EMPLOYMENT ISSUES RELATED TO MEDICAL MARIJUANA USE

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I. OVERVIEW

There now are fifteen states, plus the District of Columbia, which have some form of a medical marijuana program. The first medical marijuana initiative was passed in California in 1996 when 56% of the voters approved of Proposition 215. (Last month, California voters rejected Proposition 19 which would have legalized recreational marijuana use legislation. This measure was backed by many California medical marijuana dealers.) Since 1996, medical marijuana use in other states has been approved through ballot measures or by state legislatures. The most recent addition was Arizona where, on November 2, 2010, voters approved Proposition 203 by a 50.13% margin. The programs from state to state have similarities in that most provide possession limits ranging from one ounce (Alaska) to 24 ounces (Oregon and Washington).

Common purposes of medical marijuana measures from state to state are to insulate physicians from criminal liability for prescribing or recommending the use of medical marijuana, and insulate patients from criminal liability for possessing and using marijuana for specific medical conditions. Shortly after taking office, President Obama announced that his administration would not seek to arrest medical marijuana users and suppliers, so long as they conformed to state law. Approximately half of the states allowing medical marijuana use also accept registry identification cards from other states. As discussed in greater detail below, most of the state ballot measures or legislative amendments have paid very little attention to the workplace ramifications of medical marijuana use. Consequently, there have been several court challenges, particularly in California, Oregon, and Washington where employers have sought to
take adverse action against employees who are using medical marijuana. This most likely will continue to be an active area in employment law.

II. NEW MEXICO’S MEDICAL MARIJUANA LAW

New Mexico’s medical marijuana bill, named the “Lynn and Erin Compassionate Use Act,” became effective on July 1, 2007. Lynn Pierson and Erin Armstrong were two female cancer patients. The Act removed state criminal penalties on the use and possession of marijuana by patients “in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments.” See Section 26-2B-2 NMSA 2007. The Department of Health administers the program and registers patients, caregivers, and providers. Current qualifying debilitating medical conditions for medical cannabis include: cancer, glaucoma, multiple sclerosis, damage to the nervous tissue of the spinal cord with intractable spasticity, epilepsy, HIV/AIDS, and hospice patients. See Section 26-2B-3(B) NMSA 2007.

New Mexico patients with a qualifying condition may possess up to six ounces of useable cannabis, four mature plants, and twelve seedlings. Useable cannabis includes dried leaves and flowers and does not include seeds, stalks, or roots. A primary caregiver may provide services to a maximum of four qualified patients; registration with the Department of Health is mandatory.

III. EMPLOYMENT ISSUES REGARDING MEDICAL MARIJUANA

The single reference in the Compassionate Use Act to the workplace is as follows:

A. Participation in a medical use of cannabis program by a qualified patient or primary caregiver does not relieve the qualified patient or primary caregiver from: . . .

(3) Criminal prosecution or civil penalty for possession or use of cannabis: . . .

(c) In the workplace of the qualified patients or primary caregivers’ employment. See Section 26-2B-5 NMSA 2007.
Regulations adopted by the New Mexico Department of Health repeat the above language verbatim without any further definition or clarification.

Under the Compassionate Use Act, “primary caregiver” is a “resident of New Mexico who is at least 18 years of age and who has been designated by the patient’s practitioner as being necessary to take responsibility for managing the well-being of a qualified patient with respect to their medical use of cannabis pursuant to the provisions of [this Act].” See Section 26-2B-3(F).

As stated in this definition, the role of “primary caregiver” is confined to matters related to medical marijuana use. This raises the question of whether a “primary caregiver” under the Compassionate Use Act qualifies for coverage under the federal Family and Medical Leave Act (“FMLA”) or similar leave programs which an employer may have.

The lack of guidance for employers in the Compassionate Use Act leaves unanswered several other legal issues of concern to employers, including:

- What accommodations under the Americans with Disabilities Act, as amended, (“ADA”) must be made, if any, by an employer for an employee using legal medical marijuana?
- What is a “reasonable” accommodation under the ADA where medical marijuana use is involved?
- Can an employer use the “direct threat” analysis under the ADA in response to requests by users of medical marijuana?
- If an employee is a caregiver to a patient with a debilitating medical condition who is using medical marijuana, what must the employer do to accommodate that caregiver?
- Does the classification of the employee as an individual with a debilitating medical condition using medical marijuana qualify for leave under the FMLA (if the employer has 50 or more employees)?
- How do medical marijuana laws affect drug-free workplace and/or workplace drug testing programs?
Would “primary caregivers” be able to take FMLA leave?

