State Medical Marijuana Statutes: A Gateway to Employee Discrimination and Wrongful Termination Claims

by Grace Byrd

Across the nation, employers face uncertainty regarding the treatment of employees who are medical marijuana users. To date, 23 states and Washington D.C. have enacted statutes that permit individuals to use medical marijuana under certain circumstances.[1] Approximately half of those states have only enacted statutes within the past five years.[2] Most recently, on July 7, 2014, New York enacted a state medical marijuana law; similar medical marijuana legislation is currently pending in Missouri, Ohio, and Pennsylvania.[3]

The recent surge in states passing medical marijuana laws has created an unexpected challenge for employers, leaving them in the dark regarding the impact of these laws. Few statutes directly address the use of medical marijuana in the workplace. Indeed, the New Jersey Compassionate Use Medical Marijuana Act does not address the impact of medical marijuana use by employees.

Reviewing recent case law, as well as comparing state statutes, will provide some helpful insight to employers who are navigating this new dynamic in the workplace.

Comparison of State Statutes

State statutes pertaining to the use of medical marijuana provide considerable ranges regarding the protections, if any, provided to employees. To date, only seven states, Arizona, Connecticut, Delaware, Illinois, Maine, New York and Rhode Island, have medical marijuana laws that expressly proclaim employers may not make certain employment decisions based on an employee's (or applicant's) use of medical marijuana. Even in those seven state statutes, the specific statutory language varies significantly.

The medical marijuana laws in Connecticut, Maine and Rhode Island statutorily prohibit employers from taking adverse actions against employees based on their protected statuses as medical marijuana users.[4] For instance, the Maine Medical Use of Marijuana Act[5] sets forth that an employer may not refuse to "employ" or "otherwise penalize a person solely for that person's status as a qualifying patient or a primary caregiver unless failing" to do so would cause the employer to violate federal law or cause it to lose a federal contract or funding.[6] The Maine Medical Use of Marijuana Act further states it should "not be construed to require" "[a] n employer to accommodate the ingestion of marijuana in any workplace or any employee working while under the influence of marijuana."[7] Therefore, it appears that the act would prohibit an employer from discriminating against an employee for medical marijuana use outside of the workplace, even though it does not require an employer to accommodate marijuana use in the workplace or allow employees to work while impaired. Neither the Maine Medical Use of Marijuana Act nor Connecticut or Rhode Island's comparable medical marijuana statutes expressly address drug testing.

The Arizona Medical Marijuana Act and Delaware Medical Marijuana Act expressly prohibit discrimination against certain patients who test positive for marijuana.[8] Those Arizona and Delaware statutes also incorporate exceptions to the anti-discrimination rules for drug testing if the patients used, possessed, or were impaired by marijuana while on the employer's premises or during working hours.[9] The Delaware Medical Marijuana Act allows discipline if the employee was "impaired by marijuana on the premises of the place of employment or during the hours of employment."[10] The Arizona Medical Marijuana Act incorporates a similar provision regarding discipline and clarifies that the employers are not required to "allow the ingestion of marijuana in any workplace or any employee to work while under the influence of marijuana."[11] Some commentators have opined that because these use, possession and impairment exclusions are not well defined, it is difficult for employers to rely on those statutory exclusions.[12]

The Illinois Compassionate Use of Medical Cannabis Pilot Program Act provides an employee who uses medical marijuana some limited protections from discrimination based on the employee's status as a medical marijuana patient.[13] The Illinois pilot program, which Illinois will automatically repeal four years after its Aug. 1, 2013, effective date, sets forth certain actions that an employer may take related to an employee's medical marijuana use. For instance, an employer has the right to discipline a marijuana user if the employee's medical marijuana use would cause an employer to lose a federal contract, or if the employee violated a workplace drug policy.[14] Further, the Illinois pilot program permits an employer to discipline an employee who is impaired, using or possesses marijuana at work.[15] Unlike the medical use laws of other states, such as Arizona, the Illinois pilot program attempts to define the term "impairment."[16] However, because the Illinois pilot program places the burden on an employer to determine if an employee is impaired, an employer risks being unable to show it had a "good faith belief" the employee was impaired at work.[17]

The recently enacted New York Compassionate Use Act also includes some guidance regarding medical marijuana in the workplace.[18] Most notably, the New York law seems to require an employer to accommodate an employee who uses medical marijuana, because the legislation expressly states that medical marijuana use will be considered a disability under the New York State Human Rights Law. This unique provision in the New York law will likely create contention.

