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Dealing with Legal Marijuana and its Effect on the Workplace

Topic Overview

Ten states (Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington) and the District of Columbia have legalized recreational marijuana. Thirty states have legalized medical marijuana. However, despite legalization, each state has implemented its own regulations. As the cannabis industry continues to grow, employers and adjusters should be aware of how and when employers can drug test their employees or even take adverse action against their employees for legal marijuana use to avoid liability. Today, as marijuana usage becomes less taboo and states continue to legalize it, absent uniform guidance on recreational and medical marijuana laws, employers should implement legally-conforming guidelines to comply with the changing landscape.

I. Trends in How Employers Are Approaching the Legalization of Marijuana

Some employers in states where recreational marijuana is legal have chosen to do away with the practice of refusing job applicants who test positive for marijuana. For example, in Colorado, which legalized recreational marijuana use in 2014, the Denver Post, the 9th largest newspaper in the U.S., ended pre-employment drug testing for all non-safety sensitive positions in September 2016.

In 2017, a survey by the Mountain States Employers Council of 609 Colorado employers found that companies testing for marijuana use fell from 77 percent to 66 percent. The reasoning behind this is that drug testing for legal substances restricts the job pool, which in turn affects productivity and growth. In surveys conducted by the

Federal Reserve, one of the number one difficulties in hiring cited by employers was the inability of applicants to pass drug tests.

According to data collected from Quest Diagnostics Inc., a national drug testing and clinical laboratory, released data that failed drug tests reached an all-time high in 2017, with data not yet released for 2018. Taking all these surveys and data into consideration, there seems to be an emerging benefit for employers to reconsider their drug policies, especially considering the expense in a changing environment where marijuana usage is not only becoming more socially acceptable, but legal. Notably, employers can still, under most state laws, provide for drug testing after an accident or still require initial and routine drug tests for jobs requiring the operation of heavy machinery. It's also worth noting that employers can generally get a discount on workers' compensation insurance for maintaining a "drug-free workplace."

The Trouble with Drug Testing for Marijuana

Unlike alcohol where a Breathalyzer test can show the exact level in a person's blood, there are a few available tests that will show a similar level of impairment for marijuana. For example, saliva swabs and urine samples will only show if THC has been used over the last few days, not a person's level of impairment at the time of the test. This means that it is far more difficult to determine if an employee is impaired at work or whether they used marijuana during their off time.

Currently, blood tests are far more capable of pinpointing impairment levels more precisely. However, these are much more expensive and can take longer to analyze, making them impracticable for employers.

Legal Marijuana Use, At-Will Employment and Lingering Criminal Ramifications

In states where employment is "at-will," meaning employers can dismiss workers without just cause, these employers can likely prohibit marijuana consumption regardless of state or federal law. For example, California statutorily allows for employers to penalize workers who test positive for marijuana use, regardless of whether or not they are high on the job.

Further, as recreational marijuana use is still illegal at a federal level, federal employees are prohibited from using marijuana. This also means that under federal law, marijuana is categorized as a Schedule I substance under the Controlled Substances Act,

and its use, possession, or cultivation is a federal offense. 21 U.S.C. § 812(c)(10). Despite states' action to legalize marijuana, it remains an illegal drug and the Department of Justice has instructed prosecutors to enforce the Controlled Substances Act. As such, state marijuana laws only protect consumers from criminal prosecution by state authorities, not from federal drug offenses.

Workplace Discrimination and Medical Marijuana

Employees have tried to argue that their medical marijuana use is protected under disability discrimination laws such as the Americans with Disabilities Act ("ADA"). Under the ADA, employers must reasonably accommodate disabled employees absent a showing of hardship by the employer.

Whether or not a legal marijuana user could be accommodated for such use in their workplace, however, will depend on the employment laws of the state they work in. This is because the EEOC has not published new guidance on recreational or medical marijuana laws, leaving it up to states to determine if adverse employment action for legal, medicinal marijuana use amounts to discrimination. For example, some states, such as Arizona, Connecticut, Delaware, Illinois, Maine, Nevada, New York and Minnesota, require accommodations for registered medical marijuana users. Other states provide protections, but the scope of their protection under the law can be limited. For instance, Pennsylvania law explicitly prohibits employers from discriminating against employees who are medical marijuana cardholders, but the law only addresses the impact of a positive drug test for a limited set of job duties, such as public utility workers. In addition, New Jersey mandates that employers need not accommodate marijuana use in the workplace, but the law is silent as to off-duty medical marijuana consumption.

Steps Companies Can Take

1. Review their current policies;
2. Make sure managers are trained;
3. Make clear to employees that marijuana use on the job is prohibited;
4. Implement a legally-fool-proof drug testing protocol, including:

- a. Providing advance notice of drug testing requirements to an applicant or employee;
- b. Use a lab certified by the state;
- c. Pay for some or all of the testing costs;
- d. Give an applicant or employee an opportunity to challenge the results; and
- e. Administer the test in a way that minimizes intrusion into privacy.

