A Timely Analysis of Legal Developments

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Minnesota Medical Marijuana Law Will Cloud Employer Drug-Free Workplace Efforts

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On May 29, 2014, Minnesota Governor Mark Dayton signed into law legislation making Minnesota the 23rd jurisdiction to adopt a law authorizing the use of medical marijuana.[1] The new Minnesota medical marijuana law (MML) promises to cloud and add complexity to administration of Minnesota employers' drug-free workplace programs and compliance with and rights under the Minnesota Drug and Alcohol Testing in the Workplace Act (DATWA).[2]

Does a Minnesota employer have to accommodate an employee with a verified marijuana positive test result because that employee consumed marijuana in accordance with the MML? The MML's terms suggest that the answer may be "yes," at least in some circumstances. While the supreme courts in four states and one federal appeals court have answered "no" to that question, those states' medical marijuana laws do not include employee protections like those provided in the MML.

No Federal Law Protection

Marijuana is designated a Schedule I (illegal) controlled substance under the federal Controlled Substance Act (CSA).[3] Many years ago, the U.S. Supreme Court settled any doubt about whether individuals could lawfully grow or use marijuana for medicinal purposes despite that designation, ruling that Congress has the authority to make such uses unlawful and that the states cannot legalize what Congress had made unlawful.[4] Given marijuana's illegal status at the federal level, employers have no duty to accommodate its use under the Americans with Disabilities Act.5[5]Additionally, the U.S. Department of Transportation and other federally mandated drug-free workplace programs have steadfastly rejected medicinal marijuana use as a basis to report a

1 The other jurisdictions are: Alaska, Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, and Washington. In addition, in 2014 New York's Governor Andrew Cuomo, by executive action, initiated a 20-hospital pilot program permitting hospital participants to prescribe medical marijuana.

2 Minnesota Statutes §§ 181.950-181.957.

3 21 U.S.C. § 802(16). Regulations implementing the law are codified at 21 C.F.R. § 1308.

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

5 *See, e.g., James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012), *cert. denied*, 2013 U.S. LEXIS 3912 (2013); *Barber v. Gonzales*, 2005 U.S. Dist. LEXIS 37411 (2005). However, notably this issue has not been decided under the disability discrimination laws of many states.

positive marijuana test result as excused or "negative" on a federally mandated test.[6] Thus, there is no general protection under federal law for marijuana consumption. The MML is thus directly contrary to the federal CSA, which defines and criminalizes marijuana as including "all parts of the plant Cannabis . . . resin extracted from any part of such plant and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin."

Historically, Minnesota has Authorized Employment Action on the Basis of a Verified Positive Marijuana Test Result

Minnesota law presently permits employers to take adverse employment action on the basis of a verified positive marijuana test result, provided the employer is in compliance with the detailed requirements of the DATWA. Significantly, however, DATWA defines "drug" as "a controlled substance as defined in" the Minnesota Controlled Substances Act (MN-CSA).[7] MN-CSA, like the federal CSA, designates marijuana ("all parts of the plant . . . Cannabis"[8]) as a controlled substance, the unlawful use of which is a crime under state law.[9] The MML now amends the MN-CSA to decriminalize certain use of "medical cannabis" ("any species of the genus cannabis plant"), notwithstanding that the MN-CSA continues to criminalize other marijuana use.

General MML Provisions

The MML generally provides state criminal and civil protections to patients who enroll in a state registry program who may use or possess marijuana, and registered caregivers who possess marijuana.[10] Registry participation requires certification by a health care practitioner[11] that a patient has been diagnosed with one of nine qualifying medical conditions: cancer, glaucoma, HIV/AIDS, Tourette's Syndrome, amytrophic lateral sclerosis (ALS), seizures, Crohn's disease, "severe and persistent muscle spasms," terminal illness (with a probable life expectancy of under one year) as well as any other medical condition or its treatment approved by the Minnesota commissioner of health.[12] Unusually, only marijuana use "delivered" via liquids, pills or a vaporized delivery method that uses liquid or oil and not requiring use of dried leaves/plants is protected. Under the MML, medical marijuana will be distributed through in-state manufacturers registered by the Minnesota Commissioner of Health (there is no provision for patients to grow/process and then use their own medical cannabis).[13]

