MEDICINAL AND RECREATIONAL MARIJUANA IN THE WORKPLACE

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CFMA 2019 MIDWEST REGIONAL CONFERENCE

TOPICS

- Federal & State Marijuana Laws
- The Impact on Employers
- Drug Policies and Testing
- Practical Considerations
- Related Areas: OSHA, WC, ADA, FMLA, HIPPA

FEDERAL LAW

Under the Drug Abuse and Prevention Act, 21 U.S.C. § 812, marijuana is classified as a Schedule 1 drug.

According to this law a Schedule 1 drug is a drug or other substance that has a high potential for abuse, has no currently accepted medical use in treatment in the United States and a lack of accepted safety for use of the drug under medical supervision.

Under this Act marijuana falls under the same Schedule as Heroine, Cocaine, MDA, Mescaline, Peyote and LSD

https://www.dea.gov/sites/default/files/drug_of_abuse.pdf

STATUS OF FEDERAL LAW

In January 2018, the U.S. Attorney General issued a Marijuana Enforcement Memorandum, returning to a stricter view of federal law enforcement and allowing federal prosecutors to decide how to prioritize enforcement of federal marijuana laws.

The memo directs U.S. Attorneys to "weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community."

See: https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement

STATUS OF THE FEDERAL LAW CONT.

- DOT and other federal agencies maintain the stance that a positive drug test is still a violation of federal law.

- For example, the DOT's Drug and Alcohol Testing Regulation – 49 CFR Part 40, at 40.151(e) – 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  - The Ninth Circuit Court of Appeals in an unpublished decision held that the Montana Medical Marijuana Act does not preclude federal contractors from complying with the Drug Free Workplace Act. *Carlson v. Charter Comm., LLC,* 742 Fed. Appx 244 (9th Cir. 2018)

A SLIGHT SHIFT IN THE FEDERAL VIEWS?

Despite Attorney General Sessions' memorandum, there is a slight shift away from the federal government's strict view on marijuana:

December 20, 2018 –

President Trump legalized the cultivation of industrial hemp. Hemp production and sales have historically been illegal under the same federal regulation against marijuana

In March 2019-

The House Committee on Financial Services voted (45-15) to approve a version of the Secure and Fair Enforcement (SAFE) Banking Act to make it easier for state-licensed marijuana suppliers to get banking services—including checking accounts, deposit accounts, loans, and access to electronic payment systems.

June 20, 2019 –

The House of Representatives, by a vote of 267 to 165 approved a far-reaching measure to prevent the Department of Justice from interfering with state marijuana laws, including those allowing recreational use, cultivation and sales.

SOME FEDERAL DISTRICT COURT'S VIEWS ARE STARTING TO SHIFT – *PARTICULARLY EAST COAST*

Noffsinger v. SSC Niantic Operating Co., LLC (U.S. Dist. Connecticut September 5, 2018)

Applicant underwent pre-employment testing after accepting an offer of employment at the nursing home facility. She disclosed prior to testing that she used medical marijuana. She tested positive and the employer rescinded the offer.

Brought claim of discrimination pursuant to Connecticut's Palliative Use of Marijuana Act "PUMA"

Employer is a **federal contractor**. The Drug-Free Workplace Act "DFWA" requires federal contractors to make a "good faith effort" to maintain a drug-free workplace.

However, the court held that the DFWA does not actually require drug testing or prohibit a federal contractor from employing someone who uses illegal drugs outside of the workplace, though both the DFWA and PUMA prohibit the use at work.

Court granted summary judgment for employee, finding discrimination on the basis of the medical marijuana use.

RECENT CASE LAW EXAMPLES – SHOWING THE EAST COAST SHIFT

Barbuto v. Advantage Sales & Marketing, LLC

(Supreme Judicial Court of Massachusetts 2017).

Former employee, who used medical marijuana, was fired for testing positive. Brings claim against former employer alleging handicap discrimination and unlawful termination.

She did not use marijuana at the workplace and did not report to work "under the influence" (Apparently).

Court reversed the dismissal of the handicap discrimination claim under state law, pointing to the following:

RECENT CASE LAW EXAMPLES – SHOWING THE EAST COAST SHIFT CONT.

* The state marijuana law declares that patients shall not be denied "any right or privilege" on the basis of their medical marijuana use

* A handicapped employee under state law has a statutory "right or privilege" to a reasonable accommodation

* Court inferred that because the marijuana law does not require on-site accommodation of marijuana use, it implicitly recognizes that the off-site medical use of marijuana might be a permissible reasonable accommodation

Court did note that just because it was reversing the dismissal of the complaint at the initial stage of litigation, did not mean that it was finding discrimination. "For instance, an employer might prove that the continued use … would impair the employee's performance of her work or pose an 'unacceptably significant' safety risk to the public, the employee, or her fellow employees."

RECENT CASE LAW EXAMPLES

State of Conn. V. Conn. Employees Union Ind.

