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Still Smoking: Medical Marijuana in Maryland and What You Need to Know

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Maryland first joined the "legal marijuana" party back in 2014, and in June 2017, the Maryland Medical Marijuana Commission licensed the first dispensary. Medical marijuana creates unique headaches for companies, especially for employers. We're going to look at how we got here and best practices from an employment perspective.

So marijuana is legal in some states but illegal under federal law?

Correct. "Cannabis" is and has always been illegal under the federal Controlled Substances Act (CSA). The CSA was passed as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. It was signature legislation signed by President Nixon and as a whole, formed the backbone of the "war on drugs." Cannabis has always been a Schedule 1 substance, along with heroin, LSD, and ecstasy, for example. As a Schedule 1 substance, according to federal law, cannabis has a high potential for abuse and not currently accepted for medical use. In turn, the possession or use of cannabis – namely as marijuana – for any reason is illegal under the CSA.[1]

Despite this broadly worded statute, under the Obama Administration, a number of guidance memos were distributed throughout the Department of Justice. These memos culminated with the "Cole Memo," authored by Deputy Attorney General James Cole. The Cole Memo provided guidance on marijuana enforcement "in light of state ballot initiatives to legalize under state law the possession of small amounts of marijuana and to provide for the regulation of marijuana production, processing, and sale." In short, the Cole Memo directed a more hands-off approach in "jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale and possession of marijuana." The Cole Memo was comprehensive in that it applied to "all federal enforcement activity, including civil enforcement, criminal investigations and prosecutions, concerning marijuana in all states."

For nearly five years, the Cole Memo largely relegated marijuana control and enforcement to the states. Then, on January 4, 2018, then-Attorney General Jeff Sessions issued a memo rescinding the Cole Memo and the guidance memos related to it. Sessions stated that his memo was intended to return prosecutorial discretion to local U.S. Attorneys and other on-the-ground personnel. Commentators largely viewed the memo as signaling the DOJ's intent to prosecute marijuana-related activities in states that have legalized it.

Regardless of what the then-Attorney General and the DOJ may want, Congress has largely prohibited federal authorities from taking legal action against businesses and individuals participating in state-run medical marijuana programs. These efforts began in conjunction with the Cole Memo and led to the then-named Rohrabacher-Farr Amendment. The Amendment is a budgetary amendment that expressly prohibits the DOJ from using any funds whatsoever to interfere with state-run medical marijuana programs. The Amendment has survived legal challenges, and it has been continuously adopted since 2014. In all, the reason federal authorities are not prosecuting individuals and companies for medical marijuana has little to do with ideology and politics, and everything to do with a lack of federal funding.

But are CBDs always legal, whether at the federal or state level?

No. CBDs are not always legal under federal law, and even when they are legal at a federal level, their legality still varies by state. Putting aside botany specifics, cannabis contains a number of different compounds – chief among them are tetrahydrocannabinol, or THC, and cannabidiol, or CBD. THC is what produces marijuana's "high." CBD, by comparison, is generally considered not to produce a "high" or any other intoxicating effect. CBD is also generally considered to be a viable option for treating certain medical conditions, such as epilepsy, anxiety disorders, and chronic pain. When intended for medical use, CBD products often do not contain tangible amounts of THC. They contain scientifically de minimis amounts of THC, especially if intended for use by minors.

Until recently, regardless of whether CBD products could be made without tangible amounts of THC, they remained outright illegal under federal law. Both the Drug Enforcement Agency and the Food and Drug Administration take the position that because CBD is derived from cannabis, it is treated no differently than "marijuana" under the CSA. CBD was a Schedule I substance; therefore, the possession or use of CBD products for any reason was illegal under federal law. Strictly speaking, under federal law, CBD products were looked at no differently than heroin, LSD, and ecstasy.

At the end of 2018, Congress passed – and the President signed into law – the Farm Bill. The Farm Bill affirmed and expanded the federal definition of "industrial hemp," defined as any part of a cannabis plant with less than .3 percent THC. Under the Farm Bill, "industrial hemp" is not a Schedule 1 substance under the CSA. This is true for both "industrial hemp" and oils and extracts from it. As a result, CBD products derived from "industrial hemp" are no longer illegal under federal law. That said, many states still outlaw CBD and all CBD products, regardless of the change in federal law. Accordingly, at this time, the legality of hemp-derived CBD varies from state to state. Marijuana-derived CBD – i.e., CBD derived from marijuana (or any CBD with more than .3 percent THC) – remains absolutely illegal under federal law.

