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U.S. Supreme Court holding that federal law preempts state medical marijuana laws and strengthens ground for employers to refuse to accommodate medical marijuana use at work.

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Employers Exhale: United States Supreme Court Medical Marijuana Decision Aids Employer Anti-Drug Programs

By Nancy N. Delogu and Dale L. Deitchler

Employer drug and alcohol abuse prevention and testing programs recently received a boost when the U.S. Supreme Court ruled in *Gonzales v. Raich*, No. 03-1451 (June 6, 2005), that state laws authorizing the use of marijuana to treat illness do not insulate drug users from federal law making such behavior criminal. Had the Court ruled otherwise, pot-smoking workers would have been able to justify almost any marijuana use in those states with "compassionate use" laws, and the ruling would have required employers to permit workers to engage in such use, possibly on-duty. Justice Stevens authored the opinion for a 6-3 majority.

The case was brought by two women with serious medical conditions who use marijuana daily pursuant to California's Compassionate Use Act and upon doctors' recommendations. A few years ago, state and federal officials raided the home of one of these women, Diane Monson. The California officers concluded that her use of marijuana was entirely lawful under California law. Nevertheless, the federal officers seized and destroyed her six marijuana plants and charged her with possession. While no similar raid was conducted on the home of Angel Raich, who relies on two caregivers to provide her with the drug, Monson and Raich filed suit to avoid a similar occurrence in the future, and to ensure that they would be able to continue to use cannabis as medication.

The women obtained relief from the U.S. Court of Appeals for the Ninth Circuit. The appeals court ruled that the federal Controlled Substances Act, which regulates all drug use in the United States, was unconstitutional to the extent it sought to regulate local cultivation and consumption of drugs not intended for sale or distribution. The appeals court also entered an injunction directing federal officials to cease prosecuting individuals who cultivated and used marijuana for personal medical use. The U.S. Supreme Court reversed.

Medical Uses of Marijuana

Setting aside political concerns about marijuana use — and many who advocate legalization of marijuana see "medical marijuana" laws as a significant step toward legalizing the substance for everyone — there is a body of medical literature finding that marijuana has some beneficial medicinal effects. Well-known benefits include easing nausea and stimulating hunger in those who suffer from wasting diseases.

A form of marijuana is available in a prescription drug form (trade name Marinol), which can be legitimately prescribed by physicians. However, many people with serious health conditions complain that the prescription medication does not act quickly enough or is less effective than smoked marijuana. Federal health officials are reluctant to support efforts to legalize the use of the marijuana plant, however, since there is no way to control dosage and ensure quality and standardization. Moreover, there is an understandable reluctance among health experts to suggest that smoking marijuana is healthy, since marijuana smoke, like tobacco smoke, contains harmful compounds that can cause lung cancer and related diseases. There are side effects, too, that can be harmful, particularly if the drug is used regularly over time.

Ten states have so-called "compassionate use" or "medical marijuana" laws, which typically permit individuals with health conditions to ease the pain of chronic conditions with marijuana if their doctor or health care practitioner suggests such use. In those states — Alaska, Arizona, California, Colorado, Maine, Montana, Nevada, Oregon, Vermont, and Washington¹ — employers may be asked to hire or to continue to employ workers who test positive for marijuana use on the ground that such use is akin to prescription drug use. In fact, while doctors may recommend marijuana use, they are prohibited from prescribing marijuana, making it difficult for employers to verify whether such use is truly

authorized for medical purposes. Before the decision, many employers found themselves forced to guess whether they were obligated to permit these workers to use marijuana at or before work in order to comply with state disability discrimination laws or whether they should prohibit such use, given its apparent unlawful character under federal law.

Commerce Clause Analysis

Ms. Raich's counsel argued that the Controlled Substances Act's prohibition on the manufacture, cultivation or use of a drug for personal use is overbroad when applied to individuals. Individuals, they argued, are not involved in "interstate commerce" – the predicate for federal authority to legislate – when they engage in these activities solely for their own use and the use of their families and friends.

