Employment Compliance in the Age of Legalized Marijuana

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Cannabis—or marijuana, as it is commonly known in the United States—is illegal under federal law. However, at least 30 states and the District of Columbia have legalized cannabis for medical use and nine states, as well as D.C., have legalized it for recreational use—a dichotomy that presents a unique and complex challenge for employers. This memorandum will provide an overview of federal and state marijuana laws, discuss specific aspects of the employment relationship affected by the legalization of marijuana in certain states, and offer practical guidance for employers on how to navigate this new and developing area of the law.[1]

I. The Controlled Substances Act

Any discussion of marijuana law and policy must begin with the Controlled Substances Act, the law which makes cannabis illegal. The Controlled Substances Act (CSA), Title II of the Comprehensive Drug Abuse Prevention and Control Act, is a federal law that governs the manufacture, possession, use, and distribution of certain substances. See 21 U.S.C. §§ 801, et seq. The CSA places each covered substance on one of five "Schedules" based upon the government's determination of its medical benefits and potential for abuse. See id. at §§ 801-802, 811-812. Under the CSA, "marijuana and its cannabinoids[2]" are Schedule I substances, meaning that marijuana has "a high potential for abuse…[and] no currently accepted medical use in treatment in the United States." See id. at § 812. Although there is pending legislation in Congress to "reschedule" cannabis as a Schedule II substance, the current classification means that the possession, sale, or use of cannabis is a crime under the CSA. As will be discussed below, the CSA's prohibition of marijuana also implicates other federal employment laws and regulations, such as the Americans with Disabilities Act (ADA) and the Drug-Free Workplace Act (DFWA).

In contrast to this designation under the CSA, at least 30 states and D.C. have now legalized cannabis for medical use and nine states have approved recreational marijuana (often referred to as "adult use" of marijuana). Furthermore, some state and federal courts have ruled that the CSA does not preempt state laws legalizing cannabis. See, e.g., Noffsinger v. SSC Nantic Operating Co., No. 16-1938, 2017 WL 3401260, *4-12 (D. Conn. Aug. 8, 2017) (holding that Connecticut's medical marijuana statute was not preempted by federal law, including the CSA); Green Cross Med. Inc. v. Gally, 242 Ariz. 293, 304 (2017) (holding that a commercial lease for a cannabis cultivation facility was not void under the CSA). Employers in states that have legalized cannabis in some form must examine their employment policies and procedures to ensure they are compliant with state as well as federal law.

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[1] Please be mindful that possessing, using, distributing, and/or selling marijuana is a federal crime, and no legal advice we give is intended to provide any guidance or assistance in violating federal law nor will it provide any guidance or assistance in complying with federal law. Please also note that we are not advising you regarding the federal, state, or local tax consequences of engaging in any business in this industry.

[2] Cannabinoids are chemical compounds found within the cannabis plant.

II. State Marijuana Legalization

Notwithstanding the federal ban on marijuana, the past 10-15 years have seen a majority of states legalize marijuana for medical purposes. California was the first state to do so, in the late 1990s, but states where medical marijuana is legal now touch every region of the country. The list includes Northeastern states like Pennsylvania, New Jersey, Delaware, and New York; Southern states like Arkansas, Florida, Oklahoma, and Texas; Midwestern states like Illinois and Minnesota; and Western states like California, Colorado, and Washington—often seen as pioneers in this industry. In 2012, Colorado and Washington became the first states to legalize "recreational marijuana," and they are now joined by about a half dozen other jurisdictions, including California, Colorado, Massachusetts, Maine, and Nevada.

Similarly, the trend in federal and state law enforcement has been to take a more "hands off" approach to marijuana than in the past. Several states, and even more cities and municipalities, have passed laws that de-criminalize the use and/or possession of small quantities of marijuana. At the federal level, U.S. Attorneys under President Obama's administration were guided by the "Cole Memo," an August 2013 memorandum drafted by then-Attorney General James Cole which established eight enforcement priorities that would guide Department of Justice (DOJ) policy towards marijuana. Those priorities focused on curbing criminal marijuana enterprises, the interstate movement of marijuana, and the use of marijuana by children; and the Cole Memo was predicated in part on the notion that states which legalized marijuana in some form would maintain their own "strong and effective regulatory and enforcement systems." The ultimate effect of this policy was that legitimate marijuana businesses operating within the confines of a state-established framework were largely free from federal enforcement or criminal prosecution.

