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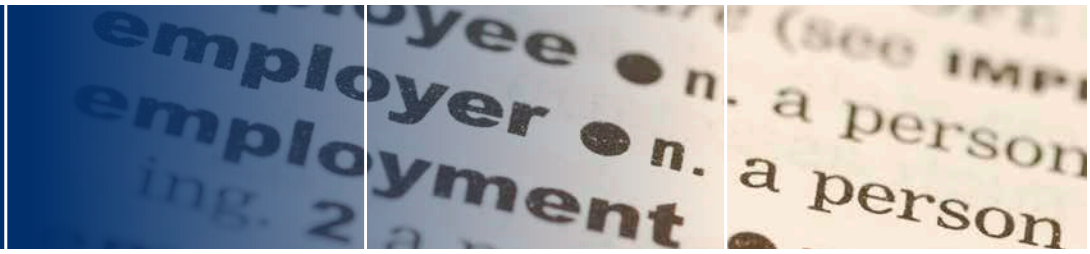

NEWSLETTER
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Employers Prevail Among the Haze of Growing Medical Marijuana Laws

On January 1, 2014, Illinois became the 21st jurisdiction since 1996 to enact legislation to decriminalize the use of marijuana for medical purposes. The other jurisdictions are Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Delaware, Hawaii, Maine, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington.

Overview of State Medical Marijuana Laws

Of the 21 jurisdictions, only six – Arizona, Connecticut, Delaware, Illinois, Maine, and Rhode Island – explicitly prohibit employers from discriminating against qualifying medical marijuana patients or their primary caregivers.

Arizona, Delaware, Illinois and Maine provide an exception to their prohibition against discrimination only if employing or taking other adverse employment action (i.e., disciplining) against qualifying medical marijuana patients or their primary caregivers would cause the employer to lose a federal contract or federal funding.

Many states' medical marijuana laws, including those in Arizona, Colorado, Connecticut, Delaware, Hawaii, Maine, Michigan, Montana, New Jersey, New Mexico, Rhode Island and Vermont, provide that employers are not restricted from prohibiting the use of marijuana in the workplace or from prohibiting employees from working while under the influence of marijuana. *Continued*

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Some states including Colorado, Illinois and Massachusetts provide in their medical marijuana statutes that employers are not prohibited from instituting or enforcing policies that restrict employees' drug use, such as drug testing and zero tolerance policies.

Illinois's Compassionate Use of Medical Cannabis Pilot Program Act provides detail (although not necessarily clarity) not found in many other state laws. For example:

- Illinois employers are prohibited from "penalizing a person solely for his or her status as a registered qualifying medical marijuana patient or caregiver."
- As mentioned above, Illinois provides an exception to its prohibition against discrimination for employers who would lose federal funding or a federal contract.
- The Act also contains a provision setting forth what it does not prohibit in terms of action employers can take related to regulating employees' medical marijuana use and otherwise enforcing workplace drug policies. Notably, the Act states, "(a) Nothing in this Act shall prohibit an employer from adopting reasonable regulations concerning the consumption, storage or timekeeping requirements for qualifying patients related to the use of medical cannabis. (b) Nothing in this Act shall prohibit an employer from enforcing a policy concerning drug-testing, zero tolerance or a drug free workplace provided the policy is applied in a nondiscriminatory manner. (c) Nothing in this Act shall limit an employer from disciplining a registered qualifying patient for violating a workplace drug policy."
- A subsequent provision in the statute states, "Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for: (1) actions based on the employer's *good faith belief* that a registered qualifying patient used or possessed cannabis while on the employer's premises or during the hours of employment; (2) actions based on the employer's *good faith belief* that a registered qualifying patient was impaired while working on the employer's premises during the hours of employment; (3) injury or loss to a third party if the employer *neither knew nor had reason to know* the employee was impaired."
- The Act explains on what basis employers may consider a registered qualifying medical marijuana patient to be impaired, which is when he or she "manifests specific, articulable symptoms while working that decrease or lessen his or her performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence or carelessness in operating equipment or machinery, disregard for the safety of the employee or others, involvement in an accident that results in serious damage to equipment or property, disruption of a production or manufacturing process, or carelessness that results in any injury to the employee or others." Further, the Act provides, "If an employer elects to discipline a qualifying patient under this subsection (i.e., for being impaired at work), it must afford the employee a reasonable opportunity to contest the basis of the determination."

