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Marijuana in the Workplace: The Growing Conflict Between Drug, Employment Laws

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On Nov. 3, 2015, the Ohio public voted ''no'' on Issue 3, a ballot initiative to legalize marijuana use in that state. Although that initiative failed, 35% of Ohio voters sought its passage, and the desire for legalization of marijuana continues to be a strong sentiment in Ohio and other states around the country.

Indeed, a growing number of states have legalized the use of marijuana. Nonetheless, the drug remains illegal under federal drug laws. This dichotomy has left employers operating in those states to consider how to approach the intersection of marijuana use and the workplace. The legal landscape is made more confusing when considering the differing levels of employment protection that these state laws offer to marijuana users. With this patchwork of state laws, employers are left to grapple with whether and how to accommodate their employees who use marijuana for medical purposes or recreationally.

Health care entities face a special challenge because their workforce is likely to be educated on medical marijuana issues and may witness first-hand its treatment effects. Many of these entities, however, employ individuals in safety-sensitive positions, such as physicians, nurses, and technicians, involved in direct patient care, medication preparation, or medical device operation. Special consideration is warranted when developing policies surrounding marijuana use by employees in this industry, and in many cases zero tolerance policies may be necessary. For instance, certain jurisdictions may require reporting of marijuana use by physicians to the appropriate licensing authority.

Based on the relatively few cases decided by courts in this area, employers who wish to continue their zero-tolerance policy for marijuana use likely are legally insulated, but should continue to monitor for developments in this area of the law.

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The Legal Landscape

Twenty-three states and the District of Columbia have legalized medical and/or recreational use of marijuana. These jurisdictions provide marijuana users with varying levels of protection against employment discrimination. The majority—Alaska, California, Colorado, Georgia, Hawaii, Maryland, Massachusetts, Michigan, Montana, New Jersey, New Mexico, Oregon, Vermont, and Washington—merely decriminalize use. Other jurisdictions—Arizona, Connecticut, Delaware, the District of Columbia, Illinois, Maine, Minnesota, Nevada, New Hampshire, New York, and Rhode Island—in addition to decriminalizing use, also provide statutory protections against discrimination. Some of these jurisdictions even require accommodation of underlying disabilities.

However, marijuana is still classified as a Schedule I drug (high potential for abuse, no acceptable medical use) and remains illegal under the federal Controlled Substance Act (''CSA''). While last year Congress passed a bill to defund the Department of Justice's efforts to challenge state medical marijuana programs, the Obama administration's public position is that it ''steadfastly opposes legalization of marijuana.''[1]

Federal precedent in this area has provided employers with broad rights to take adverse action against individuals who use marijuana, whether it is for medical purposes and/or protected under state law. For instance, under the Americans with Disabilities Act (''ADA''), courts have held that marijuana users—regardless of the legality of the use under state law—are

[1] *See* Office of National Drug Control Policy, *Marijuana*, https://www.whitehouse.gov/ondcp/marijuana.

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not qualified individuals with a disability entitled to anti-discrimination protections.[2]

Even in the health care industry, however, employers must be careful not to rely on medical marijuana use as a pretext for firing an employee with an underlying disability. The U.S. Equal Employment Opportunity Commission (''EEOC'') recently took aim at a Michigan-based assisted living center that fired a nursing administrator who used medical marijuana to treat her epilepsy and thus failed a drug test on her second day of work.[3] The district court denied the employer's motion for summary judgment on the individual's ADA claim. Although acknowledging that a positive test for medical marijuana constituted a legitimate, non-discriminatory reason for discharge, the district court concluded that the EEOC raised a genuine issue of material fact as to whether the articulated reason was a pretext for disability discrimination, particularly because the employee had been questioned about her disability during her interview and subsequently after the positive drug test. The case eventually settled but should be heeded by employers as a warning that a positive drug test for marijuana may not insulate them from discrimination claims under the ADA.

Unresolved Conflict Between Employer and Employee Rights Under State Law

State law provides greater protections to marijuana users. However, while courts have infrequently addressed the conflict between state law employment protection and marijuana use, those that have considered such issues generally have found in favor of an employer's right to take adverse action against an employee who tests positive for marijuana.

Courts in California, Montana, Oregon, and Washington have held that decriminalization laws do not confer a legal right to smoke marijuana and that employers may take adverse action against users. In 2008, the California Supreme Court first addressed the potential conflict between medical marijuana use by an individual for an alleged disability and an employer's right to refuse to hire an applicant or to terminate an employee for illegal drug use. In *Ross v. RagingWire Telecomms., Inc.*,[4] the plaintiff asserted that the Fair Employment and Housing Act, the state's anti-discrimination statute, worked together with the state's Compassionate Use Act of 1996, which exempted medical marijuana users from criminal liability under two specific state statutes, to force his potential employer to waive its policy requiring a negative pre-employment drug test. The California Supreme Court held that, because the Compassionate Use Act did not address the respective rights and obligations of employers and employees, employers may take illegal drug use into consideration when making employment decisions. The court further held that the Compassionate Use Act does not require employers to accommodate marijuana use.

Following the *Ross* decision, the high courts in Montana, Oregon, and Washington reached similar conclusions. In *Johnson v. Columbia Falls Aluminum Co. LLC*,[5] the Montana Supreme Court upheld the dismissal of an employee's wrongful termination and discrimination claims after finding that Montana's medical marijuana law did not provide an employee with a private right of action against an employer and, further, that neither the Americans with Disabilities Act nor the Montana Human Rights Act requires an employer to accommodate medical marijuana use. The following year, the Oregon Supreme Court reached the same result in *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*,[6] concluding in painstaking detail that the federal CSA preempted Oregon state law to the extent that state law affirmatively authorized the use of medical marijuana. Thus, the employee, who used medical marijuana, was not protected by the state statute from discharge because he was engaged in illegal drug use under federal law.

