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IN THE WEEDS: FLORIDA LAWMAKERS PROVIDE MEDICAL MARIJUANA GUIDANCE FOR THE WORKPLACE

Insights
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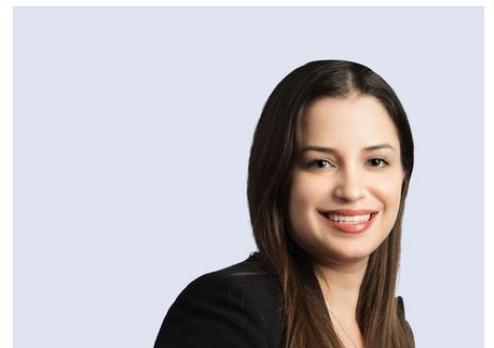
Florida Governor Rick Scott signed a medical marijuana bill into law on Friday that provides guidelines on the implementation of [the state's Constitutional Amendment](#) regarding medical marijuana. The good news for employers: the bill provides additional guidance on the amendment's application in the workplace. The bad news for employers: the bill will almost certainly invite legal challenges and continue to cause uncertainty.

BACKGROUND: FLORIDA'S MEDICAL MARIJUANA HISTORY

In 2014, Governor Scott signed into law the Compassionate Medical Cannabis Act of 2014, also known as "Charlotte's Web" bill, which legalized the use of a non-euphoric strain of marijuana for patients suffering from cancer, or certain conditions that cause chronic seizures or severe and persistent muscle spasms. In March 2016, the governor signed the Right to Try Act, which expanded the framework of Florida's Charlotte's Web law.

In November 2016, Florida voters approved [Constitutional Amendment 2](#) with roughly 71% of the vote. Amendment 2 created a constitutional right to use medical marijuana for individuals with certain "debilitating medical conditions" as determined by a licensed state physician. The list of medical conditions 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

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catch-all category for other conditions “of the same kind or class as or comparable” to those enumerated, if a physician believes that the medical use of marijuana would “likely outweigh the potential health risks for a patient.”

As we wrote back in November shortly after passage, [Constitutional Amendment 2 left many unanswered questions for employers](#). It only made clear that the new law will not require employers to accommodate “on-site medical use of marijuana” in any place of employment, but provided few answers beyond that.

WHAT DOES THE NEW LAW DO?

The Florida legislature approved the medical marijuana bill on June 9, and Governor Scott signed it into effect on Friday, June 23. The bill provides additional guidance on how Constitutional Amendment 2 will affect the workplace. Specifically, the definition of “medical use” excludes the use or administration of marijuana in a patient’s place of employment, except when permitted by his or her employer.

Further, the legislation does not limit an employer’s ability to establish or enforce a drug-free workplace program or policy. The legislation makes clear that employers are not required to accommodate the medical use of marijuana in the workplace, or any employee while under the influence of marijuana. Finally, the legislation indicates that the bill does not create a cause of action against an employer for wrongful discharge or retaliation.

Specifically, the legislation states:

“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 while under the influence of marijuana. This section does not create a cause of action against an employer for wrongful discharge or discrimination. Marijuana, as defined in this section, is not reimbursable under chapter 440.”

HOW WILL THE NEW LAW IMPACT EMPLOYERS?

Employers in Florida should be pleased that the new legislation allows you to continue to consistently enforce

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your zero-tolerance drug policies, including as it applies to medical marijuana. With this legislative clarification, you should reasonably expect that Florida courts will likewise conclude there is no legal obligation to accommodate medical marijuana use.

Notably, employers in other states have already faced challenges from employees regarding whether they were required to accommodate medical marijuana use, and courts in those states have consistently issued decisions upholding the employer's rights to enforce their drug free workplace 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.

FLORIDA EMPLOYERS HAVE OPTIONS

Accordingly, you should be able to continue to send any employee to random or reasonable suspicion drug testing consistent with your policies and practices, and then enforce your disciplinary policies as it would not matter what kind of illegal drug – including medical marijuana – shows up in the individual's system.

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 2016 amendment specifically stated 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.

Some employers who do not have employees in safety-sensitive positions may 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

With new legislation comes growing pains for both employers and employees, and we will continue to monitor developments in this evolving area of the law. Employers should seek guidance from their employment counsel to make sure their policies and procedures

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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