However, current Attorney General Jeff Sessions rescinded the Cole Memo in January 2018 and issued his own memorandum. The "Sessions Memo" instructed federal prosecutors to "follow well-established principles that govern all federal prosecutions" in marijuana-related prosecutions. While this announcement initially sent a shockwave through the legal cannabis industry, the opinion of most legal commentators has been that the Sessions Memo will not lead to an increase in enforcement or prosecution of state-sanctioned marijuana businesses. This view is bolstered by an amendment which has been part of Congressional spending bills since 2014, previously known as the Rohrabacher–Farr Amendment and now known as Rohrabacher–Blumenauer Amendment. The Amendment prohibits the DOJ from spending funds to interfere with the implementation of state medical cannabis laws, and the effect has been that businesses who comply with their state's marijuana laws have generally been free from federal prosecution.

For employers, the main takeaway from these trends is that "legal" marijuana is here to stay. All evidence (including public opinion) points to the fact that more states, not fewer, will legalize it in the future, both for medical and recreational use. Employers must face this actuality head-on to ensure compliance and avoid legal headaches.

III. Maintaining Compliance with State and Federal Law in the Employment Arena

In all aspects of the employment relationship, businesses must comply with federal laws, such as the Fair Labor Standards Act and the ADA, as well as the laws of the state(s) in which they operate. The state laws that are implicated in this context include state laws prohibiting disability discrimination and discrimination in employment generally, as well as (of course) the applicable state medical marijuana statute.

A. Federal Contractors, Federal Grantees, and the Transportation Industry

Although all employers must grapple in some respects with the friction between state and federal cannabis laws, the answers are much clearer for federal contractors and federal grantees subject to the DFWA. The DFWA applies to certain federal contractors (those who receive federal contracts of more than $100,000) and all federal grantees other than individuals. See 41 U.S.C. §§ 8102(a)(1), 134, 8103(a)(1). Covered contractors and grantees must maintain a drug-free workplace by:

(1) Publishing and giving a statement to all covered employees[3] that "the unlawful manufacture, distribution dispensation, possession, or use of a controlled substance", including marijuana, is prohibited in the workplace;

(2) Notifying employees that they must abide by the drug-free workplace statement as a condition of employment;

(3) Establishing a drug-free awareness program;

(4) Timely alerting the contracting or granting federal agency after the contractor or grantee becomes aware that a covered employee has been convicted under a criminal drug statute;

(5) Penalizing, or requiring participation in a drug abuse assistance of rehabilitation program, any employee convicted of a reportable drug offense; and

(6) Making a good faith attempt to comply with these requirements. See 41 U.S.C. §§ 8102(a)(1), 8103(a)(1).

There are potentially devastating consequences for failure to comply with these requirements, including cessation of payment, termination of the contract or grant, and suspension or permanent loss of federal contractor or grantee status. See 41 U.S.C. §§ 8102(b), 8103(b).

Simply put, because of the requirements and penalties imposed by the DFWA, covered federal contractors and grantees have effectively no choice but to maintain a drug-free workplace, notwithstanding that marijuana may be legal in some form under state law.

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[3] Covered employee means "the employee of a contractor or grantee directly engaged in the performance of work pursuant to the contract or grant described in." See 41 U.S.C. § 8101(a)(6).

Recognizing this reality, state statutes legalizing marijuana often include carve-outs for federal contractors and grantees that do not require them to comply with state law where their compliance would violate federal law. See, e.g. DE Code Tit. 16 § 4905A (employers cannot discriminate against registered medical marijuana users, "[u]nless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations"); Minn. Stat. § 152.32(3)(c) (same); 35 P.S. 10231.2103(b)(3); N.Y. Public Health Law § 3369.

