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by Nancy N. Delogu, Esq.

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Last November, voters in Colorado and Washington voted, by a slim margin, to legalize the use of marijuana for all individuals over the age of 21. Colorado's new law, which expressly suggested that the state should regulate the use and sale of marijuana like alcohol, was foreseeable, as Colorado in 2000 adopted a medical marijuana law that was expanded to offer marijuana to individuals with a generous array of health concerns. So prevalent did the use of marijuana for medical reasons become in the state that the Denver Post reported in 2011 that the greater Denver area was home to more medical marijuana dispensaries than Starbucks Coffee outlets and that the dispensaries outnumbered area schools by a factor of two.¹ Those dispensaries, which sell marijuana-infused products of every nature – including, for example, marijuana infused salad dressing, or chocolate -- helped make the use of marijuana mainstream in that state long before the vote. And although neither the Colorado nor the Washington laws require employers to tolerate or accommodate the use of marijuana by employees, several states have recently adopted “medical marijuana” laws that do expressly prohibit employers from discriminating against marijuana users.

The truth is that the medical marijuana movement is supported not only by individuals who believe that marijuana offers benefits to individuals with health conditions – a proposition that is still hotly debated by physicians and scientists, as marijuana use can have both positive and deleterious effects – but also by those who want to legalize marijuana. The National Organization for the Reform of Marijuana Laws (NORML), for example, has long expressed the hope that the implementation of medical marijuana laws will serve to convince voters that marijuana is no more dangerous than alcohol and that it can be legalized and regulated as such. Individuals who feel that too much money is spent on the criminal aspects of prohibition also may support legalization, concluding that any increase in costs to the public related to the adverse effects of abuse will be more than offset by savings in law enforcement costs.

At this point, in many states the only thing that prevents



employers from having to employ and work with individuals who use marijuana as medicine or recreationally is federal law, which continues to treat marijuana as an illegal drug. How long will that continue?

MARIJUANA USE AND ABUSE

Marijuana continues to be the most abused drug in the United States.² Prescription drug abuse has soared in recent years, but attention at the regulatory level to the abuse of prescriptions and consequent reduction in access, coupled with the recently expanded access to marijuana in a number of states, has resulted in an increase in the rate of marijuana use.

Proponents of marijuana legalization claim that the drug may have medicinal effects but in any event the drug is not deadly. Such assurances simplify what is in reality a very complex cost-benefit analysis. The scientific evidence of short-term impairment following use is compelling, while evidence of long-term impairment for chronic user is growing.³ Individuals may suffer both short-term impairment and long-term effects on their physical well-being as well as on their cognitive abilities.⁴ And, a study from Colorado reported that in a 28-month period between 2009 and 2011, 14 children were taken to hospital

(Continued on next page)

suffering from acute marijuana overdoses, most of which occurred when the children consumed foods containing the plant. Although none died, at least two were in critical condition for a period after admission.⁵

Moreover, there seems to be no widespread consensus on the health benefits, of marijuana used medicinally. Although extracts of the psychoactive chemical compounds in marijuana are currently available in the [fully FDA-approved] prescription drug Marinol, which is commonly prescribed to individuals who suffer from anorexia and other “wasting” diseases to help stimulate appetite, advocates of medical marijuana claim that the plant form of marijuana acts faster, allows them to better control the dosage (this seems unlikely, as plants don’t need to meet laboratory standards for uniform strength) and can be used to treat medical conditions not usually prescribed Marinol. At least one medical marijuana researcher has found that the drug is most useful medicinally when it contains lower levels of

crimes occurring in the work place. Entities that fail to comply may risk their eligibility to compete for federal contracts.¹⁰

In contrast, the U.S. Department of Transportation has taken the position that the use of marijuana, medical or not, serves to medically disqualify a commercial motor vehicle driver from operating a commercial vehicle or engaging in related safety-sensitive work.¹¹ Therefore, any worker subject to drug and alcohol use and testing requirements, or medical fitness for duty requirements, may not use marijuana without falling afoul of these regulations.

