Weed at Work: Must Employers Accommodate Medical Use?

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This is the second in a three-part series of articles on cannabis laws and court opinions. Today's article discusses workplace accommodations for medical marijuana use. The first part reviews different rulings on federal pre-emption of state marijuana laws (www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/Pages/Weed-at-Work-Is-All-Cannabis-Illegal.aspx), and the third part focuses on how marijuana is treated under state workers' compensation and benefit programs (www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/Pages/Is-Cannabis-Covered-Under-State-Benefit-Programs-.aspx).

A majority of states now permit medical marijuana use, and federal law may not always pre-empt state laws when it comes to their impact on the employment relationship. As employees increasingly turn to cannabis as a treatment option for various health conditions, employers must examine whether their policies—which are no doubt aimed at maintaining safe and productive workplaces—violate their obligations under state disability-accommodation and leave laws.

A Few Key Laws

The Americans with Disabilities Act (ADA) and related state laws require employers to enter into discussions with workers with disabilities to determine if reasonable accommodations can be provided so such workers can perform the essential functions of their job.

[Visit SHRM's resource page on the Americans with Disabilities Act (www.shrm.org/resourcesandtools/pages/americans-with-disabilities-act.aspx)*]*

Additionally, the Family and Medical Leave Act (FMLA) and accompanying state laws allow qualified employees with serious health conditions to take time off for medical treatment. And the Drug-Free Workplace Act of 1988 requires federal contractors and grantees to guarantee drug-free workplaces as a condition of receiving government contracts or grants.

Although medical marijuana use is not covered under the ADA or FMLA, and all marijuana use is still illegal under federal law, courts across the country are now being asked to decide whether medical marijuana use should be accommodated under state law.

Employer-Friendly Decisions

Early cases tended to hold that employers need not accommodate cannabis treatment. In *Washburn v. Columbia Forest Products, Inc.*, an employee alleged that his employer violated Oregon's disability-discrimination laws by firing him for testing positive for medical marijuana use.

The employer's policy prohibited employees from working with controlled substances (such as marijuana) in their system. The Oregon Supreme Court held that the "legislature intended the definition of 'disabled person' to be construed in light of mitigating measures that counteract ... an individual's impairment."

The court determined that the employee was not considered "disabled" under state law because he could counteract his medical issues with prescription medication. Since the employee was not considered "disabled" in this context, the court determined that the employer had no statutory duty to accommodate him.

In *Roe v. Teletech Customer Care Mgmt.,* the Washington Court of Appeals found that Washington's law does not prohibit an employer from firing an employee for using medical marijuana as authorized by a physician because the state law does not expressly require employers to accommodate on-the-job or off-duty medical marijuana use.

Similarly, the Montana Supreme Court in *Johnson v. Columbia Falls Aluminum Co.* ruled that an employer need not accommodate medical marijuana use. And in *Ross v. RagingWire Telecommunications, Inc.*, the California Supreme Court refused to require employers to accommodate marijuana use.

The California high court noted that the state's legalization statute did not give marijuana the same status as legal prescription drugs. Observing the drug's illegal status under federal law, the court held that the state's disability-discrimination statute did not require employers to accommodate illegal drug use.

Employee-Friendly Decisions

Recently, other courts have reached different conclusions. In *Barbuto v. Advantage Sales and Marketing, LLC* (http://masscases.com/cases/sjc/477/477mass456.html), the Massachusetts high court addressed whether an employer must accommodate medical cannabis use, since state law permits medical marijuana use and prohibits disability discrimination.

The employer offered a job applicant a position as an entry-level salesperson that was conditioned on passing a drug test. During the onboarding process, the applicant mentioned that she suffered from Crohn's disease and used medical marijuana based on her physician's written certification to treat it. She said she did not use marijuana daily and would not consume it before or during work. However, she was fired shortly after she started the job because her drug test came back positive for marijuana.

The court held that an exception to the employer's drug policy to permit offsite marijuana use may be a reasonable accommodation where the employee's physician determines that marijuana is the most effective treatment for the employee's disability and that any alternative medication permitted by the employer's drug policy would be less effective.

Removing Ambiguity

To avoid such court battles, a growing number of states are writing employment protections into their marijuana legalization statutes. For example, Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, New York, Pennsylvania and West Virginia provide employment protections for medical marijuana patients. And a stalled 2018 bill would have provided similar protections in California. Such statutes prohibit discrimination against off-duty cannabis use or require employers to accommodate its use for medical reasons.

Notably, these statutes generally make exceptions for use by employees in certain safety-sensitive or federally regulated positions.

Tips for Employers

An employer's drug-testing and screening practices must comply with emerging laws in relevant states, even though all marijuana use is still illegal at the federal level.

In states that cover medical marijuana patients under disability laws, employers should confirm whether positive drug tests are connected to medicinal use before making employment decisions.

If a worker seeks an accommodation for medical use, employers can lean on traditional HR practices by ensuring that the employee has the appropriate medical certification and will refrain from on-duty use or otherwise not pose a risk in the workplace.

Part three of this series will continue this discussion and consider whether employees' use of medical marijuana will negatively impact their workers' compensation or unemployment insurance claims.

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Quiz: How Do Marijuana Laws Affect the Workplace?

Test your knowledge about marijuana laws by taking this true or false quiz.

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