MEDICAL MARIJUANA:
THE IMPACT ON THE WORKPLACE

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OVERVIEW

• The federal landscape
• How the PA Medical Marijuana Law Works
• Employment aspects of PA Medical Marijuana Law
• What have the courts said (so far)
### THE FEDERAL LANDSCAPE

**Marijuana - Status Across the U.S.**

- Legal for recreational use – 11 states plus DC
- Legal for medical use – 33 states plus DC
- Low THC/High CBD laws – 14 states
- Federal Law
  - Controlled Substances Act (CSA) – Schedule I drug
  - DOJ Memo
  - Rohrabacher-Farr/Blumenauer amendment
  - Farm Bill – legalization of hemp

### THE FEDERAL LANDSCAPE

**Drug Free Workplace Act of 1988**

- Applies to Federal contractors and grantees
- Requires covered organizations to provide a *drug-free workplace* by:
  - Publishing a policy statement
  - Establishing an awareness program
  - Notifying employees of their obligations
  - Notifying the granting agency of any violations
  - Imposing penalties
- Standard – “good faith effort to maintain a drug-free workplace.”
- Penalties for lack of compliance – payments and/or grant may be suspended/terminated
MEDICAL MARIJUANA & DRUG TESTING

Does Legalization Affect Drug Testing?

• Testing generally governed by federal law
  • DOT Regulations
  • Role of Medical Review Officer

• DOT’s “Medical Marijuana Notice” October 2017
  • “MROs will not verify a drug test as negative based upon information that a physician recommended that the employee use medical marijuana.”

• DOT’s “CBD Notice” February 2020
  • “Medical Review Officers will verify a drug test confirmed at the appropriate cutoffs as positive, even if an employee claims they only used a CBD product.”

• Positive test may include external note re: alleged medical use

ACT 16 – HOW DOES IT WORK?

Pennsylvania Medical Marijuana Act (April 17, 2016)

• “Notwithstanding any provision of law to the contrary, use or possession of medical marijuana as set forth in this act is lawful in this Commonwealth.”

• Patients wishing to use medical marijuana must obtain a “certification” from a registered physician

• The patient must suffer from one of the enumerated serious health conditions

• Once certified, the patient obtains the medical marijuana from a licensed dispensary (pharmacist, CRNP, PA, MD or DO)
ACT 16 – HOW DOES IT WORK?

Pennsylvania Medical Marijuana Act (April 17, 2016)

How does a patient/caregiver obtain marijuana?

- Register via the DOH’s Medical Marijuana Registry ($50 fee)
- Make an appointment to see an approved physician/obtain certification from the physician
- Physician submits the certification through the Registry:
  - Patient has a qualifying serious health condition
  - Patient will be under a physician’s continuing care
  - DOH issues an ID Card to the patient or caregiver
- Patient or caregiver takes ID card to a licensed dispensary; may obtain a 30-day supply

QUALIFYING HEALTH CONDITIONS = DISABILITIES?

What medical conditions will qualify?

- Cancer
- HIV/AIDS
- ALS
- Parkinson’s Disease
- Multiple Sclerosis
- Spinal Cord Nerve Injuries
- Epilepsy
- Inflammatory Bowel Disease
- Neuropathies
- Huntington’s Disease
- Crohn’s Disease
- Post Traumatic Stress Disorder
- Intractable Seizures
- Glaucoma
- Sickle Cell Anemia
- Chronic or Intractable Pain
- Autism
- Opioid Use Disorders
- Dyskinetic and spastic movement disorders
- Neurodegenerative diseases
- Terminal Illness
- Anxiety
- Tourette’s Syndrome
# EMPLOYMENT RELATED PROVISIONS OF ACT 16

## Pennsylvania Medical Marijuana Act (April 17, 2016)

### In the Employment Context

**Safety Sensitive Exception** – while “under the influence”
- May not perform work at heights or in confined spaces
- May not operate high voltage electricity or public utility
- May not operate or be in control of chemicals that require a permit
- May be prohibited from performing tasks the employer deems life threatening to any employees of the employer
- May be prohibited from performing any duty that could result in a public health or safety risk

**Federal Law Exception** – employers do not have to “commit an act that would put the employer or any person acting on its behalf in violation of federal law.”

## Employer imposed restrictions

- §§510(3)&(4) – employer may restrict MM patient “under the influence” from performing “life threatening” jobs, and may restrict MM patient from jobs posing a “public safety or health risk”
- “Life threatening” and “public safety or health risk” undefined
- “Under the influence” is not defined in these subsections; unclear whether the 10 ng/ml blood standard applies
- No requirement that employees disclose MM use
- Regardless, no requirement that MM patients test for or disclose blood THC level
- No explicit permission for employers to test for MM use
EMPLOYMENT RELATED PROVISIONS OF ACT 16

Pennsylvania Medical Marijuana Act (April 17, 2016)

On the issue of testing, note also that the definition of “under the influence” requires a blood test.

