J Bus Ethics (2013) 117:659–666
DOI 10.1007/s10551-012-1551-8

Employment and Public Policy Issues Surrounding Medical Marijuana in the Workplace

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Received: 21 March 2012 / Accepted: 6 November 2012 / Published online: 16 November 2012
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Abstract The status of marijuana as an illegal drug has greatly evolved in recent years. Many countries have decriminalized possession of marijuana for personal use. Others have not decriminalized it but simply "tolerate" it for private personal use. Four countries have passed laws legalizing medical marijuana and one other tolerates the use of marijuana for medical purposes without having legislated a specific right for such possession and use. To date, 17 of the United States and the District of Columbia have also passed laws regarding medical marijuana. However, state medical marijuana laws are at odds with the federal Controlled Substances Act, which prohibits possession of marijuana. This fact, in tandem with employer requirements under the Drug-Free Workplace Act, has created a dilemma for employers who have employees with medical conditions for which medical marijuana has been recommended. Given that 18 additional states currently have medical marijuana legislation pending, medical marijuana in the workplace is an issue which is not going to go away. As a result, it is time to examine the interface between federal and state laws as well as the public policy issues surrounding the lack of rights which medical marijuana patients have in their workplaces.

Keywords Ethics · Law · Medical marijuana · Public policy · Workplace

Currently, 17 states and the District of Columbia have passed laws regarding the possession and use of marijuana for medical purposes. The common theme is these laws is to decriminalize both possession and use of medical marijuana under state law for those who have met the requirements set forth under the corresponding state statute, which usually involves a recommendation for its use from a licensed physician and/or a state-provided identification card. However, there is tremendous variation on the particular terms and conditions set forth in these laws from state to state. In addition, significant questions have arisen relative to the interplay between these individual state laws and various federal laws and regulations, particularly relative to medical marijuana in the workplace. This paper will examine the issue of medical marijuana in the workplace through an examination of relevant federal statutes and policies, state court cases which have addressed workplace issues under individual state medical marijuana laws and the implications these have for employers in setting workplace policies regarding medical marijuana.

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Marijuana Around the World

In recent years, governments and societies around the globe have re-examined their laws which criminalize possession of even small amounts of marijuana. As a result, a number of countries have decriminalized possession of small amounts of marijuana which are appropriate for personal usage. These countries include certain parts of Australia, Belgium, Brazil, Cambodia, Columbia, Costa Rica, Croatia, the Czech Republic, Ecuador, Estonia, Mexico, the Netherlands, Peru, Poland, Portugal, Spain, Switzerland, the United Kingdom, and Uruguay. In a number of other countries, such as Egypt and Jamaica, marijuana is still illegal but its use is widespread and convictions for personal use are extremely rare. However, other countries,

such as Japan where simple possession can be punishable by up to 5 years in prison, still have very strict laws regarding marijuana. Hungarian law makes no distinction between illicit drugs relative to the dangers each can pose so possession and use of marijuana can have the same consequences as possession and use of heroin.

To date, four countries, Canada, Chile, Finland, and Israel, have passed laws which specifically decriminalize marijuana for medical use. A fifth, Argentina, has not specifically legislated the decriminalization of medical marijuana but simply tolerates this use. None of these countries have had specific reported instances where their medical marijuana laws have created issues regarding workers' rights. This is most likely due to the fact these laws have been passed at the federal level rather than the local level, preventing any kind of conflict between federal laws which treat marijuana differently than state laws.

United States Laws and Policies

As noted, 17 states and the District of Columbia have passed laws related to medical marijuana. Exhibit 1 lists these states, the year in which the relevant law was passed and notation as to whether the state law was the result of a voter-approved ballot initiative or an action by the state legislature. It is noteworthy that many of these ballot initiatives and legislative bills passed by significant majorities, indicating the level of public and legislative support which has accompanied state-wide medical marijuana initiatives.