In 2011, the Washington Supreme Court, in *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*,[7] also held that an employee does not have a private cause of action if discharged for using medical marijuana. The court further concluded that the law did not create a clear public policy that would support a claim for wrongful termination in violation of such a policy.

Most recently, the Colorado Supreme Court highlighted this issue when, in *Coats v. Dish Network, LLC*,[8] it held that an employee may be fired for using marijuana even though he legally used the drug off duty. Coats, a quadriplegic who has used a wheelchair since he was a teenager, obtained a medical marijuana license and consumed medical marijuana during nonwork hours. Dish Network terminated Coats' employment after he failed a random drug test. Coats argued that Dish Network violated a Colorado law prohibiting termination for lawful off-duty conduct. The court disagreed. Because smoking marijuana was still illegal under the federal CSA, the court held that such use did not constitute lawful conduct under the Colorado statute.

Although Coats asserted an untested theory for relief, the result in Colorado was identical to the earlier results in California, Montana, Oregon, and Washington: decriminalization laws do not confer a legal right to accommodation in the workplace for marijuana users, and employers may take adverse action against such users. Interestingly, each of these decisions came in jurisdictions in the western United States, where much of the public hold liberal views with respect to marijuana use.

Employers should take note, however, that the statutes considered by the courts in the above cases decriminalized marijuana use but do not expressly provide employment protections to users or even address the employer-employee relationship. Employers must tread more carefully in jurisdictions that grant express workplace protections to marijuana users—whether for medical or recreational purposes. Yet untested is whether an employee's rights under such a state statute trump the rights of an employer to take adverse action against the use of a drug categorized as illegal under federal law. As a result, this is a still a gray area and em-

[2] *See, e.g.*, *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012).

[3] *EEOC v. Pines of Clarkston, Inc.*, No. 13-CV-14076, 2015 U.S. Dist. LEXIS 55926 (E.D. Mich. Apr. 29, 2015).

[4] 174 P.3d 200 (Cal. 2008).

[5] No. 08-0358, 2009 Mont. LEXIS 120 (Mont. 2009).

[6] 230 P.3d 518 (Or. 2010).

[7] 257 P.3d 586 (Wash. 2011).

[8] 350 P.3d 849 (Colo. 2015).

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ployers should be alert for litigation that could test the limits of employer rights.

Furthermore, each of the decisions discussed above involved a non-union workplace. Unionized employers should be mindful of their obligations under existing labor contracts. Regardless of what the courts have held on the issue of marijuana use in the workplace, labor arbitrators likely will take a more lenient view of positive tests, particularly where the use was medicinal, off-duty, and/or by an employee holding a non-safety sensitive position.

Advice for Employers

While many implications of legalizing marijuana use are yet to be decided by the courts, employers clearly may continue to prohibit the on-duty use of, or impairment by, marijuana. Employers, particularly federal contractors required to comply with the Drug-Free Workplace Act, also may continue the implementation of workplace drug testing programs. Indeed, those heath care providers with sufficient grants and/or procurement contracts with the federal government must comply with the Drug-Free Workplace Act's testing requirements. Drug testing is a mandatory subject of bargaining, and unionized employers should be cognizant of the requirements of any negotiated testing policies. Of course, any employer that drug tests should be aware that testing for marijuana has inherent limitations. Unlike testing for alcohol, testing for marijuana will only reveal the presence of marijuana and not whether an employee is actually impaired.

Certainly, workplace safety should be top of mind for employers when deciding whether to test for and how to handle marijuana use by employees. Under the Occupational Safety and Health Act of 1970, employers have a duty to provide a safe work environment for their employees. More specifically, the General Duty Clause, Section 5(a)(1), requires employers to provide employees with a workplace that ''is free from recognizable hazards that are causing or likely to cause death or serious harm to employees.'' Thus, employers can likely prohibit employees in safety-sensitive positions from using marijuana. The U.S. Department of Transportation, for example, has issued guidelines prohibiting the use of medical marijuana by transportation workers in some safety-sensitive jobs. This prohibition extends to states where marijuana is legal.

Employers, however, must treat positive tests for marijuana cautiously. The decisions in California, Colorado, Montana, Oregon, and Washington collectively provide support to take adverse action against employees who use marijuana, medicinally or recreationally, and may suggest that such employer-favorable rulings will issue even from courts reviewing state statutes providing employment protections. Thus, a bright-line approach to discharging or refusing to hire marijuana users may be defensible, especially for health care entities.

Takeaways

Given the uncertain state of the law, particularly in those states that provide employment protections for users, employers should consider taking the following steps to reduce potential liability:

- Develop and/or review policies that expressly address the right to take adverse action upon a finding of marijuana use. Communicate these policies to employees and follow the policies on a consistent basis.
- Be aware of any mandatory or permissive reporting requirements for licensed employees, such as physicians, who test positive for marijuana or other drugs.
- Particularly in jurisdictions providing employment protections for medical marijuana users, engage in a fact-based inquiry to determine whether the individual is a medical marijuana cardholder and whether the job can accommodate the individual's use of medical marijuana.
- Engage in the interactive process to determine whether medical marijuana use can be accommodated.
- When taking adverse action against a known user of marijuana, document the reasons to avoid a pretext argument.

Of course, employers should work with legal counsel to closely monitor the changing legal landscape in their jurisdictions as this area of unsettled law is ripe for future litigation.