Employers in most other states with medical marijuana laws do not have statutory guidance regarding how to handle employees who use medical marijuana. For instance, the New Jersey act does not expressly require employers to accommodate medical marijuana users and does not include an employee anti-discrimination provision.[19] Employee litigation has been prevalent in those states that have medical marijuana statutes that are silent regarding workplace issues.[20]

Developing Case Law: Courts Consistently Uphold Employer Workplace Rules and Decisions Regarding Medical Marijuana Use in the Workplace

The rush of state medical marijuana laws has led to a flurry of employee discrimination and wrongful termination claims. Court decisions interpreting medical marijuana laws have consistently found that employers do not have a duty to accommodate and may discipline employees for marijuana use.[21]

Plaintiffs have challenged employer decisions on various grounds, including that the employer violated public policy, violated state medical marijuana law, or did not accommodate an employee who has a disability pursuant to federal or state anti-discrimination law. Courts have consistently upheld employer actions and workplace rules against medical marijuana use.

One of the most publicized cases in this area is *Casias v. Wal-Mart Stores, Inc*.[22] In *Casias*, an employee sued his employer, Wal-Mart, for wrongful termination after he was fired for testing positive for marijuana in violation of its anti-drug policy. To determine whether the employer wrongfully terminated the plaintiff, the Sixth Circuit interpreted the Michigan Medical Marijuana Act (MMMA), which provides that a medical marijuana patient "shall not be...denied any right or privilege...including but not limited to...disciplinary action by a *business* or occupational or professional licensing board or bureau for the medical use of marijuana in accordance with this act...."[23]

The Sixth Circuit found the MMMA's use of the word "business" did not include private employers and did not otherwise restrict employment decisions based on an employee's use of medical marijuana. The Sixth Circuit affirmed the district court's finding that a broad interpretation of the MMMA could prohibit any Michigan business from "issuing any disciplinary action against a qualifying patient who uses marijuana in accordance" with the MMMA, and also would be "at odds with the reasonable expectation that such a far-reaching revision of Michigan law would have been expressly enacted."[24]

Further complicating this area is the interplay between state medical marijuana laws and federal laws such as the federal Controlled Substances Act (CSA), which classifies marijuana as a Schedule I substance.[25] Despite U.S. Attorney General Eric Holder Jr.'s announcement last year that the U.S. Department of Justice will not challenge state laws that legalize medical marijuana use, marijuana use remains a violation of federal law.[26] Courts have continued to rely on the fact that marijuana use violates federal law to justify upholding employee terminations.

For instance, in April 2013, the Colorado Court of Appeals in *Coats v. Dish Network, L.L.C.*,[27] affirmed a trial court's judgment dismissing a plaintiff's complaint,

alleging his employer unlawfully terminated him pursuant to Colorado's Lawful Activities Statute.[28] In *Coats*, the plaintiff, a quadriplegic who was a licensed Colorado medical marijuana patient, failed a random drug test and was fired for violating the company's drug policy. The former employee claimed his termination was a discriminatory employment practice, because his employer terminated him for smoking marijuana off duty. He allegedly never used marijuana at the workplace, and was never under the influence of marijuana while at work. The Colorado Court of Appeals found the plaintiff's termination was lawful because, despite Colorado's decision to permit the use of medical marijuana, the plaintiff's use of medical marijuana was subject to and prohibited by federal law. Decisions like *Coats* have strengthened the argument that employers in states that do not expressly address medical marijuana use in the workplace may continue to discipline employees for using medical marijuana.

In Jan. 2014, the Colorado Supreme Court granted a *writ of certiorari* in *Coats*, agreeing to decide whether Colorado's lawful activities statute protects employees from termination for lawful off-duty use of medical marijuana, where it does not affect job performance.[29] A definitive ruling from the Colorado Supreme Court would offer much-needed guidance to Colorado employers, and would likely impact employers throughout the nation.

In contrast, employees have sought protection pursuant to another federal law, the Americans with Disabilities Act (ADA).[30] However, courts that have addressed this issue have held that the ADA does not protect employees who use medical marijuana, because the ADA does not cover employees who currently use illegal drugs, and because marijuana use is illegal under federal law.[31] While the ADA has not provided a successful avenue for employee lawsuits, courts may interpret broader state anti-discrimination laws to protect employees with disabilities who use medical marijuana in accordance with applicable state law.