Exhibit 1 Medical marijuana states (as of October 2012)

Alaska	1998	Ballot Measure 8 (58 %)
Arizona	2010	Proposition 203 (50.13 %)
California	1996	Proposition 215 (56 %)
Colorado	2000	Ballot Amendment 20 (54 %)
Connecticut	2012	House Bill 5389 (96-51 House, 21-13 Senate)
DC	2010	Amendment Act B18-622 (13-0 vote)
Delaware	2011	Senate Bill 17 (27-14 House, 17-4 Senate)
Hawaii	2000	Senate Bill 862 (32-18 House; 13-12 Senate)
Maine	1999	Ballot Question 2 (61 %)
Michigan	2008	Proposal 1 (63 %)
Montana	2004	Initiative 148 (62 %)
Nevada	2000	Ballot Question 9 (65 %)
New Jersey	2010	Senate Bill 119 (48-14 House; 25-13 Senate)
New Mexico	2007	Senate Bill 523 (36-31 House; 32-3 Senate)
Oregon	1998	Ballot Measure 67 (55 %)
Rhode Island	2006	Senate Bill 0710 (52-10 House; 33-1 Senate)
Vermont	2004	Senate Bill 76 (22-7) HB 645 (82-59)
Washington	1998	Initiative 692 (59 %)

These individual state laws which permit marijuana possession and use for medical purposes run contrary to the federal Controlled Substances Act (CSA), which was passed in 1970. The CSA regulates the manufacture, possession, distribution, and classification of drugs. Under the CSA, marijuana is classified as a Schedule 1 drug (21 U.S.C. Sect. 812, 844 (a)). Schedule 1 is the most severely restricted of the five drug classifications under the CSA and includes drugs which meet the following conditions: (1) the drug or other substance has a high potential for abuse; (2) the drug or other substance has no currently accepted medical use in treatment in the United States; (3) there is a lack of accepted safety for use of the drug or other substance under medical supervision. Classification as a Schedule 1 drug is at the discretion of the Administrator of the United States Drug Enforcement Administration (DEA), in consultation with the Department of Health and Human Services, Food and Drug Administration and National Institute on Drug Abuse. Hence, state laws which provide for the possession and use of medical marijuana are based on medical opinions which run contrary to the latter two assessments of marijuana as a Schedule I drug under federal guidelines. Numerous efforts and campaigns to reclassify marijuana under the CSA to allow better congruence between federal and state law in light of state medical marijuana laws have been repeatedly rejected by lawmakers.

California was the first state to establish a law to allow for the use of medical marijuana. Upon its 1996 passage, the California Compassionate Use Act was immediately met with strict resistance and action from the federal government via a formal response from then federal drug czar Barry McCaffrey which outlined the federal government initiative to thwart the implementation of the California statute. This plan involved revoking the registration of any physician who prescribed marijuana to a patient due to its status as a Schedule 1 illegal drug, an action that would leave a physician unable to legally practice medicine as well as subject the physician to criminal charges and sanctions. As a result, physicians in California did not prescribe but rather *recommended* that patients use medical marijuana. The DEA saw no distinction between prescription and recommendation and sought action against any physician who recommended medical marijuana to patients. However, in 2002 the Ninth Circuit ruled, in *Conant v. Walters* (2002), that there was no justification for the DEA policy and that it violated the First Amendment rights of free speech for physicians regarding possible treatments. The court held that a recommendation, as opposed to a prescription, simply involved a discussion of the pros and cons of a possible treatment, in this case marijuana, without necessarily endorsing the use of an illegal drug. The court further issued an injunction which

blocked the DEA from denying or rescinding the registration of any physician due to a patient recommendation regarding medical marijuana.

As the movement toward state-sanctioned medical marijuana laws gained momentum during the past decade, the United States Department of Justice (DOJ) weighted in on the interface between the CSA and state medical marijuana laws. In October 2009, the DOJ issued a policy memorandum which states that legal users of marijuana (under state medical marijuana laws) would not be a high priority for prosecution and that drug enforcement efforts would be focused on those who may be running large, profitable marijuana distribution networks or operations. Specifically the directive stated that the federal government would not use its own resources to prosecute patients who use or distribute marijuana for medical purposes in "clear and unambiguous compliance" with state medical marijuana laws.

