

MEDICAL MARIJUANA AND THE WORKPLACE

Since New Hampshire's medical marijuana law became effective on July 23, 2013, all of the New England states now permit certain individuals to possess and use marijuana for therapeutic purposes. Increasingly, ABC employers have inquired about complying with the law. Under the New Hampshire law, possession and use of limited amounts of marijuana (up to 2 ounces) is lawful as long as the marijuana is obtained from a State-licensed non-profit dispensary and the user has a qualifying medical condition and a current identification card authorizing the possession and use. The law decriminalizes the possession and use of marijuana under very limited circumstances for individuals with a qualifying medical condition.

While the law decriminalizes certain possession and use of marijuana, it does not require employers to permit employees to possess or use marijuana at work, regardless of whether the employee is validly registered to use marijuana for therapeutic purposes under the law. In fact, the law makes it clear that the following, among other things, will still be illegal for medical marijuana users:

- Being under the influence of marijuana while operating a motor vehicle (which would include driving as part of work responsibilities);
- Being under the influence of marijuana while at work, without written permission from the employer (which the employer is not required to give);
- Being under the influence of marijuana while operating heavy machinery or handling a dangerous instrumentality (which would include while working); and
- Possessing marijuana at their places of employment, without written permission of the employer (which the employer is not required to give).

The law specifically does not require "any accommodation of the therapeutic use of cannabis on the property or premises of any place of employment." The law makes it clear that an employer would be free to deny a request by a disabled employee to possess or use marijuana at the workplace. The law also specifically provides: "This chapter shall in no way limit an employer's ability to discipline an employee for ingesting cannabis in the workplace or for working while under the influence of cannabis." New Hampshire employers remain free to take disciplinary action, presumably including termination, against an employee for using marijuana at work or working under the influence even if the employee is a patient qualified for medical marijuana use.

While the law provides clear guidelines for employers to follow regarding the possession, use, and being under the influence of marijuana while at work, there is no guidance in the law regarding off-duty therapeutic use of marijuana with no evidence of possession, use, or being under the influence while at work. Employers requiring pre-employment drug tests or random drug tests will have to wrestle with this issue as an applicant or employee could have a positive drug test result for marijuana (which is detectable for a long time after use) without ever having been under the influence while working.

It does not appear that an applicant rejected for employment or an employee terminated for a positive drug test result could bring a lawsuit against the employer under the medical marijuana law itself, as the law does not provide a private cause of action. Based on the case law to date and the language of the ADA, it does not appear that an applicant or employee with a positive drug test result would have a successful claim the ADA. Cases in other states brought by applicants and employees against employers under the ADA, state laws against discrimination, and under theories of wrongful termination have, to date, gone in favor of the employers, although this is a new and evolving area of the law. Employers should continue to pay close attention as the medical marijuana program is further developed in New Hampshire and more information becomes available about it. Employers should also continue to watch case law from other jurisdictions. In the meantime, employers may wish to update their drug and alcohol policies to prohibit the use of any drugs that are illegal under state or federal law and may also want to talk with their drug test providers to learn how the test providers plan to handle medical marijuana use.