Legalization of Marijuana Raises Significant Questions and Issues for Employers

by Jay S. Becker and Saranne E. Weimer

The trend across the nation toward the legalization of marijuana on the state level continues to gain momentum. Twenty-three states and the District of Columbia now have laws permitting the use of medical marijuana.[1] In addition, 11 other states allow "low THC, high cannabidiol (CBD)" products for medical reasons in limited situations or as a legal defense.[2] Moving the legalization trend even further, the states of Washington and Colorado also have laws permitting the recreational use of marijuana,[3] and legislators in several other states are proposing similar recreational legislation. However, despite the growing trend toward legalization, marijuana remains illegal under federal law. Not only is it illegal, it is classified as a Schedule I drug, which, under federal law, means the worst of the worst.[4] Schedule I drugs are those with a high potential for abuse, severe dependency, and no acceptable medical use. To put it in perspective, other Schedule I drugs include LSD, heroin, GHB, and Ecstasy.[5]

In states where marijuana is legal, even for limited medical purposes, employers are facing difficult questions about their workplace policies, rights, and obligations because these employers are subject to conflicting state and federal laws. Can an employer discipline an employee for off-duty marijuana use in states where it is legal? Does it matter if the off-duty use is for medical purposes? How does the use of marijuana affect workers' compensation claims and an employer's ability to challenge the claims based on impairment? What happens if a healthcare provider recommends medical marijuana as part of the treatment for an employee's work-related injury? Is medical marijuana covered by an employer-sponsored health plan? At this point, unfortunately, the answer to most questions raised by employers is "it depends." This article will examine the current state of the law, but the waters are still untested and many answers are not yet available.

Can State Law and Federal Law Co-exist?

There is an inherent conflict between federal law labeling marijuana as a Schedule I dangerous narcotic with no acceptable medical use and the majority of U.S. states permitting its use, or a defense to its use, in some form. While the issue of preemption is beyond the scope of this article, it is worth noting there are arguments on each side of the preemption issue.[6] However, even if the state laws are not preempted and can technically co-exist in the federalist system, the state laws do not impact the U.S. government's ability to enforce the federal laws that criminalize marijuana.[7] Nevertheless, the federal government has taken a look-the-other-way approach and has indicated it does not intend to prosecute individuals who use marijuana in strict compliance with state laws.

In 2009, the United States attorney general issued a directive encouraging prosecutors not to pursue criminal cases against individuals who use or distribute marijuana for medical purposes in compliance with state laws, despite its criminal nature under federal law.[8] In Aug. 2013, after Colorado and Washington legalized marijuana for non-medical purposes, the U.S. Department of Justice (DOJ) announced an updated marijuana enforcement policy.[9] While acknowledging that marijuana is still very much illegal under federal law, the DOJ noted its enforcement priorities, which do not include prosecuting individuals for possession of small amounts of marijuana. The DOJ, therefore, determined it would defer challenging state legalization laws if these laws did not impinge on the DOJ's enforcement priorities, but expects states to create strong enforcement efforts for compliance with the state legalization laws.[10] So while marijuana remains illegal under federal law, the U.S. government seems to have little interest in challenging the state laws or prosecuting individuals who use marijuana in compliance with state laws, regardless of the purpose of its use. Therefore, employers can expect state laws

enabling marijuana use to remain intact (although at any point the federal government could technically decide to begin prosecuting these individuals).

Employees Using Marijuana

There are approximately 2.5 million people in the United States ingesting marijuana in one form of another (*i.e.*, smoking, edibles, etc.) pursuant to state medical marijuana statutes.[11] In addition, there are countless numbers (on the state level) using marijuana recreationally. As expected, the majority of these people are employed, which means employers will eventually need to deal with the issues raised by the legalization trend. Likely, an employer will be faced with issues when either an employee approaches the employer with a medical marijuana registration card and requests an accommodation or when the employee fails a drug test. There is also the potential scenario of an employee actually getting caught using marijuana on the employer's premises (or rumors of use on company property). As an employer, it is important to have drug policies in place that address each of these scenarios. The policies will need to be continually updated, as the law is expected to continue changing.