II. What Do Courts Say About Legal Marijuana Use?

***Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir.2012).**

In a case involving a wrongful discharge claim brought by a Wal-Mart employee who was prescribed marijuana following Michigan's passage of the Michigan Medical Marijuana Act (the "MMMA") in 2008, the Sixth Circuit Court of Appeals found that the Act did not impose restrictions on private employers like Wal-Mart. *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir.2012). The employee, a store manager of Wal-Mart was diagnosed with sinus cancer and an inoperable brain tumor. For years he experienced persistent pain. When Michigan passed the MMMA, Casias' oncologist recommended medicinal marijuana to relieve his pain along with the side effects of his other medications. At no point did Casias work while under the influence of marijuana or bring it onto Wal-Mart property. After Casias injured himself at work, Wal-Mart required him to submit to a drug test, which he failed. After Wal-Mart terminated his employment, Casias brought suit for wrongful discharge and violation of the MMMA. The Sixth Circuit, however, reasoned that to construe the MMMA in a way that applied to private employers could potentially prohibit "any Michigan business from issuing any disciplinary action against a qualifying patient who used marijuana in accordance with MMMA."

***Braska v. Challenge Mfg. Co.*, 307 Mich.App. 340, 861 N.W.2d 289 (2014).**

In 2014, however, a Michigan Court of Appeals found that registered medicinal marijuana users could not be denied unemployment benefits, regardless of whether a public or private employer was involved. *Braska v. Challenge Mfg. Co.*, 307 Mich.App. 340, 861 N.W.2d 289 (2014). In *Braska*, an employee submitted for a drug testing after injuring his ankle while working at a manufacturing job. After he failed the drug test, he

disclosed for the first time that he was a registered medicinal marijuana user. Although the court was not confronted with the issue of whether his discharge was unlawful, it held that he could not be denied unemployment benefits. The underlying reasoning for this decision was that the use of marijuana was legal and absent evidence that the claimants had ingested marijuana in the workplace, the denial of benefits was not allowed, as this amounted to state action and thus it had no bearing whether an employer was public or private.

***Coats v. Dish Network, L.L.C.*, 2013 COA 62, 303 P.3d 147**

The most widely cited case is a 2015 Colorado Supreme Court that upheld Dish Network's firing of a disabled man who used medical marijuana and failed a drug test. In *Coats v. Dish Network, L.L.C.*, 2013 COA 62, 303 P.3d 147, the Colorado Supreme Court upheld the discharge of an employee who legally used medical marijuana. The court reasoned that federally prohibited but state-licensed medical marijuana use is not a "lawful activity" under section 24-34-402.5, C.R.S. 2012, Colorado's Lawful Activities Statute. Thus, the court dismissed the plaintiff's action, which created precedent in the state of Colorado allowing employers to remain free to discharge employees for their legal use of marijuana (under state law).

The holding in *Coats* illustrates the tension between the rights of disabled employees to treat their medical conditions, and the rights of employers to ensure a safe workplace environment. In sum, one thing is clear, medical marijuana users must be aware that in most states, it is clear that employers with "zero tolerance" drug use policies are permitted to refuse to hire, or terminate, employees who fail a drug test for marijuana regardless of whether or not they have valid medical authorization.

***Noffsinger v. SSC Niantic Operating Co., LLC*, No. 3:16-cv-01938, 2018 U.S. Dist. LEXIS 150453 (D.Conn.Sept. 5, 2018)**

Recently, one federal district court held that an employer's refusal to hire a medical marijuana user after she failed a pre-employment drug test violated Connecticut's medical marijuana law. *Noffsinger v. SSC Niantic Operating Co., LLC*, No. 3:16-cv-01938, 2018 U.S. Dist. LEXIS 150453 (D.Conn.Sept. 5, 2018). Notably, the employer, a federal contractor, refused to hire Noffsinger because it followed federal law holding that marijuana is an illegal substance and the federal Drug-Free Workplace Act barred it from hiring Noffsinger. The district court rejected this argument, noting that the DFWA does not require drug testing nor does it regulate employees who use illegal drugs outside of work while off-duty. Similarly, the court found that Connecticut's

medical marijuana act protected Noffsinger from discrimination based upon her status as a qualifying patient. The court reasoned that any other holding would make “no sense and would render the statutes’ protection . . . a nullity, because there would no reason for a patient to seek [protection] if not to use medical marijuana as permitted under [the act].”

III. How to Avoid Improper Drug Testing—Marijuana Laws and Regulations by State

Alaska

Although Alaska allows for both medical and recreational marijuana, employers are not required to accommodate medical or recreational use in the workplace, meaning that employees may be fired for failing a drug test.

