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Medical Marijuana and the Workplace

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More often than not, our courts have trouble keeping pace with advances in science and technology. The dilemmas presented by medical marijuana may be a situation where science and technology have been unable to keep up with the law and the courts. Meanwhile, employers are facing tough decisions as more and more states accept the idea of "medical marijuana".

To understand this problem requires a brief understanding of drug testing. A drug test is a technical analysis of a biological specimen *(usually urine or blood, but it can also be saliva or hair)* which is used to determine the presence or absence of various drugs or their metabolites. LabCorp, a nationwide specimen testing company, has published a chart which gives the approximate detection periods for different types of substances. For example, in a urine sample, one can learn if alcohol was ingested in the past 1-12 hours; methadone in the past 3 days; and barbiturates in the past day or two. The problem with marijuana is that urine tests for marijuana are much less likely to show recent usage and instead detect use in the past 2-7 days for a single use, and will detect usage in the past 1-2 months in persons who use marijuana regularly (such as once a week or more), or in users with a high percentage of body fat. *See*, Drugs of Abuse Reference Guide, published by LabCorp. Inc. and retrieved on line August 25, 2010.[1]

Thus, a positive marijuana urine test could be indicating usage an hour ago, last weekend, or even three weeks ago. It also means that a positive test for marijuana does not easily correlate to a current impairment, such as can be more readily detected in a test for alcohol, where tests detect both recent use as well as probable impairment. *See also* Drug Testing at Work -- A Guide for Employers, Beverly A. Potter & J. Sebastian OrPali (1998). In those states where any and all marijuana use is simply illegal, a properly administered test which is positive for marijuana or its metabolite THC can be just cause for discharge, or for refusal to hire without any further inquiry. This is changing as more and more states legalize marijuana use for medical purposes and give some protection to employees as part of that law.

This issue presents a unique dilemma for employers who have come to terms with how they handle employees or applicants who test positive for illegal drug use versus how they handle persons who test positive for prescribed painkillers or other drugs. Employers in various industries who do conduct drug and alcohol tests have for the most part come to terms with how they must balance two competing issues: the employer's right and duty to establish and maintain safe and productive workplaces against their obligation to accommodate, when reasonable, employees with disabilities that may require prescription drug use. When that drug use does not impair safe and productive job performance, employers tend not to seek disciplinary action. For employees taking prescribed drugs which can impair someone's safe or productive job performance, employers have a variety of reasonable options. For example, an employee performing safety-sensitive job duties need not be "accommodated" if their physician (or the employer's retained physician) opines that the prescription drug use may impair their ability to safely perform the essential functions of their job. *See e.g., Shipleft v. AMTRACK*, 1999 U.S. App. LEXIS 14004 (6th Cir. 1999). On the other hand, someone who can safely and productively perform their non-safety sensitive desk job while

taking a prescribed painkiller, (even ingesting it at work), would need to be reasonably accommodated under the Americans With Disabilities Act (ADA) and most state disability anti-discrimination laws. The problem is not so easily resolved when the issue is "medical marijuana".

Status of Medical Marijuana Laws - Summer 2010

As of August 2010, fourteen states (and the District of Columbia) have medical marijuana laws allowing patients to use marijuana for medical reasons. These states are: Alaska, California, Colorado, Hawaii, Maine, Maryland, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont and Washington. It is worth noting that state medical marijuana laws cannot completely legalize marijuana because the drug remains illegal under federal law regardless of the reasons for its use. 21 U.S.C. §§ 812, 844(a); *Gonzales v. Raich*, 545 U.S. 1, 26-29, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). Thus, neither the federal ADA nor its implementing regulations have been amended in any way to treat marijuana as anything but an illegal drug.

However, because almost every state has some form of disability anti-discrimination 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. One can anticipate that in a state allowing medical marijuana use, an employee's physician might certify that their patient's use of medical marijuana, as prescribed, would not impair the employee's mental or physical ability to safely and productively perform the essential functions of their job, especially if that job did not require safety-sensitive duties. Of course, under the ADA, the employer who disagrees with an employee's prescribing physician is entitled to ask a different physician or require their own medical examination to determine if an employee taking such a prescribed drug can safely perform the essential functions of their job. Americans With Disabilities Act, 29 C.F.R. 1630.14.

Meanwhile, courts are grappling with these issues while employers are left with problems not easily resolved by reference to the law or to a drug test.

California: Where Smoking Medical Marijuana Is Legal, But Can Still Get You Fired

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. Just last year, the Supreme Court of California was called upon to decide if a person's use of marijuana for medical purposes protected them from termination from employment where an employer's drug and alcohol policies considered a positive test for the illegal drug marijuana to be a dischargeable offense.

In *Ross v. Ragingwire Telecommunications, Inc.*, 174 P.3d 200 (Cal. 2008), Ross was fired when he tested positive for marijuana in a preemployment drug screen. Ross's physician had prescribed his use of medical marijuana to treat chronic pain as a result of injuries sustained while Ross was in the United States Air Force. Before taking Ragingwire's preemployment drug test, Ross gave the clinic that was to administer the drug test a copy of his prescription for marijuana. Ross tested positive for marijuana and Ragingwire suspended him as a result. Ross then gave Ragingwire a copy of his marijuana prescription and explained that he used the drug to alleviate his chronic back pain. The employer stuck by its drug and alcohol policy and fired Ross for the positive drug test.

