whitepaper

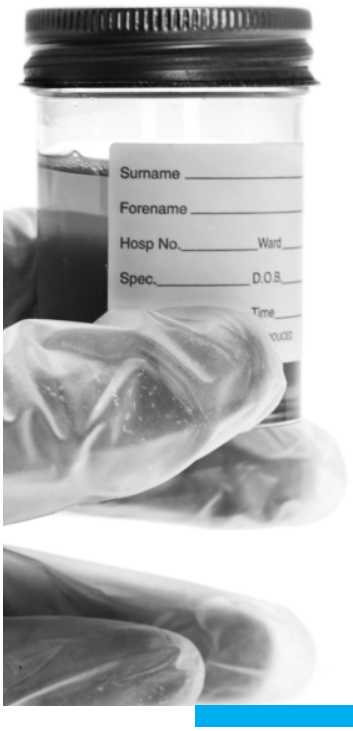
THE EVOLVING WORLD OF MEDICAL MARIJUANA AND EMPLOYMENT DRUG SCREENING

Navigating the fragmented legal landscape

Given the diverse and global nature of today's workforce, employers recognize the need to proactively detect and eliminate problematic behaviors before they cause disruptions or other serious issues in the workplace.

With an eye on maximizing employee and workplace safety and minimizing the risks associated with impaired human capital, companies have traditionally accepted a zero-tolerance drug-free workplace policy as the safest and most obvious solution. However, the recent surge in state laws allowing patients to legally access marijuana for medicinal purposes has resulted in a growing area of concern and uncertainty for human resources departments—determining whether a company can discharge an applicant or employee who tests positive for marijuana but provides the company with a valid medical marijuana prescription has become increasingly challenging for employers given the fragmented legal landscape.

First, it is important to recognize that there are no clear-cut answers on this issue given the changing nature of the law in this area. Nonetheless, given the current legal landscape, the answer to this question will depend on several factors, including whether the employer or position is federally regulated and whether the state has adopted a medical marijuana law that protects employees who lawfully use medical marijuana. The issue is easily resolved when the position in question is subject to safety standards imposed by federal regulation, the employer is a federal contractor or grantee, or when the state at issue does not have a medical marijuana program



in place. The answer is also fairly straightforward when a state's medical marijuana statute explicitly states that employers have no duty to accommodate an applicant's or employee's use of medical marijuana. All of these situations will generally allow an employer to maintain a zero-tolerance drug-free workplace policy and terminate an applicant or employee who tests positive for marijuana, even when a valid prescription is produced.

However, some states have adopted medical marijuana laws that are either silent on an employer's obligations/employee's rights, or otherwise include broad anti-discrimination language that does not explicitly address the employment context. Employers operating in these states must review the statutory language and case law carefully to determine whether such laws require accommodations in the employment context.

Further, some states have laws that explicitly protect medical marijuana users through anti-discrimination or reasonable accommodation provisions addressed at employers. These laws may include language that prohibits employers from discriminating against applicants or employees based on their use of medical marijuana, or that requires employers to provide reasonable accommodations to medical marijuana users. Employers operating in these states need 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 similar protections for medical marijuana users.

FEDERAL CONTRACTORS AND FEDERALLY REGULATED POSITIONS

The Drug Free Workplace Act (DFWA) requires federal contractors to prohibit the "unlawful … use of a controlled substance" by employees in their workplace as a condition of employment.[1] These restrictions also apply to federal grant recipients.[2]

Marijuana is currently listed as a Schedule I controlled substance under the Controlled Substances Act,[3] and therefore its use is strictly prohibited by the DFWA. Thus, federal contractors and federal grantees subject to

1 See 41 U.S.C. § 8102(a).
2 Id. at § 8103(a).
3 21 U.S.C. § 812(b)(1).

the DFWA[4] are legally required to maintain a drug-free workplace with no exceptions for employees' use of medical marijuana.

Furthermore, there are certain positions that are regulated by federal agencies and must abide by the safety standards imposed by such agencies. These federal guidelines do not allow regulated employees, such as those in safety-sensitive positions, to use marijuana even if it is pursuant to a valid prescription under state law.

One example of this is the U.S. Department of Transportation (DOT)'s Drug and Alcohol Testing Regulation for safety-sensitive transportation employees—including pilots, school bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire-armed security personnel, ship captains and pipeline emergency response personnel, among others—which does not authorize "medical marijuana" under a state law to be a valid medical explanation for a transportation employee's positive drug test result.[5]

Thus, employers subject to federal regulations that require testing for marijuana use must also follow these requirements and may do so without violating state law.