Three days subsequent to the DOJ directive, the federal Department of Transportation (DOT) issued guidelines which specifically prohibit the use of medical marijuana for transportation works in safety-sensitive jobs which include pilots, school bus drivers, truck drivers, subway operators, ship captains, and fire-armed transit security workers. Because the DOT requires that employers subject these safety-sensitive employees to regular and/or random drug testing, it is inevitable that those employees who utilized medical marijuana will be discovered and accordingly sanctioned by their employers. The DOT guidelines specify that the prohibition exists regardless of state laws which might decriminalize the possession and use of medical marijuana and note specifically,

> We want to make it perfectly clear that the DOJ guidelines will have no bearing on the Department of Transportation's regulated drug testing program. We will not change our regulated drug testing program based upon these guidelines to Federal prosecutors. The Department of Transportation's Drug and Alcohol Testing Regulation (2009)—49 CFR Part 40, at 40.151(e)—does not authorize "medical marijuana" under a state law to be a valid medical explanation for a transportation employee's positive drug test result.
>
> Medical Review Officers will not verify a drug test as negative based upon information that a physician recommended that the employee use "medical marijuana." Please note that marijuana remains a drug listed in Schedule I of the Controlled Substances Act. It remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation's drug testing regulations to use marijuana.

In addition the Drug-Free Workplace Act of 1988 requires that employers who are federal contractors maintain a drug-free workplace. Because the CSA classifies marijuana as a Schedule 1 drug, the Drug-Free Workplace Act essentially prohibits marijuana in the workplace, specifically, "the site(s) for the performance of work done by the contractor/grantee in connection with a specific contract/grant at which employees of the contractor/grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession or use of any controlled substance." Hence, the Act expressly prohibits not only use but also possession of marijuana in the workplace.

The Drug-Free Workplace Act essentially sets forth six requirements for employers who are covered under the Act, as established by the United States Department of Labor. Covered employers are required to (1) publish and distribute a policy statement to employees informing them that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the covered workplace and specifying the actions that will be taken against employees who violate the policy; (2) create a drug-free awareness designed to make employees aware of (a) the dangers of drug abuse in the workplace; (b) the policy of maintaining a drug-free workplace; (c) any available drug counseling, rehabilitation, and employee assistance programs; and (d) the penalties that may be imposed upon employees for drug abuse violations; (3) notify employees that as a condition of employment on a Federal contract or grant, the employee must (a) abide by the terms of the policy statement; and (b) notify the employer, within five calendar days, if he or she is convicted of a criminal drug violation in the workplace; (4) alert the contracting or granting agency within 10 days after receiving notice that a covered employee has been convicted of a criminal drug violation in the workplace; (5) either impose a penalty on or require participation in a drug abuse assistance or rehabilitation program by any employee who is convicted of a reportable workplace drug conviction; and (6) maintain an ongoing, good faith effort to maintain a drug-free workplace under the requirements of the Act.

Noteworthy about these requirements is the absence of any kind of mandate for employee drug testing. As the Department of Labor has noted

> The Act and these rules neither require nor authorize drug testing. The legislative history of the Drug-Free Workplace Act indicates that Congress did not intend to impose any additional requirements beyond those set forth in the Act. Specifically, the legislative history precludes the imposition of drug testing of employees as part of the implementation of the Act. At the same time, these rules in no way preclude employers from conducting drug testing programs.

Hence employers covered under the Drug-Free Workplace Act have discretion as to how they carry out the government-

mandated provisions of the Act to ensure compliance and maintenance of their federal contracts.

The implications of all of this is that because the CSA classifies marijuana as an illegal drug, even if used for medical purposes, and the Drug-Free Workplace Act and DOT guidelines specifically prohibit not only use but possession, employees who have been terminated for possession of legally recommended medical marijuana under state law do not have any legal protection against such dismissal. As will be explained below, court cases which have attempted to provide protection to such employees under the Americans with Disabilities Act (ADA) (1990) have been universally unsuccessful. These cases have argued that medical marijuana should be considered a reasonable accommodation under the ADA but have found no success in the courts specifically due to the Controlled Substances Act. While some state medical marijuana laws have created specific provisions that prohibit employers from discriminating against employees who use medical marijuana, these state laws are still contrary to federal law, undermining any protection employees might have, need or seek under the state laws against employer actions taken in response to their medical marijuana use or possession.

Court Cases

Given that California was the first state to pass a medical marijuana law (in 1996, the California Compassionate Use Act, via voter Proposition 215), it is not surprising that one of the first cases which challenged an employee termination due to medical marijuana was heard under the California statute. The state Supreme Court, in *Ross v. Raging Wire Telecomm., Inc.* (2008) found that it was not discriminatory to fire an employee for using medical marijuana. The reasoning for the decision was that protection under the state statute is afforded only against criminal prosecution for possession and no provision is made for any kind of employment-related protection. The court found that under the state medical marijuana law, employers do not need to accommodate use of medical marijuana, even when users only ingest or smoke away from the workplace and also that "under California law, an employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions."

