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Medical Marijuana and the Workplace: How Local Governments Can Take the *High* Road

It has been six years since Maryland legalized medical marijuana and more than two years since the sale of medical marijuana in the state began. Despite the passage of time, employers in Maryland have not received any substantive guidance, from either the General Assembly or Maryland's appellate courts, concerning how to deal with employees and job applicants who use medical marijuana. Employers essentially have been left to their own devices to try and reconcile Maryland's medical marijuana law not only with federal drug, drug free workplace, and anti-discrimination laws, but also with state drug and anti-discrimination laws.

Any discussion of what employers can and can't do must begin with an overview of federal law. Under federal law, marijuana remains considered a controlled substance. Thus, the cultivation, sale, purchase, possession, and usage of marijuana is a federal crime. Prescribing, administering, or dispensing marijuana is also a federal crime. But doesn't mean that Maryland's medical marijuana law, which allows many of the activities prohibited by federal law, conflicts with federal law? In short, yes. However, any ramifications from the conflict have been avoided by Congress, which has largely prohibited federal authorities from acting against businesses and individuals participating in state-run medical marijuana programs. Specifically, since 2014, federal budget legislation has prohibited the Department of Justice from interfering with the implementation of state medical cannabis programs.

Although the treatment of marijuana under federal law may seem inflexible when compared to various state laws, Maryland's medical marijuana law contains significant restrictions regarding who can prescribe and use medical marijuana, and for what purpose and where it can be used. First, "certified providers" (including physicians, dentists, podiatrists, and registered nurses) must diagnose a "qualifying medical condition" before making an application on behalf of a "qualifying patient." "Qualifying medical conditions" relate to chronic or debilitating diseases or medical conditions that result in hospitalization or palliative care, or produce cachexia, severe or chronic pain, seizures, or severe or persistent muscle spasms. Glaucoma and Post Traumatic Stress Disorder are also considered qualifying conditions. "Qualifying patients" *cannot*: (1) undertake any task under the influence of

marijuana when doing so would constitute negligence or professional malpractice; (2) operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or boat while under the influence of marijuana; (3) smoke marijuana in a public place; (4) smoke marijuana in a motor vehicle; or smoke marijuana on a private property that is rented from a landlord or condominium and that is subject to an anti-marijuana policy. These restrictions, combined with Maryland criminal law, which still considers marijuana to be "contraband," and which still criminalizes the possession of ten (10) grams or more of marijuana, demonstrate that marijuana use in Maryland is still tightly controlled.

Despite these restrictions, Maryland's medical marijuana law *exempts* persons acting in accordance with the law from arrest, prosecution, revocation of supervision, parole, or probation, or any civil or administrative penalty. The specific section of the law establishing these exemptions, § 13-3313 (a) of the Maryland Code's Health General Article, also states that persons acting in accordance with the law may not be "denied any right or privilege" for the use or possession of medical cannabis.

Considering the restrictions and exemptions in Maryland's medical marijuana law, what are employers to do concerning applicants and/or employees who use medical marijuana? Employers must first identify what they can and can't do, and then, and only then, decide what they should do. Under existing Maryland and federal law, including Maryland's medical marijuana law, employers *can* prohibit the use or possession of marijuana in the workplace and *can* take immediate adverse employment action, up to and including termination, against an employee who is impaired by marijuana use on the job. Further, pursuant to federal law and regulations, employers *can* require substance testing for employees performing safety-sensitive functions in transportation, including school bus drivers, truck drivers, subway operators, aircraft maintenance personnel, transit fire-armed security personnel, ship captains, and pipeline emergency response personnel. One's participation in a state's medical marijuana program provides no exception to such testing and no "positive" test result can be verified as "negative" simply because one uses marijuana for medical reasons. Further, and according to the Maryland Medical Cannabis Commission's website, Maryland law *does not* prevent an employer from testing for use of cannabis (for any reason) or taking action against an employee who tests positive for use of cannabis (for any reason).

But with the relaxation of criminal laws relating to marijuana in Maryland, and the passage of Maryland's medical marijuana law, should employers continue with a "zero-tolerance" policy when it comes to marijuana? The answer is certainly "yes" when it comes to employees in safety-sensitive positions. But what about employees who are not in safety-sensitive positions? Should the same "zero tolerance" approach apply to them? As it stands now, the best answer for employers is "No." Is this because of federal anti-discrimination in employment laws such as the Americans With Disabilities Act (ADA), which requires employers to make "reasonable accommodations" for workers with qualifying disabilities? No. Since possessing marijuana for any purpose is still a federal crime, the ADA *does not* require employers to accommodate marijuana use. Then what is the reason employers may want to take a more flexible approach with employees in non-safety-sensitive positions? The reason lies in the intersection of Maryland's medical marijuana law with Maryland's *own* anti-discrimination in employment laws, specifically the laws found in Subtitle 6 of

Title 20 of the Maryland Code's State Government Article. Subtitle 6, titled "Discrimination in Employment," *may be interpreted by the courts* to require accommodation of marijuana use by employers in certain circumstances.

Thus, even though Maryland's anti-discrimination in employment law does not expressly prohibit employers from discriminating against medical marijuana users, and even though Maryland's medical marijuana law does not expressly prohibit discrimination against cardholders by employers, employers *should anticipate* that there is a strong likelihood that Maryland's appellate courts will interpret existing language in both laws to, at a minimum, prohibit discrimination by employers against medical marijuana users who suffer from a disability covered by Maryland's anti-discrimination in employment laws.

Disability is defined under Maryland's anti-discrimination as "a physical disability, infirmity, malformation, or disfigurement that is caused by bodily injury, birth defect, or illness, including epilepsy; or a mental impairment of deficiency." Disability includes: "any degree of paralysis, amputation, or lack of physical coordination; blindness or visual impairment; deafness or hearing impairment; muteness or speech impediment; physical reliance on a service animal, wheelchair, or other remedial appliance or device; and any mental impairment or deficiency that may have necessitated remedial or special education and related services."

It will be up to employers to first determine what, if any, recognized disability its employee suffers from, and then determine if the disability is one recognized in Maryland's medical marijuana law. If that is the case, then the employer may want to proceed cautiously by engaging in the reasonable accommodation process with such employee. That is certainly one step towards the high road.

Although the backdrop is confused and confusing, it is worth attempting to identify actual steps that an employer can take in anticipation of the trouble to come. Employers can start by adopting policies that:

- require job candidates and employees to disclose whether they are approved medical marijuana users
- require applicants or employees who are approved medical marijuana users to obtain a written statement from their health care provider(s) that states that the provider has reviewed the duties and responsibilities required for the position and that the patient is medically capable of performing the tasks safely while using medical marijuana while on off-duty status
- require engagement in the reasonable accommodation process if the medical condition for which medical marijuana has been prescribed is recognized as a qualifying disability under Maryland's anti-discrimination in employment law

In a further effort to take the high road, employers may want to consider:

- ending zero-tolerance testing for marijuana use
- updating policies to address off-duty and off-premises marijuana use
- training managers to spot the signs of marijuana impairment
- educating employees about your medical marijuana-use policy
- seeking the advice of counsel before acting

- taking advantage of LGIT value-added services such as the LGIT Employment Law Hotline, HR Compliance Solution (at our website), and LGIT Online Campus

Despite the pace of change in laws relating to marijuana, Maryland's local governments must keep up. Failure to do so could prove costly in many ways, from employee loss to costly litigation. Local governments must utilize all of the resources available to them, and not forget the information available at the website of the Maryland Medical Cannabis Commission: https://mmcc.maryland.gov/Pages/home.aspx