(Supreme Court of Conn. March 31, 2016)

- Court held that the arbitrator did not violate public policy by reinstating state employee, **who had smoked marijuana in the workplace**.
- Court noted that public policy explicitly supported efforts at rehabilitation, employee was a skilled maintenance employee, whose misconduct was not of such a nature that his return to work would endanger persons or property, employee was employed for 15 years with no prior disciplinary incidents, and employee sought therapy for anxiety and depression prior to incident in question.
- Decision was also based on the fact that the employer's policy provided for termination but did not mandate it and that the arbitrator found that his conduct did not amount to "just cause" for termination under the union contract. (He was suspended for six months w/o pay.)

RECENT CASE LAW EXAMPLES CONT.

Callaghan v. Darlington Fabrics Corp.

(R.I. Super. May 23, 2017) (Rhode Island statute provides that an employer cannot discriminate or penalize a person solely based on status as a medical marijuana cardholder).

Chance v. Kraft Heinz Foods Co.

(Del. Super. Ct. Dec. 17, 2018) (finding that Delaware statute protects employees from termination of employment based on status as a medical marijuana user).

RECENT CASE LAW EXAMPLES – SHOWING THE EAST COAST SHIFT

Smith v. Jensen Fabricating Engineers, Inc.,
(Conn. Super. Ct. Mar. 4, 2019)

Court denied Defendant's motion to strike plaintiff's complaint finding the federal Controlled Substances Act and the Americans with Disabilities Act does not preempt Connecticut's Palliative Use of Marijuana Act ("PUMA"). Additionally, the Court found an implied cause of action under PUMA

Chance v. Kraft Heinz Foods Co.,
(Del. Super. Ct. Dec. 17, 2018)

Court found the federal Controlled Substances Act does not preempt the Delaware Medical Marijuana Act ("DMMA"). Additionally, the Court found there was an implied right of action under the DMMA.

RECENT CASE LAW EXAMPLES – SHOWING THE EAST COAST SHIFT CONT.

BUT SEE: ***Parrotta v. PECO Energy Co.,*** 363 F. Supp. 3d 577 (E.D. Pa. 2019)

Employee filed an ADA claim against his employer when he was fired after testing positive for marijuana. He claimed he used marijuana to treat a painful foot condition. Court found he failed to establish a claim under the ADA because he was cleared for full duty work and produced no medical documentation of his impairment.

New NYC Ordinance

- State of New York has medical marijuana laws enacted, however, while possession of marijuana (under 2oz) has be decriminalized, recreational use is still a crime.

- In New York *City*, the New York City Council passed an ordinance which prohibits employers from pre-employment drug testing for marijuana and THC. The law becomes effective on May 10, 2020.

New NYC Ordinance Cont.

- Exclusions under the Act: police/peace officers; any position requiring compliance of the NYC building code or labor law; any position requiring a CDL; any position requiring the supervision of children, medical patients or vulnerable persons; any position with the potential to significantly impact the health and safety of employees or the public

- This ordinance does not apply to (1) drug testing requirement with the Department of Transportation (49 CFR 40); (2) any contract entered between the federal government and employer that requires drug testing of prospective employees as a condition of receiving the contract or grant; (3) any federal or state statute, regulation or order that requires drug testing for safety or security and (4) any applicants whose prospective employer is a party to a valid collective bargaining agreement which specifically addresses the pre-employment drug testing of applicants.

STATE LAWS

- State laws surrounding marijuana use in general and in the workplace are constantly changing – but overall, we are seeing a shift toward protecting marijuana use in general.

- Case law is developing and varies greatly by state (as does each state's law on the issue).

- Regulations are *constantly* changing, including those addressing how much an individual can carry, how it can be used, and when it can be used.

FOUR VIEWS ON MARIJUANA

Fully Legal (Illinois starting Jan. 1, 2020):

- Readily available to any "of-age" adult for recreational and medical purposes
- Usually 21+
- You can go to a dispensary and purchase marijuana (in various forms) and consume (i.e. Michigan)

Medically Legal:

- Marijuana is allowed to be purchased as a "prescription" (i.e. Missouri)