Obligations under Federal Law

The fact that the federal government has not taken a hardline stance in opposing the state's legalization efforts does not mean employers can ignore obligations they may have under federal law. An employer's federal obligations remain unchanged. For example, under the Drug Free Workplace Act, any entity that receives federal contracts with a value of more than $100,000 must maintain a drug-free workplace.[12] These employers must continue to ensure all illegal drugs, including marijuana, are prohibited from the workplace and employees who use marijuana, even for a medical reason, are subject to discipline or termination if they use marijuana while on the job or show up for work under the influence of marijuana.

Additionally, the Department of Transportation (DOT) requires drug and alcohol testing for all safety-sensitive employees in aviation, trucking, railroads, mass transit, pipelines, and other transportation industries.[13] In the wake of marijuana legalization, the DOT has reiterated that an employee's use of marijuana, whether for medical or recreational purposes, will not excuse a positive drug test.[14] Therefore, an employee who tests positive in this scenario must be disciplined, regardless of the reason why the employee uses the marijuana.

Do Employers Need to Provide Accommodations for Medical Marijuana Users

Typically, under the Americans with Disabilities Act (ADA) and equivalent state disability laws, once an employee provides medical proof of a disability that may affect work, the employer has a duty to accommodate the employee's disability if it is reasonable to do so and does not place an undue hardship on the employer.[15] Under federal law, employers do not need to accommodate marijuana use under any circumstance because marijuana is not recognized federally as a legitimate treatment for any medical condition.[16] It is important to note, however, that if a physician is recommending medical marijuana to an employee, that employee would most likely be deemed disabled under the ADA (typically, medical marijuana is used to provide an alternative therapeutic option to people with debilitating conditions such as cancer, HIV/AIDs, glaucoma, or multiple sclerosis) and the employer *does* need to engage in the interactive process to determine whether or not it would need to provide an accommodation that does not involve marijuana use.[17]

Under state law, the issue of whether an employer needs to provide an accommodation is more difficult. Just because employers are not required by federal law to provide a medicinal marijuana usage accommodation, does not mean the employee is not entitled to an accommodation under state law. The good news for employers is that currently the state courts, in every jurisdiction where an employee has claimed a right to an accommodation, have found that employees are *not* protected from discipline or discharge under the marijuana legalization statutes. Supreme Courts in California,[18] Washington,[19] Montana,[20] and Oregon[21] all rejected claims by employees seeking employment protection under medical marijuana statutes. Courts have rationalized that while statutes may decriminalize the use of marijuana, they do not provide employees with protections against an employer with a drug-free workplace policy. However, none of these states explicitly provided the right to an accommodation in their statutes.

Other states' statutes may require an accommodation. For example, Arizona and Delaware explicitly bar an employer from discriminating against an employee who is a registered and qualified patient but fails a drug test due to marijuana usage.[22] Both of these statutes have an exemption if providing an accommodation would deprive the employer of monetary or licensing benefits under federal law.[23] In New York, a qualified medical marijuana patient is automatically considered disabled under New York's Human Rights Law.[24] The Minnesota medical marijuana statute suggests an employer may need to provide an accommodation, but states the employer does not have to allow the employee to be impaired on the employer's premises during working hours.[25] Under the Nevada statute, employers may need to accommodate marijuana use as long as the accommodation does not pose a threat to persons or property, impose an undue hardship on the employer, or prohibit the employee from meeting job responsibilities.[26]

The New Jersey Compassionate Use Act provides as follows: "Nothing in this act shall be construed to require...an employer to accommodate the medical use of marijuana in any workplace."[27] While at first glance it seems to give employers an unfettered right to continue to enforce their drug-free workplace policies and continue to discipline or terminate employees who test positive for marijuana, it is important to keep in mind that this language has not yet been interpreted by the courts. One possible interpretation of this language is that marijuana does not need to be accommodated in the *actual workplace*, but a positive drug test resulting from off-duty use may be outside the scope of this language. Employers can expect that at some point an employee disciplined or terminated for his or her off-duty marijuana use will challenge the meaning of this language, and claim the employer *is* required to accommodate medical marijuana use outside of work, as long as the employee is not impaired at work.

As courts interpret these statutes, it is important that employers watch to determine whether a private cause of action exists, and determine the scope and type of accommodations, if any, that need to be provided to employees. Every state is different, and it is important employers are familiar with the requirements of all states in which they operate.