Accordingly, while it appears that Illinois employees who use medical marijuana within the parameters of the state's medical marijuana law may be protected from discrimination based solely on their status as medical marijuana patients, such protection is limited. This is especially true where employees' off-duty and otherwise legal marijuana use puts them at risk for violating their employers' workplace drug policies.

The Act also places the burden on Illinois employers to determine whether its employees who are lawfully using medical marijuana are impaired while working. Employers are at risk if they are unable to show that they took action (i.e., discipline or termination) against an employee based on a *good faith belief* that the employee was impaired while working.

Employers must also be able to defend against claims brought by third parties alleging they suffered damage or injury caused by an impaired employee and that an employer had reason to know the employee was impaired. *Continued*

Medical Marijuana Users Are Not Afforded Protection Under Federal or State Employment Laws

Most statutes that have been enacted to decriminalize the use of marijuana for medical purposes do not explicitly protect individuals who are permitted to use marijuana or their caregivers from discrimination in employment (15 of 21 jurisdictions). Courts in these jurisdictions (1) have refused to expand the scope of state medical marijuana laws to protect employees, and (2) have held that medical marijuana laws do not give rise to common law wrongful termination claims on public policy grounds.

In *Casias v. Wal-Mart*, 695 F.3d 428 (6th Cir. 2012), the Court of Appeals for the Sixth Circuit upheld the dismissal of plaintiff's lawsuit against Wal-Mart for failure to state a claim for common law wrongful termination and, under its state medical marijuana law, where he was terminated for testing positive for marijuana in violation of the company's drug use policy.

At issue was Michigan's medial marijuana statute, which provides that a qualifying medical marijuana patient "shall not be … denied any right or privilege … including but not limited to … disciplinary action *by a business or occupational or professional licensing board or bureau*, for the medical use of marijuana in accordance with this act. …" (Emphasis added.) The Sixth Circuit interpreted the provision to mean that the term "business" did not restrict private employers from taking action against employees on the basis of the employees' use of medical marijuana, but rather that the word "business" qualified the type of licensing board or bureau to which the provision applied.

The Sixth Circuit also affirmed the lower court's ruling that Wal-Mart's decision to terminate the plaintiff was not contrary to public policy sufficient to give rise to a common law wrongful termination claim, reasoning that the medical marijuana statute did not regulate private employers but rather provided a defense to criminal prosecution or other state action. The court also reasoned that accepting plaintiff's public policy argument would create an entirely new category of protected employees, which would be a radical departure from the state's general employment at-will doctrine.

In *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736 (2011), the Supreme Court of Washington held that as a matter of law, Washington's medical marijuana statute did not provide an express or implied private cause of action for plaintiff to sue his former employer for wrongful termination for violating the company's drug-free policy for testing positive for marijuana, which he was taking within the parameters of the state's medical marijuana statute. The court rejected plaintiff's argument that the state's medical marijuana statue, which stated that employers do not have to accommodate on-site medical marijuana use in any place of employment, required employers to accommodate employees' off-site marijuana use. The court also held that the state's medical marijuana statute does not proclaim a public policy argument sufficient to give rise to a common law wrongful termination claim. Interestingly, plaintiff brought his suit under a pseudonym for protection from liability for violating federal laws that prohibit his drug use. The California Supreme Court addressed and rejected similar arguments raised by the plaintiff in *Ross v. Ragingwire Telecomm., Inc.*, 42 Cal. 4th 920 (2008).

Irrespective of state laws that decriminalize marijuana for medicinal purposes (and limited recreational use in Colorado and Washington), marijuana remains a Schedule I controlled substance under the federal Controlled Substances Act of 1970, which means that it is illegal under federal law to possess, ingest, grow, manufacture, import, distribute or sell marijuana in any quantity. 21 U.S.C. § 812(c), § 841(a)(1).

