

# ***Legal Implications of Medical Marijuana***

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# WARNING

- Possessing, using, distributing and/or selling marijuana is still a federal crime!
- This presentation is not intended to provide any guidance or assistance in violating federal law.



# Overview

- General overview of Pennsylvania's Law
- What does the law say about schools?
- How this effects employment and hiring issues?
- What to do about Students who want to use medical marijuana?
- What is on the horizon?
- Doesn't it matter that this is illegal under federal law and what about Rohrabacher-Blumenauer?

***What does Pennsylvania's  
Medical Marijuana Law Say?***

# *The Law*

- On April 17, 2016, Pennsylvania became the 24<sup>th</sup> state in the nation to allow for medical marijuana with the approval of The Medical Marijuana Act, 35 PS 10231.101 et seq.



# *What is permissible under the law?*

- May be in a pill, oil, gel, cream, ointment, vaporized or nebulized, liquid or tincture forms are permissible.
- Dry leaf or plant forms permitted with limitations.
- However, it may not be smoked or incorporated into an edible form.



# *Who can have medical marijuana?*

- Patient or a caretaker.
- To qualify as a patient, you must (1) have a serious medical condition, (2) meet the requirements for certification under the Act, and (3) be a resident of Pennsylvania.
- Under the law, are issued an identification card.

# *What qualifies as a serious medical condition?*

- Cancer
- HIV/AIDS
- Amyotrophic lateral sclerosis
- Parkinson's Disease
- Multiple Sclerosis
- Damage to the nerve tissue of the spinal cord with certain limitations
- Epilepsy
- Inflammatory Bowel Disease
- Neuropathies
- Huntington's Disease
- Crohn's Disease
- Post-Traumatic Stress Disorder
- Intractable Seizures
- Sickle Cell Anemia
- Glaucoma
- Certain severe and chronic or intractable pain that are neuropathic in origin
- Certain other types of chronic or intractable pain
- Autism
- Neurodegenerative Diseases
- Dyskinetic and Spastic Movement Disorders
- Anxiety

# ***Employment Law Issues***

## *What does the law say about employers?*

- (1) No employer may *discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee* regarding an employee's compensation, terms, conditions, location or privileges *solely on the basis of such employee's status as an individual who is certified to use medical marijuana.*
- 35 PS 10231.2103(b)(1)(emphasis added)

# *What does the law say about employers?*

- (2) Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment. This act shall in no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace **or** for working while under the influence of medical marijuana **when** the employee's conduct falls below the standard of care normally accepted for that position.
- 35 PS 10231.2103(b)(2)(emphasis added)

## *What does the law say about employers?*

- (3) Nothing in this act shall require an employer to commit any act *that would put the employer* or any person acting on its behalf *in violation of Federal law*.
- 35 PS 10231.2103(b)(3)(emphasis added)

# *What does the law say about employers?*

- While under the influence of medical marijuana employee cannot perform:
  - Duties at heights or confined spaces
  - “Any task which the employer deems life-threatening” to employee or other employees if done under the influence
  - “[A]ny duty which could result in a public health or safety risk” if done under the influence
- 35 PS 10231.510

## *What does the law say about employers?*

- An employee may not operate or be in physical control, if under the influence “with a blood content of more than 10 nanograms of active tetrahydrocannabinis per milliliter of blood in serum”:
  - Chemicals which require a permit by federal or state government
  - High-voltage electricity or other public utility
- 35 PS 10231.510

# *What about school employees?*

- Provides that PDE will issue regulations within 18 months of May 17, 2016. See 35 PS 10231.2104
- Regulations have not yet been issued
- However, other provisions related to employees would apply

# *Non-discrimination Provision*

- You cannot fire or discipline an employee simply because they are certified to use medical marijuana.
- Take steps to avoid appearance of a connection between discipline and certification.



# *Accommodation Issues*

- Not required to let people use medical marijuana at work.
- Not required to allow people to be under the influence of marijuana at work.
- But, what about drug testing?
- Need to be avoid confusion over why disciplined – ADA vs. marijuana.



## ***This raises other employment issues***

- If an employee tells you they use medical marijuana or even that they are eligible to, you now know something about their medical condition.
- Could you now have a duty under the ADA or Section 504 to accommodate that condition?
- Need to make sure that if you take disciplinary action, there cannot be the suggestion it was due to the disability!

## *Cases from other States*

- Barbuto v. Advanced Sales and Marketing, Inc., 78 N.E.3d 37 (Mass. 2017)
- Potential employee who had employment offer revoked due to positive drug test from medical marijuana use outside of work.
- Found no cause of action under Medical Marijuana Law, but did find a valid disability discrimination claim.
- Request for accommodation was not facially unreasonable and still a duty to engage in the interactive process.

## *Cases from other States*

- *Noffsinger v. SSC Niantic Operating Co. LLC*, 117 LRP 33592 (D. Conn. 2017)
- Employee who was fired for positive drug test.
- Found a viable cause of action under state medical marijuana law for an adverse employment action.
- Find nothing in federal law prohibits the hiring of medical marijuana users.

