

HIGH TIMES: MANAGING LEGAL MARIJUANA

Presented by:

Dee Anna D. Hays
100 N. Tampa Street
Suite 3600
Tampa, FL 33602
(813) 221-7239
deeanna.hays@ogletreedeakins.com



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Breaking News!

Marijuana in LAX?

- **Well...sort of...**
 - **“While federal law prohibits the possession of marijuana (inclusive of federal airspace,) California’s passage of proposition 64, effective January 1, 2018, allows for individuals 21 years of age or older to possess up to 28.5 grams of marijuana and 8 grams of concentrated marijuana for personal consumption.... the Los Angeles Airport Police Department will allow passengers to travel through LAX with up to [this amount].”**
- **TSA checkpoints & federal airspace are another story**
- **The law changes after departing California**

FDA & DEA Approval

- **The Food and Drug Administration approved the first cannabis-derived drug in June 2018**
 - **Epidiolex – treats two rare forms of childhood epilepsy using a cannabis compound called cannabidiol (or CBD)**
 - **Does not contain THC or create a “high”**
 - **British company manufactures the drug**
- **2 days ago, on 9/27/18, the DEA rescheduled the drug**
 - **“DEA will continue to support sound and scientific research that promotes legitimate therapeutic uses for FDA-approved constituent components of cannabis, consistent with federal law.” -- DEA Admin. Uttam Dhillon**

Total Arrests Continue to Rise

- **According to FBI data released on Monday, 9/24/18, there is an arrest for marijuana roughly every 48 seconds**
- **Arrests rose for second consecutive year**

Marijuana Remains Illegal Under Federal Law

- **Marijuana is a Schedule 1 drug under the Controlled Substances Act – 21 U.S.C. § 811 (“CSA”).**
- **1/4/2018 Attorney General Jeff Sessions reversed the Obama Administration’s hands-off approach.**
- **Only a few states have addressed how federal law impacts workplaces in states where marijuana is legal.**

Legalized Marijuana by the Numbers

- **As of February 2018, 29 states and Washington D.C. have legalized marijuana for medical use.**

29 LEGAL MEDICAL MARIJUANA STATES AND DC



- **Recreational use of marijuana is legal in 9 states: Alaska, California, Colorado, DC, Maine, Massachusetts, Nevada, Oregon, Vermont, and Washington.**

Legalized Marijuana by the Numbers

- **Oklahoma: the 30th state in the nation to allow medical marijuana**
 - **Will allow doctors to recommend cannabis for any medical condition they see fit**
 - **Most other medical marijuana laws delineate a specific list of diseases and disorders**
- **This is a sign of the growing political support for cannabis reform**

Marijuana in the Workplace



The Majority of States' Medical Marijuana Laws Do Not Presently Include Accommodation Provisions

- **Example from Section 381.986, Florida Statutes:**
 - “Medical use” does not include *the use of marijuana* “in a qualified patient’s place of employment, *if restricted by his or her employer.*”
 - “Does not exempt a person from ... *any requirement under law* to submit to a breath, blood, urine, or other test to detect the presence of a controlled substance.”

The Majority of States' Medical Marijuana Laws Do Not Presently Include Accommodation Provisions (contd.)

- So far, no laws have prohibited an employer from enforcing workplace rules prohibiting using, possessing, or being under the influence of marijuana, alcohol, or other controlled substances, while at work.**
- Case law has confirmed no accommodation presently required in OR (2010), CO (2015), NM (2016), or NJ (2018).**



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Medical Marijuana and Job Protections

11 States with Medical Marijuana Statutes Containing Express Job Protections/Anti-Discrimination Provisions:

1. Arizona

2. Arkansas

3. Connecticut

4. Delaware

5. Illinois

6. Maine

7. Minnesota

8. New York

9. Nevada

10. Pennsylvania

11. Rhode Island

Medical Marijuana and Job Protections (contd.)

- **In states with anti-discrimination provisions, merely possessing a medical marijuana card, or testing positive for marijuana on a random or pre-employment drug screen generally not sufficient cause for automatic adverse action against employee**
- **In most cases, employer must demonstrate that the employee used, possessed, or was impaired by the drug at work**

Case Law Update

Callaghan v. Darlington Fabrics Corp.
(RI Superior Court, May 2017)



- **Intern sued under Hawkins-Slater Act and Rhode Island Civil Rights Act (disability)**
 - **Corporation refused to hire her because she could not pass required drug test due to medical marijuana use**
 - **Court found implied private right of action for medical marijuana “cardholders” to seek damages for discrimination**
- **No federal preemption by CSA**

Barbuto v. Advantage Sales and Marketing
(MA Supreme Judicial Court, July 2017)



- **Christina Barbuto had a prescription for medical marijuana to her Crohn’s disease under Massachusetts law for Crohn’s disease and tested positive for marijuana. She filed suit under the State ADA.**
- **“To declare an accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the vast majority of States, *that marijuana has an accepted medical use for some patients....*”**

Barbuto v. Advantage Sales and Marketing (contd.)



