Navigating Marijuana Law in the Workplace

Christina A. Stoneburner, Esq.
Use of Marijuana and Drugs Increasing

• Job applicants are testing positive for marijuana, cocaine, amphetamine and heroin at the highest rate in 12 years.

• 10 million workplace drug screens from across the country in 2016 found positive results from urine samples in 4.2 percent.
The Federal Approach

• 1970 – Controlled Substances Act
• Marijuana classified as a Schedule One drug – highest level
• Marijuana remains illegal under federal law
• Impairing substance that is a safety threat
• More accidents, injuries, tardiness and absenteeism
The State Approaches

• California passed Proposition 215 – (Compassionate Use Act of 1996)

• Today – 39 states allow for Medical Marijuana in some form

• 10 of those states allow for Recreational Marijuana
U.S. Jurisdictions with Medical Marijuana Laws

- Alabama
- Alaska
- Arizona
- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Florida
- Georgia
- Hawaii
- Iowa
- Illinois
- Indiana
- Louisiana
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Missouri
- Montana
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- North Dakota
- Ohio
- Oklahoma
- Oregon
- Pennsylvania
- Puerto Rico
- Rhode Island
- Utah
- Vermont
- Washington
- West Virginia
Smoke it if you got it . . .

- 10 states and D.C. with laws that permit recreational marijuana use:
  - Alaska
  - California
  - Colorado
  - Maine
  - Massachusetts
  - Michigan
  - Nevada
  - Oregon
  - Vermont
  - Washington
States without Medical Marijuana Laws or that limit THC

- Idaho
- Kansas
- Kentucky, Mississippi, South Carolina, Wisconsin
  - allows use of cannabidiol only
- Nebraska
- North Carolina – allows “hemp extracts” only (.9% THC)
- South Dakota
- Tennessee – allows cannabis oil use only (.9% THC)
- Texas
  - Low THC cannabis (.5% of weight and must be at least 10% cannabidiol)
- Virginia – at least 15% CBD and no more than .3% THC
- Wyoming – “hemp extracts” only .3% THC and must be at least 5% CBD
Common Features of Medical Marijuana Laws

• Immune from prosecution under criminal laws
  – Including laws proscribing possession. Patients are allowed to possess a minimal amount

• Require registration and a qualifying medical condition
  – It is very restrictive in certain jurisdictions as to what is a qualifying medical condition.
  – Other jurisdictions may have loose definitions

• Patient will be issued a medical marijuana user card
Employment Provisions

• Most states have provisions that prevent retaliation by an employer because an employee is a registered medical marijuana user
  – Most of these states also specifically note that an employer does not have to accommodate marijuana use in the workplace
States with Anti-Discrimination/Retaliation Provisions for Employees

• Arizona
  – specifically says cannot penalize a patient for a positive drug test†

• Arkansas

• Illinois
  – discrimination provisions set to repeal on July 1, 2020

• Maine

• Pennsylvania
  – Does provide that employers can prohibit employees from being under the influence while working at heights or where there is a safety risk
  – Specifically says does not have to accommodate use at work
States with Anti-Discrimination/Retaliation Provisions for Employees

- Rhode Island
  - *Callaghan v. Darlington Fabrics* court granted plaintiff summary judgment for violation of the medical marijuana law because it refused to hire employee who failed pre-employment screen
  - Policy did not say that offers would be withdrawn with positive test
  - Case notes that employers are not obligated to make an accommodation for use at work or even alter policy on drug use in workplace
    - Question is whether outcome would be changed if said positive test will result in withdrawal of offer of employment
States with Employment Provisions that State NO Accommodation of Use in Workplace Necessary

- Alaska
- California
- Colorado
  - Coats v. Dish Network, 303 P.3d 147 (2013) lawful activities statute not violated by terminating employee who used medical marijuana off-work hours
- Connecticut
  - Can have rules prohibiting usage at work. Be careful with pre-employment testing.
States with Employment Provisions that State NO Accommodation of Use in Workplace Necessary

