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Medical Marijuana Law Presents Possible Pitfalls

Employers need to understand provisions before taking disciplinary action

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The smoke has barely lifted since Connecticut's passage of Public Act No. 12-55, "An Act Concerning the Palliative Use of Marijuana," and the questions continue to pile high.

On October 1, 2012, Connecticut became the 17th state to allow the physician-authorized use of marijuana for specifically enumerated and "debilitating medical conditions." Companies failing to adapt to the law's provisions run the very real risk of becoming its first test case, a distinction employers would undoubtedly like to avoid.

The law permits state residents 18 years of age or older, who have been diagnosed by a Connecticut-licensed physician with cancer, glaucoma, HIV, AIDS, Parkinson's disease, multiple sclerosis, damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, epilepsy, cachexia, wasting syndrome, Crohn's disease, or post-traumatic stress disorder to register as "qualifying patients" with the Department of Consumer Protection for the right to use medical marijuana. Out-of-state residents who work in Connecticut are ineligible for the program, as are Connecticut residents diagnosed by a non-Connecticut licensed doctor.

How, where, and by whom the medical marijuana will be harvested and dispensed remains unclear and will be the subject of further regulations later this year.

Section 17(b)(3) of the new law prohibits employers with one or more employees from firing, penalizing, threatening, or refusing to hire an employee "solely on the basis of" their status as a "qualifying patient." This same protection applies to the "primary caregiver" of a "qualifying patient," defined as anyone over 18 who "has agreed to undertake responsibility for managing the well-being of the qualifying patient with respect to the palliative use of marijuana."

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The legislature's use of "solely" suggests that employers can indeed take adverse employment actions against an individual if his or her status as a "qualifying patient" or "primary caregiver" is one of multiple reasons for the decision, though in practice this is likely to lead to difficult questions of proof to support the "other" proffered reasons.

Difficult Determinations

Although the act provides that nothing about Section 17(b)(3)'s protections "shall restrict an employer's ability to prohibit the

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use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours," making this determination may not be so easy.

For example, significant questions remain about whether a positive drug test can be equated with being under the influence at work. Unlike many other drugs, marijuana can remain present in the body for several weeks. "Qualifying patients" may, therefore, test positive for marijuana by virtue of using the drug legally in their homes. Before making an adverse employment decision, employers would be wise to confirm whether the employee is a "qualifying patient" and take reasonable steps to corroborate the employee's potential impairment through other means, such as speaking with the employee, interviewing co-workers or witnesses with whom the employee interacted or conducting more enhanced drug testing. The key inquiry under the act is one of impairment, not ingestion, and employers should govern their actions accordingly.

The act precludes the ingestion of marijuana: (1) in a motor bus or a school bus or in any other moving vehicle; (2) in the workplace; (3) on any school grounds or any public or private school, dormitory, college or university property; (4) in any public place; or (5) in the presence of a person under the age of 18. It remains to be seen how broadly the phrase "in the workplace" will be interpreted. Will it, for example, cover offices of employees who work from home? How about parking lots or other outdoor locations on company property, or during business trips?

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As it must, the act carves out exceptions for employer actions required by federal law or to obtain federal funding, even if based upon someone's status as a "qualifying patient." Indeed, despite Connecticut's decision to embrace medical marijuana, marijuana is classified as a Schedule I drug by the federal Drug Enforcement Agency, the most restricted drug classification, meaning the production, sale and use of marijuana are largely banned by federal law.

Recent efforts to convince DEA to reclassify marijuana as a Schedule II, III, or IV drug, on the ground that it has proven effective in treating various medical conditions, have proven unsuccessful. See *Americans for Safe Access v. Drug Enforcement Agency*, 2013 WL 216052 (D.C. Cir. Jan. 22, 2013). The U.S. Attorney's Office emphasized marijuana's illegality in a letter to Connecticut legislators shortly before the law's adoption, stating that "growing, distributing, and possessing marijuana in any capacity, other than as part of a federally authorized research program, is a violation of federal law regardless of state laws permitting such activities."

Consistent with this position, the U.S. Supreme Court has upheld federal marijuana penalties even where state laws authorize marijuana's use for medical purposes. See *Gonzales v. Raich,* 545 U.S. 1, 29, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005). Employers who rely on federal funding or operate in an industry regulated by federal laws restricting the use of marijuana would be wise to invoke the act's exception when necessary to avoid the time, expense and consequences of a federal lawsuit, or a sudden cessation of critical funding.

To avoid the numerous pitfalls presented by the new law, employers should educate their managers, human resources professionals, and hiring personnel about these provisions and consult with their attorneys before drafting new policies or taking adverse employment actions against "qualifying patients" or their "primary caregivers." ■