- **Qualified medical marijuana user may assert claims for handicap discrimination**
- **Employers must engage in an “interactive process” with a medical marijuana user**
- **No implied private right of action under statute**
- **Termination did not violate public policy**

Noffsinger v. SSC Niantic Operating Co. (CT District Court, August 2017)



- **CT Palliative Use of Marijuana Act (“PUMA”)**
 - **No adverse action “solely on basis of status as qualifying patient”**
- **Applicant failed drug test for marijuana; job offer withdrawn**
- **Two main findings:**
 - **Federal law does not preempt; no conflict**
 - **Implied private right of action under statute**
- **Qualifying patient may pursue claim for discrimination under PUMA in CT**

Additional State Law Considerations

- **Follow applicable requirements for reasonable suspicion testing.**
- **Beware of “Lawful Off-duty Conduct” Litigation.**

ADA/FMLA Considerations



- **Remember, the FMLA and ADA are federal laws and marijuana is still illegal under federal law.**
- **No Duty To Accommodate Illegal Drug Use Under ADA.**
- **So, what does apply?**

ADA/FMLA Considerations



- **Recovering Addict Provisions Apply.**
- **An Employer May Have A Duty To Engage In The Interactive Process If The Employer Has Reason To Believe The Employee Is Disabled.**
- **Employer May Also Have To Consider Whether FMLA Or Other Leave Is Appropriate For Underlying Medical Condition.**

ADA/FMLA Considerations



- Treatment and/or rehabilitation for addiction generally a “Serious Health Condition.”
- Absences caused by illegal drug use not protected.



Workplace Safety Considerations



- **Duty To Provide Safe Workplace Paramount.**
- **Medical marijuana may have positive medical benefits, but there are potential negative effects, particularly in an inherently hazardous work environment**
- **Currently, there is no reliable metric for determining when a particular level of THC from marijuana usage impairs the user and for how long the user remains impaired.**

Workplace Safety Standards



OSHA General Duty Clause

Section 5(a): “Each employer (1) shall furnish to each of his employees employment and a place of employment which are *free from recognized hazards* that are causing or are likely to cause death or serious physical harm to his employees.”

OSHA Post-Accident Testing Rules



- **OSHA Is Concerned That Post-accident Drug/Alcohol Tests Could Act To Chill Reporting Of Workplace Inquiries.**
- **BUT -- If an employer conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer's motive would not be retaliatory.**
- **May 12, 2016, Anti-Retaliation Provisions, But New Rule Will Likely Not Be Enforced Under New Administration.**

U.S. Department of Transportation



Under DOT Regulations, Marijuana Use Prohibited For Safety-Sensitive Employees:

- **Bus Drivers And Subway Operators (FTA).**
- **Truck Drivers (FMCSA).**
- **Pilots And Aircraft Maintenance Personnel (FAA).**
- **Locomotive Engineers (FRA).**
- **Ship Captains And Crews (USCG).**

U.S. Department of Transportation



“The Department of Transportation’s Drug and Alcohol Testing Regulation -- 49 CFR Part 40, at 40.151(e) -- *does not* authorize ‘medical marijuana’ under a state law to be *a valid medical explanation for a transportation employee’s positive drug test result.*”



Other Federal Considerations?

- **Federal Drug Free Workplace Act**
- **Employers with federal contracts may be prohibited from accommodated marijuana use under the terms of those contracts – read carefully.**

Key Takeaways & Best Practices



- **Filter all medical marijuana decisions through someone well-versed in this area**
- **Review your substance abuse and disability policies and enforce them consistently**
 - **Include reasonable accommodation language**
 - **Avoid blanket prohibitions against prescription medications**
 - **Create addendums to address state law issues**
- **Consider implementing a drug testing policy and an MRO**

Key Takeaways & Best Practices (contd.)



- **Keep drug test results confidential**
- **Educate workers regarding the risks of drug abuse**
 - Consider employee assistance programs to help employees
 - Encourage use of EAP if provided
- **Educate supervisors to spot signs of intoxication and to engage HR if accommodation requests are received**
- **Define and identify safety-sensitive jobs**
- **Watch (closely!) for new developments in this rapidly evolving area of law**

NOTICE

**THIS IS A
DRUG-FREE
WORKPLACE**

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[linkedin.com/in/ddhays](https://www.linkedin.com/in/ddhays)



[@deeannahays](https://twitter.com/deeannahays)

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