Arizona

Under Arizona law, medical marijuana use is allowed. Employers are permitted, however, to conduct pre-employment testing, testing based upon reasonable suspicion, and post-accident testing. If an employer implements a drug testing policy, it must apply equally to all compensated employees including officers, directors, and supervisors. Testing must be performed in accordance with a written employment policy, which must include the following:

- (1) A statement of the employer’s policy respecting drug and alcohol use by employees;
- (2) A description of those employees or prospective employees who are subject to testing;
- (3) The circumstances under which testing may be required;
- (4) The substances as to which testing may be required;
- (5) A description of the testing methods and collection procedures to be used;
- (6) The consequences of a refusal to participate in the testing;
- (7) Any adverse personnel action that may be taken based on the testing procedure or results;
- (8) The right of an employee, on request, to obtain the written test results;
- (9) The right of an employee, on request, to explain in a confidential setting, a positive test result;
- (10) A statement of the employer’s policy regarding the confidentiality of the test results.

Per Arizona statute, an employer may require the collection and testing of samples for any job-related purposes consistent with business necessity including:

- (1) Investigation of possible individual employee impairment;
- (2) Investigation of accidents in the workplace. Employees may be required to undergo drug testing or alcohol impairment testing for accidents to employees who the employer reasonably believes may have contributed to the accident;
- (3) Maintenance of safety for employees, customers, clients or the public at large;
- (4) Maintenance of productivity, quality of products or services or security of property or information;
- (5) Reasonable suspicion that an employee may be affected by the use of drugs or alcohol and that the use may adversely affect the job performance or the work environment.

Although Arizona Rev. Stat. §23-493.04 does permit employers to conduct random drug tests, the Arizona Supreme Court has held that such testing is a violation of an employee's right to privacy. Further, employers may not discriminate against medical marijuana users based solely on their status as registered cardholders, unless it would cause the employer to lose money or licensing benefits under federal law.

Arkansas

Arkansas allows for medical marijuana use only. Any employer who employs 9 or more employees may not discriminate against applicants or employees based on past or present status as a medical marijuana cardholder or as a designated caregiver for a physically-disabled medical marijuana patient. Employers may, however, take adverse action against an employee based on a good faith belief that the employee used, possessed, or was impaired by medical marijuana while on company property or during work hours. A good faith belief is not satisfied by a positive drug test alone, but employers may exclude employees from safety-oriented positions based upon a positive drug test.

California

California allows for both medical and recreational marijuana use. California generally allows for pre-employment drug testing as:

- (1) A condition of employment;

- (2) Under instances of reasonable suspicion;
- (3) Following an accident.

California courts have held, however, that random drug testing violates an employee's right of privacy and is generally not permitted. Instead, courts utilize a balancing test between employee privacy and employer interest in safety, meaning that courts may permit random testing under very limited circumstances in highly-regulated industries or where the position is one critical to safety. If an employee fails a drug test, an employer may fire him or her even if the use was off duty or for a medical condition pursuant to a valid medical marijuana card.

Colorado

Colorado allows for both medical and recreational marijuana; however, employers do not have to accommodate medical or recreational use in the workplace and employers may fire employees who test positive for marijuana.

Connecticut

Connecticut allows only for medicinal marijuana and employers may not discriminate against applicants based on their status as a qualifying patient or primary caregiver for a qualifying patient but may take adverse action if an employee is under the influence during work hours.

Delaware

Delaware only allows for medical marijuana use and employers may not discriminate against registered cardholders who test positive on a drug test, unless it would cause the employer to lose money or other licensing-benefits under federal law. An employee may be fired if he or she possesses or is impaired by marijuana during work hours or on company property.

District of Columbia

Washington D.C. allows for both medical and recreational marijuana, but employers are not required to accommodate employees in the workplace and may enforce policies restricting its use.

Florida

Florida provides for medical marijuana, but there is no legal requirement in place that requires employers to accommodate employees. Further, Florida provides incentives for employers who implement a drug-free work program. It allows employers to drug test under the following circumstances:

- (1) Drug applicant testing
- (2) Reasonable-suspicion testing;
- (3) Routine fitness-for-duty drug testing;
- (4) Follow-up drug testing.

An employer must give notice to employees and applicants that drug testing is required under Florida law.

Georgia

Georgia provides only for medical marijuana, but employers are free to enforce a zero-tolerance drug policy and terminate employees who test positive for marijuana.

Hawaii

Hawaii provides only for medical marijuana but its laws do not provide for or authorize its use in the workplace.

Illinois

Illinois provides only for medical marijuana and prohibits employer discrimination against registered medical marijuana users. An exception applies if an employer would violate federal law, lose federal funding or licensing-related benefits under federal law. If an employer has a good faith belief that an employee is using or possessing marijuana on company-owned property during work hours, it may take adverse employment action.