One case to watch is *Coats v. Dish Network*, pending before the Colorado Supreme Court.[28] Coats, a quadriplegic, was employed by Dish Network in the call center. Coats, who uses marijuana for his medical condition, never used marijuana on the employer's premises and was never impaired at work. However, he was terminated after he tested positive for marijuana in a random drug test. Coats is not claiming he is entitled to protection under the legalization statutes, but instead claims his use of marijuana is protected by the state's "lawful activities" statute, which prevents employers from taking adverse action based on an employee's out-of-work lawful activities. The issue will come down to the definition of "lawful." Since marijuana is illegal under federal law, arguably the activity is not lawful. On the other hand, there is an argument that the statute promulgated by the state is meant to protect individuals who engage in activities lawfully permitted by the state.

Challenges in Providing an Accommodation

Employers that must, and/or employers that choose to accommodate medical marijuana users should be aware of the following. First, the employer must ensure it is not running afoul of any federal requirements, such as the DOT guidelines discussed above. Second, an employer is required to provide a safe working environment for all employees pursuant to state and federal Occupational Safety and Health Administration (OSHA) regulations.[29] If an accommodation would interfere with a safe working environment, it is not an accommodation that should be provided. Employers must ensure employees are never impaired on the employer's premises.

Impaired workers open employers to significant liability. However, one of the biggest obstacles to preventing impaired employees from working, and in providing an accommodation, is that there is currently no scientific way to determine whether an individual is impaired by marijuana. Typically, marijuana is tested through a urine sample. Generally, the effects of marijuana last between two and six hours from the time an individual last used the substance. However, marijuana can remain in the individual's system for weeks. Hence, a urinalysis is not a reliable way to determine whether an individual is currently impaired. So how does an employer know when an employee is impaired on its premises? Scientifically, it doesn't. And if an employer makes a determination based on what the employer believes are objective signs of the employee's impairment, it should be prepared for the employee to challenge the determination, especially where the person making the determination is not medically trained to recognize indicators of impairment.

Workers' Compensation and Health Insurance

If an employee is injured while impaired at work, the employer can use the impairment as a defense, but as discussed above the issue of impairment is a difficult one to address with marijuana. Another issue raised in the workers' compensation area, which is just starting to develop, is whether workers' compensation covers marijuana 'recommendations' (they are typically not called prescriptions). Many people anticipated courts would not require employers and their workers' compensation carriers to pay for medical marijuana, especially while it remains a Schedule I drug under federal law. Interestingly, however, on Aug. 29, 2014, an appeals court in New Mexico ruled that if medical marijuana was recommended by the physician, it needs to be covered by workers' compensation. The court reached this conclusion despite arguments from the employer and the insurer that paying for the treatment arguably violates federal law, or at least federal public policy.[30] This is an issue employers should watch closely for developments.

Another unsettled issue on the insurance front is whether private employer-sponsored insurance plans will have to cover costs associated with marijuana treatment.

Employers Do Not Need to Allow Recreational Use Off Premises

There is currently no requirement, through statute or legal precedent, anywhere in the country, that has indicated employers cannot discipline employees

for off-site, off-hours use of *recreational* marijuana, even where the employee is not impaired at the employer's place of business. If the employer has a zero-tolerance drug policy and the employee tests positive for marijuana and doesn't have a medical usage certification, the employer can discipline that employee—for now. The *Dish Network* case discussed above may change things. Although the decision's impact will initially be limited to Colorado, the court's decision in *Dish Network* will likely influence decisions in states across the country with similar lawful activities statutes, when these states are presented with the same issue.

