

Medical marijuana use and the Colorado workplace

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Much publicity has been given lately to issues related to the authorized medical use of marijuana in Colorado. The recent focus has been on regulating physicians and dispensaries, but employers also face issues arising from the medical use of marijuana by applicants and employees. Among the questions employers face are whether they must accommodate the state-authorized use of marijuana and what steps an employer who is made aware of such use may or must take to provide a workplace that is safe for the user and others.

Summary of the law

In 2000, Colorado voters approved an amendment to the Colorado Constitution authorizing the medical use of marijuana under limited circumstances. See Constitution of Colo. Art. XVIII, §14. The amendment to the constitution provides a defense to a patient or caregiver charged with a violation of the state's criminal laws related to the patient's medical use of marijuana if the patient lawfully possesses a registry identification card from the Colorado Department of Health authorizing such use. To apply for a registry identification card, the patient must submit documentation and show that a physician has previously diagnosed the patient as having a debilitating medical condition and that, in the context of a bona fide physician-patient relationship, the physician advised the patient that the patient might benefit from the medical use of marijuana in connection with the condition. If the state health agency verifies the information, it may authorize the medical use and possession of marijuana in limited quantities.

The amendment prohibits any patient from engaging in the medical use of marijuana in a way that endangers the health or well-being of any person. It further prohibits patients from engaging in the medical use of marijuana in plain view of, or in a place open to, the general public.

Most significantly for employers, the amendment specifies that it "shall not require any employer to accommodate the medical use of marijuana in any work place." See Constitution of Colo. Art. XVIII, §14, ¶10(b).

Notwithstanding this amendment to the state constitution, the use, possession, distribution and manufacture of marijuana remains a federal crime in Colorado.

Please note that the discussion that follows is limited to Colorado state law. More than a dozen states have medical marijuana laws, each with their own requirements, and employers in other states need to evaluate the applicable laws. Colorado employers also need to check local laws. For example, the City of Boulder Revised Code contains provisions on employer drug testing.

Drug-free workplace and testing policies

Many employment policies and collective bargaining agreements recognize that alcohol and chemical abuses create dangers and costs in terms of safety and productivity and state a goal of providing a drug-free workplace. Many go further to adopt and implement a testing procedure. Such policies typically prohibit the manufacture, distribution, sale, possession or use of a controlled substance in the workplace and on worksites and provide for disciplinary action up to and including termination and the possible involvement of law enforcement authorities. To make an exception for medical marijuana use as permitted under Colorado law would be inconsistent with the goal of providing a drug free workplace and protecting employees and others from safety hazards.

Employers may apply their substance abuse and drug-testing policies to applicants and employees who are authorized to use marijuana for medical reasons under Colorado law. Note that marijuana is not in the class of substances that may be lawfully prescribed, so even under the Colorado law, its use is “authorized,” not prescribed. Marijuana use and possession continues to be unlawful under federal law. Accordingly, policy provisions for the lawful use of prescription drugs do not apply to medical marijuana use. If an applicant or employee tests positive for marijuana use, an employer does not need to accept the individual’s placement on the Colorado Medical Marijuana Registry as a reasonable explanation excusing a positive test result. The law does not require employers to accommodate medical marijuana use by applicants or employees.

Individuals may mistakenly believe that placement on the registry protects them in their employment. Employers should consider modifying their substance abuse policies to expressly state that, notwithstanding the amendment to the Colorado constitution, applicants will not be accepted for employment unless and until they test negative for all prohibited substances and employees who test positive for marijuana use will face discipline up to and including termination of employment. Policy changes must be communicated to applicants and employees before testing. Whether or not a policy is modified, supervisors and managers should be trained on how to address reports or admissions of medical marijuana use.

Perhaps believing that the best defense is a good offense, some applicants and employees have announced to employers that they are using marijuana for medical reasons, are on the registry or are applying for the registry or have produced their registry cards. An admission of use of what remains an illegal drug may be reason enough to require testing, reject an applicant or take action against an employee under the terms of an employer’s policy. When the use creates an unsafe workplace, an employer who fails to act on such knowledge may violate its duty under the Occupational Safety and Health Act requirement to provide a safe workplace or face liability for harm to persons or property that results from marijuana use.

Confidentiality

The Colorado constitutional amendment provides that the state health agency shall create and maintain a confidential registry of patients who have applied for and are entitled to receive a registry identification card. Access to information regarding the registry is strictly limited and employers and potential employers are not among those permitted access to the registry.

The Colorado legislature had adopted a law that imposes criminal penalties on any person who releases or makes public any confidential record or any confidential information contained in a record that is provided to or by the marijuana registry without the written authorization of the marijuana registry patient. Colo. Rev. Stat. § 18-18-406.3. While the law's intent appears to be to protect registry information, the language is broad enough to apply to an employer who is given a copy of an individual's application or authorization and fails to keep it and the information contained in it confidential.

Given that information related to marijuana use under the Colorado amendment is medical in nature, employers must treat it as confidential. Employers who come to possess any information related to an individual's application to the registry, registration or any medical treatment must strictly limit it to those who have a need to know (generally no more than the top human resources official, perhaps the safety director, government representatives having authority to request such information and sometimes the individual's supervisor).

Relation to other laws

Americans with Disabilities Act and Colorado Nondiscrimination Act

Both the federal Americans with Disabilities Act and the state Colorado Nondiscrimination Act protect individuals with disabilities from discrimination if they are able to perform the essential functions of the job with or without reasonable accommodation. An individual with a disability is one who is substantially limited in the performance of major life activities. Current illegal drug use, by itself, does not render one an individual with a disability. An individual who has cancer and qualifies for medical marijuana under Colorado law may be an individual with a disability protected by these laws because of the cancer. The employer may need to accommodate the underlying condition, but can refuse to provide accommodations that support or further illegal activity.

Family and Medical Leave Act

An individual with a "serious health condition" or one who is caring for an immediate family member with a "serious health condition" is covered by the federal Family and Medical Leave Act (FMLA). Here too, qualifying for the medical use of marijuana under Colorado medical marijuana law does not automatically mean one qualifies for protection under the FMLA. The individual's or family member's underlying condition may or may not meet the FMLA definition and must be the focus when determining eligibility for FMLA leave.

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