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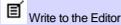
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### Weed at Work

**With a growing number of states decriminalizing medical marijuana, employers find themselves faced with a legal dilemma.**

By Julie Cook Ramirez



As senior vice president of investments for Ft. Lauderdale, Fla.-based Newbridge Securities, Irvin Rosenfeld handles millions of dollars in clients' holdings each day. He also smokes 10 to 12 marijuana cigarettes during the course of the day -- and has been doing so for nearly 40 years.

Rosenfeld suffers from multiple congenital cartilaginous exostosis, a rare condition that causes dozens of benign tumors to form in the long bones of his body.

Since childhood, he has experienced chronic pain and muscle spasms. As a teen, he endured numerous surgeries and tried an array of prescription drugs -- from muscle relaxants and anti-inflammatories to Valium, Quaaludes and morphine -- but nothing effectively quelled the pain.

Then, in 1971, during college, Rosenfeld gave into peer pressure and tried marijuana. One night, he realized for the first time in his life, he wasn't in pain and had been able to sit still for an entire chess game -- something he'd never been able to do before. The only difference was the joint he and his friends had been passing around.

With the help of his doctor, Rosenfeld embarked on a decade-long journey to research marijuana's medicinal properties and then to petition the federal government to let him use it to treat his condition. In 1982, he became the second person in U.S. history to be supplied with medical marijuana by the government.

He recently published a book about his struggle, entitled *My Medicine: How I Convinced the U.S. Government to Provide My Marijuana and Helped Launch a National Movement*.

A self-employed stockbroker at the time of the ruling, Rosenfeld went to work for Newbridge in November 2003. Not only does the company have no qualms about his medical marijuana use, Rosenfeld says, management even allows him to make use of it while on break -- in the company's designated smoking area or in his car in the parking lot. (Newbridge management declined to comment for this article due to recent changes in the executive ranks.)

Medical marijuana is typically prescribed when nothing else has worked to ease the suffering of those afflicted with AIDS, cancer, multiple sclerosis, glaucoma, migraine headaches and other debilitating conditions. So far, 14 states -- Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington -- have passed medical marijuana legislation, often dubbed Compassionate Use laws. Twelve more states are currently considering similar legislation.

Conditioning its use, however, hardly does away with the complexities and controversy surrounding medical marijuana. Despite the growing number of state statutes, federal law still classifies marijuana as a Schedule I Controlled Substance with "no accepted medical use" and, therefore, still forbids doctors from prescribing it.

U.S. Attorney General Eric Holder, on the other hand, announced last October it would not be a federal priority to prosecute patients with serious illnesses or their caregivers who are complying with state medical marijuana laws. Such conflicting messages create a confusing labyrinth of gray areas for employers.

"This is a difficult question for HR people, because there's a conflict between what the feds are saying and what 14 states have said," says Keith Watts, co-managing shareholder for the Orange County, Calif., office of employment law firm Ogletree, Deakins in Costa Mesa, Calif. "Employers, especially HR people, are caught in the cross-hairs: 'How do I deal with this on a practical basis?'"



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## Employer Response

Support for legalizing medical marijuana has grown substantially since former President Bill Clinton made his famous "I didn't inhale" comment during the 1992 presidential campaign. According to a January 2010 *ABC News/Washington Post* poll, 81 percent of Americans support legalizing cannabis for medicinal use, up from 69 percent in 1997.

But while the vast majority of Americans now support the idea, that doesn't mean they believe people should be allowed to smoke pot at work or come to work under the influence of marijuana. And it doesn't mean employers are required to accommodate employees' medical marijuana use.

The response from the employment-lawyer community runs the gamut from a sense that HR leaders better prepare for great change to a sense that the legalizations at the state levels are inconsequential.

"The net effect of medical-marijuana laws in the workplace is zero, because employers still have the ability to implement and enforce their substance-abuse policies based on federal-law prohibitions of illicit drug use," says Mark de Bernardo, founder and executive director of the Institute for a Drug-Free Workplace in Washington and a partner at the Jackson Lewis labor and employment law firm in Reston, Va.

"While there is concern among the employer community with regard to how they should respond to this, it really has not changed business as usual."

While she agrees it's possible to maintain a zero-tolerance policy even in one of the 14 medical-marijuana states, Bernice McReynolds, shareholder with Vercruyse Murray & Calzone in Bingham Farms, Mich., bristles at the suggestion that an employer simply ignore state law.

