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Employment Protections Under Medical Marijuana Laws: The Changing Landscape

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- **Many states have enacted or are considering medical marijuana legislation, some of which involves employment-related provisions.**
- **The potential exists for conflicts between state laws protecting employees who use medical marijuana and federal laws that make marijuana illegal and mandate employee drug testing.**
- **Employers should have policies addressing medical marijuana use, train staff on such policies, and document medical marijuana-related employment decisions.**

Sixteen states, plus the District of Columbia, have enacted legislation that affords protections to qualifying individuals with debilitating medical conditions by allowing them to lawfully engage in the medical use of marijuana. [1]

The following six states have pending legislation that would decriminalize the use of medical marijuana: Illinois, Massachusetts, New Hampshire, New York, Ohio, and Pennsylvania. In 2011, eleven other states considered, but ultimately rejected, legislation that would decriminalize the use of medical marijuana.[2]

Delaware recently joined this growing trend among states when it enacted the Medical Marijuana Act (the Act). The Act is noteworthy, in that it extends certain employment protections to medical marijuana users. Only a few other states have done so, but it is likely that more will follow.

This article will discuss medical marijuana laws, with a focus on employment protections provided in the Act and similar statutes. The article will conclude with recommendations on how employers should proceed in jurisdictions whose medical marijuana laws include employment-related provisions.

Delaware's Medical Marijuana Act

– Provisions Decriminalizing Use of Medical Marijuana

Like other states that have enacted similar legislation, Delaware's Medical Marijuana Act decriminalizes the authorized use of medical marijuana in an attempt "to protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties, and property forfeiture if such patients engage in the medical use of marijuana."[3] The Act permits Delaware's Division of Health and Social Services (DHSS) to issue registry identification cards to qualifying individuals. Chief among the requirements necessary to obtain a card is that the individual must present a written certification from a licensed physician stating that the individual has a "debilitating medical condition" and is likely to receive a therapeutic or palliative benefit from using medical marijuana.

In defining "debilitating medical condition," the Act takes three separate approaches. First, the Act specifically lists the following

diseases as constituting a "debilitating medical condition": cancer, HIV/AIDS, decompensated cirrhosis, amyotrophic lateral sclerosis, agitation of Alzheimer's disease, and post-traumatic stress disorder. Second, the Act specifies that individuals have a "debilitating medical condition" if they suffer from one or more of the following symptoms: cachexia or wasting syndrome; severe, debilitating pain that has not responded to prescribed medications or surgical interventions for more than 3 months or for which other treatment options produced serious side effects; intractable nausea; seizures; or severe and persistent muscle spasms. Finally, the Act specifies that the DHSS may further expand the list of "debilitating medical conditions" through the regulatory process.[4]

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– Employment Related Provisions

Unlike the majority of medical marijuana statutes, the Act includes provisions that afford additional protections to employees. Specifically, the Act prevents employers from discriminating against an employee "in hiring, termination, or any term or condition of employment, or otherwise penaliz[ing] a person" for his "status as a cardholder" or because of a "positive drug test for marijuana components or metabolites."[5]

While granting these protections, the Act qualifies the protections in two ways. First, the statute exempts employers from compliance if it would "cause an employer to lose a monetary or licensing related benefit under federal law or federal regulations."[6] Second, despite the Act's protections, an employee can be disciplined if he "used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment."[7] The Act emphasizes that it does not require employers "to allow the ingestion of marijuana in any workplace or to allow any employee to work while under the influence of marijuana," with the caveat that "a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana."[8] Beyond this statement, the statute does not define a punishable level of marijuana or its metabolites.

Other State Statutes with Employment Related Provisions

Delaware is one of four states whose medical marijuana laws contain some degree of protection for employees. Arizona's Medical Marijuana Act contains protections that are nearly identical to those in the Act. While Maine's Medical Use of Marijuana Act also prohibits employers from discriminating against registered users, unlike Delaware and Arizona, Maine provides no explicit protection to employees that test positive for marijuana use. Instead, the Maine law states that it does not require "[a]n employer to accommodate the ingestion of marijuana in any workplace or any employee working while under the influence of marijuana."[9] Rhode Island's statute is similar to Maine's.

These four statutes are in the minority, as the majority of medical marijuana statutes offer no explicit protection to registered users in the employment context. In fact, courts in several states have rejected arguments by individuals that there are implicit protections for employees in these statutes. It is worth noting that claims under the Americans with Disabilities Act (ADA) have also failed, as marijuana is an illegal drug under federal law and its use is not protected under the ADA.

