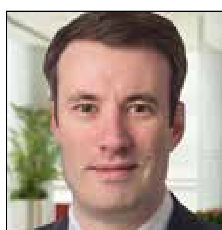
Medical and Recreational Marijuana and the Workplace: 'High' Uncertainty and Changing Requirements for Employers

by Jack Blum



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Employers often find themselves embroiled in national debates over hot-button social issues as a result of the need, or alleged need, to accommodate employee conduct that many in society would deem controversial. The issue of marijuana use by employees is one of the areas where employers have been dragged into the debate. In recent years, dozens of states have decriminalized the use and possession of marijuana for medical or even recreational purposes. The drug's increasing legitimacy can be seen in other ways as well: Established corporations like Coca-Cola and Anheuser-Busch InBev are exploring potential "cannibusiness" opportunities, and a recent *Washington Post* article highlighted the growing trend of marijuana use among middle-class, suburban professionals.[1] This changing landscape presents employers with complex and risky issues to navigate as they try to advance their legitimate interests in the health and safety of their workforces.

While there is little dispute that employers can and should be permitted to maintain a drug-free workplace, the issue of off-duty use by employees raises tricky issues. These issues are governed in overlapping fashion by the Americans with Disabilities Act (ADA), 42 U.S.C. § 12 101 *et seq*., Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq*., and a patchwork of state or even local laws. In fashioning policies and making personnel decisions, employers (and the attorneys advising them) need to consider the potential risk of disability-discrimination claims, reasonable-accommodation requirements, and permissible and impermissible medical examinations.

At the outset, it is important to recognize the legal status of marijuana (medical or otherwise) under state and federal law. More than 30 states have decriminalized marijuana for various medicinal purposes. On Nov. 6, 2018, Michigan became the 10th state (by a 55 percent to 45 percent margin) to decriminalize the recreational use of marijuana, joining California, Washington, Oregon, Alaska, Nevada, Maine, Colorado, Vermont, Massachusetts, and the District of Columbia. These numbers may soon expand. In 2019, Ohio voters will consider a referendum to decriminalize recreational use, and in 2020, South Dakota, Nebraska, Mississippi, and Arizona voters will consider referendums decriminalizing marijuana use to varying degrees. It is notable that these changes (frequently done by voter referendum) are happening in some of the most socially conservative states in the country.[2]

These state-law developments have not been mirrored at the federal level. Marijuana is still classified by the U.S. Drug Enforcement Administration (DEA) as a Schedule I controlled substance, meaning that the DEA has found that marijuana (1) has a high potential for abuse, (2) has no currently accepted medical use in treatment in the United States, and (3) lacks accepted safety for use under medical supervision.[3] The DEA most recently considered the status of marijuana in August 2016 and refused to reconsider the drug's Schedule I status. While the Department of Justice during the Obama administration had deprioritized the enforcement of federal criminal law against marijuana-related activities that are legal under state law, on Jan. 4, 2018, the Trump administration rescinded that guidance.[4] While marijuana thus remains squarely outlawed at the federal level, Sen. Elizabeth Warren previously introduced the Strengthening the Tenth Amendment Through Entrusting States Act (STATES Act) with bipartisan co-sponsorship. The STATES Act, if passed, would generally conform the federal law treatment of marijuana to that of the law of the pertinent state. While President Donald Trump has expressed support for the STATES Act, it is unclear what chances it has for passage.

While some anecdotal reports reflect a "don't ask, don't tell" trend in which employers are increasingly tolerating employees' off-duty marijuana use,[5] the ADA fully supports an employer's right to maintain zero tolerance policies even with respect to off-duty usage. Under 42 U.S.C. 12114, "any employee or applicant who is currently engaging in the illegal use of drugs," as defined by federal law, cannot qualify as

a "qualified individual with a disability" who is entitled to ADA protection. Accordingly, illegal drug (including marijuana) users cannot even bring an ADA claim "when the employer acts on the basis of such [drug] use."[6] This is not a license to discriminate, however. For example, an employer cannot refuse to accommodate an employee's broken leg merely because the employee happens to use marijuana or some other illegal drug. Employers and those advising them should also note that the ADA does provide protection for *former* drug users who have successfully completed a rehabilitation program, employees currently participating in a rehabilitation program, and employees who do not use drugs but are erroneously believed to be drug users.[7]

