercise caution to ensure the safety of all employees if marijuana use is permitted at work, or immediately prior to work.

Stringham et al. (2017) focuses on several workplace issues to include drug testing policies and federal legislation related to medical marijuana usage. Their paper looks how medical marijuana legalization affects employers who may employ people who have been prescribed medical marijuana. They offer strategies to help mitigate risk including altering drug testing policies and training supervisors. Mello (2013) indicates that most states offer little guidance on how to address these issues. Employers are left to use their discretion with regard to mitigating risk.

Given the ubiquity and rapidity of legalization since 2012, employers may need to revisit numerous workplace policies. Nagele-Piazza (2018) offers a few suggestions. These include additional time off work during treatment periods. She also states that employers need to adopt clear workplace policies.

III. Relevant Case Law

While early studies suggested caution when dealing with employees and the medical use of marijuana, many courts wrote that the purpose of state laws legalizing marijuana were intended to eliminate criminal sanctions regarding the use of marijuana and were not intended to go much further than that. One of the earliest cases is *Ross v. Ragingwire Telecommunications, Inc.* (2008). There, the employee was prescribed marijuana to deal with back spasms. He was offered a job as a lead systems administrator, but he was required to take a drug test first. The potential employee informed the clinic of his prescription for marijuana, and marijuana was ultimately found in his system. He was fired as a result of the positive drug test despite the employee's protests that he had been working in the same field since before he started using marijuana and that his marijuana use had no effect on his job performance. The employee sued the employer for refusing to accommodate his disability. Ultimately, the case ended up before the California Supreme Court.

The employee sued under the California Fair Employment and Housing Act (“California FEHA”). Like the federal American with Disabilities Act, the California FEHA requires employers the disabilities of their employees. Presumably, one could not seek an accommodation under the Americans with Disabilities Act because the law does not require the accommodation of illegal drug use, and marijuana use remains illegal under federal law. But is it possible that the employee was entitled to an accommodation under state law? The California Supreme Court said no, concluding that the purpose of California’s Compassionate Use Act was merely to address the criminal penalties for marijuana use and not go as far as to require employers to accommodate marijuana use.

In *Garcia v. Tractor Supply Co.* (2016), the employee used medical marijuana for treatment of symptoms of HIV/AIDS. The employee disclosed this information to the employer during the interview, but he was still hired for the job. The employee later submitted to a drug test, tested positive for marijuana metabolites, and lost his job due to the positive drug test. The employee sued for wrongful discrimination. The trial court held that, while New Mexico law declared medical marijuana compensable under state workers’ compensation laws, there was nothing in New Mexico law that required employers to accommodate such use. Even in Colorado, a state with a reputation for being friendly to recreational marijuana users, courts have sided with employers. For example, in *Coats v. Dish Network* (2015), the Supreme Court of Colorado had to determine whether a medical marijuana user was protected by Colorado’s “lawful activities statute,” which generally makes it an unfair labor practice to fire an employee for lawful outside-of-work activities. The court decided that, because marijuana use was still illegal under federal law, the employee was not protected under the statute. Still, employers must exercise caution with employees who use marijuana for medicinal purposes.

The employer’s obligation depends on the state that it is in. A minority of states explicitly require that employers accommodate medical marijuana use. Nevada law requires employers to accommodate medical marijuana card holders if doing so would not “(a) Pose a threat of harm or danger to persons or

property or impose an undue hardship on the employer; or (b) Prohibit the employee from fulfilling any or all of his or her job responsibilities” (Medical Use of Marijuana, § 453A.800(3)). New York law recognizes that the legal use of medical marijuana triggers protections under the New York Human Rights Law, which requires the reasonable accommodation of disabilities. (Medical Use of Marijuana, § 3369(2)). In these states, employees who use medical marijuana are entitled to a reasonable accommodation. And even in these most accommodating states, employers can still enforce rules that prohibit employees from coming to work under the influence of a controlled substance.

Many states protect employees from being discriminated against solely based on their status as a medical marijuana user. For example, in Arizona, Arkansas, Connecticut, Delaware, Illinois, Oklahoma, Pennsylvania, Rhode Island, and West Virginia, an employer would violate the law by taking an adverse employment action against an employee authorized to use medical marijuana. These same laws, however, make clear that employers can still enforce drug-free workplaces and terminate employees who come to work under the influence of marijuana. Many of these states also make clear that the anti-discrimination provision does not apply when doing so would violate federal law. In other words, employers do not have to choose between maintaining federal benefits and complying with state discrimination law.

