

Florida Employers: Here Comes Medical Marijuana – Are You Ready?

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Florida voters turned out in droves to pass Amendment 2 to legalize medical marijuana. This Constitutional Amendment greatly expanded what was once a very narrow right in Florida to be treated with low dose THC cannabis. With its passage, Florida employers need to take heed.

Who Is Entitled to Medical Marijuana?

Under the new Amendment, a person has to be a “qualified patient” or a caregiver in order to use or handle medical marijuana. To become a qualified patient, an individual must be certified by a physician as having a debilitating medical condition. The conditions given in the amendment are cancer, epilepsy, glaucoma, HIV, AIDS, PTSD, ALS, Crohn’s disease, Parkinson’s disease and multiple sclerosis. However, the amendment also allows for “other debilitating medical conditions of the same kind...for which a physician believes that the medical use of marijuana would likely outweigh the potential health risk for a patient.” While the listed serious diseases are familiar to most employers, the “other debilitating medical conditions” will likely pose a problem. Similar language has caused unintended consequences in other states. For example, over 90% of all patients in Colorado and Oregon claim they had chronic pain, an affliction easy to claim but difficult to diagnose.¹

Because marijuana is still illegal under the federal Controlled Substances Act (CSA), a physician will not be able to prescribe medical marijuana. Instead, he or she will certify that an individual is a “qualified patient.” The patient will then take his certification to a Medical Marijuana Treatment Center. These centers will be regulated by the Florida Department of Health. The Legislature will require the qualifying patient and/or caregiver to have an identification card to demonstrate their legal entitlement to possess medical marijuana. In this writer’s opinion, a state registry will be needed for law enforcement’s ease of verification.

Limitations in Amendment 2

Employers can take some solace in the limitations set forth in the amendment. More specifically, Article X, Section 29(c)(4) states: “Nothing in this section shall permit the operation of any vehicle, aircraft, train or boat while under the influence of marijuana.” Subsection (c)(6)

¹ Congressional Research Service Report Marijuana: Medical and Retail – Selected Legal Issues, dated April 8, 2015, citing Gerald Caplan, *Medical Marijuana: A Study of Unintended Consequences*, 43 McGeorge L. Rev. 127, 130, 136-37 (2012).

states: “Nothing in this section requires any accommodation of any on-site medical marijuana used in any correctional institution or detention facility or place of education or employment, or of smoking medical marijuana in any public place.” With these limitations, the use of medical marijuana in the workplace will not be as widespread as feared. This will be particularly true if the Florida legislature forbids any use of medical marijuana at work and maintains all current laws, such as the Drug Free Workplace Act which demands a zero tolerance of illegal drug use. Again, because marijuana is classified as a Schedule 1 drug under the CSA, Florida employers will be able to enforce their zero tolerance drug policies. These policies could clash with the qualified patient’s right to use medical marijuana outside of the workplace but courts in other states have generally upheld employers termination decisions based on violation of zero drug use policies. The time to adopt such a program under the Florida Drug-Free Workplace Act is now.

Impact on ADA and FCRA

Title 1 of the Americans with Disabilities Act of 1990 (ADA) prohibits private and public sector employers from discriminating against qualified individuals with disabilities in all aspects of employment. An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an undue hardship. However, Section 12114(a) of the ADA states that a qualified individual with a disability shall not cover applicants or employees currently engaging in the illegal use of drugs when the employer acts on the basis of such use. The ADA defines the illegal use of drugs as using, possessing or distributing any drug which is unlawful under federal law, not state law. Thus an employee’s use of medical marijuana is not protected in the ADA.² While the ADA does not protect current medical marijuana users, the underlying condition may still require independent accommodations in traditional manners that do not violate the law or cause an undue burden.

Florida’s own Civil Rights Act (FCRA) also makes it illegal to discriminate against applicants or employees with a disability. While the Legislature may provide some guidance on the matter in the language they create to implement the amendment, it may be up to Florida courts to interpret the FCRA as federal courts have interpreted the ADA. The current amendment states that employers do not have to accommodate onsite medical marijuana use but nothing is mentioned about use out of the workplace. In the past, Florida courts have construed the FCRA in conformity with the ADA and its predecessor the Rehabilitation Act.³

Workers Compensation and FMLA

Employers may require a drug test when an employee is in an accident at work. If the employee tests positive for an illegal substance, the decision of whether to pay benefits will be impacted. Because marijuana is still illegal under federal law, courts in other states have upheld

² James v. City of Costa Mesa, 700 F. 3d 394 (9th Circuit 2012) (Court reasoned that the ADA does not protect individuals who are using marijuana for medical purpose, even when such use is lawful under state law because the use is unlawful under the Federal CSA).

³ Smith v. Avatar Properties, Inc (Fla. 5th DCA 1998)

terminations when the worker tested positive for marijuana. Moreover, if an employee receives an injury that may otherwise qualify for medical marijuana, nothing in the Amendment 2 requires a health insurance provider to purchase medical marijuana for the employee for treatment. *See* § 29, Article X(7).

Employees requesting leave under the Family and Medical Leave Act (FMLA) for medical reasons are required to submit forms from their doctor regarding the condition giving rise to the need for the leave and the expected duration of the leave. Typically there would not be a need to know what medication an employee is taking when an employee returns to work. However, employers should have policies that require all employees to report to their supervisors when they are taking a medication that may impair their ability to perform the essential functions of their job duties. If there is a reasonable cause to suspect impairment employees can be tested for drugs. Moreover, in safety sensitive jobs such as truck and bus drivers employers are allowed to test employees randomly for illegal drug use.

No language in Amendment 2 changes the at will status of an employee in Florida. The Legislature would have to create a protected class and private cause of action for medical marijuana users, which so far do not exist in the Constitution. Some states have opted for such a route. For now Florida employers should not fear that their employees will be lighting up at work on retro-Thursdays. Employers must remain vigilant and pay attention to the new legislation that is being crafted this spring. While no one can predict the future, it is safe to say that Florida's Amendment 2 will not drastically alter the workplace because the federal government has long determined that it is a crime to possess or sell marijuana. It is not expected that the Department of Justice under the leadership of U.S. Attorney General Jeff Sessions will change this course.