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What Legal Protections Exist for Employees who Use Medical Marijuana?

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California became the first state to legalize the use of marijuana for medical purposes in 1996. Today, medical marijuana use is legal in thirty-three states, the District of Columbia, and three U.S. territories, with another thirteen states allowing the use of CBD products that have low THC content. Over four million Americans are medical marijuana patients today. And while the patchwork-legalization process over the past twenty-four years has limited the number of studies done on the effectiveness of cannabis to treat various conditions and its possible long- and short-term side effects, the vast majority of doctors and medical marijuana patients say that it is effective in treating conditions such as chronic pain, arthritis, migraines, and cancer symptoms. One study even found that worker's compensation claims decreased in states that legalized cannabis use for medical purposes.

Legal Protections for Employees Who Are Medical Marijuana Patients

Despite these benefits, protections for employees who use cannabis under a doctor's supervision remain limited and differ widely by state. For example, Oregon, the first state to decriminalize recreational marijuana use, still does not provide any employment protections for marijuana users. At least twelve states do have employment laws prohibiting employers from discriminating against employees because they are medical marijuana patients, but the laws are relatively limited. Nevada is the only state which requires employers to attempt to make reasonable accommodations for employees who have a valid medical-marijuana-patient ID card. But Nevada employers are not required to change working conditions that are based on reasonable business purposes, nor make accommodations that would pose a risk of harm or danger to persons or property, that would create an undue hardship for the employer, or that would excuse the employee from completing any of her job duties. So if, for example, an employee's long-term cannabis use impaired their motor functions such that they could competently do a desk job but not operate heavy machinery, the employer would not be required to change their duties from machine operation to customer service or paperwork. But an employer might be required to change the shifts a person works so that they can take marijuana as prescribed and work once any impairment from the drug has worn off.

Other states, such as Pennsylvania, prohibit employers from discriminating or retaliating against employees based on their status as a medical marijuana patient, but do not require employers to make any accommodations for those employees. The District of Columbia City Council has

passed several temporary orders prohibiting the D.C. government from discriminating against medical marijuana patients, but has no permanent law and offers no protections for private-sector employees.

Federal law does not offer any additional protection for employees. The Americans with Disabilities Act, or ADA, requires employers to provide reasonable accommodations to enable workers with disabilities to perform the essential functions of their jobs, and the definition of covered disabilities includes many of the conditions that marijuana is used to treat. But the ADA does not protect employees who use drugs that are illegal under the Controlled Substances Act, which includes cannabis. While the ADA includes an exception from this "illegal use of drugs" rule for those who take a drug "under supervision by a licensed health care professional or other uses authorized by the Controlled Substances Act," at least one federal court has ruled that medical marijuana users are not protected. In Barber v. Gonzalez, the Eastern District of Washington essentially read the "or" in the exception as "and," stating that in order to be protected by the ADA, the use of drugs under physician supervision must also be authorized by the Controlled Substances Act. Since federal law does not yet allow use of medical marijuana, the ADA therefore offered no protection. The Ninth Circuit agreed with this reasoning in another case brought under the ADA's provision prohibiting discrimination in access to public services.

Federal Court Allows Case to Proceed under Pennsylvania Nondiscrimination Law

A recent decision from a federal district court in Pennsylvania reveals some of the complexities of protecting employees who are medical marijuana patients. The facts underlying the claim in Hudnell v. Thomas Jefferson University Hospitals arose last October 2019 when Security Analyst Donna Hudnell tried to return to her job at Thomas Jefferson University Hospital following back surgery. Because she had been on leave for over ninety days, she was required to undergo drug testing before resuming work. Hudnell reported for her drug test on October 11 with an expired medical marijuana registration card, and explained to the nurse administering the test that she was in the process of renewing the card. She received her renewed card on October 20, and sent it to her employer, along with a note from her doctor that her positive drug test on the 11th could have been a result of THC remaining in Hudnell's system for weeks. In other words, Hudnell could have stopped using marijuana when her medical certification expired at the end of August, and the test in October would still have come back positive. The hospital nevertheless fired her, so Hudnell brought a claim of employment discrimination under the state Medical Marijuana Act (MMA). The hospital moved to dismiss her claim on the ground that the MMA does not provide a private right of action. On September 25, 2020, the district court allowed her MMA claim to proceed, finding that the Pennsylvania legislature intended to give individuals the ability to sue their employers when it included a prohibition on employment discrimination in the MMA.

Considerations for Employees

Employees who take marijuana for medical purposes, or who are considering doing so, should therefore consult not only their physician, but also their employer's human resources department and an employment lawyer to know their rights. The fact that using marijuana is legal in your state does not necessarily prevent your employer from firing you for using marijuana, even with a valid medical certification to do so. And because the drug can remain in one's system long after the intoxicating effects wear off, it is important to know whether your employer can require a drug test and fire you for having THC in your system, even though you did not come to work under the influence of the drug.

This is a complex and ever-changing area of the law, so consulting an attorney in your state who has the most up-to-date information is the best way to protect yourself and your livelihood.

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