Then, there states such as Florida, Georgia, New Jersey, and Washington where state law makes it clear that employers need not accommodate medical marijuana use at all. When language in a state’s law is clear, employers ought not face any sanctions if they take into consideration an employee’s use of marijuana, even outside of the workplace. That being said, there are cases where courts will have to distinguish between discrimination based on marijuana use (which is lawful) and discrimination based on a disability (which is unlawful). A great example is the case of *Cotto v. Ardagh Glass Packing, Inc.* (2018). There, a forklift operator was prescribed marijuana due to a previous injury. He was placed on light duty after bumping his head on a forklift. He was later told that he could no longer work for the employer. The

employee filed a discrimination suit against the employer and alleged that he could continue to do the job with a reasonable accommodation. The court recognized the intellectual challenge:

Distinguishing a treatment from a disability can present some analytical difficulties. Undue prejudice toward a treatment for a disability—say, an employer’s disapproval that an employee uses a wheelchair—can be discrimination against the disability itself. But not so here. Plaintiff has pleaded that Ardagh Glass was aware of Plaintiff’s disability for years and never discriminated against him until he was asked to take a drug test. Nothing in the complaint indicates Ardagh Glass took issue with his disability as such, only with a consequence of his treatment. New Jersey courts interpreting the LAD have noted that “it is the almost universal view that the federal laws are intended to prevent discrimination premised upon a handicap or disability, not upon egregious or criminal conduct even if such conduct results from the handicap or disability.”

Ultimately, the court was more persuaded by cases ruling that employers did not have to accommodate medical marijuana users and dismissed the employee’s discrimination claim.

The D.C. case of *Coles v. Harris Teeter, LLC*, (2016), however, demonstrates that, even in cases where the law does not clearly protect medical marijuana users, there is still the possibility of litigation. There, a grocery store employee was prescribed marijuana to help him with his glaucoma. After being fired for a positive drug test, the employer sued for wrongful termination and violation of the D.C. Human Rights Act, which prohibited discrimination on the basis of disability. The court dismissed the wrongful-termination claim, stating that the law did not clearly mandate a public policy requiring accommodation of medical marijuana use. It did allow the disability claim to proceed, due to an allegation that the employer retained at least one employee who had failed multiple drug test. This raised enough of an inference of dismissal because of the disability rather than the drug test. That being said, the court issued its opinion at an early stage of the litigation, and it acknowledged that “Plaintiff may ultimately face an uphill claim in proving that he was fired because of his glaucoma.” *Coles* should be a warning that, even

in cases where employers are not required to accommodate a condition, they open themselves to discrimination lawsuits when they fail to consistently enforce workplace policies.

When seeking guidance regarding accommodations, one might look to cases involving accommodation of prescription drug use. In *Sloan v. Repacorp, Inc.* (2018), the employee worked in a dangerous environment. To that end, the employer instructed all employees to notify management if they were taking nonprescription or prescription medication. The employee in that case understood that testing positive for nonprescription medication could result in termination. The employee later started taking prescription morphine to deal with neck and back pain. He did not inform his employer until the day of his termination. The employee filed a number of claims against the employer, including a discrimination claim. The employee was ultimately unsuccessful in the claim because he did not cooperate in efforts to investigate the extent of his injury or whether it could be reasonably accommodated with some other medication.

In *Starts v. Mars Chocolate North America, L.L.C.* (2015), the employee sued, alleging employment discrimination for failing to accommodate a back injury. The Fifth Circuit ruled in favor of the employer after upholding the finding that the employee could not do the job even with the accommodations requested by the employee. Similarly, there will be many jobs that cannot be done by an employee who uses medical marijuana (or who has a condition for which medical marijuana may be used). Put simply, there is no violation of discrimination law if the disability cannot be accommodated.

Finally, an employer who wants to fire an employee for a positive drug test might be concerned that, because he or she does not know whether the employee uses medical marijuana, termination may violate that employee's rights. While that might be a legitimate concern, the need to accommodate does not rise until the employer has reason to know that there is a need to accommodate.

What about workers' compensation? When an employee under the influence of a controlled substance suffers a workplace injury, that employee is often ineligible for workers compensation benefits.

The law is applied differently from state to state, with some states requiring the employer to prove misconduct and others placing the burden on the employee to prove lack of misconduct. But still, an employee who comes to work under the influence of marijuana risks being disqualified from receiving workers' compensation benefits if he or she is injured.

