HUMAN RESOURCES

Employment and Medical Marijuana

Laws and court rulings impact Florida cities

by Brett J. Schneider, Esq.
and
Brooke Ehrlich, Esq.
Weiss Serota Helfman Cole & Bierman

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Marijuana has long been known for its calming properties. However, it has been having the opposite impact on municipalities across Florida lately. Many cities are confronted with new questions concerning whether and to what extent they can prohibit or regulate medical marijuana use by employees.

In 2016, voters approved the Florida Medical Marijuana Legalization Initiative, also known as Amendment 2. Amendment 2 created a constitutional right for individuals to use medical marijuana if they have certain "debilitating medical conditions" as determined by a licensed Florida physician. Significantly, the amendment states that "[n]othing in this section shall require any accommodation of any on-site medical use of marijuana in any place of ... employment."

In June 2017, then-Governor Rick Scott signed into law Senate Bill 8-A, which implemented Amendment 2. Notably, Senate Bill 8-A contains the following provision:

This section does not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy. This section does not require an employer to accommodate the medical use of marijuana in any workplace or any employee working under the influence of marijuana. This section does not create a cause of action against an employer for wrongful discharge or discrimination.

Since Senate Bill 8-A became effective in 2017, approximately 300,000 Floridians have obtained medical marijuana cards. Employee medical marijuana use has potential implications for employers under federal, state and local laws, including the Americans with Disabilities Act (ADA) and the Florida Civil Rights Act.

HISTORICAL IMPACT OF FEDERAL AND STATE LAWS

To understand the impact of Florida's legalization of medical marijuana, it helps to understand applicable federal and state laws.

At the federal level, the Controlled Substances Act (CSA) places all substances that are, in some manner, regulated under existing federal law into one of five schedules. Placement is based upon the substance's medical use, potential for abuse, and safety or dependence liability. Marijuana and tetrahydrocannabinol (THC) (and any material that contains either substance) are categorized as Schedule I controlled substances. Under the CSA, it is unlawful to manufacture, distribute and possess Schedule I controlled substances.

The ADA and the disability protections placed on the Florida Civil Rights Act provide protections to qualified individuals with a disability. However, the use of medical marijuana is not protected under these laws because the term "individual with a disability" does not include an individual who is engaging in the use of illegal drugs (as defined by the CSA).

Florida's Drug-Free Workplace Act, Section 112.0455, Florida Statutes (the Act), is intended to promote the goal of drug-free workplaces through fair and reasonable drug testing methods. The Act establishes a voluntary program that provides employers

that successfully implement the program with a premium credit on their workers' compensation premiums.

The Act requires participating employers to develop drug-free workplace policies and conduct several types of employee drug testing. The drug tests include pre-employment testing, routine fitness-for-duty testing, follow up testing after participation in a drug treatment program and reasonable suspicion testing. The Act does not address medical marijuana use authorized under Amendment 2. Therefore, an employee who tests positive may lose his/her employment under the Act. However, if a municipality opted to allow use of medical marijuana, it should consult or hire legal counsel and devise appropriate drug testing policy that follows the Act as closely as possible while anticipating medical marijuana use.

IMPACT OF AMENDMENT 2 ON EMPLOYERS

Because Senate Bill 8-A has been in effect only for two and a half years, there are no reported legal decisions in Florida addressing employers' rights to prohibit or regulate employee medical marijuana use. However, in other states permitting the use of medical marijuana, courts have generally found that employers have no duty to accommodate employee use, whether on or off duty.

In *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518 (Ore. 2010), the Oregon Supreme Court held that the provision of the Oregon Medical Marijuana Act that affirmatively authorized the use of medical marijuana was preempted by the CSA (which explicitly prohibited marijuana use without regard to medicinal purpose). Therefore an employee who engaged in the illegal use of drugs was not entitled to a reasonable accommodation under the ADA.

Contradictory case law exists in which courts have held that employee medical marijuana use is protected. These cases have come from jurisdictions whose state laws specifically require accommodating employee use of medical marijuana.

For example, in *Noffsinger v. SSC Niantic Operating Company LLC*, 273 F.Supp.3d 326, 334 (D. Conn. 2017), Connecticut's District Court allowed a prospective employee who was denied employment after she tested positive for cannabis to proceed with her employment discrimination claim. The reason was that the state's Palliative Use of Marijuana Act specifically prohibited employers from discriminating against authorized persons who use medicinal marijuana. In another opinion, the Superior Court of Rhode Island cited the Beatles lyric, "I get high with a little help from my friends" and held that the anti-discrimination-in-employment provision of the state's medical marijuana statute was not preempted by the CSA. See *Callaghan v. Darlington Fabrics Corp.*, 2017 WL 2321181 (R.I. Super. 2017).

Otherwise, courts in other states including California, Washington and Colorado, have consistently upheld an employer's right to discipline employees for otherwise legal marijuana use.

OPTIONS FOR FLORIDA EMPLOYERS

Aside from the considerations regarding liability, Florida employers have other issues to consider, including employee retention, public perception and safety (both internal and external). So what should employers do?

The first option is to maintain a zero tolerance policy. Marijuana use remains illegal under the CSA, and because Amendment 2 does not require employers to allow its use (on or off duty), employers are permitted to prohibit marijuana use by their employees. From a legal perspective, this option is relatively straightforward, since employees who have challenged such policies in other states (which have laws similar to Florida) have been unsuccessful. If the employer elects this option, it should ensure that the employees are aware of its position so that employees who are permitted to use medical marijuana under state law do not unwittingly lose their jobs based on such use.

The second option is to allow employees to use medical marijuana offsite (and off duty) and only when such use does not impair employees' ability to safely perform their job duties. Under this option, employers should consider restricting use by employees with safety-sensitive positions (e.g., police and fire) and should consider requiring advance notice from their employees of their use of medical marijuana so that they can more closely monitor any such employees.

Regardless of which option is selected, employers should make a conscious decision as to how they intend to deal with the issue of employee marijuana use and make sure that their policies and practices reflect that decision.

Brett J. Schneider, Esq., and Brooke Ehrlich, Esq., are with Weiss Serota Helfman Cole & Bierman. QC

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