Rather, she recommends that employers "walk that tightrope between both." This approach will prove particularly effective should an employer find itself facing a legal challenge by an employee who feels he or she was wrongly terminated or disciplined for medical-marijuana use.

"I don't think any courts are going to be very appreciative of an employer who simply says, 'I don't care what state law says,'" says McReynolds. "They will do far better if they can show that they've made an attempt to consider all the relevant laws and tried to comply with both."

At CentraState Healthcare System in Freehold, N.J., a state where medical-marijuana legislation passed earlier this year, Vice President of Human Resources Fran Keane says she wouldn't have a problem with an employee using legally prescribed medical marijuana, as long as it didn't interfere with his or her performance.

However, if a medical-marijuana card-carrying employee were observed to be impaired while on the job, Keane says, she would rely on the organization's occupational specialists to determine if that employee was still able to perform the essential functions of his or her job.

CentraState employees who are found to be impaired due to any prescription drug are given the same treatment – and the same attempts at finding a suitable resolution.

In some cases, the situation may be resolved by granting marijuana-using employees longer breaks or having CentraState's employee-health physicians consult with them on when they are using the marijuana. It may simply be a matter of timing, says Keane, where using the drug at a different time of day could eliminate any concerns about on-the-job impairment.

In some instances, however, the employee may not be able to work at all while undergoing treatment with medical marijuana. In those situations, CentraState would look for other options.

"To the extent that we can accommodate it, we will," says Keane. "They may be eligible for family leave, they may be eligible for personal leave, there might be other things that can be done that would not be as drastic as termination."

Because of the life-or-death nature of CentraState's business, Keane says, special care must be taken to ensure that those in sensitive positions are not impaired in any way.

"You have to consider the jobs in question," she says. "Maybe you can deliver patient trays while under the influence, but in nursing, there's a tremendous amount of assessment, and a patient can go from healthy to acutely ill in the blink of an eye. You need to be astute and on the ball at all times."

This "job-specific" approach, as Keane calls it, is bound to raise some accusations of discrimination. However, such actions are perfectly legal,

according to Watts.

"Safety is paramount," he says. "If you have an employee who is using medical marijuana and they exhibit any signs that they are under the influence, you can't put them in a position where others might be in harm's way."

Safety concerns top the list for many employers faced with medical-marijuana-smoking employees. Last October, the U.S. Department of Transportation declared that transportation workers -- including pilots, aircraft-maintenance workers, truck drivers, school-bus drivers, train engineers, subway operators and ship captains -- aren't allowed to use marijuana under any circumstances, even in states that allow for its medicinal use.

Likewise, safety lies at the heart of the medical-marijuana policy enforced by Grand Valley State University in Allendale, Mich.

Like Keane, Scott Richardson, the school's associate vice president and chief human resource officer, says he doesn't necessarily have a problem with employees using medical marijuana, as long as they aren't doing so on university grounds and don't come to work impaired. As with CentraState, concerns about medical-marijuana use are heightened when GVSU jobs entail sensitive duties or use of heavy machinery.

"If they drive a vehicle for us or work in certain occupations where use of marijuana could be hazardous, like out on an archaeological dig site, we would need to say, 'You can't do that for us and use that,' even though it's a legal option in Michigan," says Richardson. "In those instances, their role at the university would conflict with their use of marijuana."

Whenever possible, Richardson says, GVSU would look to accommodate the employee's medical-marijuana use by moving him or her to another role that wouldn't involve heavy equipment or sensitive duties. If that doesn't work out, however, he would suggest the employee take sick or disability leave.

### **Battle Lines**

Other employers have been far less accommodating in their approach to the issue. Joseph Casias, the 2008 Associate of the Year at a Battle Creek, Mich., Wal-Mart, was fired after testing positive for marijuana late last year. Casias, who suffers from sinus cancer and an inoperable brain tumor, had a legal prescription to use the drug in Michigan, where medical-marijuana legislation passed in 2008.

Still, Wal-Mart policy dictates that any employee who fails a drug screen be terminated. So Casias lost his job. He has since filed suit against his former employer.

"Episodes like that are unnecessary and unconscionable," says Mike Meno, director of communications for the Marijuana Policy Project in Washington. "They wouldn't have treated somebody who had Percocet in their system that way, so why should that standard be applied to medical-marijuana patients?"

Greg Rossiter, spokesman for Wal-Mart Stores Inc., based in Bentonville, Ark., says the retail giant is sympathetic toward Casias' predicament, but he, too, points to safety concerns.