Ross sued Ragingwire under the California Fair Employment and Housing Act, California's anti-discrimination law, which protects employees from discrimination because of a disability. Ross alleged that his former employer violated the law by discharging him because of his disability, which discrimination included failing to make reasonable accommodation for his disability in refusing to allow him to take his prescribed medical marijuana (much as one might be prescribed any other painkiller) and still keep his job. Ross also sued Ragingwire for wrongful discharge in violation of public policy. The lower court dismissed Ross's claims, and the California Supreme Court affirmed, holding that, *"under California law, an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions"*

(emphasis added).

The *Ross* Court found it particularly persuasive that marijuana--even medical marijuana--was still an illegal drug under federal law. Indeed, the Court opined:

Plaintiff's position might have merit if the Compassionate Use Act gave marijuana the same status as any legal prescription drug. But the act's effect is not so broad. No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law (21 U.S.C. §§ 812, 844(a)), even for medical users.

The *Ross* Court further 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 court dismissed Ross's claim for wrongful discharge in violation of public policy on the same basis.

The Oregon Supreme Court recently reached a similar conclusion. *See, Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, BOLI 3004 (Or., April 14, 2010). The court held that, while Oregon's medical marijuana statute was silent on the issue of employment discrimination under Oregon's various employment discrimination laws, an employer was not required to accommodate an employee's use of medical marijuana.

Other States Have Provided Anti-Discrimination Provisions To Their Medical Marijuana Laws

Nine of the current states with medical marijuana laws have either adopted explicit employee protections or have arrived at that position by analysis: Colorado, Hawaii, Michigan, Montana, New Jersey, New Mexico, Vermont, Rhode Island and Maine.

For example, 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 marihuana in accordance with this act…

Mich. Comp. Laws § 333.26424(4)(a) (emphasis added). It appears that this provision protects employees against discrimination by their employers because they have tested positive for marijuana use so long as they have been prescribed medical marijuana and have the requisite registry card.

A substantial retail chain employer with stores in Michigan is now having to grapple with this law and the unfortunate lack of a reliable drug test which can detect both recent usage, as well as probable impairment. In 2010, an employee of this national retail chain sued his employer for discharging him because he tested positive for marijuana under the company's alcohol and drug testing program.

The lawsuit, filed in April of this year, alleges that the Plaintiff, Joseph Casias, was prescribed medical marijuana by his oncologist to alleviate head and neck pain resulting from an inoperable brain tumor and sinus cancer. Casias, a five year employee with this large retailer--who had received the associate of the year award in 2008--was terminated after he tested positive for marijuana following a post-accident drug test. Casias contended that he did not use medical marijuana during work hours and that he was not under the influence of marijuana at the time of his accident. He sued his employer under Michigan's Medical Marihuana Act[2], claiming wrongful discharge in violation of public policy.

This appears to be a case of first impression under those medical marijuana state statutes which specifically provide for some form of anti-discrimination protection. 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 or report to work under the influence of medical marijuana. However, given the inability of drug screens to reliably test for recent use or probable impairment from medical marijuana, how can an employer fairly balance the interests of safety in the workplace versus reasonable accommodations for disabilities and a law protecting employees prescribed medical marijuana. In this case, it appears it will not be a drug test or the employer who will decide whether Casias could have endangered himself or others while possibly under the influence, and therefore was properly discharged, it will be a jury weighing testimony, unaided by a definitive drug screen.

Meanwhile, the Michigan Supreme Court could easily part company with the courts in California and Oregon, reaching a different result simply because Michigan's medical marijuana statute articulates an intent to protect persons from disciplinary action. It would be no far leap across the judiciary divide to see a Michigan court seizing on this distinction.

Conclusion

Clearly, the law in this area is still being developed. As states adopt "medical marijuana" laws and employees in all manner of jobs are prescribed medical marijuana, the issues attendant with the use of marijuana as a pain medication will grow. Multi-state employers must pay attention to the jurisdictions in which they operate, and consider how their drug policies conform to the unique medical marijuana laws in those states and anti-discrimination case law in a particular state. Also, they should check with competent employment attorneys practicing in medical marijuana states to ensure they know how courts in that state are interpreting the law.

Assuming "medical marijuana" does become comparable to a prescription painkiller and its use becomes protected in the same manner, an employer will need to treat it in the same manner. That is, weighing their responsibility to provide safe and productive workplaces against the obligation to reasonably accommodate someone whose disability can be alleviated by prescription drug use. It cannot be ignored that this balancing is often greatly aided by reliable drug tests that detect recent and/or excessive non-therapeutic drug usage. Obviously, having such a reliable test could resolve some of the potential disputes where medical marijuana is involved. While there are some saliva tests on the market which their manufacturers claim can detect recent marijuana use, such tests have not yet been accepted as sufficiently reliable in most US markets or with most US employers.

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(1) Urine tests are the most frequently used drug test by the employers. While blood tests may be a better detector of more recent use than urine, they are costly, invasive and can be difficult to administer. Hair tests, although less expensive and certainly non-invasive, are not used as frequently as urine tests because they do not measure current drug use but rather use of a drug in the past three months or longer. While that is certainly useful for knowing if someone ingested a completely illegal drug, it is not useful for persons ingesting a properly prescribed drug. There can also be legitimate claims that a person is a "fully recovered" addict being discriminated against for prior drug use based on hair samples where use pre-dated rehabilitation.
(2) Michigan spells marijuana with an “h”.