Two other state Supreme Courts have come to similar rulings when considering employment cases under their relevant state medical marijuana laws. In Montana, the court found, in *Johnson v. Columbia Falls Aluminum Co. LLC* (2009), that an employer is not required to accommodate an employee's use of medical marijuana under either the ADA or the Montana Human Rights Act, and that no workplace protection was available under either federal or state disability laws for individuals who are legally using or in possession of medical marijuana. In this case the employee tested positive for marijuana and was suspended from work. During the suspension the employer provided the employee with a "last chance" agreement, which outlined the conditions upon which he could return to work, including a non-positive marijuana test. When the employee refused to sign the agreement, he was terminated. In his lawsuit, the employee argued that the employer should waive its drug testing policy to accommodate his medical marijuana use under the ADA. The Montana court found, in rejecting this argument, that the Montana Medical Marijuana Act clearly states that the law "cannot be construed to require employers to accommodate the medical use of marijuana in the workplace."

In Oregon, the court ruled, in *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.* (2010), that federal criminal law takes precedence over Oregon's medical marijuana law. Further, because Oregon's medical marijuana statute is silent on the issue of employment discrimination, employers do not have to accommodate employees' use of medical marijuana. In this case, the employee was terminated not from a positive drug test, but from simply disclosing to his employer that he had a medical marijuana registration card under the Oregon Medical Marijuana Act and felt it was in his best interest to disclose this before being subjected to drug testing. The employee sought protection under Oregon disability law which expressly prohibits discharging employees for previous illegal drug use or for participation in a drug rehabilitation program. However, Oregon disability law still permits discharge of an employee for current use of illegal drugs with "illegal" defined as any drug prohibited by either state or federal law. The court found that medical marijuana users are not protected by Oregon disability laws because medical marijuana still falls within the classification of illegal at the federal level.

Similar reasoning has been extended in the state of Washington. In *Roe v. TeleTech Customer Care Mgmt. LLC* (2009), the state Court of Appeals affirmed a trial court's ruling that Washington's Medical Use of Marijuana Act (MUMA) does not protect medical marijuana users from adverse hiring or disciplinary decision based on an employer's drug testing policies. In this case the employee was terminated for a positive drug test. The court specifically noted that "MUMA neither grants employment rights for qualifying users nor creates civil remedies for alleged violations of the Act" and that MUMA merely protects qualified patients and their physicians from state criminal prosecution related to the authorized use of medical marijuana.

In one of the latest high profile cases, a Michigan court issued a parallel ruling in dismissing a wrongful discharge claim against Wal-Mart. In *Casias v. Wal-Mart Stores,*

Inc., (2011) the employer successfully argued that the 2008 Michigan Medical Marijuana Act (MMMA) is preempted by both the Controlled Substances Act and the ADA and that the MMMA neither creates any kind of private right of action nor confers any employment protection relative to the use of medical marijuana. In this case, the employee, a former employee of the year winner who had an inoperable brain tumor and sinus cancer, had been terminated after testing positive for legally obtained medical marijuana.

The court found that the MMA does not regulate private employment and is only a potential affirmative defense to criminal prosecution for possession. The court also held that MMMA does not state that private employees are protected from disciplinary actions by their employers for their use of medical marijuana nor does it require that employers accommodate the use of medical marijuana in the workplace, rejecting the suggestion that the MMMA creates a new protected employee class, due to the general rule of at-will employment in Michigan. It found that the "overall structure and purpose of the Act (is) to address potential criminal prosecution or other adverse action by the state" and nothing more.

Going one step further, the court noted that no other medical marijuana statute of any other state has been held to regulate private employment and that the Michigan statute is silent on employment. Given that Michigan statute was voter-approved (Proposal 1, passed in 2008 with a 63 % vote), the court held that Michigan voters did not intend to enact "sweeping legislation" to regulate private employment and confer an implied private cause of action; "they enacted a statute whose language and purpose simply protects medical marijuana users from prosecution and other similar actions of state and local government, and does not attempt to regulate private employment decisions."

