

Medical Marijuana in the Workplace:

Information and Guidance for Employers in Pennsylvania

By Leah DiMatteo

There is no question that legalization of medical marijuana is on the rise. In 1996, California became the first state to allow residents to use medical marijuana and, since then, more than 30 other states and Washington, D.C. have passed similar laws. The shifting legal landscape surrounding medical marijuana has exposed employers to new potential liability. This series examines the medical marijuana law in Pennsylvania with a focus on employment issues. Specifically, this series aims to help employers anticipate, prepare for, and guard against potential medical marijuana-related litigation.

I. Medical Marijuana Laws in Pennsylvania¹

Medical marijuana is legal in Pennsylvania. In 2016, Pennsylvania enacted the Medical Marijuana Act (the “Act”), 35 P.S. § 10231.101, et seq., and in 2018, medical marijuana became available to Pennsylvania residents with a valid marijuana ID and who have registered with the Medical Marijuana Registry.

To qualify for, and obtain, the requisite ID card in Pennsylvania, a patient must:

1. be a resident of Pennsylvania; and
2. have an approved physician certify that the patient suffers from at least one of 17 “serious medical condition[s]” enumerated in Section 103, or has an anxiety disorder, Tourette Syndrome,

a neurodegenerative disease, terminal illness, dyskinetic and spastic movement disorder, or opioid-use disorder.

Qualifying conditions include cancer, inflammatory bowel disease, post-traumatic stress disorder, epilepsy, and a catch-all for “[s]evere chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or ineffective.”

II. Medical Marijuana FAQ for Pennsylvania Employers

The following are some common questions that Pennsylvania employers have regarding the state’s medical marijuana laws, along with some answers and guidance for best practices.

1. Must I accommodate employees who want to use medical marijuana in the workplace?

- Answer: No, but blanket prohibitions are not advisable.

Section 2103(b) of the Pennsylvania Act states: “Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment.” 35 P.S. § 10231.2103(b)(2).²

Pennsylvania employers should be mindful that employees should not be terminated, and applicants should not be denied employment simply because of their participation in the medical marijuana program.

In other words, employers may prohibit the use of medical marijuana in the workplace. However, employers should be careful and avoid implementing blanket policies against the use of marijuana in the workplace, as the employer risks being charged with employment discrimination under the Americans with Disabilities Act (ADA). Under the ADA, an employer is required to provide a reasonable accommodation to employees who qualify as disabled under the statute and can still perform the essential functions of the job with or without an accommodation. A disabled employee could argue that prohibiting all employees—including legal, medical marijuana cardholders—from using marijuana in the workplace is a violation of the ADA, as it constitutes a failure to provide a reasonable accommodation. Accordingly, employers should carefully evaluate each request on a case-by-case basis to determine whether such an accommodation (i.e., the use of marijuana on the employer’s premises) is reasonable.

2. Can I terminate or refuse to hire employees who participate in the medical marijuana program?

- Answer: No.

Under Section 2103(b)(1) of the Act, employers may not “discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee’s compensation, terms, conditions, location or privileges *solely on the basis of such employee’s status as an individual who is certified to use medical marijuana.*” 35 P.S. § 10231.2103(b)(1) (emphasis added). Employers need to be cautious when making employment decisions regarding an employee or applicant who is known to participate in Pennsylvania’s medical marijuana program, as an employment decision based solely on the individual’s participation in the program is expressly prohibited under Pennsylvania law. In a still-pending employment action in the Lackawanna Court of Common Pleas, *Palmiter v. Commonwealth Health Systems, Inc.* et al., No. 19-CV-1315, the plaintiff-

employee alleged that she was terminated based upon positive drug test results, notwithstanding the employer’s knowledge that she participated in the state’s medical marijuana program. In *Palmiter*, the court overruled the employer’s preliminary objections, finding that an aggrieved employee has an implied private right of action to seek compensatory damages from an employer that violates Section 2103(b) (1). Also pending in Pennsylvania is *Gsell v. Starline Holdings, LLC d/b/a Universal Electric Corporation*, wherein the plaintiff-employee claims that the defendant-employer failed to hire him “solely on the basis of his status as an individual who is certified to use medical marijuana.” Although the outcomes of these cases remain to be seen, Pennsylvania employers should be mindful that employees should not be terminated, and applicants should not be denied employment simply because of their participation in the medical marijuana program.

3. Can I discipline an employee for being under the influence of legal medical marijuana in the workplace?

- Answer: Yes, under certain circumstances.

Under Section 2103(b)(2) of the Act, an employer still may discipline employees who are “under the influence of marijuana in the workplace” if their conduct “falls below the standard of care normally accepted for that position.” 35 P.S. § 10231.2103(b)(2). However, absent a clearly defined “standard of care,” proving a violation may be difficult. Accordingly, employers should review and update the definitions and standards outlined in their employee handbooks and company policies. Establishing objective standards of care and clearly defining conduct that is in violation thereof can help employers guard against employee claims that they were unfairly disciplined due to participation in the medical marijuana program.

