

## **An Introduction to Medical Cannabis and the Workplace**

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In May 2016, Pennsylvania's medical cannabis law went into effect. Employers in the Commonwealth have been attempting to reconcile business needs, hiring practices, testing and disciplinary policies with the introduction of medical cannabis ever since. The advancement of the Pennsylvania Medical Marijuana Act (MMA), the evolution of the law and the growth and popularity of the industry has not made the task any easier.

To establish appropriate policy and protocol, employers must first understand the basic requirements of the MMA. Patients may only qualify for medical cannabis if they suffer from one (1) of approximately twenty-three (23) codified conditions. Some examples of those conditions include: cancer; Parkinson's disease; multiple sclerosis; epilepsy; inflammatory bowel disease; neuropathies; and post-traumatic stress disorder.<sup>1</sup> A patient must be under the care of a licensed physician who issues a certification for a medical cannabis card.<sup>2</sup> In order to provide the certification, the physician must register, complete a four-hour course, and comply with specific reporting requirements. Patients must be certified in Pennsylvania. Patients certified in other states are not permitted access to medical cannabis in Pennsylvania. If an employee tests positive for cannabis and does not have a properly acquired medical marijuana card they are not eligible for any consideration or protection under the MMA.

Many employers ask, "What do I do if I catch someone smoking cannabis at work?" Smoking medical cannabis is prohibited. Pills, oils, gels, creams, ointments, tinctures, liquid, and as of May 2018, whole-plant, flower cannabis are acceptable forms of medical cannabis. Under certain conditions, patients in a healthcare facility of residence may have medical cannabis products crushed into food or liquid to ease ingestion. Employers who find employees smoking cannabis at work should take all proper precautions to investigate the circumstances, but may generally proceed with disciplinary measures pursuant to active substance abuse policy.

Under federal law, marijuana, including medical cannabis products, remains an illegal drug.<sup>3</sup> The Federal Controlled Substances Act ("CSA") lists marijuana as a Schedule I controlled substance with a high potential for abuse, and with no currently accepted medical use in treatment or accepted safety for use under medical supervision.<sup>4</sup> As such, the manufacture, distribution, and possession of medical marijuana remains illegal under federal law.<sup>5</sup> Additionally, the Drug Free Workplace Act of 1988 ("DFWA") and regulations issued by the federal Department of Transportation ("DOT") contain additional rules and requirements for federal contractors and transportation industry employers with respect to their policies on employee drug and alcohol use, testing and discipline. Where state laws legalizing the distribution or possession of marijuana conflict with provisions of federal law governing drug and alcohol testing, the federal statute generally controls.<sup>6</sup>

<sup>1</sup> 35 P.S. § 10231.303(b).

<sup>2</sup> 35 P.S. § 10231.103 (defining the terms "medical marijuana," "certified medical use," and "serious medical condition.")

<sup>3</sup> 21 U.S.C.A. § 812(c).

<sup>4</sup> 21 U.S.C.A. § 812(b)(1).

<sup>5</sup> See *Gonzales v. Raich*, 545 U.S. 1, 14 (2005)(citing 21 U.S.C.A. §§ 841(a)(1), 844(a)). Notably, however, the CSA does not criminalize or prohibit the *use* of medical marijuana.

<sup>6</sup> 49 C.F.R. § 382.109.

The MMA also specifically states that employers are not required to commit any act that would put them in violation of federal law, such as providing accommodations for use or possession of medical marijuana in the workplace.<sup>7</sup>

Although Pennsylvania employers do not have to accommodate an employee's use or possession of medical cannabis on the jobsite, the MMA does legalize the use and possession of medical cannabis outside the workplace during off-duty hours. In accordance with the MMA, employers cannot discriminate against an employee or job applicant based exclusively on the individual's status as a certified medical cannabis user.<sup>8</sup> That stated, the MMA does not prevent employers from creating or enforcing policies that prohibit employees from performing their employment duties while under the influence of medical marijuana, particularly when the employee is working in a defined safety-sensitive position.<sup>9</sup> Moreover, an employer can discipline an employee for being under the influence of medical marijuana at work or while working if the employee's conduct falls below the standard of care normally accepted for that position.<sup>10</sup>

The MMA prohibits employees utilizing medical cannabis from performing certain defined safety-sensitive functions while under the influence of marijuana. These include, operating or controlling high-voltage electricity or government-controlled chemicals, performing duties at heights, or performing duties in confined spaces.<sup>11</sup> Additionally, The MMA also allows employers to prohibit employees who are under the influence of medical marijuana from performing or occupying certain "safety-sensitive" jobs or positions that include any tasks which pose a threat to the life of the employee or his/her coworkers, or which could otherwise result in a public health or safety risk.<sup>12</sup> While the MMA generally provides the employer with the ability to define these positions, it also requires that employers document and substantiate any safety-sensitive job designations. Employers that seek to rely on the safety-sensitive nature of a task or position to exclude an employee under the influence of medical cannabis from employment in that position should be able to demonstrate that the position has been considered and identified as safety sensitive by the employer. Further, the employer should be able to provide foundation for the designation. By way of example, the use of heavy equipment in public roadways may be self-evident. The occasional use of a power tool, such as a hand drill, may require greater scrutiny. Failure to properly document does not eliminate an employer's ability to take appropriate action for discipline and safety purposes in the event of an accident or policy violation. Proper designation and documentation is a suggested best practice and can facilitate an employer's defense against claims of discrimination, retaliation and wrongful termination.

