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## Medical Marijuana Dispensaries Are Now Operating in Arizona

By Neil Alexander and Kristy Peters

On December 3, 2012, an Arizona Superior Court judge issued an order holding that the federal Controlled Substances Act (CSA) does not preempt the Arizona Medical Marijuana Act. Three days later, the first medical marijuana dispensary opened in Arizona.

The regulations of the Arizona Medical Marijuana Act (AMMA) divide the state into 126 Community Health Care Analysis Areas (CHAAs), and each CHAA is allowed one medical marijuana dispensary. In *White Mountain Health Center Inc. v. Maricopa County, Arizona Department of Health Services*, the plaintiff, a medical marijuana dispensary, requested an injunction against defendants Maricopa County and the Arizona Department of Health Services (ADHS). The dispensary alleged Maricopa County improperly denied it the zoning documentation necessary to operate a medical marijuana dispensary within its CHAA, and the ADHS improperly denied its application for a medical marijuana facility due to Maricopa County's refusal to provide zoning documentation.

In their defense, Maricopa County and the ADHS argued that the AMMA is preempted by the CSA and, therefore, the AMMA is unconstitutional. The defendants argued that the AMMA stands as an "obstacle" to the full purpose and objectives of Congress and that it is "physically impossible" to comply with both federal and state law. The court disagreed. It held that the AMMA did not interfere with the federal government's ability to enforce the CSA and it does not conflict with the purpose of the CSA. The court also held that requiring Maricopa County to confirm zoning compliance was not aiding and abetting illegal conduct, so it was not physically impossible to comply with both the CSA and the AMMA.

As a result, the court granted the dispensary's request for an injunction and ordered Maricopa County to confirm zoning compliance so the White Mountain Health Center could submit its completed medical marijuana dispensary application to the ADHS. Three days later, the first Arizona dispensary opened its doors, and others will soon follow.

### What This Means for Employers

There are currently more than 30,000 medical marijuana cardholders in Arizona. The majority of these cardholders requested the ability to cultivate their own medical marijuana because there

were no operating dispensaries. Now, dispensaries are beginning to open, giving cardholders the opportunity to purchase medical marijuana. With the dispensaries opening, it is anticipated that the number of cardholders will increase.

Employers should ensure that their drug-testing policies are updated to comply fully with the Arizona Drug-Testing of Employees Act to take advantage of the safe harbors that are provided. Specifically, the safe harbors provide that no cause of action can be brought against an employer who has established a policy and initiated a testing program in accordance with Arizona law for certain actions. Such actions include:

- Actions in good faith based on the results of a positive drug test or alcohol impairment test;
- Failure to test for drugs or alcohol impairment or failure to test for a specific drug or other controlled substance;
- Failure to test or, if tested, to detect any specific drug or other substance, any medical condition or any mental, emotional, or psychological disorder or condition;
- Termination or suspension of any substance abuse prevention or testing program or policy;
- Actions based on the employer's good faith belief that an employee used or possessed any drug while on the employer's premises or during hours of employment;
- Actions based on the employer's good faith belief that an employee had an impairment while working while on the employer's premises or during hours of employment; and
- Actions to exclude an employee from performing a safety-sensitive position, including reassigning the employee to another position or placing the employee on paid or unpaid leave, based on the employer's good faith belief that the employee is engaged in the current use of any drug, whether legal, prescribed by a physician, or otherwise, if the drug could cause an impairment or otherwise decrease the employee's job performance or ability to perform the employee's duties.

Additionally, employers should update policies prohibiting employees from being impaired at work and from possessing or using medical marijuana at work, as well as policies prohibiting discrimination based on an employee's status as a medical marijuana cardholder. Most notably, companies that require pre-employment drug testing must develop a legally compliant action plan for applicants who test positive for marijuana and present a valid AMMA card. Applicants using medical marijuana do not need to be placed into safety-sensitive jobs; however it is unlawful to automatically disqualify all applicants from employment consideration based on a positive test without conducting a proper analysis of the types of jobs available within the company that may accommodate off-duty medical marijuana use.

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