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The Highs and Lows of Marijuana Legalization – International Association of Gaming Advisors

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POSITIONS OF STATE GAMING REGULATORS AS TO THEIR LICENSEES INVOLVEMENT IN STATE-LEGALIZED CANNABIS

- Nevada gaming regulators say no:
 - Nevada Gaming Commission Regulation 5.011.8 provides that grounds for a finding of unsuitability include “[f]ailure to comply with or make provision for compliance with all federal, state and local laws and regulations. . . .”
 - As such, Nevada gaming regulators have stated that gaming licensees or applicants can have no involvement whatsoever in any state-legalized cannabis business (including spouses, as well as a landlord or lender to such a business).



POSITIONS OF STATE GAMING REGULATORS AS TO THEIR LICENSEES INVOLVEMENT IN STATE-LEGALIZED CANNABIS (cont.)

- Interestingly, when the Nevada Gaming Commission affirmed the Nevada Gaming Control Board's decision, three of the five members (all attorneys) recused themselves because their law firms represented medical marijuana applicants. See <https://www.reviewjournal.com/business/business-columns/inside-gaming/gaming-board-sticking-to-medical-pot-stance/>



POSITIONS OF STATE GAMING REGULATORS AS TO THEIR LICENSEES INVOLVEMENT IN STATE-LEGALIZED CANNABIS (cont.)

- One could argue that Nevada’s gaming regulators’ decision conflicts with Nevada law:
 - Nevada’s Initiative allowing recreational marijuana provides that “it is lawful and must not, in this State, be used as a basis for prosecution or penalty by this State” against a person acting in accordance with the recreational cannabis laws. See <http://nvsos.gov/sos/home/showdocument?id=4434> at 29.
 - Nevada’s medical marijuana law provides that “[a] professional licensing board shall not take any disciplinary action against a person licensed by the board on the basis that. . . [t]he person engages in or has engaged in the medical use of marijuana in accordance with the provisions of this chapter.” See N.R.S. 453A.510.



POSITIONS OF STATE GAMING REGULATORS AS TO THEIR LICENSEES INVOLVEMENT IN STATE-LEGALIZED CANNABIS (cont.)

- Other state regulators say yes:
 - Illinois
 - Gaming regulators initially indicated they may follow Nevada, however the state's medical cannabis statute prevented such action.
 - Illinois' Compassionate use of Medical Cannabis Pilot Program provides that persons participating in the program shall not be denied any right or privilege, and shall not be disciplined by a licensing board, for acting in compliance with the statute and regulations promulgated thereunder. See 410 ILCS 130/25.
 - As such, the Illinois Gaming Board did not take adverse action against the video gaming café chain Lucy's Place when one of its owners opened several medical cannabis dispensaries in Illinois.



POSITIONS OF STATE GAMING REGULATORS AS TO THEIR LICENSEES INVOLVEMENT IN STATE-LEGALIZED CANNABIS (cont.)

– Pennsylvania

- Pennsylvania's Medical Marijuana Act provides that no licensee, nor employee, principal or financial backer of such shall be denied any right or privilege, including civil penalty or disciplinary action by a Commonwealth licensing board or commission, for any action taken in accordance with the Medical Marijuana Act. 35 P.S. § 10231.2103.
- The Commonwealth of Pennsylvania is set to issue cultivation and dispensary licenses in June under its recent Medical Marijuana Act, and the Pennsylvania Gaming Control Board has not made any indications that its licensees cannot be involved in the state's nascent medical marijuana industry.



OBLIGATIONS OF GAMING OPERATORS TO EMPLOYEES REGISTERED AS MEDICAL MARIJUANA PATIENTS

- Many state medical marijuana laws provide that employers cannot discriminate against any employee registered as a medical marijuana qualifying patient, including:
 - Arizona
 - Arkansas
 - Connecticut
 - Delaware
 - Illinois
 - Maine
 - Minnesota
 - Pennsylvania
 - Rhode Island



OBLIGATIONS OF GAMING OPERATORS TO EMPLOYEES REGISTERED AS MEDICAL MARIJUANA PATIENTS (cont.)

- Many state medical marijuana laws also provide that an employer cannot take adverse action against an employee for a positive drug test (Arizona, Delaware and Minnesota):
 - Provides no protection to employee who uses, possesses or is impaired during work hours.
 - Exemption for employer if compliance with state law would cause the employer to lose monetary or licensing-related benefit under federal law or federal regulations.



OBLIGATIONS OF GAMING OPERATORS TO EMPLOYEES REGISTERED AS MEDICAL MARIJUANA PATIENTS (cont.)

- Some states also require that the employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana.
 - Nevada (N.R.S. 453A.800)
 - New York (N.Y. Public Health Law §3369)
- Other states, without such requirement, have held that no accommodations need to be made for violations of zero tolerance policies by medical marijuana patients.
 - *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Ore 2010)
 - *Ross v. Raging Wire telecommunications, Inc.*, 174 P.3d 200, 204 (Ca. 2008)



UNEMPLOYMENT BENEFITS FOR EMPLOYEES TERMINATED FOR VIOLATING AN EMPLOYER'S DRUG-FREE WORKPLACE POLICY

- Courts have ruled that employees are entitled to unemployment benefits following termination for violating a company's drug-free workplace policy when using state-licensed medical marijuana for a qualifying medical condition. *See Braska v. Challenge Mfg. Co.*, 307 Mich.App. 340 (Mich. App. 2014).
 - Such finding is in accord with court decisions that have granted unemployment benefits to employees terminated for illegal, non-medical marijuana, outside the workplace. *See Eastham III v. The Housing authority of Jefferson County, et al.* 2014 IL App (5th) 130209.



OBLIGATIONS OF GAMING OPERATORS TO EMPLOYEES ENGAGED IN CONSUMING STATE-LEGALIZED RECREATIONAL CANNABIS

- Many states have laws providing that employers cannot discriminate against employees who engage in lawful activities outside of work.
 - Nevada law provides that an employer cannot refuse to hire, or fire someone because that person “lawfully” used a product outside of work hours. NRS 613.333.
 - Illinois law prohibits an employer from discharging or refusing to hire an employee because “the individual uses lawful products off the premises of the employer during nonworking hours.” 820 ILCS 55/5(a).



OBLIGATIONS OF GAMING OPERATORS TO EMPLOYEES ENGAGED IN CONSUMING STATE-LEGALIZED RECREATIONAL CANNABIS (cont.)

- Regardless, courts are finding that the off-duty activity laws require that the activities be legal under both state and federal law to cover the employee.
 - *Coats v. Dish Network LLC*, 350 P.3d 849 (Colo. 2015)



- Where do we go from here?
 - How can you protect yourself?
 - Revisit employment policy handbooks
 - Address the dichotomy between state and federal laws, and policies of gaming regulators
 - Requires a state-by-state analysis
 - <http://www.foxrothschild.com/content/uploads/2016/06/e-book-Marijuana-May-2017.pdf>



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