

Medical Marijuana Employment Issues for Ohio Lawyers

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Topics

- National trends in the legalization of marijuana
- Conflict between Federal and State laws
- The Ohio Medical Marijuana Program, with a focus on issues of importance to Employers

Trend Toward State Decriminalization of Marijuana

- 30 states and D.C. have laws which broadly decriminalized marijuana in some form
 - › 8 states (WA, OR, CA, NV, AK, CO, MA, ME) and D.C. have adopted the most expansive laws allowing recreational use of marijuana
 - › The vast majority of states allow for limited use of medical marijuana under certain circumstances

But What About Federal Law?

- Controlled Substances Act, 21 U.S.C. 801 *et. seq.*
 - › Makes it illegal to manufacture, distribute, dispense, or possess a controlled substance
 - › Marijuana is a Schedule 1 controlled substance
 - High potential for abuse
 - No currently accepted medical use
 - Same class as heroin, LSD, and ecstasy

But What About Federal Law?

- Doctors may not prescribe medical marijuana under federal law
- Possession of marijuana is at least a technical violation of federal law

Current Federal Enforcement Priorities Uncertain

- “Cole Memorandum”
 - › In 2013, DOJ issued a memorandum stating that its general policy is not to interfere with the legal use of marijuana pursuant to state law, provided that the state tightly regulates and controls the market

Current Federal Enforcement Priorities Uncertain

- On January 4, Attorney General Jeff Sessions rescinded the Cole Memorandum; enforcement of federal drug laws to prosecute marijuana offenses is at discretion of U.S. Attorneys
- But, Congress has (so far) refused to appropriate funds for the DOJ to enforce drug laws against legal state programs

Ohio Medical Marijuana Program

www.medicalmarijuana.ohio.gov

The Ohio Medical Marijuana Program: H.B. 523

- September 8, 2016 - Effective date of H.B. 523
- September 8, 2017 – Deadline for adopting all implementing regulations
- Fall 2017 to Spring 2018 – State agencies/boards grant licenses to successful applicants to grow, process, test and dispense medical marijuana
- September 8, 2018 – Ohio Medical Marijuana Program is operational

Ohio Medical Marijuana Program Implementation

- Large number of applications were submitted for state licenses to cultivate, process, dispense and test medical marijuana
- Successful cultivator applicants have been announced; process is being challenged
- Program delayed

Ohio Medical Marijuana Program

- a certified physician can recommend marijuana to a patient with a qualifying medical condition;
- a registered patient or caregiver can purchase medical marijuana from a licensed dispensary

Ohio Medical Marijuana Program *cont.*

- Legal forms of medical marijuana:
 - › Vape, eat, transdermal patch
 - › Edibles, oils, patches, plant material, tinctures
- Prohibited:
 - › Smoking or combusting
 - › Home growing

Qualifying Medical Conditions

- AIDS
- Amyotrophic lateral sclerosis
- Alzheimer's disease
- Cancer
- Chronic traumatic encephalopathy
- Crohn's disease
- Epilepsy or another seizure disorder
- Fibromyalgia
- Glaucoma
- Hepatitis C
- Inflammatory bowel disease
- Multiple sclerosis
- Pain that is either chronic and severe or intractable
- Parkinson's disease
- Positive status for HIV
- Post-traumatic stress disorder
- Sickle cell anemia
- Spinal cord disease or injury
- Tourette's syndrome
- Traumatic brain injury
- Ulcerative colitis

Medical Marijuana In The Ohio Workplace

“Ohio passed a law. It’s legal.”

“I have a doctor’s note.”

Employer Impact

- H.B. 523 DOES NOT:
 - › Require an employer to permit an employee's use, possession, or distribution of medical marijuana
 - › Require an employer to **accommodate** an employee's use, possession, or distribution of medical marijuana
 - › Prohibit an employer from **refusing to hire** a person because of that person's use, possession, or distribution of medical marijuana

Employer Impact *cont.*

- H.B. 523 DOES NOT:
 - › Prohibit an employer from **disciplining or discharging** a person because of that person's use, possession, or distribution of medical marijuana
 - › Prohibit an employer from enforcing:
 1. A drug testing policy
 2. A drug-free workplace
 3. A zero tolerance policy
 - › Interfere with federal restrictions on employment (e.g. DOT regulations)

Employer Impact *cont.*

- HB 523 **ATTEMPTS** to protect employers against claims by employees related to medical marijuana, including:
 - Refusing to hire
 - Disciplining
 - Firing
 - Discriminating
 - Retaliating

Employer Protection

- Nothing in this chapter does any of the following:
 - (5) Permits a person to commence a cause of action against an employer for refusing to hire, discharging, disciplining, discriminating, retaliating, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment related to medical marijuana.