Conclusion

Employers may continue to maintain zero-tolerance drug-free workplace policies prohibiting the use of marijuana. However, in states that require an accommodation under state law for the medical use of marijuana, the employer may have to provide some accommodation if an employee is a valid user of medical marijuana, as long as the accommodation is reasonable and does not interfere with the employer's obligations under federal law. For now, employers can continue to discipline employees for non-medical use of marijuana, but should closely watch the changing legal landscape as these issues continue to evolve. ⚖

Jay S. Becker *co-chairs the labor and employment practice area at Giordano Halleran & Ciesla. He devotes his practice to labor relations and employment law and litigation on behalf of management.* ***Saranne E. Weimer*** *is an associate with the firm, focusing her practice on representing management in employment litigation matters.*

ENDNOTES

1. The District of Columbia and the following states permit the use of medical marijuana: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington. National Conference of State Legislatures; State Medical Marijuana Laws. Aug. 25, 2014, ncsl.org/research/health/ state-medical-marijuana-laws.aspx.
2. *Id*.
3. Eliza Gray, New Laws Chart Course for Marijuana Legalization, *Time*, Oct. 19, 2013, nation.time.com/2013/10/19/new laws-chart-course-for-marijuana-legalization/.
4. Drug Scheduling, DEA, justice.gov/ dea/ druginfo/ds.shtml.
5. *Id*.
6. *See* Todd Gary, Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Law, Congressional Research Service, Nov. 9, 2012, *available at* fas.org/sgp/crs/misc/ R42398.pdf.
7. *Id*.
8. Memorandum from Selected United States Attorneys on Investigations and Prosecutions Authorizing the Medical Use of Marijuana, Oct. 19, 2009, blogs.justice.gov/main/archi ves/192).
9. Memorandum for All United States Attorneys on Guidance Regarding Marijuana Enforcement, Aug.29, 2013, jus tice.gov/iso/opa/resources/30520138291 32756857467.pdf.
10. *Id*.
11. Access to Medical Marijuana, ProCon. org, medicalmarijuana.procon.org/view. answers.php?questionID= 001199.
12. Drug Free Workplace Act of 1988 Requirements for Organizations, United States Department of Labor, dol.gov/ elaws/asp/drugfree/require.htm.
13. 49 C.F.R. Part 40.
14. DOT Office of Drug and Alcohol Policy and Compliance Notice, Oct. 22, 2009, *available at*, dot.gov/sites/dot.gov/files/ docs/ODAPC _medicalmarijuananotice.pdf; DOT Office of Drug and Alcohol Policy and Compliance Notice, Dec. 3, 2012, *available at* dot.gov/sites/ dot. gov/files/docs/odapc-notice-recreational-mj.pdf.
15. *See e.g.,* Americans with Disabilities Act, 42 U.S.C. §§ 12101-12117, 12201-12213 (1994); New Jersey Law Against Discrimination, N.J.S.A. § 10:5-1 *et seq*.
16. Controlled Substances Act, 21 U.S.C. § 801 *et seq*.
17. *See e.g.,* Americans with Disabilities Act, 42 U.S.C. §§ 12101-12117, 12201-12213 (1994); New Jersey Law Against Discrimination, N.J.S.A. § 10:5-1 *et seq*.
18. *Ross v. RagingWire Telecomm., Inc*., 174 P.3d 200 (Cal. 2008).
19. *Roe v. TeleTech Customer Care Mgmt LLC*, 2011 Wash. LEXIS 393, No. 83768-6 (Wash. June 9, 2011).
20. *Johnson v. Columbia Falls Alum. Co*., 213 P.3d 789 (Mont. 2009).
21. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus*., 348 Or. 159, 2010 Ore. LEXIS 272, CA A130422, SC S056265 (April 14, 2010).
22. *See* Az. Rev. Stat. 36-2813 (2011) ("Unless failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either: (1) the person's status as a cardholder or (2) a registered qualifying patient's positive 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."); Del. Code Title 16, § 4905A.
23. *Id*.
24. New York Bill A6357E-2013/S7923-2013.
25. Minnesota Session Laws, Chapter 311, S.F. No. 2470, *available at* https://revisor.mn.gov/laws/?id=311&year=2014&type=0.
26. Nevada Statute NRS 451A.
27. N.J.S.A. 24:6I-14.
28. *Coats v. Dish Network, LLC*, 303 P.3d 147 (Colo. App. 2013); *cert. granted*, 2014 Colo. LEXIS 40 (Jan. 27, 2014).
29. *See e.g.,* OSHA Act of 1970, 29 U.S.C. § 654; 29 C.F.R. § 1910.
30. Dave Tartre, Workers' Comp Must Cover Medical Marijuana, Courthouse News Service, Sept. 5, 2014, *available at* courthousenews.com/2014/09/05/71084.htm.