



Medical Marijuana Comes To Arkansas

Insights

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After a narrow defeat of a medical marijuana proposition four years ago in socially conservative Arkansas, this year's election result means that Arkansas will soon join many other states and become the first in the so-called "Bible Belt" to permit certain eligible users to use medical marijuana without fear of prosecution by state officials. The passage of Issue 6, the Arkansas Medical Marijuana Amendment, 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: Arkansans About To Embark On A Long, Strange Trip

The voter initiative, which passed with roughly 53% of the vote, legalizes the use of medical marijuana for those individuals with any one of 17 qualifying conditions as determined by a licensed state physician. Under the new section of the Arkansas Constitution, the state Department of Health will issue identification cards for patients approved by physicians to use medical marijuana, and will oversee the up to 40 dispensary providers and up to eight marijuana cultivators that will produce and distribute the drug, beginning November 9, 2017. The amendment does not include a provision which would allow patients to grow their own marijuana if they don't live near a dispensary.

The list of medical conditions that will permit medical marijuana use is broad and somewhat open-ended. Among other specific qualifying diseases and medical conditions, the amendment includes arthritis, cancer, glaucoma, positive status for human immunodeficiency virus (HIV) or acquired immune deficiency syndrome (AIDS), post-traumatic stress disorder (PTSD), amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, and multiple sclerosis.

But it also includes several catch-all categories, such as those suffering from "chronic or debilitating disease[s] that produce severe nausea," intractable pain, seizures, severe and persistent muscle spasms, or any other medical condition approved by the Arkansas Department of Health. Because Arkansas 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 Arkansas'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.

Employers Left High And Dry?

Arkansas joins a small cadre of at least 10 other states who have created a protected class around medical marijuana use. That list includes New York, New Jersey, Pennsylvania, Connecticut, Arizona, Illinois, and Nevada. Unlike many medical marijuana laws across the nation, the new law provides that employers can't fire employees based on medical marijuana use, landlords can't refuse to lease to tenants based on medical marijuana use, and schools can't refuse to enroll students based on medical marijuana use. Doctors, lawyers, and other professionals cannot be denied a license to practice their professions due to medical marijuana use, but a professional can be disciplined for abusing medical marijuana, just like other drugs.

The amendment was designed to treat marijuana like a medical drug; similarly to traditional prescriptions, individuals cannot be fired due to their medications, but employees can be fired for being high. 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 how employers will 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, despite the fact that they are not "high" at work or during the pre-hire drug test process. 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.

Don't Be Dazed And Confused

Despite this open question, we believe employers can consistently enforce their zero-tolerance drug policy for on-the-job drug use, 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. Moreover, the new law does not accommodate at-work use of marijuana.

If you decide to continue enforcement of your zero-tolerance policy, 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 drug – including medical marijuana – shows up in the individual's system. Keep in mind that because it is not feasible to determine an employee's level of "impairment" with a drug test (the test only determines whether the active ingredient in marijuana – THC – is in their body), frontline supervisors and managers will need to be more vigilant about documenting independent indications of impairment in the workplace such as unusual sleepiness, slowed perception and motor skills, and red eyes.

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.

Accommodation Options

Some employers might instead 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. Employers who engage in this second option might reduce the risk of facing an employment lawsuit from a medical marijuana user.

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 [Jeff Weintraub](#) (901-333-2070).

This Legal Alert provides information about a specific new state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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