Maine

Maine provides for both medical and recreational marijuana. Employers may not discriminate based on status as a medical marijuana patient, nor may it discriminate against employees based only on off-duty marijuana use. They can discipline employees who are under the influence of marijuana while on the clock.

Massachusetts

Massachusetts provides for both medical and recreational marijuana. When an employee uses medical marijuana to treat a disability, he or she is entitled to reasonable accommodation under state disability discrimination law. There is no similar accommodation required for recreational marijuana use and employers are free to restrict its consumption.

Michigan

Michigan recently legalized both recreational and medical marijuana. Michigan law does not require an employer to permit or accommodate marijuana usage on its premises during work hours and it can discipline employees if they violate a drug policy. This is because under Michigan law, an employee is presumed to be an employee at will.

Minnesota

Minnesota law only provides for medicinal marijuana and prohibits discrimination by employers against an authorized medicinal marijuana user who tests positive for marijuana following a drug test. Employers can take adverse action against any employee who is unauthorized and uses or possesses marijuana while on the clock or company property.

Montana

Although Montana allows for medicinal marijuana, an employer is not required to accommodate legal users and may prohibit its use.

Nevada

Nevada allows for recreational and medicinal marijuana and an employer is required to provide reasonable accommodations for registered medical marijuana patients, so long as it would not pose a safety threat or present an undue hardship. An employer can restrict the use of recreational marijuana by employees.

New Hampshire

New Hampshire allows for medicinal marijuana but there is no legally-imposed duty upon employers to accommodate its users and employers may discipline employees if they are using or under the influence while on company property.

New Jersey

Medicinal marijuana use is allowed, but employers are not required to accommodate and its law provides no restrictions over employers. A New Jersey court has held, however, that the benefits of random drug testing must be balanced against the privacy rights of an employee. *Hennessey v. Coastal Eagle Point Oil*, 609 A.2d 11 (N.J. 1992). The court noted that an employer should:

- (1) Use the least intrusive testing measures necessary to determine drug use;
- (2) Maintain confidentiality of results;
- (3) Give employees notice of drug testing;
- (4) Detail employee selection methods;
- (5) Warn employees of lingering effect of drug use;
- (6) Explain how the sample will be analyzed;
- (7) Notify employees of the consequences of testing.

New York

New York law provides for medicinal marijuana and prohibits employers from discriminating against employees based upon their status as a medicinal marijuana patient. If an employer employs four or more employees, it must provide reasonable accommodations but is not required to take action that violates federal law or that would result in a loss of federal funding.

North Dakota

Although North Dakota provides for medical marijuana use, an employer may still discipline an employee for possessing or using while in the workplace.

Ohio

Ohio law, although allowing for the use of medical marijuana, allows an employer to enforce a zero-tolerance drug policy and take adverse employment action against

medicinal marijuana users. Further, an employee discharged for violating an employer's drug policy is not entitled to unemployment benefits, even if the employee was legally using medicinal marijuana.

Oregon

Oregon allows for both medicinal and recreational marijuana, but there are no restrictions on employers taking adverse action against marijuana users, even if they are medicinal users.

Pennsylvania

While providing for medicinal marijuana use, an employer may discipline an employee for being under the influence while in the workplace under Pennsylvania law. However, the employee's conduct must fall below the normally-accepted standard of care for his or her job.

Rhode Island

Rhode Island provides for medicinal marijuana but does not require employers to accommodate its use in the workplace. Its law does prohibit employers from refusing to hire or from penalizing an employee if he or she is a medicinal marijuana patient.

Vermont

Vermont allows for medicinal and recreational marijuana but provides for no requirement that employers must accommodate users. Instead, employers are free to regulate or prohibit use or possession of marijuana in the workplace.

Washington

Medical and recreational marijuana is allowed but an employer can establish a drug-free workplace policy and may also refuse to hire applicants or take adverse employment action if they fail a drug test.

West Virginia

Medicinal marijuana is allowed in West Virginia and employers may not discriminate against its employees. Employers may take adverse employment action if an employee's conduct falls below a normally accepted standard of care while he or she is under the influence of medicinal marijuana. This includes implementing a policy that allows an employer to prohibit a medicinal marijuana patient from performing any tasks an employer deems life threatening or performing any duty that could result in a public health or safety risk while under the influence of marijuana. Under West Virginia law, an employer may drug test for the following reasons:

- (1) To investigate a workplace accident;
- (2) To investigate workplace theft or misconduct;
- (3) To deter or detect illegal drug use;
- (4) To investigate suspected impairment of an employee;
- (5) To protect the safety of its employees, customers, or general public;
- (6) To maintain productivity;
- (7) To protect company property or information.