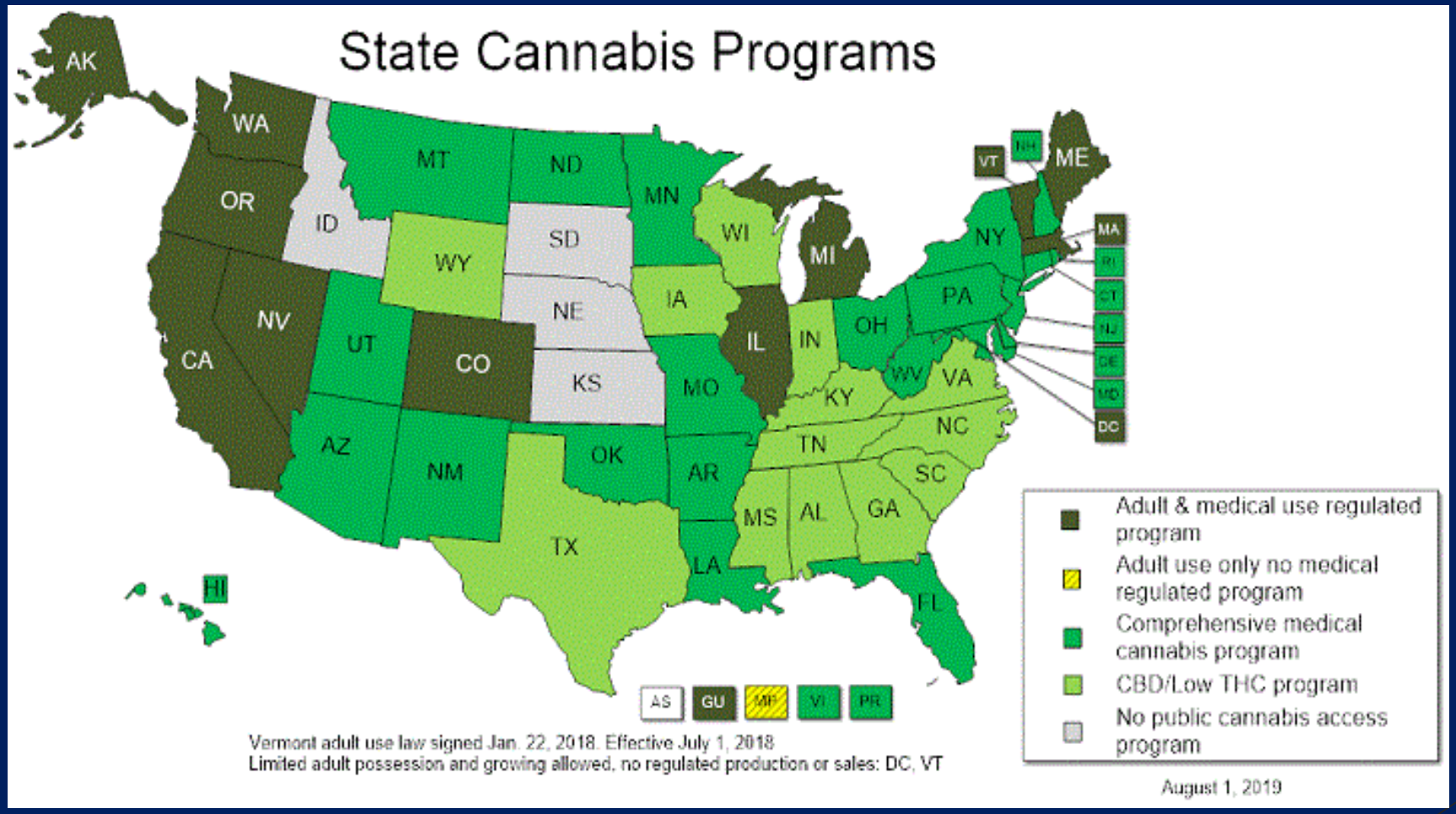
Decriminalized:

- Marijuana is illegal, however, small amounts (usually one ounce or less) punishable by a citation and fine, not jail time (i.e. North Dakota)

Illegal:

- Prohibits growing, buying, or possessing marijuana in any form
- Idaho and Federal law

MARIJUANA ACCESS BY STATE



Map available at: http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx

OVERVIEW ON STATE LAWS

- Currently, 11 states and the District of Colombia legalized marijuana for recreational purposes: Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington.

- Currently, 33 states, the District of Columbia, Guam, and Puerto Rico have approved comprehensive public medical marijuana programs (most are medically based, not recreational, *yet*).

  - 13 additional states have approved efforts to allow use of "low THC, high cannabidiol (CBD)" products for medical reasons in limited situations or as a legal defense.

    - The THC that provides the “high” and the CBD is what is used for medical purposes. Some states medical marijuana laws only allow the CBD form, while most allow for the THC form.

OVERVIEW ON STATE LAWS CONT.

- Four States have no medical or recreational laws: Idaho, North Dakota, Nebraska, and Kansas
- To be counted as a “comprehensive public medical marijuana program” it provides:
  - Protection from criminal penalties for using marijuana for a medical purpose;
  - Access to marijuana through home cultivation, dispensaries or some other system that is likely to be implemented;
  - It allows a variety of strains, including those more than "low THC;" and
  - It allows either smoking or vaporization of some kind of marijuana products, plant material or extract.

MIDWEST VIEW ON MARIJUANA

- Illinois and Michigan are the only two midwestern states that have legalized both medicinal and recreational marijuana
- Kansas, Nebraska, and South Dakota (and Idaho) have not legalized medicinal or recreational marijuana
- Iowa and Indiana have not legalized medicinal or recreational marijuana, but have a CBD/Low THC program
- Minnesota, Missouri, North Dakota, Ohio and Wisconsin have legalized medicinal marijuana; however, recreational marijuana remains illegal

MEDICINAL MARIJUANA IN ILLINOIS – *THE COMPASSIONATE CARE ACT*

Being a registered patient is a protected category in Illinois. The underlying condition being "treated" may also be protected by the ADA or similar state disability-discrimination laws.

