

Client Alert **Employment & Labor**

Employer Cautions Regarding Drug Testing for Medical Marijuana Users

This month, a federal court in Connecticut granted summary judgment to a job applicant after an employer refused to hire her because she tested positive for marijuana in a pre-employment drug test. Although the decision – *Noffsinger v. SSC Niantic Operating Company, LLC, d/b/a Bride Brook Nursing & Rehab Center* – has immediate implications for Connecticut employers, it has long-term implications for employers operating in states with medical marijuana laws like New York and New Jersey.

Background of Case

Plaintiff Katelin Noffsinger was diagnosed with post-traumatic stress disorder (PTSD) in 2012 after being in a car accident. Her doctors recommended treating her PTSD with medical marijuana, which she began using in 2015. As required by the Connecticut Palliative Use of Marijuana Act (PUMA), plaintiff registered with the Connecticut Department of Consumer Protection as a qualifying patient for the use of medical marijuana.

Defendant Bride Brook Nursing & Rehab Center (“Bride Brook”), a government contractor, recruited plaintiff in 2016 for the position of Activities Manager, and made her a job offer contingent on her passing a pre-employment drug test. The plaintiff informed Bride Brook that she took prescription marijuana in the evenings as a “qualifying patient” under PUMA. Bride Brook rescinded the job offer after the drug test revealed a positive result for THC, a chemical component of marijuana.

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2018

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The District Court Grants the Plaintiff's Summary Judgment Motion

The plaintiff sued Bridge Brook, alleging it violated PUMA's anti-discrimination provision, which states:

"[U]nless required by federal law or required to obtain funding: . . .
No employer may refuse to hire a person or may discharge, penalize
or threaten an employee solely on the basis of such person's or
employee's status as a qualifying patient."

Bride Brook raised several arguments to defend against the plaintiff's motion for summary judgment, but the court found they were all meritless. First, Bride Brook argued the federal Drug Free Workplace Act (DFWA), which requires federal contractors to make a "good faith effort" to maintain a drug-free workplace and which Bride Brook had adopted, barred it from hiring plaintiff. The Court rejected this argument, holding the DFWA does not prohibit employers from hiring people who use federally prohibited drugs outside the workplace, especially an employee who uses medical marijuana outside the workplace and during off-hours in accordance with a program approved by state law. Second, Bride Brook argued the federal False Claims Act barred it from hiring someone who uses marijuana in violation of federal law because employment would amount to a defrauding of the federal government. Similar to its reasoning on the DFWA claim, the Court found that the False Claims Act does not apply to the use of drugs outside work hours.

Third, Bride Brook claimed that PUMA only prohibits discrimination against an employee on the basis of her status as a "qualified patient" and not on the basis of her actual use of medical marijuana. The court rejected Bride Brook's theory, stating that it "makes no sense" to interpret PUMA this way, as the ability to use medical marijuana is the sole purpose of obtaining authorization under PUMA and defendant's interpretation would nullify the statute's purpose and protections. Additionally, the Court noted that PUMA allows employers to restrict using or being under the influence of "intoxicating substances" during work hours, which implies that an employer cannot discipline an employee for the use of intoxicating substances, such as medical marijuana or even alcohol, outside work.

Implications for Employers

Medical marijuana is a developing area of law with significant conflicts between the way state laws and federal laws treat its use. Despite the legalization of medical marijuana in both New Jersey and New York, marijuana remains a Schedule I controlled substance, which creates complex issue for employers, especially those in certain industries (like health care in this case) that are subject to heavy federal regulation.

Although the *Noffsinger* decision is not binding and an appeal to the Second Circuit is likely, other federal courts may find it persuasive, especially in states with robust medical marijuana laws that provide employee-friendly protections. Thus, it is important for employers to know the marijuana laws in each of the states they have employees.

For instance New Jersey's and New York's medical marijuana laws do not currently contain an anti-retaliation provision that would prohibit adverse employment actions based on lawful medical marijuana use, so the precise reasoning used by the Court in *Noffsinger* would not be applicable in these states. However, there is pending legislation in New Jersey to amend its medical marijuana law to prohibit discrimination against a qualifying medical marijuana patient, unless the employer can demonstrate by a preponderance of evidence that the employee's lawful medical marijuana use impairs their ability to do their job. So, in the near future, this decision may be very relevant in New Jersey. Under the New York State Human Rights Law, employers are specifically not permitted to discriminate against employees because they are certified to use medical marijuana. Thus, in both states, this decision will likely have an impact.

Employers should be sure to continuously evaluate their policies and practices concerning employee use of marijuana outside the workplace and work with counsel to monitor the developments in the statutory scheme in states where they have offices. The following attorneys in our Employment and Labor Law Practice Group can assist employers regarding the issues raised in this alert.

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