STATES WITHOUT MEDICAL MARIJUANA PROGRAMS

As previously mentioned, marijuana remains a Schedule I controlled substance that is illegal under federal law. Following from this, employers operating in states that have not legalized medical marijuana are likely free to strictly enforce zero-tolerance drug-free workplace policies, terminating any applicant or employee who tests positive for marijuana or any other prohibited substance under the federal Controlled Substances Act.

4 "The prohibitions of the Drug-Free Workplace Act are reflected in Subpart 23.5 of the Federal Acquisition Regulation, and are incorporated into all government contracts. See FAR § 23.505." Lucas T. Hanback, Marijuana Legalization Creates Risks For Gov't Contractors, ROGERS JOSEPH O'DONNELL PC (Feb. 27, 2015), http://www.law360.com/articles/625957/marijuana-legalization-creates-risks-for-gov-t-contractors.

5 DOT 'Medical' Marijuana Notice, U.S. DEPT. OF TRANSP. (Nov. 19, 2015), https://www.transportation.gov/odapc/medical-marijuana-notice

However, such decisions must be grounded strictly in the positive drug test, without any other contributing factors that could be considered discriminatory or are otherwise protected by federal law. In *James v. City of Costa Mesa,*[6] the Ninth Circuit Court of Appeals held that the Americans with Disabilities Act (ADA) does not cover medical marijuana use since marijuana is classified as a Schedule I controlled substance under federal law. Nonetheless, in the same opinion, the Ninth Circuit clarified that it was not ruling that medical marijuana users have no protection under the ADA in any circumstances, but only that the ADA does not protect medical marijuana users who claim to face discrimination on the basis of their marijuana use. The court clarified that a medical marijuana user may still be protected under the ADA if he or she has another condition that meets the ADA's definition of a disability.[7] The Equal Employment Opportunity Commission (EEOC) has recently used this holding to file a case arguing that an employer's stated reason for terminating an employee—because he tested positive for marijuana—was only pretext for the actual reason—because the employee suffers from epilepsy.[8]

STATES WITH MEDICAL MARIJUANA PROGRAMS

As previously noted, the question of whether an employer can discharge an employee for his or her off-duty use of medical marijuana becomes more difficult for employers in one of the 30 jurisdictions that have legalized medical marijuana.

Generally, few states remain that have laws allowing employers to implement a policy of discharging applicants or employees for testing positive for marijuana regardless of the circumstances. Some cases have analyzed states' statutory language and have upheld an employer's right to enforce a drug-free workplace policy and terminate an applicant or employee for a positive drug test even though the applicant or employee produced a valid medical marijuana prescription. However, it is important to note that these cases are generally concentrated in states with medical marijuana statutes that explicitly state that employers have no duty to accommodate medical marijuana users, are silent on the issue, or where courts refuse to interpret statutory anti-discrimination provisions broadly.

The employer's rights and responsibilities with respect to enforcing a drug-free workplace policy become more complicated when courts broadly interpret anti-discrimination language in state medical marijuana laws, finding an implicit protection for medical marijuana users in the employment context. Further, employers with zero-tolerance policies face the highest risk in states where medical marijuana statutes explicitly provide

6 700 F.3d 394 (9th Cir. 2012).
7 Id. at 397 n.3.
8 See EEOC v. The Pines of Clarkston, Inc., Civil Action No. 2:13-cv-14076 (E.D. Mich. Feb. 6, 2015).

protection for medical marijuana users through anti-discrimination or reasonable accommodation provisions addressed at employers.

Thus, an employer's rights and obligations under state law likely turns on whether the state's law contains language that either explicitly or implicitly provides medical marijuana users with some sort of protection in the employment context. If the state's law contains no such language, then employers in that state may be free to strictly enforce drug-free workplace policies, making no exceptions for medical marijuana users. However, if the state's law does include language protecting medical marijuana users, then employers in that state will have to carefully review the statutory language and determine whether their employment drug testing policies are lawful under such laws.

1. STATES WHERE EMPLOYERS HAVE NO DUTY TO ACCOMMODATE MEDICAL MARIJUANA USE

Seven states—Alaska, Colorado, Montana, New Jersey, Ohio, Oregon and Washington—have statutes that explicitly state that nothing in the law should be construed to require an employer to accommodate the medical use of marijuana in any workplace.

