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Medical Marijuana and an Employer's Rights in DC, Maryland, and Virginia

The District of Columbia, Maryland, and Virginia have all taken steps toward legalizing marijuana in some form. However, these laws differ in many respects and raise some interesting questions for employers. Because medical marijuana continues to be illegal under federal law, pursuant to the Controlled Substances Act, courts residing in jurisdictions where the use of medical marijuana is legal have found that an employer may maintain a drug-free workplace and terminate an employee for failing a drug test.

While some states such as Arizona specifically provide protections for employees that have a valid prescription for medical marijuana, neither the District of Columbia, Maryland nor Virginia have such specific protections in their respective statutes. The lingering questions is whether an employer's decision to take an adverse action against an employee for using medical marijuana is protected under the Americans with Disabilities Act ("ADA") or a state's disability discrimination statute, or under public policy. To date, however, courts have ruled that, absent statutory protections, employers remain free to set their own drug policies and to discipline or terminate employees who violate those policies.

This article details the medical marijuana laws in the District of Columbia, Maryland, and Virginia, and addresses the current legal landscape regarding an employee's use of medical marijuana and employment law. Employers should evaluate their current drug policies, and continue to monitor the changing landscape surrounding the use of medical marijuana. As some states do provide specific protections for employee's use of medical marijuana, national employers should pay special attention to each individual state's laws where employees are located and confirm that their handbook complies with each state's respective laws.

District of Columbia

Pursuant to D.C. Code § 7-1671.02, a qualifying patient may possess and administer medical marijuana, and possess and use paraphernalia for treatment of qualifying medical conditions as long as the patient received a prescription from a doctor and registers with the Mayor pursuant to the Medical Marijuana Program. Recreational use of marijuana is permitted in the District of Columbia as well. Specifically, the following activities are legal in the District of Columbia for adults over the age of 21:

- Possessing two ounces or less of marijuana;

- Giving one ounce or less of marijuana to another person over the age of 21 as long as there is no exchange of goods or services;
- Growing up to six marijuana plants in their home, no more than three of which may be mature;
- Possessing marijuana paraphernalia; and
- Using marijuana on private property.

Although current D.C. employees do not have any statutory prescribed protections for medical or recreational use of marijuana, prospective employees have some minor protections under the D.C. Prohibition of Pre-Employment Marijuana Testing Act of 2015 that employers should take note of. The Act prohibits employers from testing prospective employees for marijuana in the pre-employment stage – that is, prior to a conditional offer of employment. Important for employers, however, the Act does not prevent employers from requiring the prospective employees to submit to a drug test after a condition offer of employment has been extended. Ultimately, the Act simply delays the process in which employers may drug test a prospective employee. D.C. employers should carefully review their application process to ensure that they comply with the Act.

Prospective employees may have minor protections under D.C. law, but the Act does not prevent employers from mandating that all employees adhere to all workplace policies, including a drug-free workplace place. Therefore, employers are still free to enforce a drug-free workplace policy, and an employee may be terminated for failing to abide by that policy. Currently, there have not been any challenges under D.C. or federal law with respect to an employer's adverse action against an employee for using medical marijuana.

Maryland

Maryland legalized a workable medical marijuana program with the passage of Senate Bill 923 in 2014. The bill allows patients to receive a medical marijuana recommendation from a certified physician, and apply for a state-issued Maryland Medical Marijuana Card that allows the patient to purchase marijuana for medicinal use. The law allows qualifying patients to possess up to a 30-day supply of medical marijuana and allows licensed dispensaries to distribute medical marijuana grown by a maximum of 15 licensed cultivators. However, the application of the medical marijuana program is still in flux and the law is rapidly changing. While the law provides protection from criminal prosecution and civil fines, it is silent on its impact on an employer's ability to enforce a drug-free workplace policy. Maryland employers should stay tuned for updates regarding the changes being made to this law.

Virginia

Virginia's medical marijuana law is much more limited than the laws in both Maryland and the District of Columbia. In 2015, Virginia legalized possession of two marijuana oils but only for intractable epilepsy patients and their caregivers. Although Virginia legalized the use of two certain types of marijuana oils for a narrow class of persons, the General Assembly failed to provide any way for patients to obtain the oils without breaking federal and state laws.

