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## Labor & Employment

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# New Laws Complicate Employee Marijuana Use Rules

By Robert Nichols and Eric Lai

**W**hile the first wave of medical marijuana laws that began in 1996 generally left intact the rights of employers to prohibit and test for marijuana use, a number of the newest medical marijuana laws now include employment related protections for individuals using medical marijuana. As a result, employers need to reexamine their approach to medical marijuana.

A new Rhode Island decision illustrates the dilemma. On May 23rd, a Rhode Island court held that an employer violated state law when it denied employment to a medical marijuana cardholder who admitted she could not pass the pre employment drug test. When she applied, she disclosed she was a medical marijuana cardholder. The employer's policies prohibited the illegal use of drugs on company property, and provided that all applicants would be tested. The policy, however, did not state that a positive result would cause the employer to withdraw an offer. When the employer informed the applicant that she would not be hired because she was a cardholder, she filed suit under the state's medical marijuana and disability discrimination laws.

The Rhode Island medical marijuana law provides that "[n]o school, employer or landlord may refuse to enroll, employ, or lease to, or otherwise penalize, a person solely for his or her status as a cardholder." The Act also provides that "[a] qualifying patient cardholder who has in his or her possession a registry identification card shall not be denied any right or privilege for the medical use of marijuana." In order to qualify for such a card, an individual must have



a “debilitating medical condition” that “substantially limits one or more major life activities under the Act.”

In its decision, the court rejected the employer’s argument that the decision not to hire the individual was based solely on her use of marijuana and not her underlying disability. The court noted that separating the medical condition from its treatment would circumvent the intent of the disability discrimination law. Specifically, the court observed that individuals could not obtain registry identification cards without a “debilitating medical condition,” and employers had an obligation to reasonably accommodate qualified individuals with disabilities.

The employment protections of the Rhode Island law represent a departure from most earlier medical marijuana statutes. Beginning with the passage

employment drug tests and take illegal drug use into consideration in making employment decisions.”

In 2009, the Montana Supreme Court considered whether an employer’s termination of an employee who did not disclose his use of medical marijuana and then failed a drug test was unlawful. The employee alleged that by firing him over his medical marijuana use, the employer failed to offer a reasonable accommodation as required under the Americans with Disabilities Act and the Montana equivalent statute. The state’s Supreme Court, however, rejected these arguments, concluding that the Montana medical marijuana statute “clearly provides that an employer is not required to accommodate an employee’s use of medical marijuana.”

Yet another state followed suit in

analysis of the statute’s language. The court concluded that the medical marijuana law did not “regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use.”

In 2015, the Colorado Supreme Court considered a challenge to the termination of a medical marijuana user that was premised on a different theory. The plaintiff, a quadriplegic employee, was terminated from employment with Dish Network after testing positive for the use of marijuana.

This Colorado case was novel in that rather than relying on language in a disability law or in the medical marijuana law itself, the employee argued that Dish violated the state’s “lawful activities” law that bars employers from terminating an

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of a California law in 1996, a series of states adopted laws permitting medical marijuana use. In the next several years following the California enactment, at least seven other states adopted medical marijuana laws including Alaska, Arizona, Colorado, Maine, Nevada, Oregon and Washington.

### **DISCRIMINATION DESPITE STATE LAWS**

As employers began litigating issues related to the laws, a pattern developed from a series of state court opinions. In particular, these courts consistently ruled that employer conduct was not restricted by the laws governing medical marijuana use. For instance, the California Supreme Court concluded in 2008 that the state’s medical marijuana law did not prevent employers from regulating off duty marijuana use and did not require employers to reasonably accommodate medical marijuana use.

Accordingly, the court concluded that “an employer may require pre-

2011 when the State of Washington’s Supreme Court issued its decision concerning an employee who was terminated following a positive drug test result. The employee, who was using marijuana pursuant to the state’s medical marijuana law, had informed the employer that she was using medical marijuana before submitting to her employer’s drug test. When the positive result came back, the employee was terminated.

