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Ohio Becomes the Latest State to Legalize Marijuana for Certain Medical Uses While Avoiding Constitutional Ballot Initiatives

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Last year, Ohio legislators found themselves caught in the middle of a media firestorm created by various pro-legalized marijuana groups who were politically savvy and financially funded enough to place multiple proposed constitutional amendments on Ohio's November 2015 election ballot. While Ohio voters soundly rejected the proposed constitutional amendments—which also sought to legalize recreational marijuana use and create a small monopoly of marijuana grow site operators—the proponents' "back door" efforts to create new Ohio law through a state constitutional amendment instead of through the legislative process did not go unnoticed by members of Ohio's General Assembly. The intense media attention and political polling from last year's ballot initiatives also made clear that Ohioans were ready to legalize marijuana for medical purposes.

Beginning early in 2016, both houses of Ohio's General Assembly worked quickly and collaboratively to draft comprehensive legislation that would legalize certain uses of marijuana in Ohio for medical purposes. On June 8, 2016, Ohio Governor John Kasich signed the legislation into law. Although the new law technically takes effect on September 6, 2016, Ohio must first take steps to establish the Medical Marijuana Control Program (or the MMCP), which will oversee the new law and which could take up to two years to be fully operational.

The new law allows patients suffering from a qualifying medical condition, which includes over 20 conditions, including HIV/AIDS, epilepsy, cancer, and post-traumatic stress disorder, to use marijuana. Under the new law, medical marijuana will be dispensed only to an individual (or a caregiver of an individual) who is registered with the state and has been issued a patient or caregiver identification card. Before that happens, the state's Department of Commerce and the State Board of Pharmacy must establish rules for the licensure of cultivators, processors, and retail dispensaries as well as for the registration of patients and caregivers.

The following forms of medical marijuana may be dispensed: oils, tinctures, plant material, edibles and patches. In addition, vaporization of medical marijuana is permitted. Notably, smoking or combustion of medical marijuana is not authorized under the law.

Marijuana Remains Illegal under Federal Law

Of course, under the federal Controlled Substance Act (“CSA”), marijuana is still designated as 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 use under the Americans with Disabilities Act (“ADA”), although, depending on the circumstances, employers may need to accommodate the medical condition that underlies the marijuana use. 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 uses marijuana for medicinal purposes.

Ohio Employers Can Still Maintain a Drug-Free Workplace

For employment purposes, Ohio’s medical marijuana law tracks federal law. The new law preserves Ohio employers’ right to establish and enforce drug-testing, drug-free workplace, and zero-tolerance drug policies. Specifically, the new Ohio law:

- Does not require an employer to permit or accommodate an employee’s use, possession or distribution of medical marijuana.
- Does not prohibit an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person because of the person’s use, possession, or distribution of medical marijuana.
- Does not permit a person to commence a cause of action against an Ohio employer for refusing to hire, or otherwise taking an adverse employment action against a person with respect to the terms, conditions, or privileges of employment related to medical marijuana.

The explicit protections for employers in the new Ohio law should provide employers some comfort. In comparison, about one third of the other states that have legalized medical marijuana provide protections for workers who use medical marijuana, while Ohio workers are provided no such relief.³

In addition, Ohio employees who are terminated for violating an employer’s formal policy regulating the use of medical marijuana will be considered “discharged for just cause” under Ohio’s Unemployment Compensation Law. As a result, individuals who have been discharged for using medical marijuana will likely be deemed ineligible for unemployment benefits.

1 21 U.S.C. § 802(16). Also, it is still 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).

3 For example, Arizona, Delaware, Maine, Minnesota, Nevada, New York, Pennsylvania, and Rhode Island have enacted medical marijuana laws that provide protections for workers who use medical marijuana. However, the scope and protections afforded to workers using medical marijuana vary from state to state. Accordingly, it is critical to consult the actual law itself to determine the rights and obligations of an employer under each law.

Guidance for Ohio Employers in Navigating the New Law

The new Ohio medical marijuana law provides an opportunity for employers to review their drug-free workplace policies to ensure they meet the mandates of this law and the ever-changing landscape across the country. Another reason to bolster a drug-free workplace policy now and in advance of the MMCP's establishment is to set clear guidelines for employees, who may believe that their right to use medical marijuana commenced this week. Here are some tips:

- **The policy should prohibit illegal drug use, regardless of where or when the use occurs.**

Very often, drug policies prohibit the use of illegal drugs only at work, during work hours and/or on the work premises. Similarly, policies sometimes only prohibit being under the influence of illegal drugs at work or on work premises. This becomes problematic because marijuana may show up in a drug test hours, days, and sometimes weeks (for chronic users) after an individual has used or consumed marijuana. Simply prohibiting illegal conduct saves an employer from a debate over when the marijuana use occurred.

- **Define illegal drugs to include all drugs illegal under “federal, state or local law.”**

Communicating your expectations to workers is important. Make clear that so long as the drug is illegal under federal law, it will be illegal under your policy, without regard to whether it is legal under state law. An ambiguous policy may lead to confusion and suggest that the use of marijuana obtained through the medical marijuana program is permitted under your policy.

- **Make clear that because marijuana is (still) illegal under federal law, it is considered an illegal drug under the drug-free workplace policy and prescription drug policy.**

While Ohio does not provide protection to workers who use medical marijuana, a multistate employer should consider adding an additional sentence stating the employer “will accommodate the use of medical marijuana only as may be required by law.”

Conclusion

While the effective date of the Ohio medical marijuana law is September 6, 2016, it is possible it will take up to two years for the MMCP to be established. Nevertheless, employers can and should prepare now for the impact of its implementation.