A related question, however, is whether medical marijuana can constitute reasonably necessary treatment for a workplace accident. The answer depends on what state's court is deciding the case. Most recently, a Maine court decided that federal law prohibition of marijuana precluded state law from covering medical marijuana treatment under workers' compensation law (*Bourgoin v. Twin Rivers Paper Co.*, 2018). In contrast, the Court of Appeals of New Mexico ruled that "reasonable and necessary services from a health care provider" could include medical marijuana (*Vialpando v. Ben's Automotive Servs.*, 2014). This is an area that still requires some development of the law, and employers and employees outside of these states will only be able to speculate regarding whether their states' workers' compensation law will authorize medical marijuana as reasonably necessary treatment.

IV. Conclusions and Recommendations

Most articles on this topic recognize that employers are in a bind, navigating state laws that permit marijuana use (to varying degrees) and federal law, which continues to criminalize it. Making matters worse, there appears to be no uniformity in state law as it relates to marijuana and employment law. Still, there are steps employers can take to protect themselves. Employers should update themselves on their local laws. Articles such as this can only provide general advice. In some parts of the country, marijuana use is still a violation of state law, and employers need not worry about accommodating their use. In others, employers have an explicit duty to accommodate medicinal marijuana users. And of course, there are variations in the law between these two extremes. Familiarity and compliance with one's local laws are the best way to reduce one's risk in the workplace.

- Be aware of specific obligations under federal law. There are a few federal laws that mandate drug-free work places. Employers should continue to follow them. Most state statutes exempt employers whose federal rights would be put in jeopardy. For example, the Drug-Free Workplace Act of 1988 requires federal contractors to maintain a drug-free workplace. Similarly, the Department of Transportation have updated its regulations to instruct that a positive drug test resulting from medical marijuana is still a positive drug test. When it does to safety sensitive positions—“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”—the rule should continue to be zero tolerance.
- Employers in states that require accommodation medicinal marijuana users (or in states that do not explicitly waive the duty of accommodation) should consider what accommodations, if any, can be made to the workplace. If accommodations can be made, those employers should consider a plan of implementation in advance. Of course, there are some workplaces where marijuana use cannot be accommodated under any circumstances. While disability discrimination law requires employers to reasonably accommodate disabled employees, no accommodation is necessary when such an accommodation would constitute an undue hardship on the employer. Even under the most generous circumstances, some employers will be unable to accommodate marijuana use. There may be agencies who might assist in this endeavor. Chang (2013) mentioned California company Jian Software, which worked with the National Organization for the Reform of Marijuana Laws to create policies to accommodate medical marijuana use.
- If marijuana use is to be accommodated, then require documentation, including how the drug is used, how long it is to be used, and what it is to be used for. (from Stringham et al.) While there are privacy concerns, and it is reasonable that employees would not want to disclose sensitive

information, it is necessary for employers to have this information to provide for a proper accommodation of the disability.

- As suggested by Nagele-Piazza (2018), employers should continue to maintain drug-free workplaces. However, employers should also be sure to consistently enforce those policies. An employer is subjecting itself to liability if there is an uneven enforcement of a drug-free policy. While this should always be a concern (as employees might claim discrimination based on other factors), that concern is heightened when it comes to medical marijuana users.
- Many states protect marijuana card holders. While employers need not tolerate workplace use, they should be cautious when making employment decisions involving card holders. Even better, unless necessary, they should avoid circumstances where it could come up as an issue. There are best practices when avoiding discrimination on the basis of race, gender, and religion. Many of those practices can be employed to avoid discriminating against an employer for their medicinal marijuana use.
- In a world where marijuana use is more permissive, employers should increase training on recognizing impairment. As Phillips et al. (2015) suggests, supervisors need to recognize if and when an employee is too impaired to perform their job.
- Employers should review their drug-testing policies with medicinal marijuana users in mind. There may also be a need to clearly distinguish on-the-job impairment and off-the-clock use. This will be a challenge given how long marijuana stays in one's system. A single exposure to marijuana can be detected in a urine test for up to 72 hours. A chronic user, however, could have a positive urine test 30 days after cessation of use.

The legalization of marijuana to varying degrees will continue to provide challenges for employers, particularly if they have employees who use marijuana for medicinal purposes. The increased risk of marijuana use by employees is too substantial to ignore. By being proactive and reviewing workplace

policies, employers can protect themselves from unnecessary litigation and other problems that could result from increased marijuana use.

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