The language in these states' statutes is generally very broad and can be interpreted as allowing employers to enforce zero-tolerance drug-free workplace policies—i.e. allowing employers to terminate an applicant or employee who tests positive for marijuana, even if the marijuana use was pursuant to a valid prescription and outside of the workplace. This interpretation has been confirmed by state courts in Oregon, Montana and Washington.

Washington's law states that an employer does not have to accommodate medical marijuana use if it establishes a drug-free workplace.[9] The Washington State Supreme Court confirmed this in 2011 when it held that the state's Medical Use of Marijuana Act (MUMA) does not provide a civil cause of action for wrongful termination based on an employee's authorized medical marijuana use.[10] This case involved an applicant who used medical marijuana outside of the workplace, and while the MUMA only states that the law does not "require any accommodation of any medical marijuana

9 Wash. Rev. Code Ann. § 69.51A.060.
10 Roe v. TeleTech Customer Care Mgmt. LLC, 257 P.3d 586 (Wash. June 9, 2011).

use in any place of employment," the court refused to read this language as requiring an employer to accommodate medical marijuana use outside the workplace, since no such requirement was explicitly stated.

A federal district court in Washington reiterated this position in *Swaw v. Safeway, Inc.*, holding that an employer can terminate an employee for using marijuana, even when the employee has a prescription and only used marijuana outside the workplace.[11] In this case, Safeway conducted a drug test after a workplace injury, which was consistent with its written policy. The employee tested positive for marijuana and explained that it was due to his use of medical marijuana outside of the workplace. Nonetheless, Safeway chose to terminate the employee in accordance with its drug-free workplace policy which prohibited employees from testing positive for a controlled substance on the job or on company premises. Safeway's policy defined "controlled substance" to include "all chemical substances or drugs listed in any controlled substances acts or regulations applicable under federal, state or local laws."

The employee filed a disability discrimination lawsuit against Safeway, arguing that Safeway wrongfully terminated him for using medical marijuana for a disability, but the Court dismissed these claims and held that Washington law does not impose a duty on employers to accommodate medical marijuana in drug-free workplaces. The court noted that unlike alcohol, marijuana remains a controlled substance that is illegal under federal law, and because users of an illegal substance are not a protected class, the employee could not state a claim for employment discrimination on the basis of a disability. Notably, this decision came after MUMA was amended to add that "nothing in this chapter requires an accommodation for the medical use of cannabis if an employer has a drug-free work place."[12]

The Oregon Supreme Court[13] and Montana Supreme Court[14] have both also held that employers

11 Swaw v. Safeway, Inc., No. C15-939 (W.D. Wash. Nov. 20, 2015).
12 Wash. Rev. Code Ann. § 69.51A.060(6).
13 Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518 (Or. Apr. 15, 2010).
14 Johnson v. Columbia Falls Aluminum, 213 P.3d 789 (Mont. Mar. 31, 2009).

have no duty to accommodate an employee's use of medical marijuana. 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."[15] The medical marijuana law in Montana similarly states that nothing in the law 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.[16]

Thus, employers in states with statutory language that explicitly provides that employers have no duty to accommodate medical marijuana users are likely safe to rely on such language when discharging applicants or employees for drug screens that come back positive for marijuana.

2. STATES WITH STATUTES THAT ARE SILENT ON OFF-DUTY MEDICAL MARIJUANA USE IN THE EMPLOYMENT CONTEXT

10 states and the District of Columbia have statutes legalizing medical marijuana but that are silent on the issue of whether an employer does or does not have an obligation to accommodate an employee's medical marijuana use. Notably, some of these laws include general anti-discrimination language that courts have broadly interpreted to apply in the employment context.

These states are California, Florida, Hawaii, Maryland, Massachusetts, Michigan, New Hampshire, New Mexico, North Dakota and Vermont. Some of these states may have language in their statutes that says employers have no duty to accommodate an employee's use of medical marijuana during work hours or on work premises, however, they do not specifically address the issue of whether an employer can discharge an applicant or employee for off-duty medical marijuana use. In the past, cases brought by plaintiffs under these statutes have generally upheld an employer's right to enforce drug-free workplace policies that make no exception for medical marijuana use. However, more recent cases are trending towards taking a closer look at the language in each statute and are interpreting such language broadly to provide users protection in the employment context, even if it is not explicitly provide for in the law.

