2019 Cyber, Management and Professional Liability Conference
July 10-12, 2019
Boston, MA

Navigating the Weeds in the Workplace: Understanding the Interplay of State Disability Laws with Medical Marijuana

A. Overview of the medical marijuana legal landscape

Societal attitude towards marijuana have changed significantly over the last ten years. To date, 33 states have enacted medical marijuana legislation and at least 10 states have decriminalized recreational marijuana. Despite the changing societal views about marijuana, it is still an illegal controlled substance under the federal Controlled Substances Act ("CSA"), 21 U.S.C. § 811. Consequently, users of medical marijuana are not entitled to the protections of other federal statutes; including, but not limited to, the American with Disabilities Act ("ADA"), 42 U.S.C. § 12101 and the Genetic Information Nondiscrimination Act ("GINA"), 42 U.S.C. § 2000ff. Although the use of medical marijuana is not a "reasonable accommodation" under the ADA, an employer needs to be mindful of the ADA and GINA as the employee's underlying condition may be protected by the ADA and GINA, even if the employee's preferred method of treatment, medical marijuana, is not.

While the use of medical marijuana is not protected under federal statutes, many of the state medical marijuana statutes include anti-discrimination and accommodation provisions. So, in addition to analyzing the underlying condition, employers must also consider the unique medical marijuana statutory scheme in the state in which it operates. Despite variations in the statutory language in each jurisdiction, some common themes are emerging through case law, including an employer's obligation to engage in the interactive process to determine if an employee's use of medical marijuana is a reasonable accommodation under each state's disability law. Each state statute is unique so practitioners, underwriters and claims analysts must review each statute in order to determine an employer's obligations with respect to medical marijuana users.

Marijuana legalization can have a direct and lasting impact on employers; particularly, those with drug-free workplace policies. Employers can be placed in a difficult position of trying to enforce these policies, while avoiding disability discrimination lawsuits by employees who use medical marijuana outside of the workplace. Employers have the unenviable task of determining when off-duty use of medical marijuana may lead to on-duty impairment. While employers need to balance the needs of its

employees who use medical marijuana, employers are also responsible for the overall safety of all employees and in certain cases, the public. Most states medical marijuana statutes' include a provision that employers do not have to tolerate or accommodate employees being "under the influence" of medical marijuana on the job. Unfortunately, the law provides very little guidance on what constitutes "under the influence" and employers are left grappling with trying to figure it out before the medical community has developed clear tests for determining impairment from medical marijuana. Courts have yet to strike a balance between these two competing important societal issues as evidenced by the lack of case law on impairment. Ultimately, these issues will collide when an employee, while on duty, is in an accident, and injures a member of the public. The employer may be liable for the tortious conduct of it's' employee yet still have an obligation to accommodate the medical marijuana using employee who claims to be "not under the influence" while at work.

B. <u>Recent Case Developments</u>

This issue is highlighted in the Superior Court of New Jersey's recent decision in *Wild v. Carriage Funeral Homes, et. al*, 2019 N.J. Super LEXIS 37 (App. Div.) (March 27, 2019). The Court held that the New Jersey Compassionate Use Medical Marijuana Act, N.J.S.A. 24:6I-1to-16 ("CUMA"), is not incompatible with the Law Against Discrimination, N.J.S.A. 10: 5-1 to -49 ("LAD"), in spite of the CUMA statutory language which states that "Nothing in this act shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace." N.J.S.A. 24:6I-14. Wild was in an automobile accident while in the course and scope of his employment as a funeral director. The other vehicle ran a stop sign and struck Wild's vehicle so Wild was not at fault for the accident. Wild sought medical treatment in an emergency room and informed the ER physician that he legally used medical marijuana during his off-hours to help with pain from cancer treatments. The ER physician determined, based on his physical examination, that Wild was not under the influence, so he declined to order a blood test which would have tested positive for marijuana metabolites. Wild reported the accident and the ER doctor's findings to his employer which insisted that he go for a blood test at an urgent care center. The funeral home later terminated his employment because Wild never disclosed, as required by company policy, that he was using a potentially altering substance.

Wild filed a lawsuit alleging disability discrimination, among other things, because the funeral home fired him based on the treatment he received for his disability, medical marijuana. While the trial court granted the employer's motion to dismiss on the basis that Wild did not state a prima facie claim of disability discrimination under the LAD and that such a claim would be incompatible with CUMA, the Appellate Division reversed. The Appellate Division specifically focused on the liberal pleading standards and the fact that, on its face, the complaint states a claim for disability discrimination and that such a claim is compatible with CUMA. Significantly, the Appellate Division emphasized that the parties would need to ferret out in discovery whether or not the use of medical marijuana during off duty hours is a reasonable accommodation under the LAD. We anticipate this decision will be appealed to the NJ Supreme Court.

The Wild decision aligns with the legal analysis adopted by federal courts in Connecticut, Rhode Island and Massachusetts. A common theme underlying each of these cases is an employer's obligation

to engage in the interactive process to determine if it can accommodate an employee's use of medical marijuana. These decisions stand in stark contrast with earlier decisions from Oregon and Colorado which upheld an employer's right to terminate an employee who tested positive for medical marijuana, regardless of whether the use occurred during off-duty hours. This growing split in the jurisprudence may wind up with conflicting Supreme Court decisions from the various states with medical marijuana statutes. Additionally, federal courts add to the confusion by conflicting rulings on federal preemption since marijuana use is still illegal under federal law. Ultimately, the U.S. Supreme Court will address this issue but not for some time as the U.S. Supreme Court usually gives time for the issue to be developed by the lower courts.