A point of contention in the case was the fact that the statute provides that "A qualifying patient who has been issued and possesses a registry information card shall not be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business…for the medical use of marijuana in accordance with this act" (Mich. Comp. Laws Sect. 333.26424 (4) (a)). The court here did not include employers in considering the language "by a business."

Most recently a federal court weighed in on whether the ADA specifically provides protection for medical marijuana use and possession. The Ninth Circuit, in James v. Costa Mesa (2012), ruled on a case in which medical marijuana dispensaries were shut down by local law enforcement agencies, finding that no ADA protection was offered to the dispensaries' customers due to marijuana's illegal Schedule 1 status under the CSA. While this case dealt with Title II (provision of public services) of the ADA rather than Title I (employment), the "illegal use of drugs" language is common to both titles and when combined with the decision in *Ross v. RagingWire* (2008), sets a strongly implied precedent for the exclusion of medical marijuana as a reasonable accommodation under the employer requirements of Title I of the ADA. Indeed, the dissent in *James* noted that it was unnecessary to "decide the case on the broad ground that medical marijuana users are not protected by the ADA in any circumstance."

State Laws

While most state medical marijuana statutes are silent in considering employment, allowing courts to reason that employment was outside of the domain of such laws, one state has specifically included employment as part of its medical marijuana statute. The legislated New Jersey Compassionate Use Medical Marijuana Act, passed in 2010, was designed to protect patient users and their physicians who recommend use from arrest and prosecution and was never intended to confer any workplace rights, much like the statutes of other states. Toward this end, the Act specifically provides that "Nothing in this Act shall be construed to require….an employer to accommodate the medical use of marijuana in any workplace." (N.J. Stat. Sect. 24:6I-14).

Although less explicit, similar conclusions regarding protection might be drawn in reviewing the medical marijuana laws of other states. New Mexico's law, the Lynn and Erin Compassionate Use Act, provides that it is "illegal to possess or use medical cannabis… in the workplace of the patient," without mention of specific employment actions which can or should be taken in response to an employee testing positive for marijuana usage or possession. Arizona law, the Arizona Medical Marijuana Act (2010), states that an employer does not have to allow an employee to use or possess medical marijuana while on the job and that an employer can fire an employee for being impaired on the job—whether from medical marijuana or other substances. However, an employer can't terminate an employee for testing positive for marijuana on a drug test unless failure to do so would result in monetary loss or licensing penalties under federal law. The Act specifically prohibits discrimination against a registered qualifying patient's positive drug test unless the patient used, possessed or was impaired on the premises of the employers or during working hours. However, the Act does not provide any legal standard or guidance to determine where "testing positive" stops and "impairment" begins.

Other state laws which have yet to be tested in the courts might provide some limited protection in employment for medical marijuana users. Two statutes which COULD aid employees who use medical marijuana are Montana's

which prohibits "penalizing in any way" and Rhode Island's which states that "no school, employer or landlord may refuse to enroll, employ or lease to or otherwise penalize a person solely for his or her status as a registered qualifying patient" (of medical marijuana), making no specific mention of possession, use or impairment. More so, Arizona expressly requires employers to accommodate the medical use of marijuana in the workplace short of impairment, as discussed above, while Maine specifically prohibits employers from refusing to hire or otherwise penalize a person solely for the individuals' status as a registered qualifying patient unless failing to do so would put the employer in violation of federal law or cause it to lose federal funding. It is important, however, to remain cognizant of the fact the federal laws such as the CSA and Drug-free Workplace Act potentially trump any applicable state law which provides protection for users of medical marijuana.

Vermont law provides that medical marijuana users can be arrested or prosecuted for being under the influence "in a workplace or place of employment." The standard here appears to be impairment rather than use, possession or even a positive test result. Similarly other states, including Colorado, Hawaii and New Mexico, have implicit employee protection in place where the law mentions only on-the-job consumption or impairment as grounds for termination. However, given the fact that all of these statues were enacted specifically with the primary intent of decriminalizing the use and possession of marijuana under the CSA, it is unlikely, given the case law to date, that employment-related protection would be extended unless expressly provided in the state statute.