"Like other companies," he says, "we have to consider the overall safety of our customers and associates ... when making a difficult decision like [this]."

By and large, medical-marijuana laws are vague about how far employers must go to accommodate use by employees. To date, employers have been left to wait for the courts to weigh in on the issue, thereby creating legal precedence in their respective states. So far, there have been a number of high-profile court cases, including [Ross vs. RagingWire Telecommunications Inc](#). In that case, Gary Ross, a disabled veteran, filed suit after he was fired from his job as a systems administrator for failing a drug test.

Despite Ross' explanation that he was using legally prescribed marijuana to ease the chronic back pain caused by an injury he sustained in 1983 while serving in the Air Force -- and despite his offer to go back on Vicodin instead -- Sacramento-based RagingWire placed him on suspension and then fired him four days later.

Ross filed a legal challenge and, in 2008, the state Supreme Court ruled that, despite California's Compassionate Use Act, state fair-employment law did not require RagingWire to accommodate his medical-marijuana use. In similar cases, Oregon and Montana state Supreme Courts also ruled in favor of the employer.

The resulting decision in the Casias case could be critical for employers, not only in Michigan, but across the country.

Not only is Wal-Mart a major employer with operations in every state, but employment lawyers suspect it could be the first case in which a state Supreme Court rules in favor of the plaintiff. His cancer diagnosis, coupled with the fact that

he was named Wal-Mart Associate of the Year in 2008, could make him a sympathetic plaintiff, says McReynolds.

"It would be helpful to employers for that case to run its course, so there could be a judicial opinion that would assist employers in feeling more comfortable in what they need to do as these situations come up," says McReynolds.

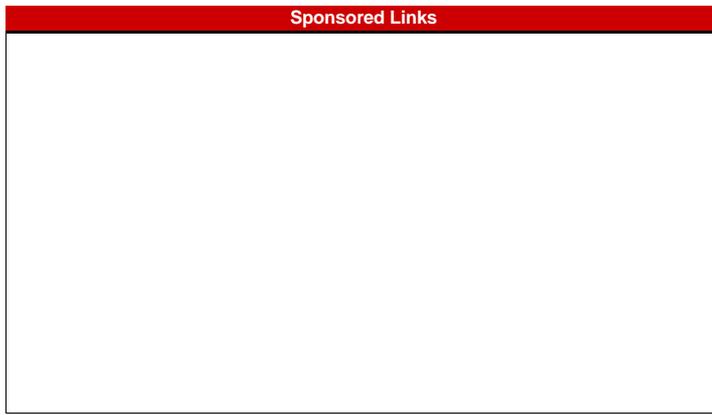
Until more state courts weigh in on the medical-marijuana debate, Watts advises employers to "get their houses in order." Regardless of whether their state is one of the 14 where medical marijuana has been decriminalized, the dozen currently considering such legislation or the remaining 25, employers should revisit their drug policies (see sidebar) to ensure they reflect what the company wants and what's legally compliant.

**See also:**

[Legalities of Medical Marijuana Differences by State Under the Influence Legal User, Legal Firing](#)

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### Differences by State

This article accompanies [Weed at Work](#).

According to ProCon.org, which regularly updates its data, 14 states have passed laws that legalize medical marijuana. At present, these are the states and permitted amounts:

Alaska: 1 ounce

California: 8 ounces

Colorado: 2 ounces

Hawaii: 3 ounces

Maine: 2.5 ounces

Michigan: 2.5 ounces

Montana: 1 ounce

Nevada: 1 ounce

New Jersey: 2 ounces

New Mexico: 6 ounces

Oregon: 24 ounces

Rhode Island: 2.5 ounces

Vermont: 2 ounces

Washington: 24 ounces

In addition, the District of Columbia recently enacted legislation that permits possession of 2 ounces of medically prescribed marijuana.

Arizona and Maryland have passed laws that, although favorable towards medical marijuana, do not legalize its use.

The ProCon.org site provides [interactive, detailed information](#) on when the laws were passed, what sort of registry ID is required as well as data on the medical conditions required for approval of marijuana possession and the ability of users to possess or cultivate pot, etc.

[ProCon.org](#) is a nonpartisan, educational site that offers information and promotes critical thinking on a variety of controversial topics.

**See also:**

[Legalities of Medical Marijuana Under the Influence](#)  
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