Some states, such as Colorado, provide that employers need not accommodate the medical use of marijuana in any workplace. There is no such language in New Mexico’s law or regulations; however, authority from other states, along with a common sense interpretation of the ADA, indicate it is unlikely an employer would be required to allow, as a “reasonable accommodation,” the actual use of medical marijuana in the workplace. Despite being able to prohibit the actual use of medical marijuana at work, there may still be an obligation to accommodate an employee for an underlying condition, such as cancer, HIV, or glaucoma, which qualifies the individual for medical marijuana use. An accommodation process would include considering if the employee could perform the essential job functions, with or without a reasonable accommodation (not including medical marijuana use at work).

On the topic of direct threat, under the ADA, the concepts of which are used in interpreting the New Mexico Human Rights Act, an employer may remove an employee with a disability from a job if the employer can demonstrate that the individual would pose a “direct threat.” See 42 U.S.C. Section 12113(b). A direct threat is defined as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” Id. Under the ADA, the determination that an individual poses a “direct threat” must be based on an individualized assessment of the person’s present ability to safely perform the essential functions of the job. This determination should rely on the most current medical knowledge and/or the best available objective evidence. It is difficult to imagine a scenario where an employer would not be able to show successfully that performing functions, such as operating heavy machinery, would constitute a direct threat if an employee was under the influence of medical marijuana.
Caregiver issues, either under the FMLA or possibly under an employer’s leave policies, may be difficult to cleanly separate into matters involving only medical marijuana. Generally, if an individual has a condition sufficient to qualify for coverage under the medical marijuana statute, that person may well need the assistance of a caregiver for purposes unrelated to medical marijuana use. Where it is the caregiver, rather than the medical marijuana user, who is the employee, whether that employee should be allowed to take leave should be considered under the guidelines of the FMLA and/or employer policies. Appropriate medical certifications, separate and apart from any medical marijuana certifications, can be required from a health care provider so the employer can determine if FMLA leave or a similar type of leave is warranted.

IV. JUDICIAL INTERPRETATIONS OF MEDICAL MARIJUANA STATUTES

On the subject of drug testing, in 2005, the United States Supreme Court held that, under federal law, an employer may safely refuse to accept medical marijuana as a reasonable medical explanation for a positive drug test. *See Gonzales v. Raich*, 545 U.S. 1 (2005). This case involved the right of California patients to cultivate and possess prescribed marijuana.

In 2009, the Washington Court of Appeals considered the Washington Medical Marijuana Act in *Roe v. TeleTech Customer Care Mgmt., LLC*, 216 P.3d 1055 (Wash. App. 2009). The Court ruled for an employer who refused to hire a prospective employee who failed a pre-employment drug test allegedly due to her medical use of marijuana. Plaintiff had argued that the Act created an implied cause of action against employers by medical marijuana users because the Act prohibited marijuana users from being “penalized in any manner, or denied any right or privilege.” In rejecting this argument, the Court noted this sentence was taken out of context, applies only to those charged criminally and does not create any new substantive
employment rights. Under *Roe*, there is, therefore, support for the notion that employers need not accommodate off-site marijuana use, regardless of whether it is medical or recreational.

In *Ross v. RagingWire Telecommunications, Inc.*, 157 P.3d 200 (2008), the California Supreme Court ruled that a company rightfully fired an employee, holding a medical marijuana certification, who failed a drug test. The employer asserted the termination was proper since marijuana use is illegal under federal law. The California Supreme Court agreed holding that the state’s Act had nothing to do with employment law and that an employer may require pre-employment drug testing and take illegal drug use into consideration in employment decisions.

In 2008, in Oregon, the Court of Appeals had let stand an administrative decision that had granted a victory to a medical marijuana user. *See Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*, 186 P.3d 300 (Or. App. 2008). Earlier in 2010, the Oregon Supreme Court ruled that Oregon law does not require employers to accommodate the use of illegal drugs, including medical marijuana that is otherwise allowed under state law. The state Supreme Court thereby reversed both the administrative ruling and the Court of Appeals which had found for the employee. *See Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*, 230 P.3d 518 (2010). By this ruling, Oregon is now in agreement with California and Washington.

V. CONCLUSION

It is safe to say that the legal issues surrounding medical marijuana will remain in flux. Employers in New Mexico should be on the lookout for possible regulatory or legislative clarification or changes regarding an employer’s duty under the Compassionate Use Act. At this point, it remains clear that employers can continue to refuse to hire applicants or terminate employees who test positive for marijuana. Where there has not been a positive test, however, and an applicant or employee requests some type of accommodation, a determination of whether
medical marijuana use can be “accommodated” should be made on a case-by-case basis. Where there is medical marijuana use, there is likely to be some disability or medical condition protected by law. Consequently, it is not advisable that there be a “one size fits all” rule as to how all medical marijuana accommodation requests should be treated.