- Delaware
- Florida
- Hawaii
- Illinois

- Be careful, as there is some limiting language on when you can consider an employee under the influence based on observation alone. In that case, an employer can find an employee to be impaired when:
  - he or she 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 a qualifying patient under this subsection, it must afford the employee a reasonable opportunity to contest the basis of the determination.
States with Employment Provisions that State NO Accommodation of Use in Workplace Necessary

• Massachusetts
• Montana
• Nevada
• New Hampshire
  – Says that employees cannot be under the influence of cannabis at work
• New Jersey
• New York
  – Says can have policy prohibiting impairment at work
• North Dakota
States with Employment Provisions that State NO Accommodation of Use in Workplace Necessary

• Ohio
• Oklahoma
• Oregon
  – *Emerald Steel Fabricators v. Bureau of Labor and Industries*, 348 OR 159 (2010). Supreme Court rejected idea that had to engage in interactive process with employee who tested positive for marijuana and was registered for medical use

• Vermont
  – Big caveat: only says patient is not immune from “arrest or prosecution” for using marijuana at work

• Washington
  – *Roe v. TeleTech Customer Care Mgt*, 257 P. 3d 586 (Wa. S. Ct. 2011) Employers may enforce policies that prohibit positive drug tests even where medical marijuana user

• West Virginia
Other Protections for Employers

• Some states that do not specifically state that no accommodation may be made provide other protections for employers such as:
  – No patient can engage in a task under the influence of marijuana that would constitute negligence or professional malpractice.
    • Arizona
    • District of Columbia
    • Maryland
    • Minnesota
    – Also do not have to allow possession or use on premises
States with No Provisions Regarding the Employment Relationship

• Michigan
  – Law just decriminalizes possession for medical use and prohibits prosecution against doctors prescribing marijuana
  – Casias v. Wal-Mart Stores, Inc. 764 F. Supp 2d 914 (WD Michigan 2011) law provides no employment protections

• New Mexico
  – Only employment provisions say employee can be criminally prosecuted or have a civil penalty for possession or use in the workplace
  – Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225 (D. New Mexico 2016) Says that there is no cause of action under the New Mexico Human Rights Act and employers are not obligated to accommodate use
Compliance with Federal Law

Most states have provisions similar to PA:

“Nothing in this act shall require an employer to commit any act that would put the employer or any person acting on its behalf in violation of Federal law.”
Recent Case Law

• Noffsinger v. SSC Niantic Operating Co., LLC, District Court of Connecticut (Case No.: 3:16-cv-01938)
  – 2018 case. Employer lost summary judgment on employee’s retaliation claim brought under state medical marijuana law
    • Employer was a federal contractor
    • Plaintiff was an applicant who tested positive for THC in pre-employment screen
    • Plaintiff had prescription for medical marijuana use
    • Employer rescinded offer based on positive test
    • Court looked at language of statute which prohibited any negative action because of status as patient
      – Law prohibits usage at work but does not mention pre-employment screens
Recent Case Law

• Chance v. Kraft Heinz Foods Company, Delaware Superior Court 2018 (Case No. K18C-01-056)
  – Employee terminated after tested positive for marijuana in post-accident testing
    • ADA and disability discrimination claims were time-barred
    • Notes that the medical marijuana statute does not specify that employers can punish employees for a positive drug test.
Recent Case Law

  - Employee was terminated after a positive test
  - Court said no private right of action under anti-retaliation provisions in medical marijuana law
  - However, court said could pursue claims of employment discrimination
    - Test was a pre-employment test. She disclosed use and company originally said medical marijuana use would not be a problem. She worked one day before test results came back. When test came back positive, they fired her.
    - Relied on language in statute that specifically says employer does not have to accommodate on-site drug use, implying that employer may have to accommodate off-site use
    - Said employer had to engage in interactive process and to prevail, prove undue hardship
Recent Case Law

