Up In Smoke: An Overview of Medical and Recreational Marijuana Issues in the Workplace

Dan Sanchez, Senior Associate, Brown & James, P.C.

For much of the twentieth century and into the 2000s, popular culture has painted a vivid portrait of the typical users and effects of marijuana. From the film “Reefer Madness” in the 1930s, to Cheech and Chong in the ’70s, Jeff Spicoli in the ’80s, to “Dude Where’s My Car,” Harold and Kumar, and “Pineapple Express,” the list goes on and on. Whether portrayed as dangerous or comical, it has become a common misconception that the impairing effects of marijuana are generally open and obvious to an objective observer. However, as the stigma of marijuana declines with the passage of each new law that decriminalizes its medical or recreational use in states across the country, employers are learning that the average user is not necessarily the caricature depicted in Hollywood, and it is not always easy to determine impairment.

Two of the most recent legal steps toward decriminalization of marijuana have occurred in Missouri and Illinois. In November 2018, Missouri passed a constitutional amendment to legalize medical marijuana; while in May 2019, Illinois legalized recreational use (effective January 1, 2020). This reflects a broader trend, as 33 states and the District of Columbia have passed laws legalizing, to one extent or another, the use of medical and/or recreational marijuana. This trend has also led employers to wonder how these legal developments will impact their workplace liability in the future.

In the workers’ compensation context, the greatest hurdle to defending claims brought by employees believed to have been impaired at the time of injury is often proving their impairment. Sure, employers can test employees following a workplace injury, but a positive result may not be sufficient to sustain a denial or reduction of benefits in many states. The results of a test for marijuana are measured as nanograms/milliliter (ng/mL). While a positive drug test can prove the drug is in an employee’s system, it does not prove the drug had an impairing effect on the employee at the time of their injury. This is because tetrahydrocannabinol (THC) may remain in the blood or urine for days, if not weeks, after use – long after the impairing effects of the drug have dissipated. Moreover, the effects of the drug vary greatly from person to person, depending on their body size, tolerance, and frequency of use, among other factors.

In Missouri, for example, there is no presumptive legal limit of impairment, such as with alcohol (i.e. 0.08). Rather, proving impairment in Missouri civil cases requires expert testimony as to the effects of the measured THC level on the user, that the user’s behavior was consistent with that THC level, and the proximity of time between the marijuana use and the injury.¹ Thus, in states such as Missouri, employers and their attorneys must be vigilant to assess any possibility of impairment leading to a work-related injury, and weigh the costs of testing and retaining an expert against the likelihood of success in obtaining a denial or reduction of benefits.

The ever-growing movement to decriminalize marijuana also presents new employment law issues. Employers must be careful not to run afoul of federal laws and regulations, which still prohibit use of marijuana, medical or otherwise. At the same time, they must comply with state laws regarding treatment of employees who use medical or recreational marijuana in accordance with state-level legalization.
**Issue No. 1:** Can an employee be fired for coming to work high?

Simply put, yes. Several states have gone so far as to enact statutes providing that no employer is required to allow its employees to come to work under the influence of cannabis. Those states include: Alaska, California, Colorado, Georgia, Florida, Hawaii, Illinois, Michigan, Massachusetts, Montana, New Jersey, Oregon, and Washington. In Illinois, the statute provides that a cannabis patient can be considered impaired when he or she manifests specific, articulable symptoms while working that decrease or lessen performance of the employee’s duties, including speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, carelessness, disregard for the safety of the employee or others, etc. In other states, employers will generally be allowed to fire employees for coming to work high. However, as discussed above, proving concurrent intoxication and impairment may be difficult.

**Issue No. 2:** Can an employee be fired (or not hired) for having a cannabis medical card?

In many jurisdictions, an employee cannot be fired, or not hired, simply for possessing a cannabis medical card. Eleven states have cannabis patient protection laws: Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania, Oklahoma, and Rhode Island. Certain exceptions apply where an employee is required to comply with federal standards, such as federal transportation regulations.

Other states have ruled that employers are not required to accommodate the use of medical marijuana in the workplace. However, simply possessing a cannabis medical card is not dispositive of drug use, nor does it serve as sufficient proof of use or impairment while at work. Thus, the focus of those laws appears to be on finding evidence of any discernable nexus between the drug use and the employee’s work activities. Still, other states actually do permit an employer to fire, or not hire, an employee based solely on possession of a cannabis medical card, or for off-duty, off-premises use of marijuana. Those states include: California, Colorado, Georgia, Michigan, New Mexico, Ohio, Oregon, and Washington.

In states that afford cannabis patient protections, a Don’t-Ask-Don’t-Tell policy is likely the best practice to avoid allegations of a pre-textual adverse employment action by the employer. However, if an employer must comply with federal laws or regulations, it absolutely should determine which, if any, of its current or potential employees possess a cannabis medical card.

One context in which compliance with federal laws permit firing, or not hiring, an employee who uses medical marijuana comes about under the Federal Motor Carrier Safety Regulations (“FMCSR”). The FMCSR states that no commercial driver can perform “safety-sensitive functions” when the driver uses any controlled substance, unless such use is under the direction of a licensed medical professional who has advised that the controlled substance will not adversely affect the driver’s ability to safely operate a commercial motor vehicle. Marijuana is considered a controlled substance under 49 CFR §40.85.

The position of the Federal Motor Carrier Safety Administration has been that a medical prescription is no excuse for a positive drug test. There is no exception granted for those states that...
have legalized medical or recreational marijuana use. Thus, an employer required to comply with the FMCSR may fire, or not hire, an employee who uses medical or recreational marijuana, even when away from work, where his or her duties involve performance of “safety-sensitive functions.”

Issue No. 3: Can an employee be fired (or not hired) for failing a THC drug test?

As stated above, a positive THC drug test, standing alone, says very little about an employee’s state-of-being while working. Presumably, because it is so difficult to prove impairment, states are currently split on the issue of whether a positive THC test can justify termination.

In Illinois, an employer is permitted to enforce a zero-tolerance drug policy if it is done in a non-discriminatory manner. Other states that permit termination for positive test results include: California, Colorado, Georgia, Michigan, New Mexico, Ohio, Oregon, and Washington. However, some states actually prevent zero-tolerance policies where federal considerations are not in play, including: Arizona, Connecticut, Delaware, Maine, Minnesota, Nevada, New York, and Rhode Island. In Arkansas, a positive drug test alone is not sufficient grounds to take adverse employment action.

The issues considered in this article are only a few of the myriad issues presented by the decriminalization of marijuana across the country. America is still in the infancy stage of this experiment, and as the individual states feel their way through, it appears that jurisdictional splits will continue to come into focus. As such, employers and their attorneys must be mindful of the laws of the state or states in which they operate, while ensuring compliance with any applicable federal laws or regulations regarding the use of marijuana.