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Budding Issue: Do the State Laws Legalizing Medical Marijuana Provide Job Protection?

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Twenty-three states and the District of Columbia recognize the mounting evidence that marijuana has the ability to provide medical relief for numerous medical conditions. They are not alone. Eighty-six percent of Americans believe that doctors should be allowed to prescribe marijuana for medical purposes.[1]

While marijuana is legal for medical purposes in twenty-three states[2] and the District of Columbia, most of the statutes stop short of affording employees any job protection when using marijuana for medical reasons. One explanation for this is that the primary objective of legalizing marijuana is to protect the medical users and their primary caregivers from criminal liability under state criminal statutes.

State Statutes that Explicitly Prohibit Discrimination

Arizona, Delaware, Maine, and Minnesota provide the most extensive protection thus far to employees. The statutes prohibit discrimination against a person in hiring, termination, or any term or condition of employment or otherwise penalize a person if the discrimination is based upon either: the employee's status as a cardholder or as a registered cardholder who tests positive for marijuana.

None of the four statutes specifically state that they provide a private cause of action. One would assume that legislation that prohibits discrimination would instinctively create a private cause of action. However, in the absence of any specific statutory language, it is up to the courts to decide. The only state supreme court to address this question directly thus far is Maine's. The Maine supreme court recognized that section 2423-E(1) of Maine's Medical Use of Marijuana Act provides a private cause of action for qualifying patients and primary caregivers who have been discriminated against by their employers. *Savage v. Me. Pretrial Servs.*, 58 A.3d 1138 (Me. 2013).

If the statutes create a private cause of action then another set of issues are raised. For example:

- Is the employer discriminating against an employee if the employer is more vigilant with an employee who holds a card vs. an employee that does not?

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[1]Roni Jacobson, "Medical Marijuana: How the Evidence Stacks Up," May 1, 2014, http://www.scientificamerican.com/article/medical-marijuana-how-the-evidence-stacks-up/.

[2] Other states are currently considering their positions on this issue, so this number may have changed after this paper was written.

- What if the employer only drug tests the employee who holds a card? Would this constitute discrimination?
- What if the employer begins testing the employee more frequently than his/her co-workers after the employee tests positive for drugs, but the test reflected the employee is not currently under the influence of marijuana?
- What if the employer never tested its employees for marijuana, even though its handbook says it will, then after an employee informs the employer that s/he is a registered cardholder, the employers starts to test the employee?
- Unlike other accommodations - if the employer conducts pre-employment drug test the employee will be forced to reveal medical conditions when the employee would otherwise not have to.

Arizona, Delaware, and Minnesota statutes provide **two** exceptions: "unless failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations, an employer may not discriminate against ..." and "unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment."

The Maine statute also provides the first exception, but it does not include the second. Instead, Maine permits an employer to prohibit smoking marijuana for medical purposes on the premises as long as the employer prohibits all smoking on the premises. Maine is the only state that provides the potential opportunity for an employee to legally smoke marijuana at work.

Interestingly enough, the first exception was drafted by all four state legislatures to only exclude employers who would face a financial loss if required to comply with the state statute. By including this particular exception, legislatures most definitely preempted future litigation.

There are two federal laws that specifically address controlled substances: the Controlled Substance Act ("CSA") 21 U.S.C. § 801 *et al.* and the Federal Drug-Free Workplace Act ("DFWA") 41 U.S.C. §§ 701 *et al.*

The Controlled Substance Act ("CSA") 21 U.S.C. § 801 *et al.* regulates the production, distribution, and possession of five "Schedules" of controlled substances. CSA 21 U.S.C. § 812 classifies Marijuana[3] as a Schedule 1 drug. The CSA **does not** implement any regulations upon employers with regard to their employees and the use of marijuana.

