Medical Marijuana

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Medical Marijuana Employment Issues

- Medical Marijuana Act (MMA) “legalizes” in Pennsylvania medical use of marijuana for certain chronic conditions.
  - Marijuana remains a Schedule 1 substance under federal law -- it is a crime to possess, sell or use
  - MMA creates uncertainty with respect to the application and enforceability of employer policies.
  - MMA injects new risks into the workplace.
  - MMA adds still more potential claims to the ever-growing list of employment-related causes of action.
Medical Marijuana Employment Issues

• Marijuana in various forms may be prescribed for specific chronic and often debilitating conditions, *e.g.*, cancer, Lou Gehrig’s disease, MS, Crohn’s disease.
  
  • PA Secretary of Health recently approved marijuana for use in cancer remission therapy, opioid-addiction therapy, and for neurodegenerative and spastic movement disorders.

– Good news: most patients needing MM will not be able to work
– Bad news: those who can work will present significant work-related issues
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Statutory employment restrictions

– § 510(1)&(2) -- illegal for employees “under the influence” to work with permit-required chemicals, high voltage electricity or on any other “public utility,” to work at heights or in confined spaces, including mines.

• “Under the influence” for this section means “a blood content of more than 10 nanograms of active [THC] per milliliter of blood.”
  – Context: Federal DOT regulations set 15 ng/mL as positive

• But MMA does not require employees to disclose THC levels to employers, nor does it expressly permit employers to test.
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**Employer imposed restrictions**

- § 510(3)&(4) – employer may restrict MM patient “under the influence” from performing tasks which may be “life threatening” to the employee or other employees; and may restrict MM patient from duties which could result in a “public safety or health risk”
  - “Life threatening” and “public safety or health risk” undefined
  - “Under the influence” is not defined in these subsections; unclear whether the 10 ng/ml blood standard applies
- No requirement that employees disclose MM use
- Regardless, no requirement that MM patients test for or disclose blood THC level
- No explicit permission for employers to test for MM use
Medical Marijuana Employment Issues

• MMA creates conflict between rights of employees and employers

• Employee rights
  – Anti-discrimination provision
    • § 2103(b) makes illegal any adverse employment action motivated “solely on the basis” of “employee’s status as individual who is certified” to use MM.
    • What does this mean? Does it protect actual use pursuant to certification?
      – No PA cases, but CT court has interpreted similar language to protect use: “Under defendant’s restrictive interpretation … employers would be free to fire status-qualifying patients based on their actual use … That makes no sense ….” Noffsinger v. SSC Niantic Operating Co., No. 3:16-cv-01938 (D. Conn. 9/5/2018)
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• Employer rights:
  – § 2103(b)(2) states that “Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment.”
    • “Use” is undefined, but seemingly means that employers do not have to allow ingestion of marijuana on site.
  – Further: “This act shall in no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position.”
    • Again, “under the influence” is not defined.
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• Additionally, § 2103(b)(3) says: “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.”
  – Federal DOT position: Medical marijuana “remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation’s drug testing regulations to use marijuana.”
  – Federal contractors are required by Drug Free Workplace Act to implement policies prohibiting drug use in workplace.
    • But see Noffsinger v. SSC Niantic: DFWA does not “prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical marijuana outside the workplace in accordance with a program approved by state law.”
Can employers continue “zero tolerance” approach?
Unknown at this time, but consider:
– MMA § 2103(b)(2) states affirmatively that employers are not required “to make any accommodation of the use of medical marijuana on the property or premises”
  • “Zero tolerance” policies and negotiated drug free workplace protocols are common in the industry
  • Relaxation of such policies would be an “accommodation”
– But you act at your peril
Medical Marijuana Employment Issues

• Potential Litigation
  – To date there have been no cases filed in PA under the employment provisions of the MMA, but it is only a matter of time
  • By applicants who are not hired because of failed post-offer, pre-employment drug screen
  • By “salts” – MM advocates who advertise their MM use on the application and are not hired
  • By current employees who disclose MM use and are removed from jobs/terminated
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• Consider:
  – Certification for MM use is *de facto* certification of a disability as defined by the Pennsylvania Human Relations Act
  – Employers are obligated to “reasonably accommodate” employees with disabilities if they can do so without “undue hardship.”
    • Supreme Judicial Court of Massachusetts: “The defendants at summary judgment or trial may offer evidence to meet their burden to show that the plaintiff’s use of medical marijuana is not a reasonable accommodation because it would impose an undue hardship on the defendants’ business.” *Barbuto v. Advantage Sales & Marketing*, 477 Mass. 456 (2017).
    – MM users are also disabled under federal ADA, but since MM is illegal under federal law ADA does not require accommodation of use of MM
Medical Marijuana Employment Issues

• Employers need to consider their position in advance of confronting the problem:
  – Identify all safety-sensitive positions
    • “Life threatening”?  
    • Threat to “public health or safety”?
  – Utilize post-offer, pre-employment physical examinations that include drug screens to identify MM users
  – Consider policy change to require disclosure of MM and other prescription use
Policy suggestion:
“Certain jobs at the company can cause serious injury to employees and/or members of the public if performed unsafely. When your doctor prescribes medication you must ask whether the medication will impair your ability to safely perform your job. If so, get the doctor’s statement in writing. The statement need not identify the medication or the underlying condition, but may simply say that you are unable to perform safety-sensitive functions due to your prescription medication. All employees must immediately inform Human Resources if they have been prescribed a medication, including medical marijuana, that may impair their ability to perform their jobs safely and effectively. The company may ask an independent physician to complete a fitness-for-duty evaluation to confirm your doctor’s opinion.”
Medical Marijuana Employment Issues -- Conclusion

• Marijuana remains illegal under federal law, but this will not in all cases protect employers.
• MMA injects ambiguity and uncertainty into the workplace that will be resolved only through litigation.
• This is one area where a call to your legal counsel will be cost effective.
Questions? Contact John McCreary:
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