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The Legalization of Medical Marijuana Poses Challenges for Employers

Now that nearly half of the states in the country (and the District of Columbia) have legalized or decriminalized medical marijuana, employers nationwide are left with the difficult question of whether they must – or can – accommodate the use of medical marijuana in the workplace. Unfortunately, it's a question with no clear answer.

Which states have legalized medical marijuana?

As of August 21, 2014, the following states have legalized or decriminalized medical marijuana: Alaska, Arizona, California, Colorado,[1] Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington.[1]

Which states require employers to accommodate the use of medical marijuana in the workplace?

Every state's medical marijuana statute is different, and not all require employers to accommodate the use of medical marijuana in the workplace. In fact, the medical marijuana statutes in Alaska, California, Colorado, Hawaii, Massachusetts, Michigan, Montana, Nevada, New Jersey, Oregon and Washington all include language either stating or implying strongly that employers *do not* need to accommodate the medical use of marijuana in the workplace.

Conversely, Arizona, Connecticut, Delaware, Illinois, Minnesota, New York and Rhode Island expressly prohibit discrimination against employees or applicants because of their status as medical marijuana cardholders or because they tested positive for marijuana (subject to certain exceptions described later in this article), and thus require employers to accommodate the use of medical marijuana.[2] The District of Columbia, Maryland, New Mexico and Vermont are silent on the issue of employer accommodation of medical marijuana.

While currently there are more states with pro-employer language in their medical marijuana statutes than there are states with anti-discrimination provisions, the tide may quickly be changing. Of the eight states that legalized medical marijuana in or after 2011, *five* passed statutes prohibiting discrimination in employment on the basis of an individual's status as a medical marijuana cardholder.

But what about the federal government?

Marijuana – medical or otherwise – is illegal under federal law, placing state laws and federal law directly in conflict. Likewise, employers with certain federal contracts are required to comply with the federal Drug-Free Workplace Act, which requires the prohibition of the use of all illegal drugs while at work, including marijuana.

The federal government appears unwilling to address or otherwise rectify these inconsistencies. Shortly after taking office, Attorney General Eric Holder announced formal guidelines for federal prosecutors in states that have authorized the use of medical marijuana, stating that prosecutors should not allocate federal resources to

[1]Recreational marijuana also is legal.

[2]Maine also prohibits an employer from refusing to employ a person solely because of the individual's status as a "qualifying patient." As Maine requires all substance abuse policies to be preapproved by the state government, however, we will not be addressing this statute.

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"individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." On August 29, 2013, the Department of Justice announced it would not challenge Washington's and Colorado's laws legalizing recreational marijuana, indicating the marijuana issue is not a priority for the current administration.

Employers should note that every state with a provision prohibiting discrimination against medical marijuana cardholders also includes an exemption for employers for whom compliance with the state law would result in the loss of a monetary- or license-related benefit under federal law or regulation(s). Employers should evaluate whether this exemption applies.

Balancing state and federal laws – what does this mean for employers?

If you think there are no medical marijuana users in your workplace, think again. According to a December 2012 study by the Medical Marijuana Policy Project, there are an estimated 1,029,315 medical marijuana patients in the United States.[3] Considering these estimates, employers cannot ignore medical marijuana laws with the hope of not encountering a medical marijuana cardholder.

To date, the courts that have considered the issue all have held that employers are not required to accommodate the use of medical marijuana in the workplace. None of these decisions, however, involved medical marijuana statutes containing an anti-discrimination provision. Therefore, it unfortunately remains unclear how anti-discrimination provisions of medical marijuana laws will be interpreted.

Employers in states with medical marijuana laws – particularly those operating in states with anti-discrimination provisions – should examine their current drug-testing practices and review any existing substance abuse policies. Employers in states prohibiting discrimination on the basis of an individual's status as a medical marijuana cardholder are faced with a difficult choice. They must decide whether to risk disregarding state law because marijuana remains illegal under federal law and state law cannot require it be accommodated or to comply with the state law and, when necessary, accommodate medical marijuana cardholders.

That being said, Arizona, Connecticut, Delaware, Illinois, Minnesota, New York and Rhode Island all allow for employers to discipline or terminate employees who are impaired by marijuana while at work.[4] Employers may find it difficult, however, to demonstrate an employee actually was working while impaired by marijuana. Unlike alcohol, an individual can test positive for marijuana days or weeks after he or she last used the drug. Further, this exemption would not apply to applicants who test positive during a routine pre-employment drug test but produce a valid medical marijuana card to explain the positive test result, as it is difficult to see how an employer would establish an *applicant* was impaired by medical marijuana while at work.

[3]The study compiled the number of state-issued medical marijuana cards in states requiring mandatory registration of medical marijuana cards and included extrapolated estimates for states where registration is not mandatory.

[4]The specific provisions vary by state.

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With limited case law and inconsistent statutes, employers should consider carefully how they wish to handle the “medical marijuana issue.” Employers operating in states where medical marijuana is legal should consult with ADP TotalSource® for guidance. Employers in states that have not yet legalized medical marijuana should keep a close eye on the news – your state may be next.

This article was developed in cooperation with Jackson Lewis LLP.