Pennsylvania Medical Marijuana – Challenges and Opportunities in the Workplace

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The Controlled Substances Act[1], classifies marijuana as a Schedule I substance, making it illegal to manufacture, possess, use, or distribute. However, 33 states (including Pennsylvania) and the District of Columbia, have legalized marijuana for medical use and about a dozen have legalized it for recreational use. This dichotomy presents a unique and complex challenge for employers, but it also offers an opportunity for businesses, and their legal counsel, to craft policies that will minimize risk and the potential for litigation.

A. Overview of the Pennsylvania Medical Marijuana Act

Governor Tom Wolf signed the Pennsylvania Medical Marijuana Act[2] in April 2016. Since that time, the Pennsylvania Department of Health published regulations for various aspects of the program and issued licenses to medical marijuana grower/processors and dispensaries. The first Pennsylvania dispensaries opened their doors to patients in February 2018, and the Commonwealth's Medical Marijuana Program now boasts over 80,000 patients and approximately 1,000 registered physicians. The law allows individuals with a "serious medical condition" (currently, 21 conditions are covered, including cancer, epilepsy, PTSD, Autism, and opioid use disorder) to receive a certification to use medical marijuana obtained from a licensed dispensary in the Commonwealth.[3]

In addition to outlining requirements for patients, doctors, and licensed marijuana businesses, the Act contains multiple provisions governing the employment realm. § 2103 of the Act applies to employers and is entitled "Protections for patients and caregivers." That provision states that employers may not discriminate or take an adverse action against an employee "solely on the basis of such employee's status as an individual who is certified to use medical marijuana."[4] That provision goes on to state however, that employers are not required to accommodate an employee's possession or use of marijuana on their premises, and are not prohibited from disciplining an employee found to be "under the influence of medical marijuana in the workplace."[5] § 510 of the Act allows an employer to prohibit employees from completing tasks which the employer deems life-threatening, or which pose a public health of safety risk while the employee is "under the influence" of marijuana. This is the case even where, "the prohibition results in financial harm for the patient."[6]

The law does not define what it means to take an employment action "solely" on the basis of an individual's status as a medical marijuana user, or what it means to be "under the influence." While this poses a challenge for employers, this perceived gap in the law also provides an opportunity for employers to craft policies which are feasible, fair, and compliant with state law.

B. Case Law from Other Jurisdictions

During the early part of this decade, many court opinions came down in favor of employers and against the need to provide reasonable accommodations. For example, in *Emerald*

Steel Fabricators v. Bureau of Labor & Industry, 230 P.3d 518 (Ore. 2010), the employer discharged an individual after he disclosed that he was a registered user of medical cannabis. The Oregon Supreme Court held that the employer did not act unlawfully in terminating the employee, holding that because federal law prohibited the use of cannabis, and the employer discharged the employee for engaging in illegal activity, the Oregon disability statute did not apply. Similarly, the Colorado Supreme Court held that, although the use of medical cannabis was lawful under state law, an employer could terminate an employee who uses medical cannabis program because it was still unlawful to do so under federal law. *See Coats v. Dish Network*, 350 P.3d 849 (Colo. 2015).

However, many medical marijuana statutes contain provisions similar to the Pennsylvania Act, and more recent court opinions have read such statutes to require reasonable accommodations by the employer. For example, in *Barbuto v. Advantage Sales & Marketing, LLC*, 477 Mass. 456, 78 N.E. 37 (2017), a Massachusetts court denied the employer's motion to dismiss and held that the employer should have engaged in an interactive process with the employee, rather than terminating her, when it learned she was a medical marijuana user. Similar decisions have followed in Rhode Island[7], Connecticut[8], and most recently, Delaware[9]. A New Jersey trial court recently held that the state's medical marijuana statute and anti-discrimination laws do not require an employer to waive drug testing requirements for medical marijuana users, but tied this decision to the fact that New Jersey's medical marijuana law contains no anti-discrimination provisions.[10]

C. Guidance for Employers and Employment Lawyers

To date, there are no reported cases in Pennsylvania analyzing the employment provisions of the Medical Marijuana Act, so employers and their counsel are left to wonder how these issues will be decided in court. However, the language of the Act and the experience of litigants in other states reveal patterns and lessons to avoid pitfalls in this arena. The two major considerations are whether employers need to alter their drug testing policies, and whether employers must provide reasonable accommodations for medical marijuana users.

