Insight

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Pennsylvania's Medical Marijuana Act Leaves Employers' Ability to Enforce Strict Drug-Free Workplace Policies Hazy

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On April 17, 2016, Pennsylvania Governor Tom Wolf signed legislation authorizing the use of medical marijuana (the Medical Marijuana Act or MMA) in Pennsylvania. The new law – effective May 17, 2016 – allows patients suffering from a variety of ailments, including HIV/AIDS, autism, cancer, and post-traumatic stress disorder, to use marijuana to treat their conditions. Smoking marijuana is still illegal under the MMA, and marijuana may only be dispensed using alternative delivery systems such as pills, oils, topical gels, creams or ointments. Under the new law, medical marijuana will be dispensed only to an individual (or a caregiver of an individual) who receives a certification from a medical provider and an identification card issued by the Pennsylvania Department of Health.

The MMA poses challenges for employers intending to enforce drug-free workplace policies, especially considering the new law directly conflicts with federal law prohibiting the use of marijuana.

Marijuana Remains Illegal under Federal Law

Under the federal Controlled Substance Act ("CSA"), marijuana is designated a Schedule I controlled substance.[1] The U.S. Supreme Court clarified over a decade ago that there is no exception to the CSA's prohibitions on manufacturing and distributing marijuana for medical necessity, holding that the states do not have the authority to legalize what Congress has deemed unlawful.[2] Because medical marijuana remains illegal under federal law, employers are not required to accommodate its

1 21 U.S.C. § 802(16). It is illegal for physicians to prescribe Schedule I controlled substances.

2 *United States v. Oakland Cannabis Buyers Co-Op*, 532 U.S. 483 (2001); *Gonzales v. Raich*, 545 U.S. 1 (2005).

use under the Americans with Disabilities Act ("ADA"). Additionally, federally mandated drug-free workplace programs, including those subject to the jurisdiction of the U.S. Department of Transportation, require employers to report positive marijuana test results, regardless of whether an employee's use of marijuana is for medicinal purposes.[3]

Pennsylvania's Medical Marijuana Act's Robust Anti-Discrimination Provisions

Although each law's protections vary, Pennsylvania now joins a handful of states, including Delaware[4] and Connecticut,[5] that prohibit employment discrimination against employees who use medical marijuana. The MMA prohibits employers from discharging, threatening, refusing to hire, discriminating or retaliating against employees "solely on the basis of such employee's status as an individual who is certified to use medical marijuana." In other words, taking adverse action against an employee based solely on the individual's status as a medical marijuana cardholder would likely be considered discrimination under the MMA. The MMA does not, however, require employers to accommodate the use of marijuana on the job "when the employee's conduct falls below the standard of care normally accepted for that position," and allows employers to discipline employees who are "under the influence" of medical marijuana at work. The law is silent as to whether an employer can rely upon a positive drug test as a reason for an adverse employment action in itself, or as evidence of impairment.

The MMA allows additional flexibility for employers with safety-sensitive work environments, specifying these employers may prohibit employees from doing any of the following while under the influence of marijuana:

- Operating or controlling government-controlled chemicals or high-voltage electricity;
- Performing duties at heights or in confined spaces, including mining; or
- Performing any tasks that threaten the life of the employee or his/her coworkers.

While this list is helpful in providing clarification to employers with workers in safety-sensitive positions, unfortunately, the enumeration of exceptions to the general rule against discrimination suggests that the law may be interpreted to prohibit other restrictions. Moreover, nothing is done to reconcile this list with the basic provision that no employer need accommodate any employee being under the influence while at work. As written, the law makes it clear that an employer should not engage in status-based discrimination against a medical marijuana cardholder; the exceptions suggest an employer may also be asked to accommodate the marijuana use, as long as it does not occur at work.

While the MMA provides some protection for employers with employees in safety-sensitive positions, it creates new practical problems for Pennsylvania employers in the drug-testing process. As an initial matter, testing vendors are not generally able to distinguish between positive test results caused by smoking marijuana (illegal under the MMA) and ingesting marijuana in an approved form.

3 DOT Office of Drug and Alcohol Compliance Notice (Feb. 22, 2014); 49 C.F.R. §40.151.

4 Del. Code. Ann. Tit. 16 § 4905A (a)(3)

5 Conn. Gen. Stat. Ann. § 21a-408p (b)(3).

Moreover, it is unclear how employers can determine whether an employee is "under the influence" of marijuana while at work. Observations are helpful, but do not identify the cause of the impairment; tests show recent drug use, but are not very useful to assess the individual's level of impairment at the time of the test. Many employers use urine samples for drug tests; however, urine testing may reveal use weeks prior to testing. While saliva testing shows more recent use, the results still provide no definitive answer whether an employee was under the "influence of marijuana" on the job. Indeed for safety-sensitive positions involving performing duties at heights or in confined spaces, including mining, the law specifies that the threshold must be measured at 10 nanograms of active tetrahydrocannabis per milliliter of blood in serum.

Guidance for Pennsylvania Employers in Navigating the New Law

Because the MMA is in direct conflict with federal law, the anti-discrimination provisions will likely be subject to legal challenge. Unfortunately, until then, employers must navigate this issue carefully. The following are some affirmative steps employers can take to bolster drug-free workplace policies:

- Ensure that all employment policies and handbooks make clear that testing positive for an illegal drug – *including medical marijuana* – is a policy violation, and that the employer reserves the right to take adverse action based upon such test results to the fullest extent permitted under the law.
- Review all drug-testing policies and ensure that justifications and safety-sensitive positions, including any task that may be deemed life threatening, are fully explained.
- Have discussions with vendors regarding testing protocols and how positive marijuana tests will be handled and reported. In the event of a positive marijuana test, medical review officers should be instructed to have a discussion with an employee regarding whether he or she has a state-issued medical marijuana identification card.
- If an employee has a valid state-issued medical marijuana identification card and occupies a safety-sensitive position, employers should engage in the interactive process to determine if an accommodation other than permitting the use of medical marijuana is available.

It would be prudent for employers to have individualized discussions with any employee using medical marijuana to manage expectations and alleviate misunderstandings.

Conclusion

Although the MMA will become effective on May 17, 2016, the MMA identifies various reports and regulations that must be developed and implemented by the Commonwealth before it can be fully implemented. Nonetheless, employers should prepare now for the impact of its implementation.