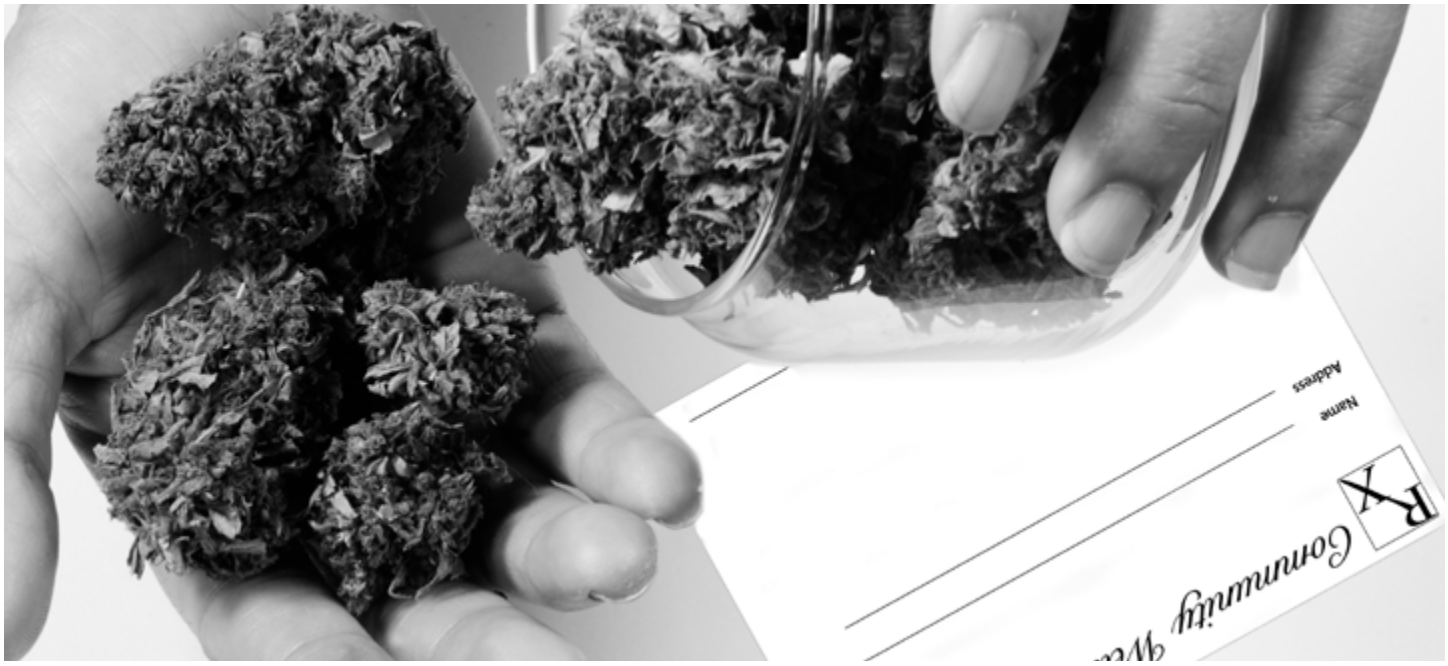

An update on medical marijuana and employment drug screening

Over the last several years, a growing number of states have enacted laws allowing patients to legally use marijuana for medicinal purposes. As a result of these laws and the fragmented legal landscape, applicant and employee use of medical marijuana has become a growing area of concern and uncertainty for human resources departments.

> Employers are now faced with the challenge of determining whether they can discharge an applicant or employee who tests positive for marijuana but who provides a medical marijuana prescription under state law.

First, it is important to note that medical marijuana is a very tricky area where several conflicting laws may be at play. Ultimately, it is up to an organization to work closely with legal counsel to develop a marijuana drug testing policy based on that organization's unique circumstances, including but not limited to, the jurisdictions in which it operates, the industry within which it operates and the nature of the various positions it hires (e.g. safety sensitive positions), whether any applicable federal laws or regulations require the organization to have a drug-free workplace and/or test for marijuana, and whether any states in which it operates have laws or case law addressing the use of medicinal marijuana in the employment context (either providing employers with rights or employees with protections through anti-discrimination or reasonable accommodation provisions).