The Potential Conflict Between Federal and State Laws

In the states that have legalized the use of medical marijuana, and especially in those that provide employment-related protections, there is a potential for conflict between state and federal laws. The crux of this conflict is the fact that, under federal law, marijuana remains an illegal drug. Indeed, in October 2009, the Department of Justice issued a memorandum to federal prosecutors advising them to use discretion when deciding whether to prosecute users of medical marijuana in states that have enacted medical marijuana statutes.[10] It is significant that the DOJ did not tell prosecutors in those jurisdictions to stand down.

Other federal laws, such as those governing employees in the transportation industry, specifically mandate drug testing.[11] The Department of Transportation (DOT) has explicitly stated that the drug testing requirements, and the ramifications of a positive test, apply to medical marijuana users.[12] Under DOT regulations, employees in safety-sensitive positions, such as a truck driver, who test positive for drugs, must be removed from those safety-sensitive positions until certain return-to-duty requirements are met.[13] Employers who fail to comply with these regulations face the risk of fines and loss of federal funding.

It is possible, but unlikely, that the employment-related provisions of the Act are in conflict with the federal Drug Free Workplace Act.[14] The Drug Free Workplace Act, which applies to recipients of federal contracts and grants, requires among other things, that the employer maintain a workplace where employees are prohibited from using controlled substances, including marijuana, which is classified as an illegal substance under federal law. Given that the Act permits employers to discipline employees

who use medical marijuana in the workplace, it is unlikely that there would be a conflict. However, if a conflict did exist, and the employer risked losing federal funding, compliance with the Act would likely be excused.

How to Manage the Uncertainties in the Medical Marijuana Statutes

As noted above, there is some uncertainty in the employee-friendly medical marijuana statutes. The Act (like the medical marijuana laws of Arizona and Maine) provides some protection to registered users of the drug but does not define when an employee will be considered "impaired" by medical marijuana use or "under the influence" of the drug, which would eliminate any employment-related protections. Unlike alcohol and blood alcohol level tests, there is no set measure that is used to determine how much marijuana is in someone's system. In making employment decisions regarding users of medical marijuana, employers should consider the following recommendations. First, employers should remember that the statutes do not tolerate employees ingesting marijuana in the workplace. In fact, the Act, for instance, explicitly permits employers to discipline employees who use marijuana in the workplace.

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Second, employers should be aware of whether they are governed by any federal statutes (such as the Department of Transportation's mandatory drug testing requirements), that arguably would trump any requirements under state statutes.

Third, with respect to determining whether an employee is "impaired" or "under the influence," employers should provide training for managers who will be tasked with making these determinations. This training should include guidance on signs and symptoms to look for when determining whether someone is under the influence. Any ensuing litigation over whether an employer violated the Act or similar laws by disciplining a medical marijuana user would hinge on the employer's basis for making the adverse employment decision. Accordingly, it is crucial that the employer be able to describe the reasons why it believed the individual was under the influence. These reasons should be documented and preserved in the event of subsequent litigation. As a reminder, a positive drug test alone is not enough to justify discipline of a registered medical marijuana user under the Act and similar state laws.

Finally, employers should create workplace policies prohibiting the illegal and improper use of drugs in the workplace. Given that there are many federal and state laws governing the implementation and enforcement of workplace drug policies, employers may find it helpful to obtain the assistance of counsel in drafting these policies. To minimize risk, employers, who employ individuals in Delaware and other states whose medical marijuana laws include employment protections, are well-advised to address the medical marijuana issue in advance of having their first "test case."

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[1] The sixteen states are Alaska, Arizona, California, Colorado, Delaware, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

[2] The eleven states are Alabama, Connecticut, Florida, Idaho, Iowa, Kansas, Mississippi, North Carolina, Oklahoma, Texas, and West Virginia.

[3] 16 *Del. C.* § 4901A (g).

[4] *16 Del. C.* § 4906A.

[5] 16 *Del. C.* § 4905A (a)(3)(a) and (b).

[6] 16 *Del. C.* § 4905A (a)(3).

[7] 16 *Del. C.* § 4905A (a)(3)(b). *See also* 16 *Del. C.* § 4907A (b).

[8] 16 *Del. C.* § 4907A(a)(3).

[9] Me. Rev. Stat. Ann. tit. 22, § 2426 (2)(B).

[10] *See http://www.justice.gov/opa/documents/medical-marijuana.pdf.*

[11] *See, e.g.,* 49 U.S.C. § 31306.

[12] *See http://www.dot.gov/odapc/documents/medicalmarijuananotice.pdf.*

[13] *See, e.g.,* 49 C.F.R. Part 382.

[14] *See* 41 U.S.C. § 701 *et seq.*