

“Weed” in the Workplace: An Employer’s Guide to Pennsylvania’s New Medical Marijuana Law

By Steven K. Ludwig

Inhale. Pennsylvania has become the 24th state to approve the use of medical marijuana for therapeutic purposes. The Medical Marijuana Act became effective in May and the Department of Health (DOH) is scurrying to issue interim regulations. While the initial focus is on the issuance of permits to manufacture, prescribe and dispense medical marijuana, the law also has provisions impacting employers.

It is now unlawful for an employer to “discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee ... solely on the basis of such employee’s status as an individual who is certified to use medical marijuana.” Both employers and individuals acting on behalf of an employer can face substantial fines for violating this prohibition. While the DOH will have broad discretion in imposing penalties, in egregious cases, the DOH is empowered to assess a penalty of not more than \$10,000 for each violation and an additional penalty of not more than \$1,000 for each day of a continuing violation.

The objective of the law is to make marijuana available for people with a serious medical condition. This includes people with cancer, HIV, ALS, Parkinson’s disease, multiple sclerosis, epilepsy, inflammatory bowel disease, neuropathies, Huntington’s disease, Crohn’s disease, post-traumatic stress disorder, intractable seizures,

glaucoma, sickle cell anemia and autism. Medical marijuana also will be available to people who are terminally ill. Since persons utilizing medical marijuana will almost always qualify as being disabled under the federal Americans with Disabilities Act, the Pennsylvania Human Relations Act and some local ordinances, there may be instances when an employer will need to make reasonable accommodations associated with the disability – and the use of medical marijuana – so long as it does not rise to the level of an undue hardship. It would be prudent for an employer to engage in the interactive process with an employee who is using medical marijuana.

Employers still may limit the use of medical marijuana in the workplace. Performing work while “under the influence” is still restricted. The law provides:

Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment. This act shall in no way limit an employer’s ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee’s conduct falls below the standard of care normally accepted for that position.

The employer's right to prohibit an employee from being impaired in the workplace will be tested by disabled employees treating a medical condition with medical marijuana. It also will be a challenge for an employer to demonstrate impairment and the courts ultimately will need to address the meaning of "under the influence" if it's not addressed through regulation. Suits are already pending in other states that present this issue. In addition, the law recognizes the obvious: it does not require an employer to commit an act which violates federal law. So, for example, an employer subject to U.S. Department of Transportation regulations still will need to report positive test results for marijuana even when the marijuana was prescribed for medicinal purposes. The law also permits an employer to prohibit an employee

"from performing any task which the employer deems life-threatening" while under the influence of medical marijuana, even if the prohibition results in an adverse financial impact upon the employee. An employer also may prohibit an employee "from performing any duty which could result in a public health or safety risk while under the influence of medical marijuana."

It now behooves Pennsylvania employers to issue or modify drug policies and nondiscrimination policies to conform with Pennsylvania's foray into medical marijuana. Exhale.

If you have any questions about the above, please contact [Steven K. Ludwig](mailto:sludwig@foxrothschild.com) at 215.299.2164 or sludwig@foxrothschild.com or any member of the firm's [Labor and Employment Department](#).



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