Employers generally desire to maintain a safe and drug-free workplace, and the Act still allows employers to do so. Initially, the Act allows an employer to prohibit employee's use of medical marijuana on their premises and to prohibit employee's from being "under the influence" at work.[11] However, because the Act states that employers cannot take an adverse employment action "solely" based upon an employee's status, employers and their counsel should ensure that existing drug testing policies, and particularly any "zero tolerance" policy, is clear that its purpose is to maintaining a safe and drug-free workplace, and is clear about what is expected and required of employees. Any employer that maintains a drug testing policy (whether it involves pre-employment drug screening, "reasonable suspicion" testing, or other similar provisions) should examine that policy and speak to their Medical Review Officer to define how the MRO should treat positive tests for marijuana.

The Medical Marijuana Act does not specifically state that employers must provide a reasonable accommodation for the use of medical marijuana. However, its provisions, when taken as a whole, suggest that businesses must have a clearly defined action plan for how they

will respond when learning that an employee is a medical marijuana user. Such knowledge may be revealed by a positive drug test or through an admission by the employee themselves. Before taking any adverse action—including refusing to hire, disciplining, or terminating an individual—the employer should determine the employee's status under the Act. Because individuals certified under the Act will do so in order to treat a "serious medical condition," it is possible that they will qualify as having a "handicap or disability" under the Pennsylvania Human Relations Act.[12]

After determining an employee has a qualified disability, employers would be wise to engage in an initial interactive process to determine whether it is feasible to make an accommodation. An accommodation in this scenario might include allowing off-site use of medical marijuana that would not result in the employee being "under the influence" during work, or a period of short term leave during which the employee may use medical marijuana. This process should begin with a review of the employee's job description and essential duties to determine if the position is one which is safety-sensitive, since the Act allows employers to prohibit employees in such positions from completing certain tasks while "under the influence."[13]

If the employer decides that an adverse action is necessary or warranted, the employer should ensure that its decision has been deliberative and is properly documented. Any such decision should be associated with the hardship in accommodating the employee's use of medical marijuana or the employee's inability to complete the essential duties of their position. The employee's status as a medical marijuana user should not be a basis—and certainly not the "sole" basis—for any adverse employment action.[14]

While the Medical Marijuana Act and its employment provisions have yet to be tested in a Pennsylvania court, employers in the Commonwealth still have time to review their policies, craft such policies to ensure compliance with the Act, and employ best practices to minimize risk and place themselves in the best position possible should litigation ensue.

D. Conclusion and More Information

So although cannabis is illegal under federal law, at least 30 states and the District of Columbia have legalized cannabis for medical use and nine states, as well as D.C., have legalized it for recreational use—a dichotomy that presents a unique and complex challenge for employers. For more information on the Medical Marijuana Act and the legal issues it creates, see the Fox Rothschild LLP White Paper on the subject. The publication provides an overview of federal and state marijuana laws, discusses specific aspects of the employment relationship affected by the legalization of marijuana in certain states, and offers practical guidance for employers on how to navigate this new and developing area of the law. It may be found at: https://www.foxrothschild.com/content/uploads/2018/07/Employment-Compliance-in-the-Age-of-Legalized-Mariujana.pdf

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1 21 U.S.C. § 801, et seq.

2 35 P.S. § 10231.101, et seq.

[3] 35 P.S. § 10231.103 contains a listing of the "Serious medical conditions" currently covered by the Act and § 501 sets forth the process for individuals to obtain a medical marijuana "identification card."

[4] 35 P.S. § 10231.2103(b)(1).

[5] *Id.* at (b)(2).

[6] 35 P.S. § 10231.510(3)-(4).

[7] *Callaghan v. Darlington Fabrics/Moore Company*, No. PC-2017-56802017, 2017 WL 2321181 (Super. Ct. May 23, 2017)

[8] *Noffsinger v. SSC Niantic*, 273 F. Supp. 3d 326 (D. Conn. 2017); *Noffsinger v. SSC Niantic*, 338 F. Supp. 3d 78 (D. Conn. 2018).

[9] *Chance v. Kraft Heinz Foods Co.*, No. K18C-01-056 NEP, 2018 WL 6655670 (Del. Super. Ct. Dec. 17, 2018)

[10] *See Cotto v. Ardagh Glass Packing*, No. CV-18-1037, 2018 WL 3814278 (D.N.J. Aug. 10, 2018)

[11] 35 P.S. § 10231.2103(b)(2).

[12] Section 4(p) of the Human Relations Act, 43 P.S. § 954(p).

[13] See 35 P.S. § 10231.510(3)-(4).

[14] See 35 P.S. § 10231.2103(b)(1).