What are the specifics of Maryland's medical marijuana law?

Maryland's law allows for the possession and use of marijuana by a "qualifying patient," which is any individual "who has been provided with a written certification by a certifying provider in accordance with a bona fide provider-patient relationship."[2] To be a "certifying provider," an individual must be registered and licensed in a medical, dentistry, podiatry, or nursing filed, among other requirements.[3] The written certification is not a prescription per se, as marijuana cannot be "prescribed" given its status under federal law. Instead, the written certification affirms that the patient meets the requirements for using medical marijuana and the potential benefits from medical marijuana "would likely outweigh the health risks."[4]

The law specifies when medical marijuana should be considered, such as for patients in hospice or palliative care, for those with chronic or debilitating conditions, and for other conditions identified by the Commission.[5] The Commission[6] has since added glaucoma and PTSD.[7] The Commission also requires that qualifying patients register with it and obtain an identification card.[8] Absent a special determination, a qualifying patient can possess no more than a 30-day supply, which, for dried marijuana is set at 120 grams (or four ounces).[9] The law allows for the identification and designation of "caregivers." A caregiver is any person "who has agreed to assist with a qualifying patient's medical use of cannabis, and, for a qualifying patient under the age of eighteen, a parent or legal guardian."[10]

Finally, so long as they are otherwise complying with the law, qualifying patients, caregivers, certifying providers, as well as those otherwise within the medical marijuana industry and their agents are shielded from "arrest, prosecution, or any civil or administrative penalty."[11] This includes any "hospital, medical facility, or hospice program where a qualifying patient is receiving treatment."[12] This immunity has absolutely no impact on federal law, none whatsoever.

Can an employee be disciplined or fired for using medical marijuana?

Yes. Marijuana use or possession in the workplace is grounds for disciplinary action, up to and including immediate termination. Not only is marijuana illegal under federal law, but like alcohol, marijuana is an intoxicant. For this reason alone, employers can take disciplinary action based on marijuana use or possession in the workplace, up to and including immediate termination.

The result is the same if an employee uses medical marijuana away from work and, for example, fails a drug test. Maryland's medical marijuana law does state that any qualifying patient, caregiver, etc. "may not be" "denied any right or privilege" because of medical marijuana, so long as they are otherwise complying with the law.[13] While this could arguably be read to cover private employment, according to the Commission's website, "Maryland law does not prevent an employer from testing for use of cannabis (for any reason) or taking action against an employee who tests positive for use of cannabis (for any reason)."[14] Additionally, Maryland's law also states that it does not prevent the imposition of "civil, criminal, or other penalties for" using medical marijuana "when doing so would constitute negligence or professional malpractice."[15]

Please note the distinction between knowing an employee is using medical marijuana, i.e., a positive drug test, and suspecting medical marijuana use, i.e., the employee has an identification card. Like all employment decisions, care should be taken to base them on actual knowledge, not suspicions.

Does my company need to change its drug testing policies?

No, at least not right now. If, however, the policy has not been reviewed in some time, it likely needs to be updated just as a matter of course.

This seems too easy – is it really this simple?

Not quite. Fortunately, at least for Maryland employers, marijuana use does not have to be tolerated in any form or at any time. This includes workplace accommodations. Every federal court to consider the issue has held that marijuana use is neither protected nor, for example, a reasonable accommodation under the Americans with Disabilities Act (ADA).[16] To start, as noted above, marijuana is an intoxicant. As such, an employee would be hard pressed to describe the use of marijuana as reasonable. That aside, marijuana remains illegal under federal law. So marijuana in any form, including medical marijuana, falls within the ADA's "illegal use of drugs" exclusions.[17] The ADA, therefore, does not apply.[18] To date, no Maryland court or agency has reached a different conclusion under the Maryland Fair Employment Practices Act (MFEPA).