- Marijuana Policy Project has observed that THC levels vary significantly depending on what fluid is being tested — 10 ng/mL in serum is about the equivalent of about 5 ng/mL in whole blood.
- hightimes.com reports that “five nanograms of active THC is an incredibly low threshold for a regular user, and many may maintain this level in their blood no matter when they last smoked, vaped or otherwise consumed marijuana.”

EMPLOYMENT RELATED PROVISIONS OF ACT 16

Pennsylvania Medical Marijuana Act (April 17, 2016)

- Is the employer required to provide training to supervisors to detect “under the influence“?
- Many law enforcement agencies utilize “Drug Recognition Experts” to determine impairment during traffic stops
- Can employers rely on the traditional, and considerably cheaper, urine test?
- May employers insist that employees consent to blood tests, which are considerably more invasive than urine tests and require medical training to administer?
- What if you are the government? 4th Amendment issues
EMPLOYMENT RELATED PROVISIONS OF ACT 16

In the Employment Context

- Anti-Discrimination Provision - no employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against any employee regarding 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.

- Accommodation for use at work is not required – employers are not required to accommodate the use of medical marijuana on the property/premises

- Disciplining is permitted – employers may discipline an employee for being under the influence of medical marijuana in the workplace
  - Note – under the influence is not defined in the Act

WHAT HAVE THE PA COURTS SAID?


- Complaint alleges a violation of the PA Medical Marijuana Act – specifically the anti-discrimination language in section 2103.
- Current employee applied for a new job; had previously disclosed MMj use
- Drug test required for new position; denied new position because she could not pass the test
- Employer filed Preliminary Objections arguing no private right of action provided for or implied by MMA; Judge disagreed and allowed action to proceed
WHAT HAVE THE PA COURTS SAID?

**Gsel v. Universal Electric (Allegheny Cty. 2019)**
- Complaint alleges a violation of the anti-discrimination language in section 2103 – failure to hire decision “undertaken with malice or reckless indifferent to Gsel’s rights under Act 16”

**Gass v. 52nd Judicial District, Lebanon County (Middle District PA, 2019)**
- Policy prohibiting medical marijuana use by individuals under court supervision
- Supreme Court King’s Bench power – temporary halt

WHAT HAVE THE PA COURTS SAID?

**Employer rights:**

§2103(b)(2) states that “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.”
- “Use” is undefined, but seemingly means that employers do not have to allow ingestion of marijuana on site.
- Does the employer have to permit an employee who uses off site to return to work?
# REASONABLE ACCOMMODATION FOR MM USE

**Barbuto v. Advantage Sales and Marketing** (Supreme Ct. Mass, July 2017)

- Accommodation requested by employee – waiver of policy barring anyone from employment who tests positive for marijuana – is facially reasonable; medical marijuana user may assert state law discrimination claim

- What might be unreasonable?
  - Use of medical marijuana poses an “unacceptably significant safety risk.”
  - Continued employment would violate “employer’s contractual or statutory obligation and thereby jeopardize its ability to perform its business.”

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# MM USER MAY SUE FOR DISCRIMINATION IN STATE COURT


- Medical marijuana act, by virtue of non-discrimination clause, contains an implied right of action for employee

- Employer’s enforcement of a neutral drug testing policy to deny employment to medical marijuana user violated anti-discrimination provision of state law

- Under DFWA, “workplace” means the actual workplace.
## ONLY CERTIFIED USERS PROTECTED?

**Lambdin v. Marriott Resorts Hospitality Corp. (Dist. Hawaii 2017)**

- Employer’s policy - testing required following an on-the-job accident; providing a sample found to contain evidence of drug use will result in disciplinary action; the use of marijuana violates federal law even if the employee has a prescription
- Employee suffered a panic attack at work; transported to the hospital and drug tested; positive for marijuana
- Note - employee had only applied for certification under state law
- Employee’s claims dismissed

## A POSITIVE DRUG TEST IS NOT ENOUGH TO DEMONSTRATE THAT AN EMPLOYEE IS “UNDER THE INFLUENCE”

**Wild v. Carriage Funeral Holdings (Superior Ct. NJ 2019)**

- Post MVA – clear plaintiff was not under the influence; no blood test required by hospital; employer required the test anyway
- Claim for disability discrimination under NJ law
- “Just because the legislature declared that nothing in the CUA shall be construed to require an employer to accommodate the medical use of marijuana in any workplace, does not mean that the LAD may not impose such an obligation.”

