

# Lawyer Insights

## Tricky Questions Emerge for Employers over Medical Marijuana in the Workplace

By Juan Enjamio and Daniel Butler  
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A rapidly evolving set of state and local laws have reshaped the legal landscape concerning the use of marijuana. Once prohibited in all 50 states, marijuana has now gained some form of legality in all but three states.

Yet the drug remains illegal under federal law.

Because of these disparities, tricky questions have emerged for employers. Must an employer accommodate an employee's medical marijuana use? Can employers maintain zero-tolerance drug testing programs? The answers to these questions are largely state-specific.

Twenty states, including Florida, permit residents with certain health conditions to use medical marijuana. Another 10 states allow medical *and* recreational marijuana use. And 16 states allow the use of "CBD" or "low-THC" products. But each state's medical and/or recreational marijuana laws has its own unique implications for the employer-employee relationship. Some states provide explicit protections to medical marijuana users whereas other states provide protections to employers. A smaller subset of these laws are silent as to their effect on the employer-employee relationship.

The Americans with Disabilities Act ("ADA"), a federal law, generally prohibits employers from discriminating against employees with certain medical conditions that qualify as disabilities. The law may also require employers to accommodate disabled employees by, *e.g.*, modifying work hours or providing light-duty assignments.

As an example, an employer probably could not terminate an employee with diabetes because he or she requires brief breaks each day to inject insulin.

Recently, medical marijuana users have argued in court that their employers violated the ADA when they terminated them for their use of medical marijuana (*e.g.*, after a failed drug test). But federal courts have largely rejected these arguments because the ADA specifically excludes from its definition of disabled individuals those who are using illegal drugs, under federal law, to treat their conditions.

As a result, many states have extended protection to medical marijuana users through the passage of their own anti-discrimination laws.

Connecticut, for example, prohibits employers from taking adverse employment actions against employees based on their status as medical marijuana users. The law was recently tested in court. In September 2018, a Connecticut court ruled in favor of a terminated employee who made a claim under

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the law's anti-discrimination provision, entitling the employee to back pay and other compensatory damages.

Unlike Connecticut, Florida's medical marijuana law actually provides protections to employers. It states that the law does not limit an employer's ability to maintain a drug-free workplace, does not require an employer to accommodate an employee's medical use of marijuana, and further provides that the law does not create a cause of action for discrimination or wrongful termination.

Importantly, however, two bills were introduced in the Florida Legislature which, if passed, would extend protections to medical marijuana users.

House Bill 595 and Senate Bill 962 — both entitled "Medical Marijuana Employee Protection Act" — seek to prohibit employers from taking adverse employment actions against qualified medical marijuana users. Like similar state laws already on the books, there are exceptions for "safety-sensitive positions," such as the operation of motor vehicles or the handling of hazardous materials. The bills also explain that the law would not require an employer to perform an act which would cause the employer to violate federal law or lose a federal contract.

Although the ADA does not yet provide a cause of action for medical marijuana users, many states have provided their medical marijuana residents with grounds to contest their terminations in court. Florida is not currently such a state. But the introduction of HB 595 and S 962 are emblematic of the nationwide movement to relax marijuana laws, and Florida may soon be among the list of states that provides anti-discrimination protection to medical marijuana users in the workplace.

Also, in a related development: On Thursday, the Florida Supreme Court heard arguments in a case challenging the legislature's implementation of the constitutional amendment that legalized medical marijuana. Critics of the implementation argue that the state is unconstitutionally restricting access to the medical marijuana market by preventing certain business from obtaining the required licensure. Health department lawyers argued that the implementation is consistent with the constitutional amendment and ensures the system is safe and well-regulated.

Employers and employees alike should keep a close eye on the legislative and court developments.

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