In the meantime, employers are left trying to navigate this confusing maze with no clear guidance from legislatures or courts. We recommend that employers compare the legislation in their own state to the legislation in states where the courts have ruled at least in part on the parameters of that state's medical marijuana statute. For example, the Compassionate Care Act of New York, and Connecticut's Act Concerning the Palliative Use of Marijuana all allow certified primary care physicians to prescribe medical marijuana to qualified individuals for the treatment of certain medical conditions. In Connecticut, it is unlawful for an employer to refuse to hire, terminate, penalize or threaten an employee solely because of that employee's status as a qualified medical marijuana patient. In New York, the law states that employees and applicants who are registered medical marijuana users are considered to be disabled under the law. Although this law does not specifically require employers to accommodate medical marijuana users, by qualifying such employees as per se "disabled", these individuals will have a stronger standing to sue in the event that they request an accommodation related to their status as a cannabis user and the employer unreasonably denies that request. Since the New York law is similar to the Connecticut law and CUMA, it is reasonable to assume that New York courts may adopt similar interpretations as the courts did in New Jersey and Connecticut.

Similarly, Section 2103 of Pennsylvania's Medical Marijuana Act contains similar language to that found in the Connecticut law in that it also prohibits employers from taking certain actions against employees based upon their legal use of medical marijuana. However, employers are not prohibited from disciplining employees who are under the influence of medical marijuana in the workplace or who work under the influence of medical marijuana when the employee's conduct "falls below the standard of care normally accepted for that position." The act also contains exceptions for acts that would put the employer in violation of federal law.

A recent decision from a district court in Arizona provides a reminder that employers should use caution when taking action against an employee who legally uses marijuana, especially in states with similar marijuana laws, such as Pennsylvania. In *Whitmire v. Wal-Mart Stores Inc*., (D. Ariz. Feb. 7, 2019), the court found that the Arizona Medical Marijuana Act contained an implied private right of action because it was needed in order to enforce the law's mandate that employers "may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon . . . [a] registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment." The court then granted

summary judgment to an employee who was terminated after testing positive for marijuana because the employer did not meet its burden of proving that the worker was impaired by marijuana during the hours of employment.

C. All employers should review and revise their drug testing policies in light of the medical marijuana landscape

These types of medical marijuana laws have left many employers puzzled about whether they may continue to enforce zero tolerance drug policies. Fortunately for employers, these laws do not guarantee employees the right to "light up" at work, nor do they protect employees who are impaired from marijuana while on duty. These laws also do not permit federal employees, or those employed by federal contractors to consume medical marijuana, as the drug remains illegal under federal law.

In addition, not all employees who suffer from a medical illness qualify for medical marijuana. The New York Compassionate Care Act limits prescriptions to those who are diagnosed with certain qualified medical conditions, including: cancer, positive status HIV or AIDS, amyotrophic lateral sclerosis ("ALS"), Parkinson's disease, multiple sclerosis ("MS"), epilepsy, post-traumatic stress disorder and rheumatoid arthritis. Other states have similar statutes that codify and limit the types of disabilities that qualify for legal medical marijuana use. Accordingly, as part of the interactive process, an employer is permitted to ask for medical verification of the employee's right to use medical marijuana, including asking for a letter from the employee's recommending physician that medical marijuana is the best form of treatment for the employee's condition. All too often, some are taking advantage of a state's liberal distribution of medical marijuana cards without fully exploring all traditional forms of medical treatment.

In addition to consider the applicability of the medical marijuana statutes to its workforce, employers should use this opportunity to evaluate its drug testing policies. Employers who operate businesses in these "green" states can take the following steps to ensure that they maintain a safe working environment with regards to employee medical marijuana use, while reducing the risk of costly legal claims:

- Closely review their current drug testing policies to the extent that they test for marijuana, and determine whether state law requires exceptions to testing policies as a reasonable accommodation;

- Train managers and human resources employees on how to handle reasonable accommodation requests by disabled employees who are certified medical marijuana users;

- Review policies regarding illegal drugs and disabilities to ensure that each complies with your state's current medical marijuana laws; and

- Ensure that managers and human resources employees are properly trained on how to determine (and document) employee impairment when an employer suspects that drug use (legal or otherwise) is causing workplace issues.

Furthermore, employers must seek guidance and training when confronted with a situation in which an applicant or employee tests positive for marijuana or voluntarily discloses his or her use of medical marijuana. For example, how should an employer respond when an employee who uses medical marijuana at home fails a drug test, or requests an accommodation for their medical marijuana use outside of the workplace? An employer should first confirm that the employee has a legal prescription for marijuana by asking the employee for documentation of the prescription. In states like New Jersey, where patients are required to carry a Medicinal Marijuana Program ("MMP") card at all times, employers can request a copy of the employee's identification card to confirm legal use.

Depending on the circumstances, certified medical marijuana "cardholders" are not excused from following the employer's drug-free workplace policy. For example, employers need not accommodate medical marijuana use that endangers anyone else's health or well-being or that occurs in moving vehicles, workplaces, public places, or the presence of minors. However, off-duty medical use sometimes requires more careful consideration. In states such as Massachusetts, employers need to determine whether the employee's off-duty medical use can be accommodated without causing a hardship on company operations, or risks to employee health and safety. In these situations, determining whether an employee is impaired at work is a key consideration. Because drug tests typically measure past marijuana use, not current impairment, this can be a very fact-sensitive issue. Ordinarily, an employer should not take an adverse action against a medical marijuana user unless the employer has engaged a medical expert to render an opinion on the employee's ability to safely do a particular job.

Given the complexities of this evolving issue, employers in medical marijuana states should consult experienced employment law counsel before refusing to hire, terminating, or changing any terms or conditions of an employee's job because of off-duty medical marijuana use.