The ADA also provides a safe harbor for several drug-related employment policies and actions that employers may take. An employer subject to the ADA may safely (1) prohibit the use of drugs and alcohol in the workplace, (2) require that employees not be under the influence of drugs or alcohol while in the workplace, (3) require that employees behave in conformance with the requirements of the Drug-Free Workplaces Act, (4) hold employees who use illegal drugs or alcohol to the same standards of performance and behavior as other employees, and (5) comply with any and all federal regulations regarding drug testing.[8] The ADA also makes clear that testing employees for illegal drugs is not considered a "medical examination," which would be heavily regulated under other provisions of the ADA.

While the ADA's guidance is relatively clear, there are some traps that employers can fall into if personnel decisions are not made and handled carefully. As noted above, employees who are undergoing or have completed rehab can retain their ADA rights, and employees who are erroneously believed to be drug users can maintain an ADA "regarded as" claim.[9] In some instances, courts have held that the ongoing effects of drug *addiction*, as distinct from drug use, can qualify as a disability that the employer must accommodate. For example, an employer could potentially be required to modify an employee's work schedule to permit the employee to attend Narcotics Anonymous meetings or provide a leave of absence for the employee to seek additional treatment, subject to any "undue hardship" defense the employer may have.

Particularly in cases involving medical marijuana use, employers should be very clear that it is the drug use itself, not the underlying condition for which the medical marijuana was recommended, that is the basis for the decision. If an employer sends mixed signals—such as managerial comments showing animus toward the condition, intrusive questioning, or excessive interest in the condition—then a court may find a factual dispute precluding summary judgment or dismissal on a motion to dismiss, subjecting the employer to the cost and risk of a trial.[10] In addition, if the employer has not enforced its drug policies consistently and the employee can show that other employees without a disability were not subjected to the same discipline, an inference of discrimination could also arise.

The FMLA does not distinguish between legal and illegal drug use as the ADA does, but it operates in a similar manner to provide protection for employees to seek treatment for drug abuse without providing protection for drug use.[11] Employees may take FMLA leave to receive treatment for substance abuse if the treatment is provided by a "health care provider" or on referral from a health care provider. The FMLA regulations also limit the protection that employees receive for leave based on substance abuse treatment by providing a safe harbor for an employer to take action pursuant to "an established policy, applied in a nondiscriminatory manner that has been communicated to all employees, that provides under certain circumstances [that] an employee may be terminated for substance abuse."[12] Again, employers taking action on this basis should be careful to ensure that the record clearly shows that the action is based on the employee's drug abuse, not on the fact that the employee is taking FMLA leave. Finally, FMLA regulations permit employees to take leave to care for a covered family member who is receiving substance abuse treatment and prohibit employers from taking action against such an employee.

While federal law provides only limited protection to employees who use medical or recreational marijuana, state laws in some instances are more generous. In several states, the applicable medical marijuana statute explicitly provides employment protections for medical marijuana users. Courts have not thus far been receptive to arguments by employers that these protections are pre-empted by the ADA or the illegal status of marijuana under federal law.[13] Even in states where the applicable medical marijuana statute is silent on employment protections, there is still risk to employers that a court would find such protections to exist. In late 2017, the Supreme Judicial Court of Massachusetts issued a groundbreaking opinion in which it found that employers must reasonably accommodate an employee's off-duty medical marijuana use under Massachusetts' state employment discrimination statute based on language in the Massachusetts medical marijuana law providing that medical marijuana users shall not be "denied any right or privilege" due to their marijuana use.[14] The court held that the employer's position urging application of the ADA's safe harbor would deny a medical marijuana user her right to receive a reasonable accommodation of her disability. Notably, several states' medical marijuana statutes that are silent as to employment protections contain "right or privilege" language similar to that relied upon by the Massachusetts court, thus giving rise to the potential that these states could also impose reasonable accommodation requirements on employers.