4. Can employees who use medical marijuana be prohibited/restricted from performing any work-related activities?

- Answer: Yes.

The Act enumerates certain “[p]rohibitions” which Pennsylvania employers should know. Under Section 510, a patient “under the influence with a blood content of more than 10 nanograms of active tetrahydrocannabinol per milliliter of blood in serum” may not operate or be in physical control of federally or state-permitted chemicals or any “high-voltage electricity or other public utility.” 35 P.S. § 10231.510(1). Additionally, under Section 510, a patient who is “under the influence of medical marijuana”:

a. is prohibited from performing any employment duties at heights or in confined spaces (e.g., mining);

b. may be prohibited from “performing any task which the employer deems life-threatening, to either employee or any of the employees of the employer,” and

c. may be prohibited from “performing any duty which could result in a public health or safety risk.”

35 P.S. § 10231.510 (2)-(4). Importantly, the statute carves out a protection for employers in points b. and c. above, providing that “[t]he prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.” 35 P.S. § 10231.510 (3)-(4).

5. Should I ask employees and applicants whether they participate in the state’s medical marijuana program?

- Answer: No.

It is important to note that the law in each state provides for a medical program that may raise HIPAA privacy concerns. Employers should be careful about how they approach this, as the information they seek may be confidential. Moreover, as discussed in a prior article in this series, in Pennsylvania it is unlawful to discriminate against an employee or applicant solely because the person participates in the medical marijuana program. To avoid risking confidentiality violations or the appearance of discrimination, employers should try to avoid directly asking employees and applicants whether they are

medical marijuana cardholders.

6. Should I drug test my current employees for THC?

- Answer: No, not without a good reason.

As an initial matter, drug testing can be expensive, and with the laws changing to be more accepting of marijuana use, it may not be advisable to conduct such tests, and in fact, many employers are dropping them. With Pennsylvania's prohibition against discrimination based on participation in the state's medical marijuana program, drug testing may actually work against the employer, as it could support a claim that the employee was discriminated against on the basis of those results. On the other hand, if the employee's job responsibilities include any prohibited activities outlined in Section 510, an employee should submit to a drug test. (See answer to Question No. 5).

III. Conclusions and Recommendations

In this evolving legal landscape, employers in Pennsylvania should take certain measures to guard against marijuana-related litigation, including:

- Reviewing and updating their Employee Handbook, policies, and procedures to ensure that the rules regarding discipline, performance evaluations, accommodations, and drug testing are clearly defined, uniformly applied, and comport with the current laws;

- Training managers and supervisors to properly handle emerging medical marijuana issues; and

- Monitoring any pending legislation and preparing to adjust accordingly.

Additionally, if an employer suspects an employee is under the influence at work, the employer should engage in an interactive process. Specifically, the employer should:

- Regularly document the employee's performance to determine whether productivity or performance has changed/declined; and

- Drug test with caution, as the tests can return positive results where the employee used marijuana while off-duty but is not necessarily under the influence while at work.

Taking these precautions can help employers maintain a safe and productive workplace and avoid litigation.

¹ As an initial matter, under federal law, marijuana is an illegal Schedule I controlled substance, 21 U.S.C. § 802(16), and any employer subject to federal laws or regulations mandating a drug-free workplace (e.g., the trucking industry) must continue to abide by such laws. This article does not address federally regulated employers and businesses.

² The Pennsylvania Act allows medical marijuana to be dispensed only in the following forms: pill; oil; topical forms (e.g., gels, creams, ointments); a form appropriate for vaporization (excluding dry leaf or plant form); tincture; or liquid. 35 Pa. Stat. Ann. § 10231.303(b)(2). The drug may not be dispensed in dry leaf or plant form. 35 Pa. Stat. Ann. § 10231.303(b)(3). This means that in Pennsylvania, smoking or ingesting marijuana in an edible form is not allowed. ■

Leah DiMatteo (ldimatteo@theaxelrodfirm.com) is an associate at The Axelrod Firm, PC. She is a civil defense attorney who litigates employment law and general liability matters in Pennsylvania and New Jersey.

ADR OPTIONS CONDUCTING MEDIATIONS AND ARBITRATIONS THROUGH VIDEO CONFERENCING

While you work from home and the courts are closed, you can still conduct all mediation and arbitration hearings through ADR Options.

Our neutrals have already held numerous hearings via Zoom. So far **ALL** the mediations have settled successfully. These hearings have each been handled by different members of our panel.

Video hearings have included anywhere from two attorneys and a mediator to four attorneys, a judge, witnesses and a court reporter.

This is all at **no additional cost** to you and no travel cost is incurred by anyone! Please contact us to help keep your cases on track and resolved quickly.

Wishing you and your families good health during this difficult time!

Maggy Carney, President
mcarney@adroptions.com

ADROPTIONS®

Setting Cases Since 1993

MEDIATION ■ ARBITRATION

215-564-1775 | 800-364-6098 | adroptions.com