- In 2013, the Compassionate Use of Medical Cannabis Pilot Program Act became law. The law legalizes the use of medical cannabis in tightly controlled circumstances.
- "Legally registered patients" may, with a prescription from a medical caregiver, apply for an ID card that allows the use of marijuana for medical purposes. The law lists over 30 specific medical conditions that may be legally treated using cannabis.
- On August 28, 2018, Illinois' medical cannabis program greatly expanded becoming available as an opioid painkiller replacement. The legislation also eased the application process as applicants will no longer have to be fingerprinted or undergo criminal background checks.

RECENT CHANGES TO THE ILLINOIS MEDICAL MARIJUANA LAW

On August 9, 2019, Governor J.B. Pritzker signed Senate Bill 2023 expanding and making permanent Illinois' medical marijuana program. (It was a "pilot program" before.) It added 11 new conditions to the existing 41 qualifying conditions for eligibility purposes and expands the range of medical professionals who can certify eligibility of applicants under the program.

On August 12, 2019, Governor J.B. Pritzker signed Senate Bill 455, which allows school nurses or school administrator to administer medical marijuana to students.

ILLINOIS *MEDICAL* MARIJUANA LAWS AND IMPACT ON EMPLOYERS

- Allows an employer to adopt reasonable regulations concerning consumption, storage or timekeeping requirements for qualifying patients related to the use of medical marijuana
- Allows an employer to enforce a policy concerning drug testing, zero tolerance or a drug free workplace so long as it is applied in a nondiscriminatory manner
- Allows an employer to discipline a registered qualifying patient for violating a workplace drug policy
- Allows an employer to discipline an employee for failing a drug test if failing would put the employer in violation of federal law or cause it to lose a federal contract or funding

ILLINOIS *MEDICAL* MARIJUANA LAWS AND IMPACT ON EMPLOYERS CONT.

- An employer may consider a qualifying patient to be impaired based on specific articulable symptoms. If an employer elects to discipline a qualifying patient, it must afford the employee a reasonable opportunity to contest the basis of the determination

- Under this Act, there is no cause of action against employer for: (1) actions based on the employer's good faith belief that the employee used or possessed marijuana while on employer's premises or during work hours; (2) actions based on the employer's good faith belief that the employee was impaired while working on the employer's premises during the hours of employment; (3) injury or loss to a third party if the employer neither knew or had reason to know that the employee was impaired

- This Act does not interfere with any federal restrictions on employment, including, but not limited to the U.S. Department of Transportation regulation 49 CFR 40.151(e)

RECREATIONAL MARIJUANA WILL BE LEGAL IN ILLINOIS ON JANUARY 1, 2020

On June 30, 2019, Governor JB Pritzker signed into law the Cannabis Regulation and Tax Act ("CRTA"):

Under this new law, an Illinois resident, over the age of 21 can possess:

- 30 grams of cannabis flower (the plant itself)
- 500 mg of THC in cannabis infused product
- 5 grams of cannabis concentrate
- Qualifying patients must secure any raw marijuana over 30 grams in their residence

410 ILCS 705 *et seq.*

ILLINOIS RECREATIONAL MARIJUANA LAW ALLOWS EMPLOYERS TO MAINTAIN A DRUG FREE WORKPLACE

Section 10-50 of the law provides:

- Employers may adopt reasonable zero tolerance or drug free workplace policies in the workplace or while on call so long as applied in a nondiscriminatory manner
- Employers are not required to permit an employee to be under the influence or use marijuana in the workplace or while performing employee's job duties or while on call
- Employers can discipline or terminate an employee for violating an employer's employment polices or workplace drug policy
- Employers may decide based on traditional symptoms if an employee is impaired, so long as its in good faith

410 ILCS 705/10-50

KEY TERMS SPECIFICALLY DEFINED UNDER ILLINOIS' NEW LAW

"Workplace" is defined as:

(1) Employer's premises – any building and parking area under control of Employer

(2) Any area used by an employee while in performance of his/her job duties

(3) Vehicles – leased, rented or owned

(4) Workplace may be further defined by Employer's policy so long as consistent with the statute

KEY TERMS SPECIFICALLY DEFINED UNDER ILLINOIS' NEW LAW CONT.

"On call" is defined as:

(1) Employee is scheduled with 24 hours notice by Employer to be on standby

(2) or otherwise responsible for performing tasks related to his or her employment

(3) at Employer's premises or other previous designated location to perform a work-related task

CAN AN EMPLOYER DRUG TEST?

- Under both the medical and recreational law, it is clear that Illinois employers can prohibit the use of marijuana in the workplace and can terminate if there is reasonable suspicion of impairment in the workplace.
- ***However***, how does this affect drug testing in the workplace?
- Prior to passing legalized marijuana in Illinois, the scope of protections in the workplace regarding medical marijuana was largely speculative and not addressed by the courts. *Now*, pending further interpretation, it appears that some of the gray areas—particularly pre-employment testing—are now clear.

