

HAZY FUTURE AHEAD FOR FLORIDA EMPLOYERS AFTER MEDICAL MARIJUANA VOTE

Insights
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Yesterday's election result means that Florida will soon be the 26th state in the country to permit certain eligible users to use medical marijuana without fear of prosecution by state officials. The passage of Constitutional Amendment 2 is troublesome for employers, however, as it leaves open some very basic questions about whether and to what extent the use of the drug by applicants and employees will need to be accommodated.

Background: Floridians About To Embark On A Long, Strange Trip

The voter initiative, which passed with roughly 71% of the vote, legalizes the use of medical marijuana for individuals with specific debilitating diseases or comparable debilitating conditions as determined by a licensed state physician. Under the new section of the Florida Constitution, the state Department of Health will issue identification cards for patients approved by physicians to use medical marijuana, and will oversee the centers that will produce and distribute the drug.

The list of medical conditions that will permit medical marijuana use is broad and somewhat open-ended. It includes cancer, epilepsy, glaucoma, the human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), post-traumatic stress disorder (PTSD), amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, and multiple sclerosis. It also includes a broad catch-all category to include "other debilitating medical conditions of the same kind or class as or

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comparable” to this list, so long as a physician believes that the medical use of marijuana would “likely outweigh the potential health risks for a patient.”

Because Florida is not the first state to enact a medical marijuana law, we can look to the experiences in other states to predict what will develop. And if the future of Florida’s law is anything similar to these other states, you can expect to soon see a cottage industry of physicians readily issuing medical marijuana permission to their patients for a whole host of ailments and conditions. In other words, it will not be very difficult for individuals to obtain a medical marijuana card.

Although the state agency will not begin to issue identification cards immediately, you can expect to see the first instances of state-permitted use fairly soon. In fact, the state has already issued several conditional production licenses to successful bidders.

Employers Left High And Dry?

Unfortunately for Florida employers, the new law does not provide much guidance about employer rights and responsibilities when it comes to medical marijuana. The constitutional amendment only makes clear that the new law will not require you to accommodate any “on-site medical use of marijuana” in any place of employment. Therefore, you can feel comfortable barring employees from smoking, ingesting, or otherwise consuming medical marijuana at your workplace.

However, left open to debate is whether employers need to extend reasonable accommodations to medical-marijuana-using applicants or employees who happen to have the drug in their system while on duty at work or submitting to a pre-hire drug test. Given that this conundrum could run into direct conflict with an employer’s zero-tolerance drug policy, you will need to decide how to respond to these inevitable situations.

If there is any good news for employers, it’s that the constitutional amendment does not contain any language which would affirmatively require you to accommodate medical marijuana use, or include card-holders into a special protected class garnering antidiscrimination protection. At least 10 states have such protections in place, a list that includes New York, New Jersey, Pennsylvania, Connecticut, Arizona, Illinois, and Nevada.

Don't Be Dazed And Confused

Despite this open question, we believe employers should consistently enforce their zero-tolerance drug policy, including medical marijuana. One justification for doing so is that the new law runs counter to federal law, where marijuana (even for medical purposes) remains illegal under the Controlled Substances Act. You can contend that you should not be forced to accommodate a substance that is prohibited by federal law.

Employers in at least six states have already gone down this road, and courts in all six states have issued decisions upholding an employer's right to enforce their zero tolerance policies:

- In 2008, [California's highest court](#) found that the state's medical marijuana law only protects individuals from criminal prosecution, ruling in favor of an employer who declined to hire an injured vet using marijuana to treat chronic back pain after he failed his pre-employment drug test.
- In 2010, [the Oregon Supreme Court handed employers a comprehensive victory](#), ruling that medical marijuana's status as an illegal drug under federal law meant that no employer should be forced to accommodate it.
- In 2011, [the Washington Supreme Court handed employers a similar victory](#), deciding that employers need not accommodate an employee's use of medical marijuana, and that employees terminated for medical marijuana use – even offsite use – have no basis to sue their employers.
- In 2012, [the Montana Supreme Court ruled](#) that medical marijuana users and providers had no special right to their employment despite the state's new law.
- This was followed by [a unanimous 2015 Colorado Supreme Court decision](#) holding that employers were still free to prohibit employee marijuana use in their workforces, and can still discipline and terminate employees who test positive for the drug, despite state law permitting its medicinal (and recreational) use.
- Most recently, in January 2016, [a federal court judge in New Mexico dismissed a lawsuit](#) brought by an employee terminated after testing positive for the drug, finding that

state law does not require employers to accommodate medical marijuana use.

If you decide to go down this same path, you should send any employee to random or reasonable suspicion drug testing consistent with your policies and practices, and then enforce your disciplinary policies as you would no matter what kind of illegal drug – including medical marijuana – shows up in the individual's system. Because it is not feasible to determine an employee's level of "impairment" with a drug test, you would simply be testing to determine whether the active ingredient in marijuana – THC – is in their body.

If you employ individuals in safety-sensitive positions or other jobs that require drug testing under federal or state guidelines, you will almost certainly want to follow this recommendation. In some cases, you may be required to do so under federal law, such as Department of Transportation (DOT) regulations. In other cases, you will want to do so in order to avoid the risk of having one of your employees cause an accident involving members of the public, coworkers, or simply themselves, which could lead to devastating consequences and employer liability.

In fact, the amendment specifically states that "nothing in [the law] shall permit the operation of any vehicle, aircraft, train, or boat while under the influence of marijuana." Thus, any employee who has to drive as part of the job, even if not subject to DOT regulation, should be legally prohibited from being under the influence of marijuana.

This option is not without risk from a workplace law perspective. None of the cases discussed above have any direct influence over the way a Florida court would rule in a similar case, and although they may be looked upon favorably, we cannot predict how the inevitable litigation that will unfold over this issue will be resolved.

Some employers might choose instead to engage in an interactive process with any employee that self-identifies as a medical marijuana user before or after a positive test. Typically, that employee's accommodation request would include a wish that they be absolved from your zero-tolerance policies. These employers would not necessarily have to permit that employee to get a free pass from zero-tolerance policies.

Instead, they would first determine whether a true underlying disability is present such to justify an accommodation, and if so, then determine whether other accommodations besides drug use could allow for the performance of essential functions. Because it is the employer's prerogative to determine which accommodation will be granted (as long as the accommodation is designed to successfully permit the employee to perform the essential job functions), that employer could end up permitting other options and rejecting the drug use accommodation request.

Recognize that employers who engage in this second option might reduce the risk of facing an employment lawsuit from a medical marijuana user, but increase the risk of a safety-related claim. No matter how vigilant you are in ensuring that your medical marijuana-using employees play safe while at work (prohibiting car travel, removing safety-sensitive functions, etc.), there is an inherent risk permitting a drug user in your workplace.

Finally, public sector employers may need to take constitutional considerations into account before proceeding with discipline against medical marijuana users. The state constitution and related laws afford public employees additional rights that need to be considered in conjunction with this new law. Therefore, public employers should discuss action steps with their counsel in anticipation of marijuana entering the workplace.

Conclusion

The state is expected to issue regulations clarifying the law in the coming months, and we will monitor the situation to determine if our recommendations are altered. Until then, we recommend that you consult with your legal counsel to walk through the specific scenarios which could arise in your own workplace to help confirm your decisions.

If you have any questions about this new law, or how it may affect your organization, please contact your Fisher Phillips attorney or one of the attorneys in any of our Florida offices:

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