Special rules also govern certain employers in the transportation industry with employees whose jobs are considered "safety-sensitive." These include, without limitation, pilots, bus drivers, truck drivers, train engineers, subway operators, airline pilots and flight crews, and ship captains. The United States Department of Transportation (DOT) has a zero-tolerance policy towards use of controlled substances, including marijuana, and has enacted detailed rules governing drug test requirements and procedures. See 49 CFR Part 40, et seq. Notable here, the DOT's testing rules do not authorize medical cannabis under a state-established program as a valid excuse for a positive drug test by a covered employee. Thus, for transportation employers subject to the DOT, the DOT's marijuana prohibition takes priority over any state law legalizing marijuana in some form.

B. Zero Tolerance and Drug Testing Policies

For employers not subject to federal drug testing laws, drug testing is an area that is generally governed by state law. Thus far, few states have changed their existing drug testing laws to account for the legalization of marijuana, but there are some examples. A law in the District of Columbia, for instance, bars employers from testing applicants for cannabis until after they have issued a conditional offer of employment (i.e. an offer of employment contingent on the applicant passing a drug test). See D.C. Code § 32-931. In the wake of legalizing recreational marijuana, the Maine legislature initially passed a law prohibiting employers from refusing to employ a person over 21 years of age "solely for that person's consuming marijuana outside of the employer's…property," which effectively prohibited Maine employers from testing for marijuana in the pre-employment context. See 7 MRS § 2454(3). In June 2018, the legislature amended its recreational marijuana statute to remove this prohibition. However, while employers may test applicants and employees for marijuana, Maine law requires employer drug testing policies to be approved by the Maine Bureau of Labor Standards before implementation.

The present trend towards legalization suggests that more states may alter their drug testing laws to account for the legalization of cannabis. Nevertheless, there is a recognized need for employers to maintain a safe and drug-free workplace, and employers should not abandon a legitimate drug testing policy that has those goals in mind. Employers should be familiar with the current drug testing requirements (if any) in states where they operate, and should maintain a written drug test policy that sets clear expectations for employees and states the legitimate purpose of such testing. That policy should be provided to all job applicants and published for all employees. Substantively, the policy should clearly define the parameters of the testing as well as

what constitutes a failed test. It is also imperative that the employer consistently apply its own policy to each employee or applicant.[4]

As will be discussed next, the more difficult questions arise not from the drug test itself, but how the employer responds when an employee or applicant tests positive for marijuana.

C. Hiring and Firing

The decision to hire or terminate an employee can be difficult and fraught with legal pitfalls. While adding marijuana to the mix seemingly complicates the decision even further, planning for this eventuality will put employers in the best position to take the correct and lawful action. Among states that have medical marijuana programs, the laws differ in what they require of employers. Some medical marijuana statutes, like in Pennsylvania and Rhode Island, provide that employers cannot discriminate against employees "solely" on the basis of their status as a medical marijuana user. See 35 P.S. § 10231.2103(b)(1), 21 R.I. Gen. Laws § 21-28.6-4(d). Other state laws, like in Minnesota and Delaware, go a bit further by prohibiting employers from terminating employees who test positive for medical cannabis, unless they can demonstrate the individual was impaired on-the-job. See Minn. Stat. § 152.32(3)(c), DE Code Tit. 16 § 4905A(a)(3).

State court decisions from the early part of this decade emphasized marijuana's illegal status under federal law and found in favor of employers on these issues. In Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518 (Ore. 2010), the employer discharged an individual after he disclosed that he was a registered medical cannabis user, and the employee filed suit under the state's disability discrimination statute. The Oregon Supreme Court held that the employer did not act unlawfully in terminating the employee, ruling that because federal law prohibited the use of cannabis, the employer discharged the employee for engaging in illegal activity and the Oregon disability statute did not apply. Courts in California and Washington have issued similar decisions. See Ross v. Raging Wire Telecommunications, Inc., 174 P.3d 200, 204 (Ca. 2008); Swaw v. Safeway, Inc., No. 15 cv-939-MJP, 2015 WL 7431106, *1-2 (W.D. Wash. Nov. 20, 2015). Likewise, the Colorado Supreme Court held that, although the use of medical cannabis is lawful under state law, an employer could terminate an employee who used medical cannabis because it is still unlawful under federal law. Coats v. Dish Network, LLC, 350 P.3d 849, 852-53 (Colo. 2015).