While this is good news for employers, it does not provide the answer to every question or situation. Take, for example, an employee asking to use medical marijuana outside of the workplace to treat a medical condition. While this may not be a *reasonable* accommodation under the ADA, the employer should still engage in the interactive process required by the ADA (and arguably the MFEPA). Moreover, a general request for leave to treat a medical condition may trigger an employer's obligations under the Family and Medical Leave Act.[19]

As another example, say an employer learns from social media that two employees used medical marijuana outside of the workplace. If one employee is terminated but the other is not, this inconsistency could be seen as discriminatory should employees be different races, genders, etc. Or say an employer learns an employee sometimes uses marijuana outside of the workplace, not just for medical purposes, but in connection with a religious practice or ritual. This may provide an employer grounds for drug testing the employee, but using it as grounds for immediately terminating the employee will likely give rise to a charge of religious discrimination.

As for drug testing, whether under the federal Drug Free Workplace Act[20] or in connection with Maryland's workers' compensation program, employers can still require a drug-free workplace. Also, because marijuana is illegal under federal law, testing for it is not a medical examination under the ADA. Therefore, the ADA's restrictions on medical examinations and inquiries do not apply. However, given that many drug tests cover substances beyond marijuana – including prescription medications – employers are strongly encouraged to

maintain drug testing programs in compliance with the ADA, or Maryland law where it provides heightened requirements.[21]

The overall takeaway is this. For right now, marijuana remains illegal under federal law and Maryland's medical marijuana law does not provide workplace protections. Accordingly, employment decisions based on the use of marijuana under any circumstances are generally defensible. By avoiding snap decisions and following the traditional decision-making process, employers will make marijuana-related decisions that much more defensible.

If you have questions about how medical marijuana laws in your state affect the employer-employee relationship, contact the author, Zachary Busey, or any member of Baker Donelson's Labor & Employment Group.

[1] "Cannabis" refers to a species of plant. Both "hemp" and "marijuana" come from varieties of that plant.

[2] Md. Code Ann., Health-Gen. § 13-3301(m).

[3] Md. Code Ann., Health-Gen. § 13-3301(c).

[4] Md. Code Ann., Health-Gen. § 13-3301(n).

[5] Md. Code Ann., Health-Gen. §§ 13-3304(d), (e).

[6] Maryland established the Natalie M. LaPrade Medical Cannabis Commission. The Commission is tasked with developing "policies, procedures, guidelines, and regulations" to make medical marijuana available. *See* Md. Code Ann., Health-Gen. § 13-3302.

[7] COMAR (Code of Maryland Regulations) 10.62.03.01(B)(3).

[8] COMAR 10.62.06.01.

[9] COMAR 10.62.01.01(B)(35)(a).

[10] Md. Code Ann., Health-Gen. § 13-3301(b).

[11] Md. Code Ann., Health-Gen. § 13-3313(a).

[12] Md. Code Ann., Health-Gen. § 13-3313(a)(7).

[13] Md. Code Ann., Health-Gen. § 13-3313(a).

[14] Patient FAQ, "My employer tests for drug use including cannabis. Can they test me if I am a medical cannabis patient? Can they fire me if I use medical cannabis?" available at http://mmcc.maryland.gov/Pages/patients_faq.aspx (last visited January 27, 2018).

[15] Md. Code Ann., Health-Gen. § 13-3314(a)(1).

[16] For general guidance on accommodations under the ADA see U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans*

with Disabilities Act, available at http://www.eeoc.gov/policy/docs/accommodation.html (last visited January 27, 2018).

[17] 42 U.S.C. § 12210(d)(1).

[18] *See, e.g.*, *James v. City of Costa Mesa*, 700 F.3d 394, 398 (9th Cir. 2012) (generally discussing the issue); *see also Forest City Residential Mgmt., Inc. ex rel. Plymouth Square Ltd. Dividend Hous. Ass'n v. Beasley*, 71 F. Supp. 3d 715, 730-31 (E.D. Mich. 2014) (not reasonable accommodation under Fair Housing Act or Rehabilitation Act).

[19] 29 U.S.C. §§ 2601 et seq.

[20] The Drug Free Workplace Act of 1988 requires those working with the federal government to adopt zero-tolerance workplace drug policies. *See* 41 U.S.C. § 8102.

[21] For general guidance on medical examinations, inquiries, and drug testing under the ADA see U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act*, available at https://www.eeoc.gov/policy/docs/guidance-inquiries.html (last accessed January 27, 2018).

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