The Supreme Court rejected that argument, concluding that Congress, pursuant to the Commerce Clause of the U.S. Constitution, has the right to regulate an entire class of economic activity (in this case, the sale and distribution of drugs) that substantially affects interstate commerce, even if the activity in and of itself is of a noncommercial nature. The fact that the ill women who brought the case cultivated the drug locally or obtained it from friends and used it only to treat themselves did not justify their exemption from the law. According to the Court, although the impact of an individual's use on the overall market would be small, the impact of many such users in the aggregate would undermine the efficacy of the regulatory scheme, particularly when 10 states already have laws authorizing such use. We have "never required Congress to legislate with scientific exactitude," wrote Justice Stevens. When Congress decides that the "total incidence" of a practice poses a threat to a national market, even an illegal market, it may regulate the entire class.

The opinion, which five other Justices joined,

points out that if Congress did not have the right to regulate the local cultivation and use of marijuana, it would also lack the right to regulate the production and consumption of any drug produced solely for personal use and/or limited distribution, regardless of whether a state had enacted a medical marijuana law. The Court noted that Congress' right to regulate economic activity by and between the states includes not only the right to regulate such activity, but also the right to prohibit the activity altogether, as it has elected to proscribe marijuana use and trafficking. In particular, the Court also considered the estimated \$10 billion annual black market for marijuana and the risk that marijuana grown for home consumption would be drawn into that market as proof that significant interstate commerce issues exist.

The Court candidly laments the fact that its ruling may deprive very ill persons from a drug that might ease their pain, but notes that since Congress has the authority to legislate in this area, only Congress may amend the federal law to permit marijuana use by certain individuals. The Court's opinion did not address other arguments advanced in the lower courts, such as medical necessity, but it appears that other arguments in favor of judicial, rather than legislative action are doomed to fail.²

Accommodating Medical Marijuana Users

The decision does not overturn the state medical marijuana laws, which primarily direct state law enforcement not to prosecute those who use marijuana in accordance with state limits on medical use and cultivation. Employers, however, can now feel confident in refusing to accommodate such use by affirming that this conduct remains illegal under federal law.

Employers should understand that they may still have to consider accommodating an

employee or applicant whose medical condition has led to a recommendation of marijuana use. Although federal anti-disability discrimination law permits employers to refuse to accommodate an individual who currently uses an illegal drug, state law in jurisdictions that permit medical marijuana may be more protective, if the drug use is related to the health condition. Even so, employers can refuse to consider accommodations that would acknowledge or support illegal activity; a "reasonable" accommodation is likely to include steps like allowing an employee the opportunity to transition to another medication (e.g., Marinol) or other treatment.

Employers who wish to communicate clearly to employees and applicants should say that state-authorized marijuana use is not accepted as legitimate drug use under the employer's policy. (Marijuana use is not and never has been recognized as a legitimate excuse under U.S. Department of Transportation rules regulating drug use among transportation employees.) Policies also should carefully prohibit all illegal drug use, and not just drug use that occurs on work time or while at work, since most employer drug testing programs measure only the quantity of drug in a person's system, and cannot determine when the substance was ingested.

Nancy Delogu is a Shareholder resident in Littler's Washington, D.C. office and Dale Deitchler is a Shareholder resident in the Firm's Minneapolis office. Each specializes in substance abuse and testing issues. If you would like further information, please contact your Littler attorney at 1.888.LITTLER, info@littler.com, Ms. Delogu at nndelogu@littler.com or Mr. Deitchler at ddeitchler@littler.com.

¹ Maryland has a law that limits the sanction that a medical marijuana user may face if arrested by state or local authorities, and many other states, like Virginia, have laws that permit marijuana use by a doctor's permission, but which are not effective, because doctors may not lawfully prescribe marijuana.

² See, e.g., *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001) (refusing to read into the Controlled Substances Act an exception for medical necessity.)