**Chance v. Heinz (DE Super. 2018)**

- Post accident testing; employee terminated in accordance with company policy; No allegation that the company believed the employee was impaired at the time of the accident
- Court upheld private right of action - “Controlled Substances Act does not make it illegal to employ someone who uses marijuana, nor does it purport to regulate employment matters.”
A POSITIVE DRUG TEST IS NOT ENOUGH TO DEMONSTRATE THAT AN EMPLOYEE IS “UNDER THE INFLUENCE”

Whitmire v. Wal-Mart Stores, Inc. (Dist. AZ 2019)

- Post injury test; due to the high levels of marijuana metabolites (more than 1000 ng/ml), employee must have been impaired (according to Wal-Mart)
- Claims for discrimination in violation of the AMMA and the Arizona Civil Rights Act (state law disability discrimination)
- Court found an implied private cause of action in the AMMA
- AMMA provides: “patient shall not be considered to be under the influence solely because of the presence of metabolites that appear in insufficient concentration to cause impairment.”
- Court – proving impairment based on a drug test is a scientific matter; employer offered no evidence that it observed impairment or believed the employee was impaired

Further, under PA’s MMA: “This act shall in no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position.”

- Again, “under the influence” is not defined.
- Assuming 10 ng/ml standard, do you need a blood test?
A POSITIVE DRUG TEST IS NOT ENOUGH TO DEMONSTRATE THAT AN EMPLOYEE IS “UNDER THE INFLUENCE”

- Additionally, §2103(b)(3) says: “Nothing in this act shall require an employer to commit any act that would put the employer or any person acting on its behalf in violation of Federal law.”
- Federal DOT position: Medical marijuana “remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation’s drug testing regulations to use marijuana.”

Can employers continue “zero tolerance” approach?

- MMA §2103(b)(2) states affirmatively that employers are not required “to make any accommodation of the use of medical marijuana on the property or premises”
- “Zero tolerance” policies and negotiated drug free workplace protocols are common in industry
- Relaxation of such policies would be an “accommodation”
- But Human Relations Act may require an accommodation
- You act at your peril
A POSITIVE DRUG TEST IS NOT ENOUGH TO DEMONSTRATE THAT AN EMPLOYEE IS “UNDER THE INFLUENCE”

Potential Litigation

• It is only a matter of time before there are more lawsuits:
• By applicants who are not hired because of failed post-offer, pre-employment drug screen
• By “salts” – MM advocates who advertise their MM use on the application and are not hired
• By current employees who disclose MM use and are removed from jobs/terminated
• It is still an open question in Pennsylvania whether MMA provides for a private cause of action. In Connecticut and other states the courts have ruled that medical marijuana laws do permit plaintiffs to sue

A POSITIVE DRUG TEST IS NOT ENOUGH TO DEMONSTRATE THAT AN EMPLOYEE IS “UNDER THE INFLUENCE”

Employers need to consider their position in advance of confronting the problem:

• Identify all safety-sensitive positions
• “Life threatening”?
• Threat to “public health or safety”?
• Utilize post-offer, pre-employment physical examinations that include drug screens to identify MM users
• Be prepared to “reasonably accommodate” MM users
• Interactive process
A POSITIVE DRUG TEST IS NOT ENOUGH TO DEMONSTRATE THAT AN EMPLOYEE IS “UNDER THE INFLUENCE”

Consider policy to require disclosure of MM and other prescription use: “Unsafe work practices can cause serious injury to employees and/or members of the public. All employees must immediately inform Human Resources if they have been prescribed a medication, including medical marijuana, that may impair their ability to perform their jobs safely and effectively. Ask your doctor about how the prescription will affect your work. Consult with the Human Resources Department if you have been prescribed such medication. The company may ask an independent physician to complete a fitness-for-duty evaluation to confirm your ability to safely perform your job.”

THE FARM BILL . . . WHAT ABOUT CBD OIL?

- Hemp Farming Act of 2018 – removed hemp (cannabis with less than 0.3% THC) from Schedule I of the CSA
- Both the Hemp plant and the Marijuana plant can produce CBD
  - Only CBD derived from Hemp is legal under the Farm Bill!
- CBD is a “drug product.”
  - FDA has approved only one CBD product
  - Illegal to market CBD by adding it to food or labeling it as a dietary supplement
- User Beware . . . CBD Oil should not be a “get out of jail free card.”
THE FARM BILL . . . WHAT ABOUT CBD OIL?

Washington Health System v. Unemployment Compensation Board of Review

- Claimant eligible for UC benefits after her discharge for testing positive for marijuana
- Claimant was employed as a licensed Occupational Therapist and was subject to random testing under policy
- Prior to the test, Claimant disclosed that she used cannabidiol (CBD) that she purchased over-the-counter to manage her cancer-related symptoms

THE FARM BILL . . . WHAT ABOUT CBD OIL?

Washington Health System v. Unemployment Compensation Board of Review

- Test results not entered into the record
- Court stated that use of CBD oil with a THC concentration of .3% or less would be legal.
- Given that there was no evidence of the drug test result or the THC concentration in Claimant’s test result, the Board found that she was eligible for unemployment benefits.
### Conclusion

- Marijuana remains illegal under federal law, but this likely will not protect employers.
- MMA injects ambiguity and uncertainty into the workplace that will be resolved only through litigation.
- This is one area where a call to your legal counsel will be cost effective.