In response, the employee sued, claiming that the termination violated Washington’s medical marijuana law.

Looking to the language of the Washington medical marijuana statute, the court noted that employers were not required to accommodate medical marijuana use “in any place of employment.” Although the employee argued that “the statute implicitly requires an employer to accommodate an employee’s medical marijuana use outside the workplace,” the court rejected this argument based on an

employee based upon engagement in “lawful activities” away from work. The employee argued that because the medical marijuana use was not illegal under state law, his conduct was lawful outside activity for which he could not be penalized by his employer.

The court, however, rejected this argument based on its conclusion that the marijuana use did not qualify as “lawful” activity because the conduct was still illegal under federal law.

This Colorado decision echoed an important theme that arises in a variety of court decisions. Specifically, courts recognize that while states may enact medical marijuana laws, the use of marijuana for medical purposes or otherwise remains illegal under federal law.

### **NEW LAWS INCLUDE EMPLOYMENT PROTECTIONS**

Responding to pressure from medical marijuana supporters in recent years, legislatures have increasingly limited how employers may address

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medical marijuana use. For instance, as referenced earlier, the Rhode Island law provides that employers cannot discriminate solely based on an individual's status as a medical marijuana cardholder. The Connecticut medical marijuana law includes comparable language.

A number of the state statutes dealing with medical marijuana also provide certain employer protections. For example, under the Arizona statute, employers may prohibit employees from using or being impaired by marijuana during working hours. The difficulty with the concept of "impairment" is the subjectivity of the term. Some experts have concluded that impairment associated with marijuana use ends within several hours of the use while other researchers believe that impairment can continue for a much longer period. Given this uncertainty concerning "impairment," managing employee marijuana use can prove to be extraordinarily difficult.

In addition to providing a nondiscrimination provision, New York's medical marijuana law categorically classifies authorized users as having a "disability" under the state's disability

employee's authorized, off duty use of medical marijuana and an employee's unauthorized use of marijuana during, or shortly before, working hours. As a result, in a variety of states, it is uncertain whether an employer can take action against a medical marijuana user for a positive test result.

### BEST PRACTICES GOING FORWARD

Unless a multi-state employer wants to wholly abandon its normal practices with regard to marijuana, employers will need to adopt a state specific approach to employee use of medical marijuana. In the vast majority of states, employers may still prohibit all marijuana use and test for marijuana without limitation. However, a small but growing number of states require a more measured approach.

Employers should be careful about taking action simply because an employee admits to being a cardholder. While employment action on this basis may be permissible in some states with medical marijuana laws, it is unlawful in a number of other states.

In certain states with medical marijuana laws that impose restrictions on employers—including, for

prohibit employees from reporting to work impaired, a positive test provides no reliable indication that the employee reported to work "impaired."

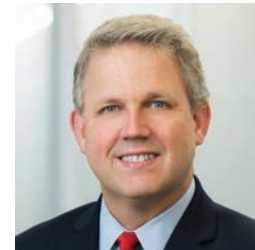
Employers need to recognize that, in a number of states, reasonable accommodation obligations exist for medical marijuana use pursuant to the state's disability discrimination laws. Thus, employers should assess their drug policies to ensure they are consistent with the laws of the states in which they have employees. Finally, employers should watch for further developments from state legislatures with new marijuana laws pending and continue to comply with federal drug testing requirements, including Department of Transportation regulations, to the extent applicable. ■

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discrimination law. As a result, employers in New York may have an affirmative duty to reasonably accommodate authorized marijuana users.

One significant complication for employers associated with these protections is the impact on marijuana testing. Marijuana tests generally cannot differentiate between an

example, New York, Rhode Island and Connecticut—an employer may need to modify its drug testing program. Specifically, employers must refrain from taking action against an employee who produces a positive result and participates in the state's medical marijuana program. While most states with employment protections still



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August/September © 2017 *Today's General Counsel*

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