The Federal Drug-Free Workplace Act ("DFWA") 41 U.S.C. §§ 8102, 8103 imposes a drug-free workplace requirement only on institutions receiving federal contracts in excess of $100,00 or receiving federal grants. The DFWA does NOT apply to all other private employers. In order to remain eligible for federal funds, the DFWA requires contractors and grantees to comply with seven requirements: 1) publish a statement notifying employees that involvement with controlled substances is prohibited in the workplace; 2) give employees a copy of this statement; 3) notify employees in this statement that they must abide by its terms and report drug convictions for violations occurring in the workplace within five days; 4) notify the appropriate

[3] Spelled in the CSA as "marihuana."

agency within 10 days after receiving notice of any such conviction; 5) establish a program to inform employees of the dangers of drug abuse, the employer's anti-drug policy, available counseling or rehabilitation, and penalties for drug abuse violations; 6) impose a sanction on or require rehabilitation of an employee with a drug conviction; and 7) make a good faith effort to maintain a drug-free workplace.[4]

The DFWA does not require employers to drug test their employees; in fact the legislative history precludes the imposition of drug testing of employees as part of the implementation of the Act.[5] Additionally, the DFWA **does not** require employers to fire employees who use marijuana at home; **does not** require employers to report positive drug test to the federal government, and employers that recognize state laws permitting employees to use marijuana at home will not lose federal contracts. Rather, an employer will only be penalized if it fails to comply with the DFWA requirements.[6]

Since the DFWA applies only to a select group of employers, most employers in Arizona, Delaware, Maine, and Minnesota are prohibited from discriminating against an employee who is a registered cardholder or is a registered cardholder that has tested positive for marijuana.

The second exception in the three statutes expresses the responsibilities that the Occupational Safety and Health Act ("OSHA") 29 U.S.C. § 651 imposes on employers. OSHA requires employers to maintain a safe workplace. Maintaining a safe workplace logically includes prohibiting an employee from working while under the influence of marijuana, which is quite different than testing positive. Traces of THC can be detected in someone's urine several days after the person has used marijuana and can be detected even longer in hair.[7] The statutes take this into account and draw a distinction. Employers are prohibited from discriminating against an employee who tests positive for marijuana.

Whereas, Connecticut's statute specifically states: "non-federally funded" employers are prohibited "from discriminating against employees or prospective employees on the basis of their status as a 'qualifying patient.'" The statute stops short of specifically stating an employer is prohibited from discriminating against an employee or prospective employee who tests positive for marijuana. Yet, it is highly probable that a "qualifying patient" will test positive for marijuana. So, it seems counterintuitive to prohibit employers from discriminating against employees permitted to use marijuana for medical reasons, but allow an employer to discriminate against an employee for exercising that right. However, the Connecticut statute also provides:

> Nothing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances **during work hours** or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours.[8] (Emphasis added.)

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4 41 U.S.C. §§ 8102(a)(1), 8103(a)(1).

5 United States Dept. of Labor, *Drug-Free Workplace Act of 1988, Frequently Asked Questions*, http://www.dol.gov/elaws/asp/drugfree/screenfq.htm.

6 41 U.S.C. §§ 8102(a)(1), 8103(a)(1).

7 http://www.drugabuse.gov/publications/marijuana-facts-teens/want-to-know-more-some-faqs-about-marijuana. THC is the main active chemical in marijuana.

8 Conn. Gen. Stat. Ann. § 21a-408p.

When considering the statute in it entirety, a negative inference can be deduced from this subdivision that employers in Connecticut cannot discriminate against employees who test positive for marijuana but are not under the influence. We will have to wait and see if the court agrees.

New York takes a different approach. The statute specifically states a certified patient is deemed to have a 'disability' "under article fifteen of the executive law (human rights law), section forty–c of the civil rights law ..." Section forty-c states in pertinent part: "all persons within the jurisdiction of this state shall be entitled to the equal protection of the laws of this state or any subdivision thereof."

Illinois' four-year pilot program only permits an employer to penalize a person for their status as a patient or caregiver if failing to do so would cause the employer to violate federal law or would cause the employer to lose federal funding or license. However, the statute also **does not** prohibit an employer from enforcing a zero tolerance or a drug free workplace as long as the policy is enforced in a non-discriminatory manner. This particular caveat permits employers to discriminate against an employee who is legally using marijuana. As many employers have a drug fee workplace and zero tolerance policies, an employee in Illinois will have to choose between his/her job and relief.