15 Or. Rev. Stat. § 475.340.
16 Mont. Code Ann. § 50-46-320.

The most 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." The Massachusetts Supreme Court interpreted the above language in *Barbuto v. Advantage Sales and Marketing LLC*,[17] and concluded that the broad anti-discrimination provisions in the state's medical marijuana law include the right to a reasonable accommodation by an employer. While the court held that an employer violates the statute's general anti-discrimination language when it fires 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.

Alternatively, in *Casias v. Wal-Mart Stores*, Inc.,[18] the U.S. Court of Appeals for the Sixth Circuit was asked to consider whether language in the Michigan Medical Marijuana Act (MMMA) that prohibits "disciplinary action by a business or occupational or professional licensing board or bureau"[19] against a medical marijuana patient would be applicable in the employment context. Rather than reading the word "business" independently, the court interpreted it as a modifier and thus only applicable in the business licensing context. Based on this interpretation, the court concluded that the MMMA was silent on a patient's protections in a private employment context, and held that the applicant had no cause of action for wrongful discharge or violation of the MMMA when Wal-Mart terminated his employment due to a positive drug test for marijuana in accordance with its drug use policy. The court reached this conclusion even though the applicant alleged that he was lawfully prescribed medical marijuana for treatment of head and neck pain related to sinus cancer and an inoperable brain tumor.

Similarly, California's law provides that "nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment. …" While the law states that employers do not have to allow employees to use medical marijuana while at work, it is silent on the issue of whether an employer can terminate an employee for his or her off-duty use of medical marijuana. In light of this gap, the plaintiff in *Ross v. Raging Wire Telecommunications* brought an action alleging that an employer discriminated against him based on a disability and violated California public policy by terminating him for using medical marijuana

17 *Barbuto v. Advantage Sales and Marketing LLC*, 78 N.E.3d 37 (Mass. 2017).
18 695 F.3d 428 (6th Cir. 2012).
19 Mich. Comp. Laws § 333.26424(a).

as recommended by his doctor to treat chronic back pain. The California Supreme Court held that California law does not prohibit an employer from terminating or refusing to hire an individual who tests positive for marijuana, even if such use was lawful under California's Compassionate Use Act (CCUA). In reaching this conclusion, the court noted that the CCUA "do[es] not speak to employment law," but only to criminal liability, and that California's Fair Employment and Housing Act does not require employers to accommodate the use of drugs that are still illegal under federal law.

Some applicants and employees who have been terminated for their medical marijuana use have brought suits against employers under other theories, alleging claims such as disability discrimination like in the *Raging Wire Telecommunications* case above or violation of state laws that protect lawful "off-duty conduct," but such claims have failed to gain any traction thus far. In *Coats v. Dish Network*, the Colorado Supreme Court rejected the argument that employers who terminate applicants or employees who test positive for marijuana are in violation of state "off-duty conduct" laws. The plaintiff's argument was based on a combination of Colorado's legalization of both medicinal and recreational marijuana and the state's lawful off-duty conduct statute that prohibits employers from terminating employees for "engaging in any lawful activity off the premises of the employer during nonworking hours."[20] The Colorado Supreme Court agreed with the lower courts and held that because medical marijuana use continues to be unlawful under federal law, a Colorado employee who tests positive for marijuana in violation of an employer's drug policy cannot then seek protection under Colorado's lawful activities statute when his or her employment is terminated. In effect, court rulings around this issue have generally required an activity to be lawful under both state and federal law in order for it to be protected by "lawful off-duty conduct" laws.

Thus, given the varying conclusions reached by courts in these states, employers operating in states with medical marijuana laws that do not explicitly address whether an employer is obligated to provide reasonable accommodations for medical marijuana use should carefully review each state's statute to determine whether it implicitly requires reasonable accommodations for medical marijuana users in the employment context.

20 Colo. Rev. Stat. Ann. § 24-34-402.5.

3. STATES THAT EXPLICITLY PROVIDE PROTECTION TO MEDICAL MARIJUANA USERS THROUGH ANTI-DISCRIMINATION OR REASONABLE ACCOMMODATION PROVISIONS ADDRESSED AT EMPLOYERS

There are currently 12 states that include anti-discrimination provisions within their medical marijuana statutes: Arkansas, Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania, Rhode Island and West Virginia.

The laws in these states generally include language that requires employers to make reasonable accommodations for medical marijuana users or that makes it unlawful for an employer to not hire or otherwise discriminate against an applicant or employee based on his or her use of medical marijuana. Employers operating in these states must be particularly vigilant and may need to modify their drug screening policies and practices in order to remain compliant with such laws.