CAN AN EMPLOYER DRUG TEST

- **Pre-Employment** – In Illinois, no*. In Michigan and Indiana, generally, yes.
  - * Alternate view on next slide
- **Random** – may see similar concerns to that of pre-employment.
- **Reasonable Suspicion** – this is where the focus needs to be moving toward (especially as more states fully legalize marijuana).
- **Post-accident or post-injury** – this is still a useful form of testing; be aware of OSHA and WC guidelines. Do not state that testing is mandatory; end result, may revert to a reasonable suspicion analysis.

PRE-EMPLOYMENT TESTING *ALTERNATE VIEW (WE DISAGREE)

- Other firms take the position that pre-employment testing is allowed based on the statements made during the legislative debates prior to voting on the Act.
  - Rep. Cassidy stated that zero tolerance will remain, and the Act enforces the employer's right to have zero tolerance policies. This Act does not change the status quo of zero tolerance.
  - In response to a question regarding actions of discipline and ***termination of an employee*** by an employer for failing a drug test, including a random drug test, Rep. Cassidy stated these actions are protected from litigation under the Act.
  - However, this view does not take into consideration the plain language of the Act that provides that drug testing is only protected from litigation if the employer had a ***"good faith belief"*** that the ***"employee"*** used or possessed marijuana in the workplace.
  - Do you want to be the test case?

AMENDS THE ILLINOIS RIGHT TO PRIVACY IN THE WORKPLACE ACT

- The new Illinois law amends the Illinois Right to Privacy in the Workplace Act and prohibits employers from taking disciplinary action against employees for lawfully using cannabis outside of work.
  - The Illinois Right to Privacy in the Workplace Act protects things such as the lawful use of alcohol and tobacco products outside of the workplace.
  - The amendments add marijuana to the protections, similar to alcohol. This further establishes that pre-employment testing for marijuana may not be within the scope of the employer protections under the law, as any positive test at the pre-employment stage would of course be the result of use outside of the workplace.

CERTAIN CAUSES OF ACTIONS AGAINST THE EMPLOYER ARE PROHIBITED UNDER THE NEW LAW

Under the new law, an employer cannot be sued for the following:

- actions, including but not limited to subjecting an employee or **applicant** to reasonable drug and alcohol testing under the employer's workplace drug policy, including an employee's refusal to be tested or to cooperate in testing procedures or disciplining or termination of employment, ***based on the employer's good faith belief that an employee used or possessed cannabis in the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's employment policies***; ("applicant" & "good faith belief" unclear)
- actions, including discipline or termination of employment, based on the employer's good faith belief that an employee was impaired as a result of the use of cannabis, or under the influence of cannabis, while at the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's workplace drug policy; or
- injury, loss, or liability to a third party if the employer neither knew nor had reason to know that the employee was impaired.

IMPACT OF ILLINOIS' LAW ON EMPLOYER'S DUTIES UNDER OTHER FEDERAL, STATE OR LOCAL LAWS

Section 10-50(g) of the CRTA specifically provides:

Nothing in this Act shall be construed to interfere with any federal, State, or local restrictions on employment including, but not limited to, the United States Department of Transportation regulation 49 CFR 40.151(e) or impact an employer's ability to comply with federal or State law or cause it to lose a federal or State contract or funding.

Maybe this is where the term "applicant" applies.

COMPARE MICHIGAN

Eplee v. City of Lansing 2019 WL 691699 (Mich. Ct. App. 2019)

Conditional offer of employment was rescinded after Plaintiff tested positive for THC during a drug test that was part of the hiring process.
Plaintiff brought this action for violations of the Medical Marijuana Act, as she was a qualified patient.

- Section 333.26424(a) provides that a qualifying patient who has been issued and possesses an ID card is not subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business… for the medical use of marijuana

Court rejected Plaintiff's argument and found that plaintiff had no legal right to be employed because Plaintiff never alleged the employment was not at-will and did not allege she had a contract with the employer for a definite term of employment.

If the employer can terminate plaintiff's employment at any time after her employment began for any or no reason, it logically follows that the employer could rescind its conditional offer of employment at any time and for any or no reason at all.

BUT: *Braska v. Challenge Mfg. Co.*, 307 Mich. App. 340, 861 N.W.2d 289 (2014) (Individuals with medical marijuana cards pursuant to the state medical marijuana statute could not be disqualified from receiving unemployment benefits)

TRENDS IN OTHER STATES IMPACTING EMPLOYMENT MARIJUANA POLICIES

Nevada is the first state to enact legislation prohibiting Employers from not hiring a person based on a positive test of marijuana.

Under the Nevada's law (effective January 1, 2020), it is unlawful for any employer to refuse to hire a prospective employee because the screen test came back positive for marijuana.

- Does not apply to: Firefighters, EMT, any employment requiring operation of a motor vehicle or federal or state law that requires the employee to submit to tests
- Also does not apply if the Employer determines it could adversely affect safety of others

Employee has the right to submit to additional screening tests (at his/her expense) to rebut initial test results.

This law does not apply:

- If inconsistent or in conflict with employment contract or collective bargaining agreement
- If inconsistent or in conflict with federal law
- If position of employment is funded by a federal grant

TRENDS IN OTHER STATES IMPACTING EMPLOYMENT MARIJUANA POLICIES

New Jersey Governor signed into law on July 2, 2019 the Compassionate Use Medical Cannabis Act ("CUMCA") which expands the State's medical marijuana program.