Of course, the employer's duty is to provide *reasonable* accommodations and does not necessarily require adoption of the employee's preferred accommodation. Under the ADA and most state statutes, an employer can assert as a defense that the employee's accommodation would impose an "undue hardship" on the employer's business. Most if not all courts would probably agree that permitting an employee to use marijuana while on the job would be an undue hardship to the employer. How that would operate with employees who are required to be "on call" or to respond to emails or phone calls outside of working hours is a trickier question. While every case turns on its specific facts, it is also likely that an employer could successfully assert an undue-hardship defense based on the need to comply with regulations applicable to government contractors or certain industries like transportation and shipping, the need for a particular employee to maintain a security clearance that is dependent on passing a drug test, safety concerns such as the employee's operation of heavy machinery, or an essential requirement for the employee to be "on call" when off duty. If an employer plans to deny the employee's requested accommodation, the employer should be mindful of the requirement to engage in an "interactive process" with the employee to explore the availability of other, alternative accommodations that would not create an undue hardship.

Just as there has been a relatively rapid sea change of society's acceptance of marijuana, the standards that govern employers'

reactions to marijuana use by employees are also in flux. Particularly at the state level, there is relatively little case law explaining employees' rights and employers' obligations. As more states (and possibly the federal government) continue to liberalize the treatment of marijuana, employers should be sure that their drug policies are clearly expressed and evenhandedly applied. Given the medicinal nature of some employees' marijuana use, failing to make clear that a personnel action is about the drug use and the drug use alone can lead to trouble for employers. ⊙

Endnotes

[1]Lavanya Ramanathan, *"I Don't Feel Like I'm Doing Something Wrong": Yuppies Have Discovered Pot—and They Like It*, Wash. Post (Dec. 1, 2018), https://www.washingtonpost.com/lifestyle/style/i-dont-feel-like-im-doing-something-wrong-yuppies-have-discovered-weed-and-they-like-it/2018/11/30/dd2b7240-e90c-11e8-a939-9469f1166f9d_story.html; Chris Morris, *A Can of Buds? Anheuser-Busch Considers Adding Cannibis Drinks to Its Lineup*, Fortune (Dec. 19, 2018), http://fortune.com/2018/12/19/anheuser-busch-cannabis-budweiser-tilray; Jen Skerritt & Craig Giammona, *Coca-Cola is Eyeing a Possible Entry Into the Cannabis Market*, Time (Sept. 23, 2018), http://time.com/5404095/coca-cola-cannabis-market-cbd-drinks.

[2]*Marijuana On the Ballot*, Ballotpedia, https://ballotpedia.org/Marijuana_on_the_ballot#By_year (last visited Feb. 6, 2019).

[3]*See* 21 U.S.C. § 812.

[4]Memorandum from Jefferson B. Sessions III, Att'y Gen., to All United States Attorneys, Subject: Marijuana Enforcement (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download.

[5]*See* Jena McGregor, *Why Drug Testing at Work "Is the New Don't Ask, Don't Tell,"* Wash. Post (Dec. 21, 2018), https://www.washingtonpost.com/business/2018/12/22/why-drug-testing-work-is-new-dont-ask-dont-tell.

[6]42 U.S.C. § 12114(a).

[7]*Id.* § 12114(b).

[8]*Id.* § 12114(c).

[9]*See id*. § 12102(1)(C) (defining "disability" as including "being regarded as having such an impairment").

[10]*See, e.g.*, *Coles v. Harris Teeter LLC*, 217 F. Supp. 3d 185 (D.D.C. 2016).

[11]29 C.F.R. § 825.119(a).

[12]*Id.* § 825.119(b).

[13]*See, e.g.*, *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326 (D. Conn. 2017).

[14]*Barbuto v. Advantage Sales & Mktg. LLC*, 78 N.E.3d 37 (Mass. 2017).

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