• Cotto v. Ardagh Glass Packing, Inc. (D.N.J. 2018)(Case No. 18-1037)
  – Employee failed a drug test due to Percocet and medical marijuana. Company would not let him return to work until he passed the drug test
  – Court noted that medical marijuana statute does not require accommodation under LAD where requested accommodation is to waive a drug testing requirement
Serious Medical Conditions

• Many states have a defined list of qualifying conditions
  – Most, if not all, will count as disabilities under state and federal law
  – In states where the law does not specifically state that employers need not make accommodations, may have to engage in the interactive process
What about the Americans With Disabilities Act?

- Under the ADA, current illegal drug users, which include drugs that are unlawful under the Controlled Substances Act, are not “individuals with disabilities.”
- However, what about employees who do not use at work but might test positive due to length of time marijuana stays in system?
  - Employers may need to reasonably accommodate a person with a disability – and the use of medical marijuana – so long as it does not rise to the level of an undue hardship. It would be prudent for an employers to engage in the interactive process with an employee who is using medical marijuana.
Cases

• Most cases have held that employers do not have to engage in interactive process with an employee to accommodate marijuana use:
  – *Ross v. RagingWire Telecommunications*, California
  – *Coats v. Dish Network*, Colorado
  – *Cotto v. Ardagh*

• Be careful in Rhode Island
  – *Callaghan v. Darlington Fabrics*.
    • Although case says no duty to accommodate, how policies are defined are key

• **Massachusetts accommodation is Required**
  – *Barbuto v. Advantage Sales and Marketing*
Types of Reasonable Accommodations

- Leave of Absence beyond FMLA
- Job Reassignment
- Modified work schedules
- Excuse from drug testing rules
- Based on an individualized assessment
Documentation

• If you are engaging in the interactive process over marijuana use, you can still request medical information such as:
  – Doctor’s note or prescription noting that use was prescribed
  – Information to help decide if an employee is disabled, i.e., symptoms and job duties the employee cannot perform
  – Medical marijuana registration card
Medical Marijuana Identification
State of Pennsylvania

Patient: [Redacted]
ID #: 6612839500
Exp: 10/1/2016
June 27, 2017

Re: Gary
DOB: 11/11/1960

To whom it may concern,

We would like to inform you that our patient, Mr. Gary 11115, is being treated in our office in the Medical Marijuana Program.

Should you have any questions or need further support, please feel free to contact our office.

Sincerely,

[Redacted]

MD
Checklist for Deciding if Have to Accommodate

• Is employee located in a state with protection laws?
• Has employee presented medical marijuana card?
• Has employee tested positive? Pre-employment screen or during employment?
• Has employee been impaired at work?
• Has employee brought marijuana to work?
Where do We Go From Here?

- Review and modify drug policies and nondiscrimination policies.
- Review job descriptions –
  - Add as an “essential job function” the ”ability to work in a constant state of alertness and safe manner”
- Interactive process/Individualized assessment
Suggested Policy Language if Prohibiting Medical Marijuana

• Drug and alcohol policies:
  – “Employees who test positive for marijuana use, even if prescribed by a physician, will be deemed to have a positive test for illegal drugs.
  – For pre-offer screens add: “The company will rescind any offer to any applicant who tests positive for illegal drugs.”
Do you actually care about a positive test result?

• Is there really a difference between an applicant who is using Percocet pursuant to a lawful prescription and one using medical marijuana?
  – In most cases, you would not even know about the Percocet use as the MRO would mark it as a negative test
  – Safety concerns are similar
  – Do you just want to prohibit use at work and not address it on pre-screens?
    • If so, consider adding to drug and alcohol policy statement that employee must disclose any medication whose usage would impair their ability to work safely
QUESTIONS?

Christina A. Stoneburner
973-994-7551
cstoneburner@foxrothschild.com