



## Labor: Employment protections under medical marijuana laws

Delaware's Medical Marijuana Act exemplifies the battle between state and federal marijuana laws

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The age of medical marijuana has arrived. Sixteen states, plus the District of Columbia, have enacted legislation that affords protections to qualifying individuals with debilitating medical conditions by allowing them to lawfully engage in the medical use of marijuana. Other states are considering enacting similar legislation in the near future.

Delaware recently joined this growing trend among states when it enacted the Medical Marijuana Act. Unlike the majority of medical marijuana statutes, the Delaware Act includes provisions that afford additional protections to employees. Specifically, the Delaware Act prevents employers from discriminating against an employee "in hiring, termination, or any term or condition of employment, or otherwise penaliz[ing] a person" for his "status as a cardholder" or because of a "positive drug test for marijuana components or metabolites."

While granting these protections, the Delaware Act qualifies the protections in two ways. First, the statute exempts employers from compliance if it would "cause an employer to lose a monetary or licensing related benefit under federal law or federal regulations." Second, despite the Delaware Act's protections, an employee can be disciplined if he "used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment."

The Delaware Act emphasizes that it does not require employers "to allow the ingestion of marijuana in any workplace or to allow any employee to work while under the influence of marijuana," with the caveat that "a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana." Beyond this statement, the statute does not define a punishable level of marijuana or its metabolites.

Delaware is one of four states whose medical marijuana laws contain some degree of protection for employees. Arizona's Medical Marijuana Act contains protections that are nearly identical to those in the Delaware Act. While Maine's Medical Use of Marijuana Act also prohibits employers from discriminating against registered users, it provides no explicit protection to employees that test positive for marijuana use. Rhode Island's statute is similar to Maine's.

The future of the Delaware act has been called into question, as the U.S. Department of Justice recently announced that growers, distributors and state employees could be prosecuted under federal drug laws. It has been reported that in a letter to Delaware Gov. Jack Markell's chief legal counsel, U.S. Attorney Charles M. Oberly III stated that growing, distributing and possessing marijuana, in any capacity, other than as part of a federally authorized research program, is a violation of federal law, regardless of state laws permitting such activities.

Based on this development, Gov. Markell announced the suspension of the regulation-writing and licensing processes to implement the Delaware Act. It should be noted that federal enforcement actions are taking place in only a few jurisdictions with medical marijuana laws. In contrast, New Mexico and Maine are among states that have implemented medical marijuana dispensaries without incident. It remains to be seen whether Delaware will amend its law or perhaps engage in further discussions with the USDOJ. Uncertainty exists in the employee-friendly medical marijuana statutes. The statutes provide some protection to registered users of the drug but do not define when an employee will be considered "impaired" by medical marijuana use or "under the influence" of the drug, which would eliminate any employment-related protections.

Unlike alcohol and blood alcohol level tests, there is no set measure that is used to determine how much marijuana is in someone's system. In making employment decisions regarding users of medical marijuana, employers should consider the following recommendations:

1. Employers should remember that no statute requires employers to tolerate employees ingesting marijuana in the workplace.
2. Employers should be aware of whether they are governed by any federal statutes (such as Department of Transportation regulations that require testing) that would trump any requirements under state statutes.
3. With respect to determining whether an employee is "impaired" or "under the influence," employers should provide training for managers who will be tasked with making these determinations. The training should include guidance on signs and symptoms to look for when determining whether someone is under the influence. Managers should also be trained to document their observations and reasons for believing an employee was under the influence, in the event of subsequent litigation.
4. Employers should create workplace policies prohibiting the illegal and improper use of drugs in the workplace.

Given that there are many federal and state laws governing the implementation and enforcement of workplace drug policies, employers may find it helpful to obtain the assistance of counsel in drafting these policies. To minimize risk, employers who employ individuals in Delaware, and other states whose medical marijuana laws include employment protections, are well-advised to address the medical marijuana issue in advance of having their first "test case."