Recent Employee Test to the New Jersey Act

On March 14, 2014, Charlie Davis filed a complaint in Essex County against his employer, New Jersey Transit, related to his use of medical marijuana.[32] Davis's complaint is reportedly the first employment-related claim testing an employee's use of medical marijuana pursuant to the New Jersey act.[33] Davis alleges he uses medical marijuana to treat a neuropathy of his lower extremities, and that he voluntarily disclosed his use of medical marijuana to his employer. Subsequently, Davis's employer forced him to take a drug test, and he tested positive for marijuana. His employer then informed him he could not hold any position at New Jersey Transit. Davis asserted claims for disability discrimination, perceived disability discrimination and discriminatory termination/failure to accommodate pursuant to the New Jersey Law Against Discrimination (LAD).

If the *Davis* action continues through the state court system, the outcome may shed some light on how New Jersey employers should treat medical marijuana users. However, any decision from a trial court will likely be subject to appeal due to medical marijuana use being a fervently contested issue on the national stage, as well as in New Jersey.

Conclusion

State medical marijuana laws have obscured the already sensitive area of employee drug testing and related employer policies and actions. Particularly in states with medical marijuana statutes that do not address workplace issues, like New Jersey, employers do not have guidance regarding whether there is a duty to accommodate medical marijuana users or whether employers may discipline employees for using marijuana. Until those states directly address the issue of employees' use of medical marijuana, employers should look to recent court decisions from other jurisdictions, which suggest that employers may continue to enforce reasonable anti-drug policies.

While court decisions have consistently been employer friendly, the state statutes at issue in those cases did not expressly prohibit discriminating against qualifying medical marijuana users in employment decisions. Therefore, employers in states such as Connecticut, Maine and Rhode Island, which have marijuana laws with some parameters regarding medical marijuana in the workplace, cannot rely upon those cases, and instead should make sure their employee policies and practices are consistent with applicable state law. In contrast, because the New Jersey act does not expressly provide employee protections, New Jersey employers have a stronger position for enforcing workplace drug policies and disciplining employees who violate those policies. For now, until *Davis* or a similar case addresses this issue, it does not appear New Jersey has expressly established such a duty.

Employers should presume employees will continue to pursue claims based on employment decisions related to medical marijuana use. Given the various factors impacting these claims, such as the effect of the CSA, employers will likely continue to face uncertainty.

It is prudent for employers to keep apprised of developments and carefully draft policies on drug use in the workplace, and then reasonably and evenly implement them. All employers who have employees in states that have adopted medical marijuana laws should educate managers regarding the requirements of such laws, and update their policies, as needed, to reflect any new legal requirements.

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Endnotes

1. Bara Vaida, Medical Marijuana OK'd in More States in 2014, WebMD Health News, (May 22, 2014), http://www.webmd.com/pain-management/news/20140522/medical-marijuana-more-states ("Nine other states passed laws that allow medical marijuana, but only for children with seizure disorders.").
2. *See* Office of National Drug Control Policy, Marijuana Resource Center: State Laws Related to Marijuana, available at http://www.whitehouse.gov/ondcp/state-laws-related-to-marijuana, (last visited, May 24, 2014); National Conference of State Legislatures, *State Medical Marijuana Laws*, (May 16, 2014), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.
3. *Id.*; Lorenzo Ferrigno and Haimy Assefa, New York legalizes medical marijuana, CNN.com, (July 8, 2014), http://www.cnn.com/2014/07/07/health/new-york-medical-marijuana/.
4. *See* Jesse McKinley, New York Senate Passes Bill on Medical Marijuana, *N.Y. Times* (June 20, 2014), *available at* http://www.nytimes.com/2014/06/21/nyregion/new-york-senate-passes-bill-on-medical-marijuana.html?_r=0; Palliative Use of Marijuana, Conn. Gen. Stat. § 21a-408, *et seq.*; Maine Medical Use of Marijuana Act, 22 M.R.S. § 2421, *et seq.*; The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, R.I. Gen. Laws § 21-28.6-1 *et seq.* (2013).
5. 22 M.R.S. § 2421.
6. 22 M.R.S. § 2423-E.
7. 22 M.R.S. § 2426.
8. *See* A.R.S. § 36-2813; 16 Del. C. § 4905A(a)(3).
9. Stacy A. Hickox, Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment, 29 *Hofstra Lab. & Emp. L.J.* 273, 278 (2012).
10. Del. Code. Ann. tit. 16 § 4904A (2014).
11. A.R.S. § 36-2814(B) ("Nothing in this chapter prohibits an employer from disciplining an employee for ingesting marijuana in the workplace or working while under the influence of marijuana").
12. *See, e.g.*, Hickox, *supra* note 9.
13. 410 ILCS 130/1, *et seq.* (2014).
14. 410 ILCS 130/50(d) and (c).
15. 410 ILCS 130/50(f).
16. *Id.*
17. 410 ILCS 130/50(g).