One recent example of this is Rhode Island's Hawkins-Slater Medical Marijuana Act, which makes it unlawful for an employer to refuse to employ or to otherwise penalize a person solely for his or her status as a medical marijuana cardholder.[21] The ACLU filed a lawsuit under this anti-discrimination provision, alleging that an employer unlawfully refused to hire an applicant based on her status as a medical marijuana patient.[22] The state court in this case agreed, finding that the employer acted unlawfully and violated the state's medical marijuana law when it refused to hire an applicant due to her use of medical marijuana.

A federal district court in Connecticut reached a similar conclusion in *Noffsinger v. SSC Niantic Operating Co, LLC,*[23] finding that an employer violated the state's medical marijuana law by refusing to hire a medical marijuana user who tested positive for cannabis, and further concluding that federal law did not preempt the state law protections afforded to medical marijuana users. Connecticut's medical marijuana statute—the Palliative Use of Marijuana Act (PUMA)—expressly makes it unlawful to refuse to hire or to discharge an employee solely because of the individual's status as a qualifying patient or for testing positive during a drug screen. Notably, the court distinguished this case from cases brought in other states that reached a different conclusion, concluding that those other states did not have a

21 N.Y. Public Health Law § 3369.
22 Id.
23 *Noffsinger v. SSC Niantic Operating Co, LLC.*, No. 3:16-cv-01938 (D. Conn., Aug. 8, 2017).

provision barring employment discrimination in their medical marijuana statutes. Finally, the court noted that the Controlled Substances Act does not regulate the employment relationship and that the American's with Disabilities Act does not regulate non-workplace activity.

Another example is New York's Compassionate Care Act (NYCCA), which specifically provides that certified patients shall not be subjected to "disciplinary action by a business" solely based on their use of medical marijuana.[24] Additionally, the NYCCA includes a nondiscrimination provision, which states that being a certified medical marijuana patient is considered a "disability" under the New York State Human Rights Law (NYSHRL), and thus New York employers with four or more employees are prohibited from firing or refusing to hire an individual (or otherwise discriminating against an individual) based on the individual's status as a certified medical marijuana patient.[25] Following from this, New York employers with four or more employees are now likely required to provide reasonable accommodations for applicants or employees who are certified to use medical marijuana.

Despite the strong protections these statutes provide for applicants and employees who are medical marijuana users, these laws also generally provide that employers are never obligated to permit the use of medical marijuana on work premises or during work hours, and typically prohibit employees from performing their duties while under the influence of marijuana. Further, these laws typically include an exception that makes the law inapplicable to any employer who would be in violation of a federal law by complying with the state law or who would lose a federal contract or funding by complying with the state law.

Employers operating in states that include anti-discrimination or reasonable accommodation provisions within their medical marijuana statutes would be well-advised to review their drug-free workplace policies and drug screening practices with the assistance of legal counsel. Many recent cases out of these states

24 R.I. Gen. Laws § 21-28.6-4(c).
25 See Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680 (R.I. Super. Ct., May 23, 2017).

have concluded that employers violate the explicit protections provided by state law when refuse to hire or fail to accommodate medical marijuana users. Thus, it is important for employers operating in these states to review the statutes and case law with legal counsel, and to develop a policy that ensures compliance.

CONCLUSION

Based on the current state of the law, employers in most states would be well-advised to carefully review the language of each state's medical marijuana statute to determine whether they are required to accommodate medical marijuana users.

If an employer concludes that it is permitted to discharge any applicant or employee who tests positive for marijuana, it should ensure that it has a detailed zero-tolerance drug-free workplace policy in place that is applied evenly across the board and does not discriminate against any group of individuals. This policy should prohibit all unlawful drug use and should not be limited to drug use that occurs during work hours or on work premises. If an employer is going to discharge a medical marijuana user for testing positive, the employer should ensure that the adverse employment decision is strictly grounded in the positive drug test and not based on the underlying medical condition or another reason that may be unlawful under state or federal law.

Employers operating in one of the 12 states that explicitly protect medical marijuana users—Arkansas, Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania, Rhode Island and West Virginia—should review their current drug testing policies in these states and determine whether any modifications are necessary. Employers operating in states that are silent on the issue, or that have general anti-discrimination language that has been broadly interpreted to apply in the employment context (such as in Massachusetts), should also engage in a similar review process.

Finally, all employers should continue to remain vigilant and attentive to developing case law surrounding this issue and keep an eye out for potential legislative action in other states that may create similar protections for medical marijuana users. ■