

Mastering the Legalities of Medical Marijuana

A practical guide to a thorny issue

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Medical-marijuana laws present employers with a unique dilemma regarding how they handle employees or applicants who test positive for illegal drug use as compared to how they handle persons who test positive for prescribed painkillers or other drugs. Given the status of medical marijuana, employers in various industries who conduct drug and alcohol tests may need to re-evaluate their drug policies. They should consider how they deal with employees and applicants who test positive for marijuana versus other illegal drugs and legally prescribed medications.

Status of Medical Marijuana Laws

Fourteen states (and the District of Columbia) have medical marijuana laws allowing patients to use marijuana for medical reasons. Those states are: Alaska, California, Colorado, Hawaii, Maine, Maryland, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont and Washington.

State medical marijuana laws cannot completely legalize marijuana because the drug remains illegal under federal law regardless of the reasons for its use. However, because almost every state has some form of disability antidiscrimination law protecting employees at work, which includes the employer's duty to reasonably accommodate, employers need to know if medical marijuana must be treated the same as a prescription for a painkiller.

State Laws Differ

States have taken different approaches to medical-marijuana laws; thus, there is not a catch-all response for employers that operate in these jurisdictions. For example, California's Compassionate Use Act was approved by California voters almost 14 years ago in November of 1996. The act gives a person who uses marijuana for medical purposes, based upon a physician's recommendation, a lawful defense to state criminal charges involving possession and use of marijuana.

When asked to answer the question whether an employee's use of medical marijuana was protected in the workplace, the California Supreme Court held that, "under California law, an employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions." In *Ross v. Ragingwire Telecommunications Inc.*, the court recognized an employer's legitimate concern about its employee's use of illegal drugs, noting that the California Compassionate Use Act did not change marijuana's status as an illegal drug; nor did it create special employment protection for medical marijuana users. The Oregon Supreme Court also reached a similar conclusion in *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*.

Michigan's medical marijuana statute, unlike California's and Oregon's, contains a specific provision prohibiting discrimination against medical marijuana users:

A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marijuana in accordance with this act...

This provision appears to protect employees against discrimination by employers because they have tested positive for marijuana use so long as they have been prescribed medical marijuana and have the requisite registry card. It is noteworthy that Michigan's law does not give unlimited protection to employees using medical marijuana. Specifically, the act does not require employers to accommodate the smoking or ingesting of marijuana in the workplace, nor are they required to permit an employee to report to work under the influence of medical marijuana.

The Employers Path Forward

As states adopt medical-marijuana laws and employees in all types of jobs are prescribed medical marijuana, the issues attendant with the use of marijuana as a pain medication will grow. Because the approach to medical marijuana is not uniform, what, then do employers do as they analyze their drug testing policy?

- Employers must look at every jurisdiction in which they operate and determine if that jurisdiction has laws that allow or permit the use of medical marijuana. This will be of particular importance for multi-state employers.
- Employers must determine whether applicable laws create special protections for the use of medical marijuana by employees. That question becomes to what extent are employees protected: are they protected from discrimination, or must an employer go so far as to accommodate the use of medical marijuana in the workplace? This may necessitate a review of safety-sensitive positions, and the ability of certain employees to safely and effectively perform their jobs while using medical marijuana.

Given the complex nature of these questions, and the fact that the law in this area is still developing, employers should check with competent employment attorneys practicing in medical-marijuana states to ensure they know how courts in that state are interpreting the law.