MML Employment Protections Go Beyond Those Adopted by Any Other State

Unlike the great majority of state medical marijuana legislation, the MML directly prohibits employers from discriminating against MML program participants, with few exceptions. Specifically, unless a failure to take adverse action would violate a federal law or regulation or cause an employer to lose a monetary or licensing benefit under federal law or regulation, the MML prohibits employers from discriminating against or otherwise penalizing a person with respect to hiring or other terms and conditions of employment if the adverse actions are based on:

1. the person's status as a patient enrolled in the state registry or
2. "a patient's positive drug test" unless the patient used, possessed, or was impaired by medical marijuana on employer premises or during hours of employment.

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6 *See, e.g.*, DOT Office of Drug and Alcohol Compliance Notice (Feb. 22, 2014) (reiterating DOT Medical Review Officers, "will not verify a drug test as negative based upon," information that a physician recommended that the employee use "medical marijuana" when states have passed "medical marijuana" initiatives) and 49 C.F.R. §40.151.

7 Minnesota Statutes § 181.950, Subd. 5.

8 Minnesota Statutes § 152.01, Subd. 9.

9 Minnesota Statutes §§ 152.021-152.027.

10 Minnesota Statutes § 152.32. Patients enrolled in the state registry program will be presumed to be engaged in authorized medical marijuana use.

11 A "health care practitioner" means Minnesota licensed doctors, physician assistants, and advanced practice registered nurses.

12 Cancer and terminal illness are qualifying conditions only if the underlying condition or treatment produces severe/chronic pain, nausea, severe vomiting or cachexia or severe wasting.

13 The MML states that a "patient shall only receive medical cannabis from a registered manufacturer but is not required to receive medical cannabis products [delivery devices, related supplies and educational materials] from only a registered manufacturer." Minn. Stat. §§ 152.22, Subd. 8 and 152.30(c).

The latter prohibition in particular creates significant problems for workplace testing programs, which often rely upon positive test results as the best evidence that an employee has come to work "under the influence" or impaired by illegal drugs. Under this standard, how will employers prove that an employee used, possessed, or was impaired by medical marijuana at work? (Most employer test methods measure recent use, not impairment, which could result from use occurring days or even weeks before the test). Will reasonable suspicion determinations include employee searches, or drug-sniffing dogs? Even more troubling, the MML effectively prohibits employers from denying employment to any applicant with a medical marijuana prescription and a positive pre-employment drug test, even if the applicant is to be placed in a safety-sensitive position, because employers will be unable to show an applicant's use, possession or impairment on employer premises or during hours of employment.

The MML goes further, providing:

> An employee who is required to undergo employer drug testing pursuant to [DATWA—the state workplace testing law] may present verification of enrollment in the patient registry as part of the employee's explanation under [that law].[14]

This MML "explanation" provision effectively eliminates employers' abilities to take adverse action if an employee's explanation for a positive test result is lawful medical marijuana use, unless the employer can also show impairment, possession, or use while at work.

Minnesota joins Arizona and Delaware as states with medical marijuana laws prohibiting discrimination solely on the basis of a confirmed positive marijuana test. No reviewing court in those states has decided whether, under the federal Controlled Substances Act, an employer must accept as valid an employee's excuse that a positive drug test was the result of medical marijuana use. And none of those states' medical marijuana laws create, as the MML does, an express law endorsing medical marijuana use as an acceptable explanation for a positive workplace test result. Minnesota employers with workplace testing programs will clearly be navigating uncharted waters under the MML.

