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Connecticut Legalizes Medical Marijuana Use, Places Limits on Employers

By Katherine Goetzl

Beginning on October 1, 2012, Connecticut residents will be able to smoke marijuana to alleviate symptoms of a debilitating medical condition without fear of arrest or prosecution by Connecticut authorities, or adverse employment action by employers in the state. The new law, entitled An Act Concerning the Palliative Use of Marijuana (Public Act No. 12-55), was signed by Governor Malloy on May 31.

Connecticut joins approximately one-third of the states and the District of Columbia in legalizing medical marijuana use and possession by certain individuals. However, the Connecticut law goes further than most similar laws because it forbids employers from refusing to hire, discharging, penalizing, or threatening individuals based on their medical marijuana use.

The new law requires medical marijuana users to register with the Connecticut Department of Consumer Protection (DCP). A physician's written certification for the palliative use of marijuana will be required for registration. The physician must certify that, in his professional opinion, the patient has a debilitating medical condition and the potential benefits of medical marijuana use would likely outweigh the health risks of such use. Debilitating medical conditions include such illnesses as cancer, glaucoma, AIDS, multiple sclerosis, epilepsy, post-traumatic stress disorder, and any other medical condition approved by the DCP. Physicians cannot be arrested, prosecuted, or penalized in any way by the State of Connecticut for providing a certification for medical marijuana use to a patient.

Medical marijuana producers and dispensaries must be licensed by the DCP, which will determine how many producers and dispensaries are necessary to meet the needs of patients. However, the law caps the number of producers at ten. The DCP will decide whether a producer applicant is qualified to cultivate, sell, deliver, transport, and distribute marijuana, and whether a dispensary applicant is qualified to acquire, possess, distribute, and dispense marijuana. Only licensed pharmacists may apply for dispensary licenses. Dispensaries may acquire marijuana only from licensed producers and producers may distribute marijuana only to licensed dispensaries.

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Medical marijuana users will not be subject to arrest, prosecution, or any type of penalty under Connecticut law, and cannot be denied any right or privilege due to their marijuana use. However, they will not be permitted to smoke in the workplace, in a moving vehicle, on school grounds, in any public place, or in the presence of a minor. In addition, users may not possess more than a one-month supply of marijuana.

The law also directs the DCP to reclassify marijuana under state law from a Schedule I drug to a Schedule II drug. Schedule I drugs are those considered to have a high potential for abuse and no currently accepted medical use in treatment because it is not clear the drug can be used safely even under medical supervision. Schedule II drugs have a high potential for abuse and a currently accepted medical use with severe restrictions, and abuse of the drug may lead to severe psychological or physical dependence. Marijuana remains a Schedule I drug under the federal Controlled Substances Act.

The Connecticut law specifically states that "[n]o employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient." However, it also provides that employers may prohibit the use of intoxicating substances during work hours and may discipline employees for being under the influence of intoxicating substances during work hours. In addition, the law permits employers to take action that is required either by federal law or to obtain federal funding even if such action is based upon the person's status as a qualifying patient.

It is unclear how the Connecticut law can be implemented without coming into conflict with federal law, which continues to prohibit the cultivation, use, possession, and dispensing of marijuana. For example, although the state statute promises Connecticut will not discipline physicians or pharmacists for prescribing or providing marijuana, the law provides them no protection from federal authorities who may move to prosecute individuals who supply or prescribe marijuana to patients or to withdraw their licenses to prescribe narcotics. Since October 2009, the Justice Department has conducted more than 170 aggressive SWAT-style raids in nine medical marijuana states, resulting in at least 61 federal indictments, according to data compiled by Americans for Safe Access, an advocacy group.[1]

Moreover, in *James v. City of Costa Mesa*, No. 10-55769 (May 21, 2012), the U.S. Court of Appeals for the Ninth Circuit, widely considered to be among the more liberal federal appellate courts, wrote, "Congress has made clear, however, that the [Americans with Disabilities Act] defines 'illegal drug use' by reference to federal, rather than state, law, and federal law does not authorize the plaintiffs' medical marijuana use. We therefore necessarily conclude that the plaintiffs' medical marijuana use is not protected by the ADA."

Nevertheless, employers should review their substance abuse prevention policies to ensure that at a minimum employees are on notice that the use of medical marijuana is prohibited during work hours and that disciplinary action will be taken against anyone who is under the influence of medical marijuana during work hours. However, it remains to be seen whether a medical marijuana user who tests positive for marijuana will be deemed to be under the influence during work hours and thus subject to discipline.

Employers should also confirm that their medical review officer (MRO) inquires whether an individual who tests positive for marijuana is a registered user. It seems clear that to comply with the statute an employer cannot in most cases reject an applicant due to his medical marijuana use. However, it is unclear whether an MRO can report an employee's medical marijuana use to the employer as a legitimate medical explanation for a positive test, and, if the MRO does so, whether the employer can then take any action – such as moving the employee to a non-safety-sensitive position – without running afoul of the law. The law permits an employer to reject an applicant for a position for which federal law requires a negative drug test (such as a U.S. Department of Transportation regulated driver), regardless of whether the applicant is a registered medical marijuana user.

The law does not contain any enforcement mechanism so it is likely that an applicant or employee who believes he was unfairly treated by an employer due to his medical marijuana use would seek to file a lawsuit for failure to hire or discharge in violation of public policy. Applicants and employees in other states with medical marijuana laws such as California, Michigan, Montana, Oregon, and Washington have not been successful with such cases to date. However, none of those states' laws forbids employers from taking adverse employment action based on

1 See Lucia Graves, *Obama Administration's War On Pot: Oaksterdam Founder Richard Lee's Exclusive Interview After Raid*, The Huffington Post, Apr. 18, 2012, http://www.huffington-post.com/2012/04/18/obama-war-on-weed-richard-lee-oaksterdam-raid_n_1427435.html.

a person's medical marijuana use as Connecticut's new law does. Two states with statutes prohibiting adverse employment action on the basis of medical marijuana use are Maine and Rhode Island. Those statutes have not yet been tested in the courts to determine whether the employment-related provisions can be enforced.

In sum, Connecticut employers will have to be cautious when deciding what action to take when an applicant or an employee who tests positive for marijuana produces a medical marijuana user registration certificate.

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