This law is a result of the *Wild v. Carriage Funeral Holdings, Inc.*, 458 N.J. Super. 416 (App. Div. 2019), which found the New Jersey's anti-discrimination statute may require employers to accommodate medical marijuana use to treat a disability.

As a result, CUMCA was amended to expressly prohibit an employer from taking any adverse employment action against a medical marijuana user if that adverse employment action is based solely on the employee's status as a medical marijuana patient.

However, this amendment does not restrict an employer's ability to prohibit or take adverse employment action for the possession or use of intoxicating substances during work hours or on workplace premises outside of work hours.

An employer is permitted to take adverse employment action against a medical marijuana patient if the accommodation would violate federal law or result in the loss of a federal contract or funding.

CASE LAW EXAMPLES: CONFLICTING *COURT DECISIONS*

Whitmire v. Wal-Mart Stores, Inc. (Dist. Arizona Feb. 7, 2019)

Court denied, in part, Wal-Mart's motion for summary judgment regarding the termination of an alleged injured worker and medical marijuana user, who failed a post-injury drug test.

Court's opinion highlights that "terminating a registered qualifying patient who tests positive for marijuana 'regardless of whether the employee possesses a medical marijuana card and regardless of the level of marijuana detected' constitutes a 'complete and bright line disregard for the Arizona Medical Marijuana Act's antidiscrimination provisions[.]'"

Without any evidence that Plaintiff "used, possessed or was impaired by marijuana" at work on (the day of her accident) it is clear that Defendant discriminated against Plaintiff in violation of …the AMMA by suspending and then terminating Plaintiff solely based on her positive drug screen."

Important takeaway from this case: State statutes range from merely decriminalizing the use of marijuana to actually placing affirmative duties on employers. The language of each state's statute is key. *Compare Arizona's law to Montana's*, which specifically provides that it cannot be construed to require employers to accommodate marijuana in any workplace.

CASE LAW EXAMPLES

- *Lambdin v. Marriott*, (D. Hawaii September 14, 2017). Court granted summary judgment for employer on wrongful termination discrimination claim brought pursuant to ADA and held that because the employer maintained a drug free workplace policy, it may prohibit the use of illegal drugs by its employees. The federal court in Hawaii also held that, "[a] state law decriminalizing marijuana use does not create an affirmative requirement for employers to accommodate medical marijuana use."
- *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015) (plaintiff was not protected under statute that prohibited employer from terminating employee due to employee's participating in "lawful" activities off the premises of the employer during non-working hours, because court interpreted "lawful" to mean lawful under both state and federal law).
- *Stanley v. Cty. of Bernalillo Comm'rs*, 2015 WL 4997159, at *5 (D. N.M. 2015) (courts have "rejected the plaintiff's claims that state anti-discrimination laws prohibit private employers from terminating employees for state-authorized medical marijuana usage as a matter of statutory interpretation").

SO HOW DOES ALL OF THIS AFFECT THE WORKPLACE?

Key areas for Employers:

- Pre-Employment Testing? (exclude marijuana?)
- Drug and Alcohol Policies/Testing (Reasonable belief)
- Job Descriptions
- OSHA
- Workers' Compensation
- ADA and FMLA

DRUG AND ALCOHOL POLICIES

- What is acceptable for purposes of a Drug and Alcohol/Testing Policy with regard to marijuana?
  - Prohibit the use, consumption, possession, sale, storage, *or being impaired* while on the employer's premises, while on Company business, during working hours.
    - In Illinois, for example, prohibit employees from smoking marijuana where smoking is otherwise prohibited by the Illinois Smoke Free Workplace Act.
  - Testing based on reasonable suspicion.
  - Discipline employees for violating workplace drug and alcohol policy (assuming the policy is in line with state law).

REVIEW: CAN AN EMPLOYER (STILL) DRUG TEST?

When is it *generally* safe to test and take action based on a positive marijuana result?

- If the employer is a federal contractor **and** testing is required per law or contract;
- The employee is regulated by the Department of Transportation or other similar agency mandating drug testing; and
- ***Caution:*** Depending on particular state law, if the employee is working in a safety sensitive position (and that is clearly spelled out in a job description) and the use could endanger the employee, co-workers, or the public.

CAN AN EMPLOYER (STILL) DRUG TEST? *PRE-EMPLOYMENT FOR MARIJUANA*

What if the employer doesn't fit into one of the possible exceptions?

- Short Answer: Depends on what state. In Illinois, no*. In Michigan or Indiana, *generally*, yes.
- *Compare*: Colorado and Washington employers continue to have the power to prohibit marijuana; take action based on a positive marijuana drug test; and maintain zero tolerance in all aspects of employment and test results.
  - Washington's Medical Use of Marijuana law "does not require employers to accommodate the use of medical marijuana where they have a drug-free workplace, even if medical marijuana is being used off site" to treat a medical condition. (Compare Arizona, Connecticut and Delaware, which state laws make no such exception for employers who maintain a drug free workplace.)
  - In states such as Colorado and Washington: May want to consider a statement in the drug policy such as: While the use of marijuana is legalized under state law for recreational and medicinal purposes, it remains illegal under federal law and its use as it impacts the workplace is prohibited by the Company's policy."