Employer Guidelines

While the above summary of federal laws, court cases and specific language of state statues makes it clear that employers do not HAVE to accommodate employees who have the legal right to possess and use medical marijuana, many employers, particularly those not covered under the DOT policy or Drug-Free Workplace Act, still have a choice as to whether they will provide some kind of accommodation to employees who legally use marijuana for medical purposes. A large number of these employers who have discretion regarding how they treat medical marijuana take the safest route in having a "zero-tolerance" policy. Under this approach, employers would consider both the CSA and Drug-Free Workplace Act and terminate employees found to possessing, using, under the influence of or testing positive for marijuana. In addition to unambiguous compliance with federal laws, zero-tolerance policies can be useful as a public relations tool, a means of promoting workplace safety, productivity and employee health and a safeguard against liability for the actions of an employee who may be impaired while on the job.

Support for such an approach has been bolstered by a Supreme Court decision. In *Gonzales v. Raich* (2005), the high court affirmed the right of federal law enforcement agents to seize the drugs of and prosecute those who possess and use marijuana in violation of federal law and that it was within the purview of Congress to regulate the non-commercial intra-state cultivation, distribution, and consumption of marijuana, including medical marijuana.

Other employers may consider what might be called a more "compassionate," albeit risky, approach in attempting to accommodate workers who have medical conditions for which medical marijuana has been recommended. Advocates for the users of medical marijuana have argued, in spite of consistent court rulings to the contrary, that the ADA requires that employers make reasonable accommodation for workers with documented disabilities and that medical marijuana is such an accommodation. This is particularly true when the employee in question remains otherwise qualified to perform her/his essential job functions, which is a parallel requirement as part of any accommodation under the ADA. Countering the fact that marijuana is an illegal Schedule 1 drug under the CSA is the argument that (1) other fully legal drugs, many of which are sold over the counter, such as painkillers and antihistamines, can impair one's ability at work just as marijuana can; (2) any blanket policy against marijuana but not against other "potentially impairing" drugs, whether prescribed or over the counter, does not address actual impairment; and (3) a medical marijuana card serves the same essential function as a prescription for any other medication when a state has passed laws which decriminalize possession and use of marijuana.

At the other end of the spectrum, employers, particularly those not covered by the DOT policy, could also simply not test for marijuana, only recognize significant quantities of marijuana in the employee's system or ignore completely test results which come back positive for marijuana. The Drug-Free Workplace Act does provide employers with some discretion as to how its mandates are carried out and while such an "ignorance strategy" could be risky for an employer, particularly relative to safety concerns, such an approach could result in cost savings associated with a drug testing program as well as send a strong message concerning the employer's position regarding medical marijuana.

However, as noted, to fully protect themselves against liability employers should ensure that their policies comply with federal laws which address illegal drug possession and usage. Similarly, any employer policies and associated testing should be based on detectable and measurable (objective) amounts of illegal drugs in the applicant or

employee's system rather than a subjective "under the influence" standard. It is also critical to closely monitor legislative and judicial developments in this evolving area of law. Washington recently attempted to amend its medical marijuana laws to provide express workplace protections but this effort was defeated. However, given the controversial nature of medical marijuana in the workplace, similar efforts will most likely be forthcoming in other states.

Implications and Ethics

Despite what appears to be a fairly clear legal framework for medical marijuana in the workplace, largely given its status as an illegal drug under the CSA, it is important to remember that state statutes were all designed with a single purpose in mind; shielding from prosecution individuals for whom medical marijuana has been recommended for their possession and use of the drug. That having been said, not only are state laws pertaining to medical marijuana inconsistent with each other, most do not address employment and workplace issues surrounding medical marijuana. In most states, an employer who conducts drug testing, for example, has discretion as to whether it accepts medical usage of marijuana as a legitimate reason for a positive test or employs a zero-tolerance policy to shield itself from potential liability. Most employers are safely opting for the latter approach.

Federal contractors as well as employers in the transportation and commercial nuclear power industries are required to maintain drug-free workplaces and facilitate this by regular or random drug testing. Other employers who may not be covered by the Drug-Free Workplace Act yet choose to enforce the spirit of its provisions test employees as well. Despite these legal requirements the question remains regarding how to treat an employee who has tested positive for marijuana yet has the state-sanctioned right to use it. This requires an examination of the nature of employee drug testing.

Urine tests are the most frequently used drug test by employers. While blood tests may be a better indicator of more recent usage than urine tests, blood tests are costly, more invasive and can be difficult to administer. Hair tests are less expensive than urine tests and certainly non-invasive, but they do not guarantee a measure of current drug use and can detect use during the past 3 months or even longer. While this can be useful for determining illegal drug usage at any point in time, it does not aid in the case of an individual utilizing a lawfully prescribed or physician-recommended drug away from work who does not report to work "impaired," in addition to raising the possibility of detecting prior drug use in someone who claims to be "rehabilitated" and, hence, possibly under the protection of the ADA or relevant state disability law.