The Obama Administration has suggested that it will not prosecute individuals who use marijuana in a manner that complies with relevant state law, and although federal authorities have raided marijuana dispensaries, it has announced no plans to move against dispensaries operated by state governments. At the same time, there are two bills pending in Congress (H.R. 499

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THC than much of what is commonly available (there does seem to be widespread agreement that marijuana today is 300 to 400 percent stronger than marijuana analyzed in the 1970s).⁶ If marijuana has medical benefits, the current evidence is that it may need to be regulated carefully, just as prescription medications with potentially adverse effects are.

MARIJUANA AND FEDERAL LAW

Marijuana is classified as a Schedule I drug under the federal Controlled Substances Act, meaning that federal regulators have concluded that it is an addictive substance with little or no medical benefit and a significant risk of abuse. Because marijuana is classified as a Schedule I controlled substance, it is illegal to possess, manufacture, distribute, or dispense as a matter of federal law. Medical doctors and other practitioners therefore may not prescribe Schedule I drugs without running afoul of regulations adopted by the U.S. Drug Enforcement Administration.⁷

Similarly, the Americans with Disabilities Act, which protects individuals with disabilities, does protect individuals who are “former” or “recovering” drug addicts from discrimination by employers, but specifically permits an employer to discriminate against workers on the basis of current illegal drug use.⁸ Therefore, an individual who currently abuses an illegal drug like marijuana is not considered to be a “qualified individual with a disability” under the employment provisions of that law.⁹ The Drug-Free Workplace Act of 1988 requires covered employers to publish policies supporting a drug-free workplace, and to report and discipline employees who engage in drug-related

and H.R. 1523) that, if enacted, would formally direct federal authorities to permit states to regulate marijuana as they see fit.

MEDICAL MARIJUANA IN THE WORKPLACE

Twenty-one states have enacted medical marijuana laws: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois (effective 2014), Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. The District of Columbia has also passed such a law.¹²

State laws vary significantly, particularly with regard to who may be eligible to participate and where marijuana may be obtained. For example, in Colorado, an estimated 80,000 residents have obtained medical marijuana cards, 90 percent of whom described their medical condition as involving primarily pain. In contrast, the New Mexico law authorizes such use only for a more modest list of conditions, and as of April 2013, Delaware reportedly had issued a total of 22 medical marijuana cards.¹³

At this point, a handful of states have adopted laws that require employers to accommodate workers’ use of medical marijuana. Arizona is one such state, and prohibits employers from discriminating against applicants or employees who have medical marijuana cards, unless the job is safety-sensitive, or hiring the individual would place a government contract at risk. The law does also prohibit individuals from coming to work impaired, and impairment can be shown by a properly conducted drug test. The other states that require employers to accommodate

medical marijuana use do not include similar exceptions. Connecticut, Delaware, Maine, and Rhode Island have adopted laws that protect medical marijuana users from adverse employment action. These laws have not attracted much attention, not only because the laws in Connecticut and Delaware are new, but also probably because it is difficult to test workers in Maine and Rhode Island under those states’ restrictive drug testing laws.

It remains to be seen whether those laws will have a long-term impact on workplace drug abuse programs – for example, will employers will forgo testing for marijuana altogether? In contrast, will the nondiscrimination provisions will be found unenforceable because of the conflict with federal law, as occurred in California, Oregon, and Washington – albeit those medical marijuana statutes did not explicitly require employers to accommodate marijuana use? Or, will additional states vote to make marijuana use “legal” for all adults, as in Colorado and Washington, and take the position that marijuana use constitutes lawful off-work activity, so that employers cannot discriminate against marijuana users as long as they don’t bring it to work? Finally, will federal law change to permit the use of marijuana, medically or otherwise? If so, employers could expect to have to accept marijuana use by employees, provided the employees were not demonstrably impaired by the drug at work.