Minnesota's Lawful Consumable Products Statute Fogs the Issue Further

Minnesota's Lawful Consumable Products (LCP) statute[15] may also be affected by the enactment of the MML. The LCP prohibits Minnesota employers from refusing to hire an applicant or disciplining or discharging an employee on the basis of off-premises use of any lawful consumable product, absent specified exceptions, such as restrictions founded on "bona fide occupational" requirements "reasonably related to employment activities." While Minnesota employers can argue that marijuana continues to be illegal under federal law, it is likely that marijuana advocates will argue medical marijuana use is protected under the LCP as well. Notably, a legal challenge under a similar lawful products statute and state marijuana legislation is now pending before the Colorado Supreme Court,[16] although to date, Colorado's courts have declined to hold that marijuana is lawful within the meaning of the law despite state-regulated sales occurring throughout the state.

Practical Problems in the Testing Process and Additional Due Diligence Steps

The MML creates new practical problems in the drug testing process, and warrants employer preparedness efforts. Testing vendors are not generally equipped to distinguish between positive test results caused by medicinal marijuana use versus smoking marijuana or other uses that will continue to be illegal even under the MML. That technology is either currently unavailable or, if available, very costly. Compliance with DATWA can also limit an employer's ability to make impairment determinations. While saliva samples show more recent use, DATWA testing requirements on sample retention and re-testing may limit the ability to use saliva samples (and DATWA encourages the use of urine samples, which may report use weeks prior to testing).

As a result, due diligence steps in detection efforts will be critical, even prior to institutional decision-making about employer action in the event of a positive test result. If an employee, for example, claims MML-authorized marijuana use, an employer or the employer's Medical Review Officer should request to see the donor's "registry verification," which is the verification provided by the Minnesota Commissioner of Health that a patient is enrolled in the state registry. Review of the registry verification may generate additional investigation (*e.g.*, if there is

14 Minnesota Statutes § 152.32.

15 Minnesota Statutes § 181.938.

16 *Coats v. Dish Network*, 2014 Colo. LEXIS 40 (Co. 2014).

any information that suggests the verification is fraudulent). Assuming an employee does produce such a registration, however, employers may find themselves obligated to determine if the worker is in need of any other accommodation in order to perform the essential functions of his or her job. Trained Human Resources professionals will no doubt play a critical role in navigating these murky waters.

Preparing for Stormy Weather: What Can Employers Do?

Given the direct conflict between federal and state law, we anticipate that the employment law provisions of the MML will be subject to legal challenge. Unless and until the law is found to conflict with federal law, however, employers can take some affirmative steps in response to the MML in support of their drug-free workplace programs. Workplace testing policies may need updating to ensure that an employer's policy clearly defines illegal drug use, and should provide a clear statement that the employer reserves the right to take adverse action based on a verified positive marijuana test result to the fullest extent permitted by the law.

Conversations with vendors would also be prudent. Those conversations should include some direct discussions about test methods, receipt of information and result-reporting protocols.

Finally, when medical marijuana is identified to explain a positive test result, employers should not abandon ship. The employer may be able to show that the employee was impaired at work. If not, there may be some reasonable accommodation available that does not include the use of medical marijuana. Alternatively, an employer may be able to show that the employee is not considered fit for safety-sensitive work while he or she uses the drug. Inevitably, an individualized discussion with each employee who uses medical marijuana will likely be necessary in connection with workplace testing and substance abuse policy administration.

Conclusion

Although the MML is effective on May 30, 2014, the day after it was signed, it will take time for Minnesota to establish rules on recognized and/or lawful sources for medical marijuana, and to set up the state registry program for patients authorized to use medical marijuana. Some of the deadlines identified in the legislation extend into mid-2015.[17] Nevertheless, employers may wish to begin preparing now for those changes.

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17 In addition to establishing the state registry program, which has no deadlines under the MML, the Minnesota Commissioner of Health must take the following steps by the following deadlines: (1) register two in-state manufacturers for medical cannabis production (December 1, 2014) (unless an adequate supply of federally sourced medical cannabis is available by August 1, 2014); (2) adopt distribution rules (July 1, 2015) with rules notice published no later than January 1, 2015. Registered manufacturers must have at least one operating distribution facility by July 1, 2015 and all four facilities each must begin distribution by July 1, 2016.