

# Medical marijuana—what every employer should know



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The growing state legalization of medical marijuana use presents unique challenges for employers. At last count, thirty states have legalized the use of medical marijuana. Nine states have legalized adult recreational use as well. In our area, Pennsylvania has recently joined New Jersey and Delaware in legalizing and regulating the use of medical marijuana.

The scope, requirements, and restrictions surrounding the use of medical marijuana vary from state to state, and this relatively new area of law is changing rapidly.

Irrespective of state legislation, marijuana remains a Schedule I drug and thus is illegal under federal law, whether used for medical or recreational purposes. Enforcement of federal law is left to the discretion of individual U.S. Attorneys.

This article is intended to highlight issues, increase awareness for employers, and provide a general overview of the topic. All employers should be prepared to recognize and manage potential legal issues surrounding the use of medical marijuana by their employees.

Certainly, there is no place for an intoxicated employee in the workplace, especially in the marine and transportation industry. Presumably, all would agree that no employee should be on duty, or operating a vessel or equipment, if impaired due to ingestion of any legal or illegal substance, including alcohol, sleep aids, narcotic pain medication, or marijuana.

The Coast Guard regulations for DOT drug testing are well known in the transportation industry. The regulations include requirements for pre-employment, random, post-accident, and reasonable cause drug tests. Alcohol testing is also required in certain circumstances. The main purpose of these regulations is safety, to ensure that those involved in the operation of vessels are not impaired or under the influence of drugs or alcohol that could affect their judgment or reaction time.

The key distinction for marijuana is that its active ingredient, THC, remains in the user's system for long periods of

time, up to 30 days, and thus standard drug tests will detect the presence of THC long after its intoxicating effects have dissipated. In contrast, detectable levels of alcohol and even opiates disappear much more quickly, within a day or two.

Therefore, an employee's use of medical marijuana while off duty is likely to result in a positive drug test, even if the employee is not impaired at the time of an incident or when tested. In other words, a positive drug test for marijuana is not evidence of impairment but is only that the subject has used marijuana sometime in the past. DOT has recently authorized medical review officers to investigate whether a positive test for marijuana is potentially the result of Marinol (a synthetic form of THC, approved by the FDA in 1985), but they are not required to do so. To further complicate matters, the use of hemp oil (CBD) can also lead to a positive drug test, even if its use is medicinal and not intoxicating.

Because of state legalization of medical marijuana, employers now face difficult decisions if they become aware that any employee uses medical marijuana while off duty. Depending on the employee's duties, the termination of that employee may give rise to state employment claims that the employer has discriminated against the employee as a result of his/her medical condition or disability. Most state laws prohibit discriminating against employees with disabilities if the disability does not prevent the employee from performing his or her duties with "reasonable accommodation."

Some states, including Delaware, have incorporated this concept directly within their medical marijuana statutes. "Unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations, an employer may not discriminate against a person in hiring, termination or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon . . . a registered qualified patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed,

or was impaired by marijuana on the premises of the place of employment or during the hours of employment." The Supreme Court of Massachusetts has found that the off-duty use of medical marijuana may, in some circumstances, give rise to a cause of action against an employer for failing to offer a reasonable accommodation to the employee.

Fortunately for employers in the marine and transportation industry, the Coast Guard and Department of Transportation have adopted a zero-tolerance standard with respect to a positive drug test for marijuana, irrespective of use medicinally or recreationally. Unlike the use of a prescribed sleep aid or certain narcotics, there are no exceptions for mariners who obtain the medical marijuana from a state-sanctioned facility and against whom there is no evidence of impairment while on duty.

Marine and transportation employers cannot breathe a sigh of relief at this news, however. Not all marine/transportation employees are subject to Coast Guard or DOT drug testing regulations, and even those who are may still have a state law cause of action for discrimination if terminated or disciplined as a result of a positive drug test. That does not mean that the employer cannot have solid defenses to such an action, but nonetheless these issues should be considered when developing policy and addressing personnel issues.

Finally, the increasing state legalization of medical marijuana could impact current and future litigation in the event of a personal



injury or accident. Plaintiffs' lawyers will no doubt seize on the opportunity to present evidence of a crew member's positive drug test in the event he/she is involved in a marine incident, even if there is no evidence of impairment. Many crewmembers work a two week on/two week off schedule, and someone's use of marijuana while off duty could lead to a positive drug test following an accident that occurs weeks later. Again, marine employers have defenses to such arguments, but such issues should be kept in mind when forming company policy as to both routine and post-incident drug testing.

In conclusion, this article should not be construed as legal advice, nor is it a comprehensive review of the law or science underlying the advent of legalized medical marijuana. Marine and other employers are urged to consult their maritime and employment lawyers if they have specific questions or concerns.

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