REVIEW: CAN AN EMPLOYER (STILL) DRUG TEST FOR MARIJUANA?

- **Pre-Employment** – In Illinois, no*. In Michigan and Indiana, generally, yes.
- **Random** – may see similar concerns to that of pre-employment.
- **Reasonable Suspicion** – (the Current Trend)
- **Post-accident or post-injury** – this is still a useful form of testing; be aware of OSHA and WC guidelines. Do not require mandatory testing for all work related injuries: end result, may revert to a reasonable suspicion analysis.

WHAT IS "REASONABLE SUSPICION"?

If a supervisor reasonably believes that someone is impaired (by any drug or alcohol), even if we know they are a medical marijuana user):

- Adopt a reasonable suspicion checklist or form and follow it. (witness)
- Follow drug testing procedures (have employee transported to clinic, do not let them drive to or from clinic)
- May need to consider whether workplace search policy applies, if one exists
- Treat all employees the same. If there is reasonable suspicion, send him/her for testing

WHAT IS "REASONABLE SUSPICION"? CONT.

What may give rise to a reasonable suspicion? (combination of things: case-by-case)

- Slurred speech, smell
- Under Illinois law (medical and recreational) definition: good faith belief is key. Manifests specific, articulable symptoms while working that decrease or lessen his or her performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence or carelessness in operating equipment or machinery, disregard for the safety of the employee or others, or involvement in an accident that results in serious damage to equipment or property, disruption of a production or manufacturing process, or carelessness that results in any injury to the employee or others.
- If an employer elects to discipline an employee based on reasonable suspicion, it must afford the employee a reasonable opportunity to contest the basis of the determination.
- 410 ILCS 130/50 (f) and 410 ILCS 705/10-50

- *Alternative*: Consider not testing.

INTERACTION WITH OSHA – POST ACCIDENT/INJURY TESTING

OSHA

2016 regulation prohibits "retaliation" by employers for reporting workplace injuries. 29 C.F.R. Section 1904.35(b)(1)(i) and (iv)

- Preamble to regulations provides examples of what OSHA considers as retaliatory conduct by employers:
  - Incentive programs
  - Mandatory or blanket policy for post-injury/post-accident testing

2018 OSHA regulation clarifies that most types of drug testing are permissible, and not retaliatory, including

- Random testing
- Testing unrelated to the reporting of a work-related injury or illness
- Testing under a state workers' compensation program, including those that provide a discount in premiums for policies that include testing
- Testing under federal law – such as for DOT covered drivers
- Testing post-accident or injury where there is a reasonable, objective basis for concluding that drug use could have contributed to the injury or illness (and therefore that the result of the drug test could provide insight into why the injury or illness occurred). If no reasonable basis, no testing—i.e. bee sting.

CFMA 2019 MIDWEST REGIONAL CONFERENCE

To determine whether an employer had a reasonable basis for drug testing an employee who reported a work-related injury or illness, OSHA will evaluate whether:

- The employer had a reasonable basis for concluding that drug use was a contributing factor to the reported injury or illness.
- Other employees involved in the incident that caused the injury or illness were also tested, as opposed to just testing the employee who reported the injury or illness.
- The employer has a heightened interest in determining if drug use may have contributed to the injury or illness due to the hazardous nature of the work being performed when the injury or illness occurred.

Examples of drug testing that may violate OSHA's regulations include:

- Drug testing an employee for reporting a repetitive strain injury because drug use could not have contributed to the injury.
- Administering a drug test in an unnecessarily punitive manner, as such:
  - Escorting employees out of the work area; or
  - Barring employees from accessing their personal belongings or vehicle (caution about driving though).

OSHA

CROSSING STATE LINES

In theory, crossing state lines with marijuana falls under federal jurisdiction and is unlawful.

- If you employ an Illinois resident in Iowa, for example, his ability to purchase marijuana for recreational use does not change the fact that he cannot use, possess, consume, etc., the marijuana on company property or during working hours at the facility in Iowa or Illinois (pursuant to the Company's written policy).
  - The only way this would pose a potential concern is if he tests positive for marijuana. In theory, his use is legal in Illinois and we generally cannot take action for lawful off-duty conduct (similar to smoking, drinking alcohol) where he is not impaired at work. (Challenge: drug tests don't test for impairment they test for use, so we truly will not know, unless obvious that someone is impaired at work.)

INTERACTION WITH WORKERS' COMPENSATION LAWS

Many state workers' compensation laws still provide that when an employee is "intoxicated" by marijuana, any injury is presumed to be related to the intoxication/impairment, rather than the work. Much like state marijuana laws, state workers' compensation laws and the scope of the laws vary greatly.

