



# Marijuana Update

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## State Medical Cannabis Laws

- All of the states that have legalized cannabis permit employers to prohibit employees from possessing or using in the workplace.
- Most permit employers to prohibit employees from coming to work under the influence.
  - *But* see PA law: Employers may not discipline employees for being under the influence unless the employee's conduct falls below the standard of care normally accepted for that position.
- Some affirmatively require accommodation.

# The Difficult Questions

- Off Duty Use:
  - May employers with drug testing policies still test for cannabis in states where use is legal?
  - May employers have a zero tolerance policy, and refuse to hire individuals who use cannabis, even completely outside of work?
- How does an employer determine whether an employee is under the influence?

## Potential Restrictions on Employer Action

- Maine adult use statute does not contain an anti-discrimination provision, and so likely does not restrict employers' ability to take action based on off-duty recreational use.
- Maine law expressly prohibits discrimination based on "status" as a medical marijuana patient.
- MHRA requires employers to provide reasonable accommodations to qualified employees with disabilities.

## ***Barbuto*, 2017 MA decision**

- Applicant used cannabis in small quantities, in the evening, 2-3 times / week.
- Job – entry level, promoting products in supermarket.
- Court said that, under MA law, medical cannabis was akin to any legally prescribed drug.
- Illegality under federal law immaterial, since employer bears no risk for off-duty use.

## *Callaghan*, 2017 RI decision

- Employer refused to hire applicant after she disclosed her status as a medical cardholder and failed a pre-employment drug test.
- Employer argued that non-discrimination provision in medical marijuana law applied only to discrimination based on *status*, not to failing a drug test.
- The court held that this was a meaningless distinction, and the employee had a cause of action for the employer's violation of the medical marijuana statute

## *Noffsinger*, 2018 CT decision

- Applicant with PTSD has offer withdrawn after she failed a drug test.
- Court held the CT cannabis law was not preempted by the federal Controlled Substances Act.
- Court held that a jury could find the employer discriminated against the applicant on the basis of disability, by failing to consider an exception to its policy prohibiting even off-duty use.

## *Chance*, 2018 DE decision

- Employee involved in a work-related accident while operating a “shuttle wagon” on railroad tracks.
- Sent for a drug test, which indicated marijuana use.
- Terminated, notwithstanding possession of a card.
- Delaware statute expressly prohibits termination based on a positive test unless the individual used, possessed, or was impaired at work.
- Court found Delaware statute was not preempted by federal law, which doesn’t make it illegal to employ a marijuana user.



## *Eplee*, 2019 MI decision

- Employee's conditional job offer rescinded after a positive pre-employment drug test.
- Michigan statute says qualifying patients may not be "denied any right or privilege including . . . disciplinary action by a business . . . for the medical use of marijuana. . ."
- Court said employee had no "right" to or property interest in the job, and therefore had no claim.

# Workers' Compensation

- *Bourgoin v. Twin Rivers* (Me. 2018)
  - Holding WC carrier cannot be compelled to subsidize medical marijuana.
  - Otherwise, carrier would be forced to aid and abet the individual's violation of federal law.
- *Appeal of Andrew Panaggio* (N.H., March 7, 2019)
  - Holding WC carrier not banned from reimbursing for medical marijuana under state law.
  - Remanding the case for further consideration of the effect of federal law that makes possession a federal crime.
- Note several states have relied on the federal policy of noninterference to compel carriers to cover.

## Where does this leave us?

- Still unclear whether Law Court would hold employers are required to accommodate off duty medical marijuana use.
- Risky not to do so, unless a federal contract or statute (DOT) is in play or unless employer can demonstrate legitimate safety concerns.
- Assess timing of use, impact of use, and impact on employee's job / safety considerations.
- Unless safety risk is apparent, may be advisable to seek an expert opinion about impact of off duty use on employee's ability to safely perform the job.

# Presenter

**Katy Rand**

[krand@pierceatwood.com](mailto:krand@pierceatwood.com)

Merrill's Wharf  
254 Commercial Street  
Portland, ME 04101

PH / 207.791.1267