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Mixed Results for Employers on Marijuana – Two Federal Courts Refuse to Find State Marijuana Laws Preempted by Federal Law

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Two recent federal cases illustrate why employers – even federal contractors – must be cognizant of relevant state-law pronouncements regarding the use of marijuana (i.e., cannabis) by employees. While one case found in favor of the employer, and the other in favor of the employee, these decisions have emphasized that state law protections for users of medical marijuana are not preempted by federal laws such as the Drug-Free Workplace Act (DFWA). Employers must craft a thoughtful and considered approach to marijuana in the workplace, and in most cases should not take a zero-tolerance approach to marijuana.

Ninth Circuit Finds in Favor of Employer Who Discharged Employee for Positive Drug Test

In Carlson v. Charter Communication, LLC, the Ninth Circuit affirmed the dismissal of a lawsuit brought by an employee who alleged discrimination under the Montana Medical Marijuana Act (MMA) because he was discharged for testing positive for marijuana use. The plaintiff, a medical marijuana cardholder under Montana state law, tested positive for THC (a cannabinoid) after an accident in a company-owned vehicle. His employer, a federal contractor required to comply with the DFWA, terminated his employment because the positive test result violated its employment policy.

The District Court of Montana held that the employer was within its rights to discharge the plaintiff because (1) the DFWA preempts the MMA on the issue of whether a federal contractor can employ a medical marijuana user; and (2) the MMA does not provide employment protections to medical marijuana cardholders. Indeed, the MMA specifically states that employers are not required to accommodate the use of medical marijuana, and the Act does not permit a cause of action against an employer for wrongful discharge or discrimination. The Ninth Circuit rejected this rationale. Because the MMA does not prevent employers from prohibiting employees from using marijuana and does not permit employees for suing for discrimination or wrongful termination, the Ninth Circuit held that the MMA does not preclude federal contractors from complying with the DFWA and thus found no conflict.

The plaintiff asserted that the provisions of the MMA exempting employers from accommodating

registered users and prohibiting such users from bringing wrongful discharge or discrimination lawsuits against employers are unconstitutional and sought certification of the question to the Montana Supreme Court. The Ninth Circuit rejected this request because, it determined, the Montana Supreme Court already decided the issue. The MMA and the specific sections challenged by the plaintiff appropriately balance Montana's legitimate state interest in regulating access to a controlled substance while avoiding entanglement with federal law, which classifies the substance as illegal.

Plaintiff Wins Summary Judgment Against Employer That Rescinded Job Offer Due to Positive Test

If federal law does not preempt state law on the issue of marijuana, then in certain states – like Connecticut – employers will be more susceptible to discrimination claims from marijuana users. In Noffsinger v. SSC Niantic Operating Company, the District of Connecticut granted summary judgment to a plaintiff-employee of Bride Brook Nursing & Rehabilitation Center who used medical marijuana to treat post-traumatic stress disorder ("PTSD") and whose offer was rescinded for testing positive for THC during a post-offer drug screen. Plaintiff filed a discrimination claim under the Connecticut Palliative Use of Marijuana Act ("PUMA"), which makes it illegal for an employer to refuse to hire a person or discharge, penalize, or threaten an employee "solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver."

We covered a previous decision in this case, in which the court held that PUMA is not preempted by the federal Controlled Substance Act ("CSA"), the Americans with Disabilities Act, or the Food, Drug & Cosmetic Act ("FDCA"). The decision was notable then for being the first federal decision to hold that the CSA does not preempt a state medical marijuana law's anti-discrimination provision, a departure from a previous federal decision in New Mexico.

In this recent decision, the District Court again considered whether PUMA was preempted by federal law. In ruling for the Plaintiff, the court rejected Bride Brook's argument that its practices fall within an exception to PUMA's anti-discrimination provision because they are "required by federal law or required to obtain federal funding." Bride Brook argued that in order to comply with DFWA, which requires federal contractors to make a good faith effort to maintain a drug-free workplace, it could not hire plaintiff because of her failed pre-employment drug-test. The court was not persuaded, concluding that the DFWA does not require drug testing, nor does it prohibit federal contractors from employing people who use illegal drugs outside the workplace. The court noted that simply because Bride Brook's zero-tolerance policy went beyond the requirements of the DFWA does not mean that hiring the plaintiff would violate the Act.

The court also rejected Bride Brook's argument that the federal False Claims Act ("FCA") prohibits employers from hiring marijuana users because doing so would amount to defrauding the federal government. Because no federal law prohibits employers from hiring individuals who use medicinal marijuana outside of work, employers do not defraud the government by hiring those individuals.

Lastly, the court rejected the theory that PUMA only prohibits discrimination on the basis of one's registered status and not the actual use of marijuana, as such a holding would undermine the very purpose for which the employee obtained the status.

What These Decisions Mean for Employers

These decisions are notable for the fact that the federal courts refused to find the state laws were

preempted by federal law. Importantly, neither found that the DFWA preempts state law, which means that even federal contractors must be aware of and follow state law with respect to marijuana use by employees. Thus, in states in which employers may not discriminate against medical marijuana users – such as Connecticut – all employers must take care not to make adverse employment decisions based solely on off-duty marijuana use and, in certain states, must accommodate medical marijuana use. A majority of states and the District of Columbia now permit the use of medical marijuana; employers, including federal contractors, should be mindful of these statutes and consult with counsel to ensure their employment policies are compliant.

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