The Americans with Disabilities Act (ADA) protects qualified individuals with a disability. 42 U.S.C. § 12101, et seq. But, the ADA specifically states that "the term 'individual with a disability' does not include those who are currently engaging in the illegal use of drugs, when the [employer] acts on the basis of such use." 42 U.S.C. § 12210(a). *Continued*

The ADA defines the term "illegal use of drugs" as "the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. *Such term does not include the use of a drug taken under supervision by a licensed health care professional*, or other uses authorized by the Controlled Substances Act or other provisions of Federal law." 42 U.S.C. § 12210(d)(1) (Emphasis added.). "Drug" is defined in the ADA as "a controlled substance, as defined in Schedules I through V of the Controlled Substances Act or other provisions of federal law." *Id.* at (d)(2).

In *Barber v. Gonzalez*, a federal district court in the State of Washington dismissed plaintiff's lawsuit alleging that his employer violated the ADA when it took adverse employment action against him on the basis of his marijuana use, even though he used the marijuana for medicinal reasons legally under Washington state law. The court interpreted the ADA's definition of "illegal use of drugs," which excludes drugs taken under supervision by a licensed health care professional (see language in italics above), to refer only to those drugs that are also authorized under the Controlled Substances Act or other provisions of federal law. Based on this interpretation, the court reasoned that it was immaterial that plaintiff's marijuana use was supervised by a physician as authorized under Washington state law.

Plaintiffs whose employment is terminated for their use of medical marijuana legal under their state medical marijuana laws have also been unsuccessful in bringing wrongful termination claims under their state fair employment statues.

In *Johnson v. Columbia Falls Aluminum Co., LLC*, 2009 MT 1089N, 2009 Mont. Lexis 120 (March 31, 2009) (unpublished), the Supreme Court of Montana affirmed the dismissal of plaintiff's claims alleging that his employer violated the ADA and Montana's state fair employment statute when it terminated him and failed to accommodate his medical marijuana use by waiving the company's drug-free policy. The court reasoned that Montana's medical marijuana statute explicitly states that employers are not required to accommodate employees' medical marijuana use and the ADA does not require such an accommodation.

In C*urry v. MillerCoors, Inc.*, 12-cv-02471-JLK, 2013 U.S. Dist. Lexis 118730 (D.C. Colo. Aug. 21, 2013), plaintiff alleged that MillerCoors's decision to terminate his employment for violating the company's drug-free policy when he tested positive for marijuana taken to treat his disabling medical condition violated the state's fair employment statute. The court dismissed plaintiff's claim for failure to state a claim.

The court relied on a provision in its state unemployment benefits statute to support its holding that under Colorado law there is a legitimate basis for employers to discharge employees for testing positive for marijuana, irrespective of whether for medical or other use. The court based its decision on Colorado's state unemployment benefits statute, which provides that employees are not entitled to unemployment compensation if separation from employment occurs because the employees tested positive for the presence of non-medically prescribed controlled substances as defined in Colorado's Uniform Controlled Substances Act of 1992, which includes marijuana, as evidenced by a drug test taken pursuant to an employer's written drug policy.

The court's reasoning in *Curry* appears to highlight what can be described by lawful medical marijuana users in Colorado as a loophole in their state law: (1) a person can be denied unemployment benefits for taking non-medically prescribed controlled substances as defined in Colorado's Uniform Controlled Substances Act, which defines marijuana as a controlled substance; (2) consequently, courts in Colorado find that it is legal to terminate employees for violating their employers' drug-free policies, despite the fact that Colorado's Controlled Substance Act was amended to legalize marijuana for medical purposes.

The Oregon Supreme Court rendered two opinions, both favoring employers who fired employees for their medical marijuana use when taken consistent with the

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state's medical marijuana law. In *Washburn v. Columbia Forest Prods.*, 340 Ore. 469 (2006), the court held that an employee who used marijuana legally to treat leg spasms was not protected under Oregon's statue that protected against disability discrimination in the workplace. The court engaged in statutory analysis to conclude that the employee did not show that he suffered from a disability because his condition could be mitigated and therefore did not rise to the level of a substantial limitation on a major life activity – a necessary prerequisite for protection under its state disability law.