Relative to medical marijuana, urine tests are less likely to show recent usage than detect use from the past 2–7 days, for even a single use, and can also detect usage from the past 1–2 months. As a result, a positive marijuana urine test could be showing usage within the past hour, over the past weekend or even a month or more ago. Hence, a positive test for marijuana does not easily correlate to any kind of immediate use or current impairment, unlike tests for alcohol, for example, and may be reporting results from when an employee was off-duty or even on vacation. This vague "time of usage" factor further complicates the dilemma employers face in determining whether or not the employer should follow a "compassionate" approach to accommodating medical marijuana as a reasonable accommodation for an employee's disability. Is it appropriate to terminate an employee who, for example, has been a loyal, productive employee, never used or possessed marijuana at work or shown any impairment and who has a state-issued medical marijuana card simply because a urine test came back positive for marijuana usage (at an unspecified time and place of use)?

On the other hand if employees are to be accommodated relative to their use of medical marijuana, what happens if an employee is injured on the job? State worker's compensation laws are generally "without fault" but policies typically exclude coverage for workers who are impaired on the job. More so, what happens if an employee's actions, regardless of whether the employee is considered impaired or unimpaired, results in the injury (or worse) to a co-worker or customer? The Occupational Safety and Health Act (1970) requires that employers ensure that their workplaces have appropriate measures of safety for all employees. There are clearly no easy answers here as an employee may not be impaired at the time of a legitimate accident at work, but test positive for a drug which could cause impairment. Liability for the employer could be significant.

The issue here is one of ethics. Employers have to balance the competing issue of the employer's right and duty to establish and maintain a safe work environment with their ethical, if not legal, obligations to reasonably accommodate employees with disabilities who may require prescribed or recommended drugs. Because "impairment" is a subjective and hence legally risky measure, employers understandably have incentive to favor the more objective measure of drug testing and an associated zero-tolerance approach. In the case where impairment is not a usual outcome of the medication, attention can turn to whether the employee can perform the job and remains otherwise qualified, as stated in the ADA and most state disability statutes. However, cases involving medical marijuana are

not straight-forward as much scientific and medical evidence exists relative to the impairment of both cognitive and physical abilities which can result from the use of marijuana. Further clouding the issue is the fact that drug screening tests (urine) for marijuana do not test for current or even probable impairment (or even recent usage) at the time of testing. As a result, employers cannot easily balance workplace safety issues with reasonable accommodations for employees who have disabilities, who are protected under both federal and state laws, when these employees have been recommended to use medical marijuana. Essentially, for an employer, does after-hours and off-site use of medical marijuana matter and can or should it be accommodated? Should an employer be able to discipline or discharge employees found to be using marijuana for medical purposes, either on or off premises, or should they be encouraged to carve out a narrow exception for such employees?

Again, the safest approach for an employer is a zero-tolerance policy. However, the ultimate issue SHOULD be whether any prescribed or recommended medical treatment for a legally recognized disability or medical condition, be it marijuana usage or anything else, impacts the employee's ability to do their job or involves any kind of safety issue with consideration made on a case-by-case basis. Is it good public policy to force people with legitimate protected medical conditions, under the ADA and relevant state law, to have to choose between maintaining their employment and associated health care benefits or availing themselves of their physician-prescribed or recommended treatments? In tandem with this, employers should not have the opportunity to intrude upon the private professional medical care recommendations made for their employees which have no impact on the employee's ability to do their jobs.

The ADA requires "reasonable accommodation" of individuals with disabilities only to the extent they remain "otherwise qualified" to perform the essential functions of their jobs. As noted, the Ninth Circuit recently ruled the ADA that does not afford protection to users of medical marijuana. However, employers can and SHOULD enact policies which consider the accommodation of employees who have the legal right to use medical marijuana to the extent that the employees remain otherwise qualified to do their jobs and pose no safety risk via impairment to themselves, their co-workers or customers. While not the legally "safe" route, carving out such a narrow exception to "illegal" (under the CSA) drug use in the workplace is simply good public policy.

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