Rhode Island's statute provides some protection but falls short of complete protection. It states: "[n]o school, employer or landlord may refuse to enroll, employ or lease to or otherwise penalize a person solely for his or her status as a cardholder." R.I. Gen Laws § 21-28.6-4 (2011). It also states that an employer does not have to accommodate the use of marijuana in any workplace. This exception, as discussed below, depending on how it is interpreted, may leave an employee jobless even though s/he is a legitimate cardholder.

State Statutes That Do Not Specifically Prohibit Discrimination

Many of the other states that have also legalized medical marijuana do not specifically prohibit employers from discriminating against employees who are registered users.[9] So the question is do the statutes create a negative inference that discrimination is prohibited?

The U.S. District Court for the Western District of Michigan, applying Michigan law, ruled that the Michigan Medical Marihuana Act does not provide a private right of action against employers who terminate medical marijuana users. It also held that the discharged employee could not recover under a wrongful discharge theory. The court noted that the act's provision that an employer need not accommodate the ingestion of marijuana in the workplace or any employee working while under the influence of marijuana "does not operate as a negative inference, prohibiting private employers from disciplining an employee who uses medical marijuana away from the workplace." *See Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914 (W.D. Mich.).

[9] See chart attached.

In contrast to the state statutes discussed above, many other statutes state that employers do not have to accommodate the medical use of marijuana in some way, but the legislatures fall short of specifically stating whether the employers do not have to accommodate employee use of medical marijuana outside the workplace.

The statutes that are most open for interpretation are:

- Alaska Stat. § 17.37.030 (d) - "Nothing in this chapter requires any accommodation of any medical use of marijuana in any place of employment."
- Amendment 20, the Colorado Constitution's provision allowing the use of medical marijuana, provides that an employer is not "required to accommodate the medical use of marijuana in any place."
- N.J. Stat. Ann. §24:6I-14 - "Nothing in this act shall be construed to require ... an employer to accommodate the medical use of marijuana in any workplace."
- Oregon - "Nothing in ORS 475.300 to 475.346 shall be construed to require: ... (2) An employer to accommodate the medical use of marijuana in any workplace."

The phrase "in any workplace" could be interpreted two ways:

- Employers do not have to accommodate an employee actually using marijuana during work hours; or
- Employers do not have to accommodate an employee's use of marijuana at all.

The Oregon Supreme Court decided that an employer does not have to accommodate the use of medical marijuana, but did not reach this conclusion by interpreting the phrase "in any workplace." An employee was terminated after he informed his employer of his medical marijuana use. The court held that an employee terminated for medical marijuana use had no claim for relief under Oregon's anti-discrimination statutes, which for disability cases tracked and relied upon the federal Americans with Disabilities Act ("ADA") 42 U.S.C. § 12101 *et seq.* The ADA does not require an employer to accommodate an employee's use of illegal drugs. The court found that medical marijuana use is an "authorized use" under state law; however, the Controlled Substances Act, which makes marijuana illegal for medicinal use, preempted state law. *See Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 536 (Or. 2010). So, the court never had to interpret what the legislature meant by "[a]n employer to accommodate the medical use of marijuana in any workplace."

In contrast, the following statutes do a better job of defining the parameters:

- Mass. Gen. Laws ch. 94C, App. § 1-7 - "Nothing in this law requires any accommodation of any **on-site** medical use of marijuana in any place of employment ...."
- Mich. Comp. Laws § 333.26427 provides "... (c) Nothing in this act shall be construed to require: ... (2) An employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana."
- N.H. Rev. Stat. Ann. § 126-X:3 - Employer is not required to accommodate the therapeutic use of cannabis on the property or premises of any place of employment, and the statute does not limit the employer's ability to discipline an employee for ingesting cannabis in the workplace or for working while under the influence of cannabis.

The language in these three statutes suggests that it was the legislatures' intent to require an employer to accommodate an employee's use of medical marijuana just not the actual use of it while at work.