Thus, in March 2016, the Virginia General Assembly passed a bill (Senate Bill 701) to allow these oils to be produced and distributed in Virginia. The legislation provides the solution by requiring the Board of Pharmacy to create regulations to safely and securely provide the oils. These regulations will be brought back before the legislature in 2017 for final approval. Therefore, processing and distribution of the oils in Virginia would not begin

until sometime in 2017. There is no provision in the bill that provides any protections for prospective or current employees that use medical marijuana.

Wrongful Termination Claims in State Courts

As noted, none of the statutes in the D.C., Maryland, or Virginia Codes specifically provide workplace protections for employees using legally prescribed medical marijuana. However, in light of the passage of these statutes legalizing medical marijuana, D.C., Maryland, and Virginia employers may have concerns that these statutes may serve as the basis for a claim of wrongful termination in violation of public policy. While D.C., Maryland, and Virginia courts have not determined whether a public policy prohibiting the discharge of an employee for medical marijuana use exists, a majority of courts have found that medical marijuana laws do not support such a public policy.

Absent specific statutory language providing employees with certain protections in the workplace, courts have typically struck down wrongful discharge claims based on public policy – holding that the state's medical marijuana statue does not alter an at-will employment relationship or confer any obligations upon employers. *See, e.g. Casias v. Wal-Mart, Inc*. 695 F.3d 428 (6th Cir. 2012) (holding that the Michigan Medical Marijuana Act does not regulate private employment); *Roe v. Teletech Customer Care Management LLC*, 171 Wash. 2d 736 (Wash. Sup. Ct. 2011) (holding that Washington's Medical Use of Marijuana Act does not regulate a private employer's conduct and an employee who used medical marijuana had no claim for wrongful discharge); *Ross v. Ragingwire Telecomms., Inc.*, 174 P.3d 200, 203 (Cal. 2008) ("Nothing in the text or history of the Compassionate Use Act [California's medical marijuana law] suggests the voters intended the measure to address the respective rights and duties of employers and employees."). Thus, it is unlikely that an employee would be able to succeed on a claim for wrongful termination.

Federal Law Concerns

The current state of the law surrounding the use of medical marijuana and workplace protections under federal law is equally unsettled. The ADA is clear that there is no obligation to accommodate someone that is using an illegal substance under the Controlled Substances Act ("CSA") where the employer makes an employment decision based on the use of that illegal substance. 42 U.S.C. § 12114. Because marijuana use is still considered illegal by the federal government under the CSA, it seems clear that marijuana users, even those registered through a state's medical marijuana program, may be excluded from ADA protection.

At least one Circuit Court of Appeals has ruled that doctor-recommended marijuana use permitted by state law, but prohibited by federal law, is an illegal use of drugs for purposes of the ADA and any use of federally proscribed drugs brings a person within the ADA's illegal drug exclusion. *See James v. City of Costa Mesa*, 700 F.3d 394, 405 (9th Cir. 2012), *cert denied*, 133 S. Ct. 2396 (2013) ("We do not hold, as the dissent states, that 'medical marijuana users are not protected by the ADA in any circumstance.' We hold instead that the ADA does not protect medical marijuana users who claim to face discrimination on the basis of their marijuana use.").

However, employers need to be extra careful where it seeks to terminate an employee for using medical marijuana. Although illegal drug use for medicinal purposes is not covered by the ADA, an employee may still be able to make out a *prima facie* case of disability discrimination if he or she can raise a dispute as to the real

reason for suffering an adverse employment action. *See EEOC v. Pines of Clarkston*, No. 13-cv-14076; 2015 U.S. Dist. LEXIS 55926, at 14 (E.D. Mich. Apr. 29, 2015) (denying defendant's motion for summary judgment where plaintiff raised a genuine issue of material fact whether she was terminated based on her marijuana use or epilepsy).

Conclusion

As this area of the law continues to evolve, employers should pay careful attention to the changes in state law. For now, D.C., Maryland, and Virginia employers can continue to enforce policies prohibiting employees from using marijuana for any purpose. However, employers should carefully evaluate their workplace policies with respect to drug-use and drug-testing. Policies with an imprecise definition of "illegal drug" may lead employees to believe using medical marijuana is not prohibited because it is "legal" under state law. The definition of "illegal drugs" for zero-tolerance employers should be clearly stated, and employers should emphasize that the policy prohibits the use of any drug made illegal under federal law – *including* marijuana.