HB 523. Section 3796.28(A)(5)

Ohio's Fair Employment Practice Statute

- Ohio Revised Code § 4112.02 Unlawful Discriminatory Practices:
 - It shall be an unlawful discriminatory practice:
 - (A) For any employer, because of the race, color, religion, sex, military status, national origin, **disability**, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

Must Employers Accommodate Medical Marijuana?

- **Federal Law**

- › Active drug use is not protected

- **State Law**

- › Pre-empted by federal law 

- › Unreasonable on its face 

- › Inability to pass a drug test 

- **Fact Intensive Analysis**

Court Rulings

- "The fact that the employee's possession of medical marijuana is a violation of federal law does not make it per se unreasonable as an accommodation." *Barbuto v. Advantage Sales and Marketing LLC*, (Mass.) July 17, 2017. CROHN'S DISEASE
- The employer's refusal to hire plaintiff based on her use of marijuana outside the workplace that prevented her from passing a drug test violated state law. *Callahan v. Darlington Fabrics* (R I.) May 23, 2017. MIGRAINE HEADACHES
- Using a facially-neutral drug test to screen out medical marijuana users puts patients in a worse position than a recreational user who can cease use long enough to pass the drug test and get hired. *Callahan*.
- Colorado law prohibiting discharge of an employee based on the employee's "lawful" outside of work activities did not protect employee who used marijuana at home in compliance with state law because his marijuana use was unlawful under federal law. *Coats v. Dish Network*, (Cob.) June 15, 2015. PARAPLEGIC - painful muscle spasms.

Employment: Reasonable Accommodations

- Engage in interactive process
- Consider alternatives
- To deny accommodation, employer might try to establish undue hardship
 1. Impairs employee performance
 2. Unacceptable safety risk
 3. Violates employer's contract
 4. Violates federal rule or regulation
 5. Safety sensitive position/Dept. of Transportation

Ohio's Law and Unemployment Benefits

- An employee terminated for using medical marijuana shall be considered discharged for “just cause” if:


That use violated “an employer’s drug-free workplace policy, zero tolerance policy, or other formal program or policy regulating the use of **medical** marijuana.”

Section 3796.28(B)

Ohio's Law and Workers' Compensation

- If an employee suffers a workplace injury, and the proximate cause of the injury was due to the employee being under the influence of marijuana¹, there is a rebuttable presumption² that the employee is ineligible for workers' compensation benefits.
 1. including medical marijuana
 2. provided the employer posted the rebuttable presumption notice in writing

Union Considerations

- Drug testing is a mandatory subject of bargaining
 - Union employees are entitled to a union representative before being required to take a drug test
 - Union employees cannot be discharged without just cause:
 - › Off duty conduct vs. On duty conduct
- 
- › Complicated when dealing with medical marijuana use which is “legal” under state law

Union Considerations *cont.*

- Just Cause = Discipline
- Degree of punishment also subject to binding arbitration:
 - › Arbitrator may soften the penalty.
 - › Referral to EAP + Last Chance Agreement = common solution.
 - › If an arbitrator orders reinstatement of the employee, it is unlikely the employer will be successful in overturning the arbitrator's award.

A Short Detour Into Legal Ethics

State Law Immunity for Activities Related to Medical Marijuana

- H.B. 523 protects parties lawfully participating in the Ohio Medical Marijuana Program from arrest, prosecution, and civil liability for violating Ohio drug laws
- Persons holding professional and occupational licenses may not be subjected to professional disciplinary action solely for engaging in lawful professional or occupational activities related to medical marijuana
- Financial institutions are exempted from crimes involving financial services related to funding of drug or marijuana trafficking and drug-related offenses of conspiracy and complicity

But ...Ohio Rules of Professional Conduct Still Apply

Client-Lawyer Relationship

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Ohio Supreme Court Amendment to Rule 1.2(d)

- Consequently, shortly after H.B. 523 was enacted, the Ohio Supreme Court amended Rule 1.2(d) and added a new subparagraph:
 - › A lawyer may counsel or assist a client regarding conduct expressly permitted under Ohio's medical marijuana law. In these circumstances, the lawyer shall advise the client regarding federal law.
- Consult your firm's ethics committee, particularly if you seek to represent a party directly involved in the medical marijuana industry

Thank you.

ADDITIONAL QUESTIONS? PLEASE CONTACT

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