More recent decisions, however, have signaled a potential swing of the pendulum. In March 2017, the Supreme Judicial Court of Massachusetts held that a plaintiff who was discharged when she tested positive on a drug test administered shortly after she accepted an offer of employment stated a prima facie case of discrimination because she was a "handicapped person" under the state's disability statute, and her use of medical marijuana recommended by her doctor was a "reasonable accommodation."

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[4] Employers who are alleged to enforce a drug test policy selectively, as opposed to uniformly, could expose themselves to a potential discrimination claim. See, e.g., Perkins v. Nat'l Express Corp., 105 F. Supp. 3d 970, 978 (N.D. Cal. 2015) (denying defendant's motion for summary judgment seeking to dismiss claims by African American employee that his selection for random drug testing amounted to unlawful race discrimination).

Barbuto v. Advantage Sales and Marketing, 78 N.E. 3d 37, 43-48 (Mass. March 9, 2017). Similarly, a Rhode Island trial court ruled that federal law did not preempt Rhode Island's medical marijuana statute, and the employer's termination of an employee for medical marijuana use was a violation of both the state's medical marijuana law and civil rights statutes. See Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 WL 2321181 (R.I. Super. Ct. May 23, 2017); see also Noffsinger v. SSC Niantic Operating Company, 273 F. Supp. 3d 326 (D. Conn. 2017) ("plaintiff who uses marijuana for medical purposes in compliance with Connecticut law may maintain a cause of action against an employer who refuses to employ her for this reason").

The wider acceptance of marijuana, including by the courts, appears likely to result in amendments to state marijuana laws providing more protections for employees. For instance, legislation proposed in New Jersey provides an employee with three days to prove enrollment in the state medical marijuana program before the employer can take action against the employee for a positive test for marijuana. See NJ A2482 [2016] and NJ S2161 [2016]. Further, before taking any adverse employment action, the employer, under the proposed legislation, would be required to show by a preponderance of the evidence that the employee's use of medical marijuana "has impaired the employee's ability to perform the employee's job responsibilities." Id.

Despite this backdrop, because many medical marijuana programs are in their early stages, some states have not addressed the legality of hiring and firing decisions based on marijuana use. Thus, any decisions to hire or fire based on a positive drug test for marijuana should be preceded by an examination of the employee's status under the applicable medical marijuana statute. Even if the state statute is not explicit, the employer should engage in an interactive process (under the ADA and applicable state law) with the applicant or employee and consider (1) whether a reasonable accommodation is available and (2) whether the employee can perform the essential functions of the job despite the off-site use of marijuana. In all cases, the employer should examine and document hiring and firing decisions to ensure there is a basis other than an employee's status as a lawful user of cannabis, such as safety or an inability to effectively complete the employee's essential job functions.

D. Employee Working Conditions and Reasonable Accommodations

Employers in states where medical marijuana is legal must also be mindful of the ADA, 42 U.S.C. §§ 12101, et seq. and similar state anti-discrimination laws. The ADA generally prohibits employers from discriminating against employees with disabilities and requires employers to make accommodations for employees with a disability, so long as the accommodation does not impose an "undue hardship" on the employer. See 42 U.S.C. § 12112. Because individuals certified to use medical marijuana are using marijuana to treat a diagnosed medical condition, they will usually qualify as "disabled" under the ADA and similar state laws.

Under the ADA, however, an individual who is currently using "illegal drugs" does not qualify as "disabled." See 42 U.S.C. § 12114. Because the ADA is a federal law and federal law still considers marijuana an "illegal drug," the ADA currently does not require the accommodation of the use of medical marijuana. It is nevertheless instructive for employers to think about medical marijuana in this context because

many state laws require such an accommodation, either expressly in the state's medical marijuana statute or through judicial interpretation of the state's medical marijuana statute or employment discrimination laws. Thus, in states where medical marijuana is legal, it is good practice for employers to treat medical marijuana like they would any other medicine. This puts employers in the best position to ensure they are compliant with state law.

