

# Are Employers Required to Accommodate Medical Marijuana?

By Nathan Pangrace

Medical marijuana has finally arrived. Over 53,000 Ohio residents have applied for and received medical marijuana cards. Ohio's first dispensaries have opened and begun selling marijuana recommended by physicians for the treatment of 21 different medical conditions, including common conditions such as cancer and chronic pain.

How should an employer handle an employee who is legally permitted to use medical marijuana?

The answer for employers in Ohio is clear, at least for now. Employers may still implement drug testing, drug-free workplaces, and zero tolerance policies. Ohio law does not require employers to accommodate employees or job applicants' use, possession, or distribution of medical marijuana. An employer can discharge, discipline, or refuse to hire an employee because of his or her medical marijuana use. Ohio law even denies unemployment benefits to employees who use medical marijuana in violation of a workplace policy.

Federal law is also straightforward. Marijuana is illegal under federal law and a Schedule 1 controlled substance. The Americans with Disabilities Act (ADA) does not protect employees' use of medical marijuana because it is an illegal drug. Federal courts have consistently held the ADA does not require employers to permit employees' use of medical marijuana as a reasonable accommodation. The Drug-Free Workplace Act also requires federal contractors and federal grantees to guarantee drug-free workplaces as a condition of receiving government contracts and grants. Businesses that employ individuals subject to federal regulations, such as DOT regulated drivers, must also maintain a drug-free workplace policy.

However, the issue of whether employers must accommodate medical marijuana in states outside Ohio is becoming increasingly complicated. Eleven states have legalized the recreational use of marijuana, while over 20 other states have legalized medical marijuana in some form. Most states have laws that are like the ADA and require employers to reasonably accommodate qualified employees with disabilities. For that reason, courts are increasingly being asked to decide whether an employer must accommodate medical marijuana under state law.

Recent court decisions, particularly from the east coast, have expanded the rights of employees that legally use medical marijuana. Courts in Massachusetts, Connecticut, and Rhode Island have recognized that an employer may be obligated to accommodate employees who use medical marijuana while off duty by making an exception to the employer's drug-free workplace policy. Other states, such as Arizona and Nevada, have passed legislation prohibiting discrimination against employees based on their use of medical marijuana. One federal court in Arizona recently held that an employer violated state law when it terminated an employee for failing a drug test because it could not establish that the employee was under the influence of marijuana while at work.

The key takeaway from these decisions is that employers with operations in multiple states must stay abreast of changing marijuana laws. Employers should re-examine their drug-free workplace policies and evaluate whether these policies comply with state disability discrimination and leave laws. No law prohibits employers from firing an employee who is under the influence of marijuana while at work. However, given the trend in recent state court decisions, employers may want to consider moving away from zero- tolerance drug testing policies and toward a policy that accommodates employees who legally use medical marijuana while off duty.

Roetzel's employment services practice group frequently counsels clients regarding drug-free workplaces and reasonable accommodation policies throughout the country. Please contact any of the listed attorneys for assistance.

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