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NEWSLETTERS

Marijuana In The Workplace: An Update

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Logistically Speaking, May 2018

With so many states permitting the use of marijuana recreationally or for medical reasons, it will continue to be difficult for employers to understand their legal obligations and how, in a practical way, to address a topic that continues to create human resources and legal issues. The law in this area is changing in significant ways and here are some top trends.

Tension Between State and Federal Marijuana Law

Currently, 28 states and the District of Columbia allow for medical use of marijuana; seven states and the District of Columbia allow for recreational use of marijuana (1). Nevertheless, marijuana is currently deemed a Schedule 1 substance under the federal Controlled Substances Act (CSA), which means that under federal law, it is illegal to use, buy, or sell marijuana. A number of states have taken the position that, despite the CSA, marijuana is not illegal. However, the right to prosecute is a right that the federal government still holds. This creates significant tension in how courts may address issues relating to marijuana, both generally and in the workplace.

Pre-2017 Trends

Prior to 2017, court decisions that interpreted the interplay between federal and state marijuana laws were generally employer-friendly. For example, in 2016, the Colorado Supreme Court ruled in *Coats v. Dish Network, LLC* that employers may terminate an employee for off-duty marijuana use, despite the state's medical marijuana law. The employer at issue had a zero tolerance drug use policy and the employee, a legally prescribed medical marijuana user, failed a random drug test due to his off-duty use. The employer terminated the employee and the court found its policy and termination permissible since marijuana is illegal under federal law.

Likewise, in *Shaw v. Safeway, Inc.,* a Washington federal court held that employers were not required to accommodate medical marijuana use in a drug-free workplace. Following a workplace injury, the employee tested positive for marijuana. Despite his valid prescription for medical marijuana, the employer terminated him pursuant to its drug-free workplace policy. The court reasoned that since marijuana is illegal under federal law, the employer was not required to provide a reasonable accommodation.

While these employer-friendly rulings were the trend prior to 2017, recent decisions have taken a turn.

Recent Trends

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David B. Ritter
Partner
Chicago

P 312-214-4862
F 312-759-5646
david.ritter@btlaw.com

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Barbuto v. Advantage Sales & Marketing

In July 2017, Massachusetts' highest court ruled in *Barbuto v. Advantage Sales & Marketing, LLC,* that employers may be held liable for disability discrimination for firing an individual because he or she legally uses marijuana under a prescription. In *Barbuto*, the plaintiff took a pre-employment drug test. Before she took the test, she told the employer that she had a medical marijuana prescription to treat her Crohn's disease pursuant to the Massachusetts medical marijuana law. The plaintiff informed her employer that while she used marijuana to treat her Crohn's disease, she did not use it before or during work. Not surprisingly, the plaintiff tested positive for marijuana, and the employer terminated her after one day on the job. The plaintiff brought a claim against the employer and alleged that the employer violated Massachusetts' law prohibiting handicap discrimination.

The court held that legally prescribed marijuana is, with respect to disability laws, the equivalent of any other prescription medication, noting "The use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication." The ruling made clear that employer's must engage in the interactive process with employees that are legally prescribed marijuana.

Thus, in Massachusetts, the same principles under the Americans with Disabilities Act (ADA) apply to medical marijuana users: the employer must show that allowing for off-site marijuana use constitutes an undue burden. Employers must allow for a reasonable accommodation as it would for other legally prescribed medications.

Noffsinger v. SSC Niantic Operating Company

One month later, in August 2017, a Connecticut federal district court held in *Noffsinger v. SSC Niantic Operating Company LLC* that federal laws that prohibit the use and sale of marijuana do not preempt Connecticut's Palliative Use of Marijuana Act (PUMA), which provides protections for employees and applicants against discrimination based upon medical marijuana use that is legal under state law. After the employer offered the plaintiff a job, she disclosed that she had a prescription that allowed her to use marijuana to treat post-traumatic stress disorder. Upon learning this, the employer withdrew the job offer. The plaintiff sued the employer for violation of Connecticut's medical marijuana statute's anti-discrimination provision.

The court found that PUMA was not preempted by the CSA or the ADA, and did not conflict with either federal law because neither addresses an employee's use of marijuana outside of the workplace and neither disallows states from providing greater protections to its citizens. While the purpose of the CSA is to prohibit marijuana use, it does not prohibit the employment of marijuana users. Similarly, while the ADA permits employers to prohibit drug use at the workplace, it does not provide authorization for employers to take adverse actions based on drug use outside of the workplace.

The court's decision in *Noffsinger* is the first of its kind, as no other court has concluded that marijuana's illegality under federal law does not bar a discrimination claim based upon conduct that is protected by a state's medical marijuana law. In other words, employees in Connecticut may

bring discrimination claims based upon their status as medically prescribed marijuana users pursuant to state law.

Wise Words for Employers

While *Barbuto* and *Noffsinger* are binding only in their respective states, they provide a legal path for other courts to follow. It is highly likely that employees in other states will follow this path and make the same arguments. It remains to be seen whether other courts will rule similarly.

In Illinois, the Compassionate Use Act contains a specific provision that prohibits employment discrimination based upon an employee's status as a medical marijuana user, unless it would put the employer in violation of a federal law or cause the employer to lose monetary or licensing benefits under federal law. To date, there have been no court decisions regarding the interpretation of the act's anti-discrimination provision.

Outside Illinois, employers are advised to maintain a watchful eye on changes to the law and precedent in their local jurisdictions. Even though future implications remain unknown, there are various ways for employers to limit their exposure to liability. At this point, employers would be wise to consider accommodation requests made by medical marijuana users just as they would any other potential disability. Employers should engage in the interactive process with the employee and determine whether off-duty marijuana use will cause an undue burden on its business operation.

Even if the *Barbuto* and *Noffsinger* decisions start a trend, employers may still enforce policies with respect to marijuana use. Employers may maintain a commitment to a drug-free workplace and disallow on-site marijuana use by employees. The same holds true for policies constructed around safety-related concerns or federal drug-free workplace laws. Employers should, however, consider leaving room in each of their policies for certain "exceptions" regarding legally prescribed marijuana use.

For more information about this topic and the issues raised in this article, please contact David Ritter at david.ritter@btlaw.com or (312) 214-4862.

(1) The following states permit the medicinal use of marijuana: Alaska; Arizona; Arkansas; California; Colorado; Connecticut; Delaware; Florida; Hawaii; Illinois; Louisiana; Maine; Maryland; Massachusetts; Michigan; Minnesota; Montana; Nevada; New Hampshire; New Jersey; New Mexico; New York; North Dakota; Ohio; Oregon; Pennsylvania; Rhode Island; Vermont; and Washington; D.C. The following states permit the recreational use of marijuana: Alaska; California; Colorado; Maine; Massachusetts; Nevada; Oregon; and Washington; D.C.