- ***Illinois:*** Medical marijuana law provides that "nothing in this Act may be construed to require a government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of cannabis." Yet, the law provides no guidance about whether an employer/insurer would have to pay the cost of medical marijuana in a work-related injury situation.
- ***Maine:*** Supreme Court of Maine held that because marijuana was illegal under federal law, it could not compel employer to reimburse workers' compensation claimant for medical marijuana. *Bourgoin v. Twin Rivers Paper Co.* (Maine June 14, 2018).
- ***New Mexico:*** Medical marijuana ordered as reimbursable expense on claim. Due to the number of cases finding that medical marijuana is subject to reimbursement pursuant to the state's workers' compensation laws as reasonable and necessary, New Mexico developed a fee schedule for medical marijuana which includes dosage guidelines. *Lewis v. American General Media* (New Mexico Court of Appeals June 26, 2015).

INTERACTION WITH WORKERS' COMPENSATION LAWS CONT.

- **Florida:** Workers' compensation claimant failed to rebut statutory presumption that workplace injury, caused by falling and injuring her shoulder while working as housekeeper at hospital, was occasioned primarily by the influence of marijuana. *Brinson v. Hosp. Housekeeping Servs., LLC*, 263 So. 3d 106 (Fla. Dist. Ct. App. 2018)

- **New Hampshire:** Workers' compensation insurance carrier was not prohibited from reimbursing claimant for the cost of purchasing medical marijuana by provision of therapeutic cannabis statute addressing reimbursement claims. *Appeal of Panaggio*, 205 A.3d 1099 (N.H. 2019)

- **Kansas:** For marijuana metabolites, a confirmed test result at or above 15 nanograms per milliliter triggers the impairment presumption. However, the employee may overcome that presumption by presenting "clear and convincing evidence" that the impairment didn't contribute to the injury, disability, or death. *Woessner v. Labor Max Staffing*, 56 Kan. App. 2d 780, 794, 437 P.3d 992 (2019)

IMPORTANCE OF JOB DESCRIPTIONS FOR SAFETY SENSITIVE POSITIONS

- "The General Assembly supports and encourages labor neutrality in the cannabis industry and further finds and declares that employee workplace safety shall not be diminished and employer workplace policies shall be interpreted broadly to protect employee safety." (410 ILCS 705/1-5)

- Thus, it is important to update job descriptions to clearly identify positions that are safety sensitive; operate heavy or dangerous equipment, tools, or any other criteria that you may try to use to support the basis for testing and taking an adverse action based on marijuana use.

- Identification of key duties, including physical duties on job descriptions is also important to properly address requests for reasonable accommodations pursuant to the ADA or other accommodation-based state laws.

AMERICANS WITH DISABILITIES ACT AND FAMILY AND MEDICAL LEAVE ACT

The Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) do not recognize medical marijuana as a medical treatment because it remains illegal under federal law.

- Employers generally do not have to accommodate a disability or provide FMLA leave for the purpose of allowing an individual to use marijuana.
- *But* employers may need to engage in the interactive process, offer a reasonable accommodation, and/or a leave of absence under the FMLA for the underlying condition (regardless of the method of treatment).
- **Caution:** As seen the case examples earlier, an accommodation may be considered reasonable (and therefore required) under state law.

HIPAA AND OTHER CONFIDENTIALITY OBLIGATIONS

- Drug testing results must be separate from personnel files and results are generally confidential.
- Under HIPAA, medical marijuana is treated similar to any other prescription or treatment.
- Difference between asking or verifying a medical card user status (compared to asking what the use is for). (May only be an issue in states without recreational marijuana)
  - Alternative: May want to consider having medical card status verified by the Medical Review Officer so that the Company does not have that information. Alternative is to have MRO not report a positive to the company when marijuana use is authorized, and applicant/employee presents card.

MINIMIZING RISK SUMMARY

- Stay up-to-date on the changes in the law in the states in which your Company operates.
- Seek legal advice prior to taking adverse action based on a positive drug test – particularly when it is due to marijuana.
- Educate employees on the Company's position on medical and recreational marijuana. This position may vary by state.
- Train management and/or HR employees involved in the hiring process on how to address questions from applicants regarding preemployment drug testing and marijuana.

MINIMIZING RISK SUMMARY CONT.

- Train management employees on confidentiality issues – the fact that an individual is a medical marijuana user is confidential just as any other information regarding prescription drugs (except arguably to the extent a supervisor may need to know for safety purposes).

- Utilize a written checklist for impairment

- Train management employees on how to recognize impairment (not just due to marijuana) and how to make a “reasonable suspicion” determination.

POLICY RECOMMENDATIONS

- Make it clear that marijuana is prohibited on company premises and an individual cannot be impaired on the job. Be specific as to what constitutes the company's "premises"
- **Illinois:** If there is an "on-call" requirement for employees, specify in policy no marijuana use while "on-call" even if employee is working from home (predetermined location as defined by statute).
- Multiple locations (which include states with more marijuana-friendly laws): Consider not having the MRO report positive marijuana tests when used pursuant to a medical card or in a recreational state (when not safety sensitive); focus on reasonable suspicion.

ANY QUESTIONS?

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