Employers can face legal liability for discrimination, retaliation and wrongful termination for adverse employment decisions based on an employee or applicant's status as a medical cannabis cardholder. To begin, only patients treating for one of approximately twenty-three illnesses can qualify for certification under the MMA.<sup>13</sup> ~~Inherently, these individuals~~ may potentially come under the protection of the Americans with Disabilities Act by virtue of their diagnosis.

<sup>7</sup> 35 P.S. § 10231.2103(b)(2)-(3).

<sup>8</sup> 35 P.S. § 10231.2103(b)(1).

<sup>9</sup> 35 P.S. § 10231.510(3)-(4).

<sup>10</sup> 35 P.S. § 10231.2103(b)(2).

<sup>11</sup> 35 P.S. § 10231.510(1)-(2).

<sup>12</sup> *See Id* at 9.

<sup>13</sup> *See Id* at 1.

Any adverse employment action must be reviewed in this context to determine the cause and source of infraction and resulting discipline to determine if the patient is eligible for reasonable accommodation. Employers must train supervisors and establish policy for appropriate investigation of such claims.

In addition, it was originally thought that the MMA, itself, did not provide a private right of action for a patient based on their status as a certified medical cannabis cardholder. However, in August of 2021, the Superior Court of Pennsylvania, in *Palmiter v. Commonwealth Health*, determined that employees can sue their employers for claims under the MMA.<sup>14</sup> In this case, the employee, Palmiter was working as a medical assistant. She was fired for testing positive for marijuana on an employer-directed drug test. The employee asserted multiple claims, including a claim under the MMA and a claim for common law wrongful termination in violation of public policy.

The Superior Court of Pennsylvania held that there is an implied private right of action under the MMA. The court found that by enacting the MMA, the Legislature established a public policy prohibiting discrimination based on medical marijuana use. The court also determined that the MMA "evidences a clear public policy against termination of employment and other types of discrimination based on certified marijuana use off the employment premises." Accordingly, the court determined that employees may also assert claims for wrongful termination in violation of public policy for termination stemming from the legal use of medical cannabis outside the hours and location of employment.<sup>15</sup> By and through its Decision in *Palmiter*, the Superior Court of Pennsylvania provides the first binding opinion confirming a private right of action under the MMA. This case makes it necessary for employers to carefully evaluate how they address and potentially accommodate medical marijuana users in the hiring practices, in the workplace and in their drug-testing policies.

Employers must carefully navigate their address of medical cannabis use in the workplace. Employers should first decide on a policy based on their legitimate business interest, business needs and job functions. As stated above, some employers, such as federal contractors or transportation industry employers, may have little flexibility in testing protocol or stance as to use of medical cannabis due to federal laws and regulations. Many employers may need to balance their position on medical cannabis use against the practical effects that marijuana testing might have on populating their workforce. Some employers have removed cannabis from their post- offer pre-employment test screen. Some have opted to remove the pre-employment test altogether and moved to reliance on a stricter reasonable suspicion-based policy combined with training and enhanced employee assistance programs.

Best practice first steps might include a review of all employment policies and handbooks. Employers should clearly set forth their testing policy. Where appropriate, employers should identify that testing positive for an illegal drug – *including medical marijuana* – shall constitute a policy violation. The policy should explain the consequence for violation. Employers should scrutinize job descriptions for safety-sensitive functions, including any task that may be deemed life threatening. Both policy and job description should be updated to explain the application of

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<sup>14</sup> See generally *Palmiter v. Commonwealth Health Systems, Inc.*, 260 A.3d 967, 2021 Pa. Super. 159 (2021) (holding that such implied private right of action existed in the MMA as a matter of first impression.).

<sup>15</sup> See *Id* at 14.

the MMA to the position. Employers should assess and organize their vendor/partners. Medical review officers should be advised to inquire of an employee, in the event of a positive test, whether he or she has a state-issued medical marijuana identification card. If an employee has a valid state-issued medical marijuana identification card and occupies a safety-sensitive position, employers should engage in the interactive process to determine if an accommodation is available.

This is a burgeoning legal topic and a quandary for many employers. There is a myriad of considerations for address by Pennsylvania employers related to medical cannabis. Employers should engage internal staff for training and education as to the impact of the MMA on their workplace as well as the help of outside legal counsel in an effort to mitigate legal liability and exposure.

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