18. New York Compassionate Use Act, Bill No. A06357E, http://assembly.state.ny.us/leg/?bn=A06357.
19. N.J.S.A. § 24:6I-1, *et seq.*
20. Dustin Stark, Comment, Just Say No: Foreclosing a Cause of Action for Employees Seeking Reasonable Accommodation Under the New Jersey Compassionate Use Medical Marijuana Act, 43 *Seton Hall L. Rev.* 409 (2013).
21. Several state courts, including those in California, Montana, Oregon and Washington have held that employers do not have a duty to accommodate and may discipline or terminate employees for marijuana use. *See Ross v. Raging Wire Telecommunications, Inc.*, 42 Cal. 4th 920 (2008) (finding former employee terminated for testing positive for marijuana use had no claim against employer for failure to accommodate use of medical marijuana and no claim for wrongful termination in violation of state public policy); *Johnson v. Columbia Falls Aluminum Co., LLC*, 2009 MT 108N (March 31, 2009) (affirming the dismissal of plaintiff's claims based on the Americans with Disabilities Act and Montana's state fair employment statute, finding employer did not have a duty to accommodate off-duty medical marijuana use); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Ore. 159 (2010) (finding employer was not required to accommodate employee's use of medical marijuana); *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wn. 2d 736 (Wash. 2011) (upholding employer's discharge of an employee for medical marijuana use).
22. 695 F.3d 428 (6th Cir. Mich. 2012).
23. Mich. Comp. Laws § 333.26424(a) (2014) (emphasis added).
24. *Casias*, 695 F.3d at 436-37.
25. *See* Barbara L. Johnson, Out of Joint: How the Growing Disconnect Between Federal and State Marijuana Laws Impacts Employers, BloombergLaw.com (2013), http://about.bloomberglaw.com/practitioner-contributions/out-of-joint-how-the-growing-disconnect-between-federal-and-state-marijuana-laws-impacts-employers/.
26. *See* Eva Perez, No federal challenge to pot legalization in two states, CNN.com (Aug. 30, 2013), http://www.cnn.com/2013/08/29/politics/holder-marijuana-laws/; *see also* Bloomberg View, Eric Holder's Hazy Vision on Pot, BusinessWeek.com, (Feb. 6, 2014), http://www.businessweek.com/articles/2014-02-06/u-dot-s-dot-marijuana-laws-time-for-some-clear-eyed-logic.
27. *Coats v. Dish Network, L.L.C.*, 2013 COA 62 (Colo. Ct. App. 2013).
28. Colo. Rev. Stat. § 24-34-402.5.
29. *Coats*, 2014 Colo. LEXIS 40.
30. 42 U.S.C. § 12101 *et seq.* The ADA specifically states that the term "individual with a disability" does not include those who are currently engaged in the illegal use of drugs, when the [employer] acts on the basis of such use. 42 U.S.C. § 12210(a).
31. *See*, *e.g.*, Johnson, *supra* note 25.
32. Complaint, *Davis v. N.J. Transit Corp.*, Docket No. ESX-L-1778-14 (Law Div. March 14, 2014).
33. *See* Susan K. Livio, NJ Transit sued for suspending employee in medical marijuana program, *The Star-Ledger* (April 4, 2014), *available at* http://www.nj.com/politics/index.ssf/2014/04/nj_transit_sued_for_suspending_employee_in_medical_marijuana_program.html#incart_m-rpt-1; Matt Ferner, This Medical Marijuana Patient Was Sent To Rehab By His Employer—Now He's Fighting Back, HuffingtonPost.com (April 9, 2014), http://www.huffingtonpost.com/2014/04/09/charlie-davis-medical-marijuana-new-jersey_n_5107650.html; Karen Rouse, Medical marijuana a dilemma for NJ Transit worker, The Record (April 1, 2014), *available at* http://www.northjersey.com/news/medical-marijuana-a-dilemma-for-nj-transit-worker-1.839462?page=all.