In *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 348 Ore. 159 (2010), the court similarly held that the employer did not violate Oregon's employment statute that proscribes discrimination based on disability when it terminated plaintiff's employment after he advised he was taking marijuana for medical purposes consistent with the state's medical marijuana statute.

In *Emerald Steel*, the court reasoned that Oregon's disability discrimination statute provided that employees were not afforded its protection when they engaged in the "illegal use of drugs" when the adverse employment action was based on that drug use. The statute defined "illegal use of drugs" as drug use that is "unlawful under state law or under the federal Controlled Substances Act … *but does not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized under the Controlled Substances Act or under other provisions of state or federal law.*" (Internal quotations and citations omitted; emphasis added.)

The court rejected plaintiff's argument that his marijuana use was not illegal based on Oregon's medical marijuana law. The court interpreted the exclusion found in the statutory definition of "illegal use of drugs" (see excerpt in italics above) to apply only if two criteria are satisfied: (1) the federal Controlled Substances Act must authorize a licensed medical care professional to monitor or supervise the use of the controlled substance, and (2) the health care professional must actually monitor or supervise the drug use.

Because physicians may not prescribe marijuana under the federal Controlled Substances Act (absent approval for limited research projects not at issue in this case), the court found plaintiff's marijuana use illegal such that he was not entitled to the protection of Oregon's disability discrimination statue at issue. The court also held that plaintiff's employer was not obligated to engage in the interactive process or otherwise accommodate his use of medical marijuana because he was engaged in the illegal use of drugs.

Statutes that prohibit employers from discriminating against employees based on employees' off-duty lawful conduct may not offer protection for employees' consumption of marijuana even though lawful under state law, but which remains unlawful under federal law.

In *Coats v. Dish Network, LLC*, 303 P.3d 147 (Colo. App. 2013), plaintiff, a quadriplegic who was licensed to use medical marijuana pursuant to Colorado's medical marijuana law, was terminated after he tested positive for marijuana in violation of his employer's drug-free policy. Plaintiff sued his employer alleging that the termination of his employment violated Colorado's Lawful Activities Statute, which prohibits employers from terminating employees' employment for engaging in lawful activities off the premises of the employer during non-working hours. The appellate court affirmed the trial court's dismissal of plaintiff's complaint, reasoning that Colorado's Lawful Activities Statute did not define "lawful activities" and did not specify whether the activities had to be lawful under state and/or federal law, such that plaintiff's marijuana use was not a protected lawful activity because it was unlawful under federal law.

KEY TAKEAWAY POINTS

- In the majority of states that have legalized marijuana for medical purposes, the protection extends to insulate users from criminal liability and penalties only under state law.
- The majority of states that have enacted legislation to legalize marijuana for medical purposes do *not* afford any protection to employees who test positive for marijuana, even when the employees' use is consistent with medical marijuana laws. *Continued*

- Employees who are qualified to use marijuana to treat a disabling medical condition but who work for employers with drug-free policies are more likely than not still required to comply with the company's policy or risk termination of employment.
- In the minority of states that provide some measure of protection from workplace discrimination for qualifying medical marijuana patients, employers should ensure that their internal policies and practices are consistent with applicable state law.
- Employers should provide training for management to help them determine whether an employee is "impaired" or "under the influence" of marijuana and take action necessary to protect themselves from liability for work-related accidents.
- As evidenced by the courts' analyses of the cases discussed in this article, the courts' decisions often turn on technical statutory interpretation of various state and federal laws. Therefore, employers are cautioned to consult an employment attorney who is up to date in this developing area of law before taking action (i.e., discipline or termination of employment) against employees who are authorized to take marijuana for medical purposes.

The employment law professionals at Wilson Elser are available to assist employers by providing guidance on the developing medical marijuana laws and their impact on a company's employment practices and policies.

Members of Wilson Elser's Employment & Labor practice, located throughout the country, provide one convenient point of contact for our clients. Please contact any of the following partners to access the experience and capabilities of this formidable team.

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