Courts in some states, including Rhode Island, Connecticut and Nevada, have upheld an applicant/employee's right to not be discriminated against (or to be provided reasonable accommodations) based on his or her status as a medical marijuana user. These courts' decisions were based on the statutory language in these specific states that provide expicit protections to medical marijuana users in the employment context (see *Callaghan v. Darlington Fabrics Corp*., No. PC-2014-5680 (R.I. Super. Ct., May 23, 2017); *Noffsinger v. SSC Niantic Operating Co, LLC*., No. 3:16-cv-01938 (D. Conn., Aug. 8, 2017); and *Nellis v. Sunrise*, No. A-17-761981-C). Several other states have medical marijuana laws with similar pro-applicant language, including Arkansas, Arizona, Delaware, Illinois, Maine, Minnesota, New York, Oklahoma, Pennsylvania and West Virginia.

Additionally, some states may have very general anti-discrimination language within their medical marijuana statutes that applicants may try to rely on in employment discrimination cases. One recent example comes out of Massachusetts, where the state's medical marijuana law provides that patients may not be denied "any right or privilege on the basis of their medical marijuana use." Massachusetts' highest court interpreted this language in *Barbuto v. Advantage Sales and Marketing LLC*, and concluded that the broad anti-discrimination provisions cover an applicant/employee's right to a reasonable accommodation by an employer. However, while the court held that an employer may violate the statute's general anti-discrimination language when it terminates an employee who fails a drug test due to medical marijuana use, it left open the possibility that accommodating such medical marijuana use could still pose an undue burden to employers in certain situations, such as when hiring for a safety sensitive position.

On the other hand, some courts such as a Washington federal court in *Swaw v. Safeway, Inc*., No. C15-939 (W.D. Wash. Nov. 20, 2015), the Oregon Supreme Court in *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus*., 230 P.3d 518 (Or. Apr. 15, 2010), and the Montana Supreme Court in *Johnson v. Columbia Falls Aluminum*, 213 P.3d 789 (Mont. Mar. 31, 2009) have held that employers have no duty to accommodate an employee's use of medical marijuana based on a reading of the medical marijuana statute in each of those states. Oregon's law provides that "nothing in [the Oregon Medical Marijuana Act] shall be construed to require: … (2) An employer to accommodate the medical use of marijuana in any workplace." The medical marijuana law in Montana similarly states that nothing in it should be construed as requiring an employer to accommodate the use of medical marijuana, but goes even further by stating

that nothing in the law should be construed to permit a cause of action against an employer for wrongful discharge or discrimination. Courts in California and Michigan reached similar conclusions, finding that employers have no obligation to accommodate an employee's medical marijuana use (including off-duty medical marijuana use) because the state's medical marijuana law does not impose such a requirement or obligation on employers (see *Casias v. Wal-Mart Stores* (Michigan) and *Ross v. Raging Wire Telecommunications* (California)).

Thus, employers in states with statutory language that explicitly provides that employers have no duty to accommodate medical marijuana users may be safe to rely on such language to enforce zero-tolerance drug-free workplace policies and discharge applicants or employees who test positive for marijuana. However, the same may not be true in those states that provide protections to medical marijuana users in the employment context, either through anti-discrimination or reasonable accommodation provisions, or that do not address the issue of an applicant/employee's off-duty medical marijuana use. Nonetheless, employers who are subject to federal laws such as the Drug-Free Workplace Act, or federal regulations such as through the Department of Transportation (DOT), may be able to avoid the myriad of state law issues altogether due to their obligations under federal law or regulation.

In addition, this analysis will only increase in complexity for employers as a growing number of states legalize recreational marijuana use. For example, Maine recently enacted a voter referendum, which went into effect on Feb. 1, 2018, that legalized recreational marijuana use and prohibited employers from refusing to employ or from otherwise penalizing any person over the age of 21 based on that person's consumption of marijuana outside of an employer's property. However, on May 2, 2018, the Maine Legislature enacted the Marijuana Legalization Act and removed this explicit anti-discrimination provision from the law. Instead, the Act states that employers "are not required to permit or accommodate the use, consumption, possession, trade, display, transportation, sale or cultivation of marijuana or marijuana in the workplace" and allows employers to "enact and enforce workplace policies" restricting marijuana use "in the workplace or while otherwise engaged in activities within the course and scope of employment."

As illustrated above, the varying and rapidly changing nature of the law in this area serves as a reminder to employers to be extremely cautious with employment drug screening practices, ensuring that such practices are fully vetted on a regular basis by legal counsel. Furthermore, all employers must remain vigilant and attentive to developing case law surrounding this issue and potential legislative action in other states that may create protections for marijuana users

For more information and a detailed discussion on the complexities of medical marijuana and employment drug screening, please see our White Paper available here .