ADVICE TO NEW JERSEY EMPLOYERS

New Jersey, of course, has adopted a medical marijuana law and is moving to implement it so that certain ill people can use marijuana without fear of state criminal action against them on that basis. The law does not, however, require employers to accommodate such use if marijuana otherwise violates policies against substance abuse, or the employees work in U.S. Department of Transportation-regulated positions. Unfortunately, those who elect to use marijuana may not be aware that their medical use of marijuana does not excuse them from complying from employers’ generally applicable policies against illegal drug use.

To avoid unpleasant surprises and employee relations issues that might otherwise be avoided, we think it’s better for an employer to address its policy on the use of medical marijuana in its written policy on substance abuse. For example, if an employer will treat medical marijuana just as it treats other illegal drug use, a published policy advising employees and applicants of that fact will help individuals who may be considering the use of medical marijuana to make an educated decision (with their physicians, rather than their lawyers) about how that use may affect their employment. Employers with safety-sensitive operations may also find it helpful to conduct training on some of the adverse effects of marijuana use, so employees understand

why their use of the drug could be problematic. Training on the potential adverse effects of the lawful use of prescribed medication is also appropriate, as is a well-thought-out policy on how employees who work in sensitive positions should balance their need to use a medication with their job responsibilities.

¹ http://www.denverpost.com/news/ci_14112792 (1/21/2011)

² In 2011, 18.1 million Americans (80.5 percent of current drug illicit drug users) used marijuana. About two thirds (64.3 percent) of illicit drug users used only marijuana in the past month. Current use of other drugs but not marijuana was reported by 19.5 percent of illicit drug users, and 16.2 percent of illicit drug users reported using both marijuana and other drugs. Substance Abuse and Mental Health Services Administration, Results from the 2011

National Survey on Drug Use and Health: Summary of National Findings, NSDUH Series H-44, HHS Publication No. (SMA) 12-4713. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2012.

³ See “Rates of ED visits per 100,000 population involving illicit drugs, 2011,” Center for Behavioral Health Statistics and Quality, SAMHSA, Drug Abuse Warning Network, 2011, showing that the rate of marijuana involvement in Emergency Department visits is 146 per 100,000 population, exceeded only by emergency room visits involving cocaine.

⁴ See, e.g., “How Safe is Recreational Marijuana,” by Roxanne Khamsi, Scientific American, May 31, 2013, discussing various studies; available online at <http://www.scientificamerican.com/article.cfm?id=how-safe-recreational-marijuana>

⁵ <http://www.foodproductdesign.com/news/2013/05/marijuana-study-are-colorado-kids-accidentally-ge.aspx>

⁶ An interesting interview of Mahmoud ElSohly, Ph.D. can be found here: <http://www.menshealth.com/medical-marijuana/>

⁷ The U. S. Drug Enforcement Administration recently declined to reclassify marijuana into another Schedule that would permit some medical use. A court challenge to that decision recently failed in the U.S. Court of Appeals for the D.C. Circuit. See *Americans for Safe Access v. Drug Enforcement Administration*, 11-1265, U.S. Court of Appeals for the District of Columbia Circuit (January 22, 2013).

⁸ 42 U.S.C. § 12114(a) and (b).

⁹ 42 U.S.C. § 12114(a).

¹⁰ Public law 100-690, later modified by the Federal Acquisition Streamlining Act of 1994.

¹¹ See DOT Office of Drug and Alcohol Policy and Compliance Notice dated September 22, 2009, reaffirming text of 49 C.F.R. §40.151, which prohibits the use of medical marijuana.

¹² You can find a useful list of medical marijuana laws here: <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>

¹³ See Delaware State News, <http://delaware.newszap.com/centraldelaware/121533-70/delaware-eyes-relighting-medical-marijuana-program>

About the Author

Nancy Delogu is the managing shareholder in Littler Mendelson, P.C.’s Washington, D.C. office. In addition to counseling employers on substance abuse prevention and disability discrimination laws, she helps them with strategic counsel and defense of employment law disputes.

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