In 2000, Colorado became the fifth state to legalize medical marijuana when the voters passed Amendment 20 to the state constitution. However, Amendment 20 does not require employers to accommodate the use of medical marijuana in any workplace. Yet, Colorado also has a Lawful Activities Statute. So, arguably an employee terminated for testing positive would constitute a wrongful termination under the state's Lawful Activities Statute. The Colorado Supreme Court is currently considering this very question and a decision is expected any day.[10]

Washington's Medical Use of Marijuana Act (a/k/a MUMA) specifically states employers do not have to accommodate on-site medical use of marijuana in any place of employment, Wash. Rev. Code § 69.51A.060(4), and also does not require an employer to accommodate the use of medical marijuana if it establishes a drug-free workplace. Wash. Rev. Code § 69.51A.060 (6). Washington's supreme court concluded that MUMA does not create a private cause of action for discharge of an employee who uses medical marijuana. It further found that the act did not create a clear public policy to support a wrongful discharge in violation of public policy claim. In this case, the employee brought claims for wrongful termination and violation of public policy. See *Roe v. TeleTech Customer Care Mgmt.* (Colo.) LLC, 257 P.3d 586 (Wash. 2011)

In contrast, Montana's medical marijuana statute allows an employer to prohibit employees from using marijuana, and it specifically states it does not create a cause of action for wrongful discharge. Mont. Code Ann. § 50-46-320. In 2009, the supreme court in Montana affirmed that the statute does not create an expressed or implied cause of action for wrongful termination. The court also determined that an employee terminated for testing positive for marijuana use could not state a claim under either the ADA or Montana's Human Rights Act for an employers' failure to accommodate his medical marijuana use. *See Johnson v. Columbia Falls Alum. Co.*, 213 P.3d 789 (Mont. 2009).

Nevada takes a different approach. An employer is not required to allow the medical use of marijuana in the workplace but is required to "make reasonable accommodations for the medical **needs** of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card ...." What does this mean? The language of the statute as a whole would suggest employers are required to accommodate employees' use of medical marijuana but do not have to allow the employees to use or be under the influence of marijuana in the workplace. If the term "in the workplace" is interpreted to mean an employer can prohibit

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[10] In *Coats v. Dish Network, LLC*, 303 P.3d 147 (Colo. App. (2013), a quadriplegic employee was licensed to use medical marijuana under Amendment 20. He used medical marijuana according to the limits of his license; he never used marijuana on the employer's premises; and he was never under the influence of marijuana at work. He tested positive for marijuana, and his employer, Dish Network terminated his employment for violation of the company's drug policy. A decision by Colorado's Supreme Court is imminent. The court is considering: "whether federally prohibited but state-licensed medical marijuana use is "lawful activity" under section 24-34-402.5, C.R.S. 2012, Colorado's Lawful Activities Statute." If it is lawful activity, then Coats was wrongfully discharged.

the use of marijuana all together, then the subsequent accommodation requirement would be impractical.

The state statutes legalizing medical marijuana provide a wide range of protection or lack thereof. Most of the statutes are not clear about what if any job protection an employee has. The last thing a sick employee can afford is the loss of his/her job and health insurance. So many employees are left literally dazed and confused about whether or not to risk the use of marijuana to ease their suffering.

Yet, the fact that the statutes exist demonstrates there is a movement in this country to legalize marijuana for medical purposes. It is progressing like many other movements have in the past, i.e., same sex marriage. However unlike same sex marriage, there is a federal law standing in the way. As long as marijuana remains classified as a Schedule 1 drug under the CSA, employee protection in the workplace will be limited.

If the federal government were to reclassify marijuana, it would be a game changer. The Americans with Disabilities Act does not require employers to accommodate an employee's use of illegal drugs.[11] As a legal drug, which marijuana would be if it were to be reclassified as a Schedule 2 drug, employers would be required to accommodate a disabled employee's use of marijuana for medical purposes. As federal law preempts state law, employees in every state would be provided this protection and would have a private cause of action. Additionally, the state statutes that say employers do not have to accommodate an employee's use of marijuana in the workplace would be clearly trumped by federal law.

Until the federal law is changed, the movement will advance on the same path via state law, creating vast differences in protection to employees using marijuana for medicinal reasons.

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[11] 42 U.S.C. § 12114(a).