

Medical marijuana laws create dilemma for firms

JUDY GREENWALD

Employers are facing the challenge of maintaining a safe workplace while more states legalize the use of medical marijuana, experts say.

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While courts generally have ruled that firms do not have to

accommodate medical marijuana users, employers in some jurisdictions still are awaiting guidance on the issue (see story, page 20).

Furthermore, all employers must guard against the potential of running afoul of disability and privacy laws, experts warn.

Fourteen U.S. states now have laws that permit physicians to prescribe marijuana for cancer, chronic pain and a host of other medical conditions, while legislation to permit medical marijuana has been introduced in another 12 states, according to Santa Monica, Calif.-based independent researcher ProCon.org.

New Jersey is the latest state to legalize medical marijuana, under a law that takes effect July 1 (see box, page 20). States with legislation pending as of Jan. 22 were Alabama, Delaware, Illinois, Iowa, Massachusetts, Mississippi, Missouri, New York, North Carolina, Pennsylvania, Tennessee and Wisconsin.

Despite the state action, marijuana remains an illegal substance under the federal Controlled Substances Act, which creates tension between state and federal laws. Observers say this was eased in October, when the Justice Department said the federal government will not prosecute individuals using marijuana for medical purposes—provided that they adhere to state laws.

David H. Black, of counsel with law firm Jackson Lewis L.L.P. in Seattle, said employers have sympathy for employees whose medical issues have led them to use marijuana.

“By the same token, they also have a concern or responsibility to maintain a safe and secure workplace for all the other workers that are there and for the public too,” Mr. Black said.

“It really creates a Catch-22 for employers,” said Richard R. Meneghello, a partner with law firm Fisher & Phillips L.L.P. in Portland, Ore. “If they try to discipline an employee or not allow medical marijuana in the workplace, they could face a potential disability discrimination claim by the employee, or could they face some other invasion of privacy or legal action by the employee.

“Yet if they try to accommodate the employee, then they could face a potential safety issue if the employee shows up for work impaired and injures himself and others. And moreover, there could also be the nightmare scenario of a catastrophic injury caused to a member of the general public or employee,” where the employer “could face liability because they knowingly allowed someone who’s a marijuana user to operate on behalf of the company,” Mr. Meneghello said.

“There really is a fine line, a balancing act that they have to negotiate that really makes it difficult for employers to determine which avenue to go,” he said.

However, Frederick T. Smith, a partner with law firm Seyfarth Shaw L.L.P. in Atlanta, had a different view.

“The issue isn’t as gray and as complicated as people think it is, and I think it’s pretty clear, notwithstanding the laws that have been enacted in 14 states, that an employer has no obligation to accommodate an employee’s use of medical marijuana,” Mr. Smith said.



LEGAL IN 14 STATES
Fourteen states have enacted laws that legalized medical marijuana

STATE	YEAR PASSED
Alaska	1998
California	1996
Colorado	2000
Hawaii	2000
Maine	1999
Michigan	2008
Montana	2004
Nevada	2000
New Jersey	2010
New Mexico	2007
Oregon	1998
Rhode Island	2006
Vermont	2004
Washington	1998

Source: ProCon.org

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Vance O. Knapp, an attorney with law firm Sherman & Howard L.L.C. in Denver, said, "It's no different than if somebody had Percocet and they weren't supposed to use it during work" but "wanted to take it during a work break."

Richard L. Hurford, a shareholder with law firm Ogletree, Deakins, Nash, Smoak & Stewart P.C. in Bloomington Hills, Mich., said, "I think your greater liability will stem from looking the other way with individuals who use medical marijuana as opposed to...strictly enforcing your zero-tolerance policies."

However, some observers say there may be room for accommodation.

An employer's policy should depend on "how aggressive they want to be," said Mr. Meneghello. "If they want to take a very aggressive approach," employers can treat marijuana use the same as any other illegal substance and fire those who test positive.

A more moderate approach is "to only discipline employees if they can demonstrate that the employee was impaired by the marijuana," he said.

A worker who is prescribed medical marijuana obviously has a physical problem that led to the issue, Mr. Meneghello said. He advises employers to treat this like "any other physical problem. Conduct an interactive process to see what accommodations might work."

This could include asking employees to work with a doctor and providing intermittent time off or more frequent breaks, "anything that might allow them to do work despite the condition that has allegedly disabled them," aside from being allowed to use marijuana, he said.

Whatever the employer's policy may be, consistency is critical, experts say.

This "helps make sure they're not inadvertently discriminating against any kind of a protected class," Mr. Black said.

In New Jersey, "the most important thing is for an employer, before the issues arises, to decide how they want to deal with" it, said Amy Komoroski Wiwi, of counsel with law firm Lowenstein Sandler P.C. in Roseland, N.J.

"It's going to really depend on the workplace and it's going to depend on (employers') preference," Ms. Wiwi said.

Experts generally agree that, at the very least, employers can safely forbid workers from smoking any marijuana on their premises or from coming to work impaired.

Mr. Hurford said one employer called him and said, "An employee has a prescription for medical marijuana and he wants me to make a smoking room available. What can I say?" I said, "No, you don't have to do that."

The issue, though, is rife with questions, observers say. For instance, marijuana remains in the system after its effects have worn off. How can an employer tell if a worker is under the influence? At what point does smoking marijuana stop having an effect on someone who has smoked it? And what if a worker with a permit to smoke medical marijuana is found to have it in his system after a random drug test, but has otherwise shown no indication he is under its influence?

One inherent problem is "there is no standard" as to how much marijuana an employee can have in his system "and still be able to work safely and effectively," said Paula A. Barran, a partner with law firm Barran Liebman L.L.P. in Portland, Ore.

Meanwhile, asking employees about underlying medical conditions can leave employers vulnerable to discrimination charges if a worker is terminated later for other reasons, observers say.

Employers also could be accused of violating health privacy regulations for asking the wrong questions. It is "not the employer's province to get involved in that issue, or should not be, at least," said Mr. Knapp.

Meanwhile, medical marijuana is unlikely to be covered under employers' health care plans, observers say. Medical marijuana is not approved by the U.S. Food and Drug Administration and most health plans do not cover drugs without FDA approval, said a CIGNA Corp. spokesman.

It is also not reimbursable under employee's flexible spending accounts. Reimbursements under the FSAs "can only be used for things that are approved by the (Internal Revenue Service)" and medical marijuana is not, the CIGNA spokesman said.

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EAH

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I advise employers to not fret irrationally. Cannabis is not a very powerfully acting herb. The effects are less impairing than alcohol. Honestly. This is especially true for habituated users. Most function at virtually normal performance levels. All the handwringing and angst is not necessary. Unless one already has prejudice in search of validation, good employees that are using cannabis as medication will continue to be good employees. We need to stop treating the herb irrationally, politically, and as a culture war icon. Employers with reality based concerns can fear cannabis less than alcohol or most prescribed pain medications. The level of effect can be compared to coffee. Cannabis is not a stimulant per se but that is how you should be considering the degree of effects. Employees who have consumed several strong coffees. I ask you, how concerned are you about them?

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