Is One Toke Over the Line? The Impact on the Workplace of Legalizing Medical Marijuana

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Television personality Montel Williams, who suffers from multiple sclerosis, was detained at a Germany airport in July after inadvertently leaving prescription marijuana powder in his luggage. This incident underscores that although New York has legalized medical marijuana for some illnesses, carrying or using it may nonetheless have repercussions.

Effective January 2016, New York's Compassionate Care Act ("CCA") grants qualified permission for some New York State workers to use non-smokable medical marijuana for serious conditions such as cancer, HIV/AIDS, Parkinson's Disease, epilepsy and other named diseases. This article explores some of the issues related to employment when workers carry or use medical marijuana. Because there are few cases so far in New York, cases in jurisdictions that have similarly legalized medical marijuana are instructive.

Section 3362 of the CCA describes the lawful medical use of marijuana. A certified patient in New York may not be discriminated against or disciplined solely for the certified medical use or manufacture of marijuana. As a result, employers may be required to provide a reasonable accommodation to certified patients and may not discipline employees for their legal use of medical marijuana. These protections do not bar enforcement of a policy prohibiting an employee from performing employment duties while impaired by a controlled substance.

However, the federal Americans with Disabilities Act (ADA), does not protect New York medical marijuana patients. Possession or use of marijuana violates the federal Controlled Substances Act, even if it is medically prescribed pursuant to state law. In addition, the Drug-Free Workplace Act of 1998 requires federal contractors and recipients of federal grants to establish drug-free workplace policies in order to access federal monies, and proscribes the use and possession of marijuana, even if used for an approved medical purpose. The U.S. Department of Transportation (DOT) also maintains comprehensive drug testing regulations, covering over seven million workers with safety-sensitive responsibilities. Under DOT rules, use of medical marijuana will be considered a positive drug test result.

To the extent that New York's CCA conflicts with these or other federal laws, employers and employees are bound by federal law. New York's law does not authorize or immunize employers for violations of federal law.

In one of the first cases looking at the issue under federal law, an assisted living facility did not violate the ADA by firing a worker following a medical examination when she tested positive for marijuana use. The court held that there was no ADA claim, since marijuana is still an illegal drug under federal law.

Similarly, the Colorado Supreme Court held in June 2015 that a worker could be fired for failing a drug test where the company had a zero tolerance policy. The plaintiff, a state-certified medical marijuana patient, was fired by Dish Network after he failed a random drug screen. The plaintiff filed suit under Colorado's lawful activities statute because Colorado, unlike New York, does not protect patients against employment discrimination. The lawful activities statute generally prohibits employers from terminating employees for lawful activities undertaken outside of working hours. The court held that there was no exception under the policy for medicinal use of drugs, and pointed out that the use, even of medical marijuana, was illegal under federal law.

While New York has a lawful activities statute that protects against discrimination for using medical marijuana, it is possible that the result would be the same in New York, at least if: 1) the employer had a zero tolerance policy and 2) the use of even medical marijuana continues to be illegal under federal law.

In view of these cases, employers may wish to enact policies prohibiting employees from performing their job while impaired by a controlled substance. For those employers who require post-offer, pre-employment or random drug testing, it is important to remember that the mere fact that an employee tests positive for marijuana does not mean that the employee is impaired by a controlled substance. While private non-unionized employers can readily develop those policies, private unionized employers looking to change their policies in relation to testing or in relation to medical marijuana use will be obliged to bargain over the policy modification.