With this in mind, employee manuals and job descriptions should clearly define the essential duties of each job position, and in particular, whether a particular job is "safety-sensitive." If a job is "safety sensitive" and defined as such, the employer may, in certain states or circumstances, have a legitimate, non-discriminatory basis for refusing to accommodate medical marijuana use. See, e.g., 35 P.S. § 10231.510(3) ("A patient may be prohibited by an employer from performing any task which the employer deems life-threatening, to either the employee or any of the employees of the employer, while under the influence of medical marijuana.")

Employers should also have an established protocol for discussing accommodations with applicants and employees, one that engages the individual in an interactive process to determine if an accommodation is required and feasible. One accommodation in this context would be to allow the employee to lawfully use cannabis away from the workplace and outside of work hours, since most—if not all—state medical marijuana laws do not require employers to accommodate the possession or use of marijuana on the premises. Before declining an accommodation, the employer should ensure that its decision is legitimately tied to undue hardship in accommodating the employee, the employee's inability to complete the job, or (for current employees) a decline in the employee's performance. And the decision, as well as the decision-making process, must be documented. As with any employment policy, this process will only be successful if those involved in the accommodation process (like managers, supervisors, and Human Resources employees) are trained on the policy and required to implement it in every instance.

IV. Conclusion and Takeaways

As this memorandum has made clear, "legal marijuana" is here to stay, and marijuana use is becoming more widely accepted by the American public. Indeed, a February 2017 opinion poll conducted by Quinnipiac University[5] found that 94% of respondents supported legalization of medical marijuana and 60% supported recreational marijuana. However, employers have a legitimate interest in maintaining a safe and productive workplace that is free from illicit drugs. And marijuana remains a banned substance under federal law. With these sometimes conflicting narratives as a backdrop, here are steps employers can take to ensure they are operating within the guidelines of the federal framework and evolving state marijuana laws:

- Where does your business fall? Gain an understanding of the laws and regulations that apply to your business and employees. Are you operating in a state that has legalized medical marijuana? Recreational marijuana? Are you subject to the

[5] Quinnipiac University Poll, "U.S. Voter Support For Marijuana Hits New High," April 20, 2017. https://poll.qu.edu/national/release-detail?ReleaseID=2453

DFWA? Do you have employees that work in "safety-sensitive" positions? You must answer these questions before knowing how to navigate this developing area of the law.

- Marijuana is still illegal under federal law. While state marijuana laws have changed significantly in the last decade, the CSA still classifies marijuana as a Schedule I substance. Federal contractors, federal grantees, and businesses covered by the DOT must ensure that they comply with the DFWA and prioritize the mandate of federal law over any state marijuana statute.
- Know your state (and local) laws. Despite the federal ban on marijuana, employers must be mindful of—and compliant with—state marijuana laws and employment statutes. Some cities and municipalities may also place additional requirements on employers in areas like reasonable employment accommodations.
- Train and inform your employees. Employment policies are only as good as the managers empowered to implement them. Take this opportunity to meet with Human Resources and those with hiring and firing authority to discuss a plan for addressing a positive drug test or an employee who discloses that they are a medical marijuana user. Likewise, employees and applicants cannot be expected to know or follow policies unless they are provided with them at the outset of their employment.
- Review employment policies and job descriptions. While the advent of legal marijuana is not a cause to tear up your employee handbook and start over, it offers a great opportunity to review and update these policies. Because the designation of a job as "safety-sensitive" is paramount in determining whether a reasonable accommodation may be required under state law, it is important that your job descriptions clearly designate it as such. If you have a "zero tolerance" drug testing policy, define "zero tolerance" and other essential features of the policy.

If you should have any questions or require assistance regarding these issues, please contact William Bogot, Joshua Horn, Joseph McNelis, or Lee Szor of Fox Rothschild's Cannabis Law Practice Group.

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