## *Cases from other States*

- Cotto v. Ardagh Glass Packing, No. 18-1037 (D.N.J. 2018)
- Employee was fired after tested positive for medical marijuana after a work-related accident.
- The court found that New Jersey's law did not provide any protections in the employment context.
- NJ statute is very different from PA's and more recent case calls this case in doubt.

## *Cases from other States*

- Chance v. Kraft Heinz Food Co., (Del. Super. Ct. 2018)
- Held a terminated employee could sue under Delaware's Law because it – like Pennsylvania's – includes an anti-discrimination provision.
- The Court also noted that providing accommodations to the employee would not violate federal law, because it would not require the employer to participate in illegal activity.

# *What is on the horizon?*

- Regulations were to be issued in the fall of 2017, but has not happened yet.
- PDE has issued temporary guidance for students, but not for employees.
- Likely to see an increase in claims that the use of marijuana is for medical purposes.
- Likely to see an increase request from employees to use this in school especially now that you can buy it.
- May face suit for disability discrimination or directly for violated Pa's state law.

# *What schools should do*

- Review and revise policies and procedures to address these issues.
- For example provisions that say illegal drugs may not cover marijuana or at least be unclear.
- Make sure policies and procedures are consistently followed in order to avoid potential discrimination claims.
- Nurses may be asked to determine if an employee is under the influence of marijuana. Whitemore v. Wal-Mart Stores, Inc.
- Be on the look out for the draft regulations and provide feed back.

# ***Student Issues***

## *Limited Guidance in the Law*

- Some states have provided limitations or prohibitions as to use at school, while others have specifically allowed it.
- Pennsylvania's law states that PDE is to issue regulations within 18 months of May 17, 2016. 35 PS 10231.2104.
- Regulations have not been issued yet and it is unclear what they will say.

# *Temporary Guidance from PDE*

**Recommended Guidance:** A parent, legal guardian or caregiver *may* administer medical marijuana to their child/student on school premises provided that the parent, legal guardian or caregiver: (1) provides the school principal with a copy of the Safe Harbor Letter; and (2) notifies the school principal, in advance, of each instance on which the parent or caregiver will administer the medical marijuana to the child/student. The school principal shall provide notification to the school nurse in each instance a parent or caregiver will be administering medical marijuana to the child/student as well. The parent/caregiver shall follow all school protocols applicable to visitors to the school during the school day.

A parent, legal guardian or caregiver shall bring to the school and administer the medical marijuana to their child/student without creating a distraction, and shall promptly remove any excess medical marijuana and related materials from the school premises after the administration of medical marijuana is complete. The school shall provide a secure and private location for the parent/legal guardian/caregiver to administer the medical marijuana to the student.

Students themselves shall not be permitted to possess any form of medical marijuana at any time on school property or during any school activities on school property.

## *What have other states done?*

- A New Jersey case found that there is no requirement to allow use of medical marijuana on school grounds under the IDEA. Maple Shade Township Bd. of Educ., 115 LRP 54740 (SEA NJ 2015).
- New Jersey has since passed a law requiring that it be permitted on school grounds.

# *What have other states done?*

- A federal judge in Illinois ordered it under Section 504, but did not issue an opinion explaining. See Surin v. Schaumburg Sch. Dist. 54.
- A Hearing Officer in California directed a school district to permit it on school grounds finding that without it, the student could not attend school. Rincon Valley Union Elementary School District, 118 LRP 39709 (Cal. SEA 2018).

# *Student Issues*

- Controlling students having and using medical marijuana on school grounds.
- Referral for IDEA or Section 504 Evaluation?
- Disciplining students for the use/possession of such items. See e.g. Eugene Sch. Dist. 104 LRP 42399 (Or. SEA 2004)(finding discipline permissible).
- Do you need to permit it under Section 504 or IDEA?
- If you do allow it, need to worry about liability, insurance and possible labor issues.

# ***Federal Law Implications***

# *What about federal law?*

- Still illegal!
- Could attach to federal grants and the like and need to double check.
- May raise issues under Drug Free Schools and Campuses Act.
- Wide discretion to federal agencies as to what they can do about this.
- DOT has ruled this is not a legitimate medical reason for a positive drug test.

# *What about Rohrabacker- Blumenauer?*

- Attachment to federal budget that prohibits use of federal funds to prosecute people using medical marijuana.
- To be eligible, must be in strict compliance with the state law. U.S. v. Pisarski
- Unclear if you can do that in Pa. in schools.
- Has recently been called into question in Congress and DOJ wants it ended.

# *What is on the horizon on federal law?*

- President Trump has stated he supports state laws to permit it, but also indicated federal government can still go after those who use it.
- Congress has given mixed messages on the issue ranging from attempts to revise federal law to permit it to efforts to crack down on it.
- Head of the FDA has suggested changes will need to be made given number of states that have legalized it.
- Should be prepared for all eventualities and stay informed of changes!

# ***QUESTIONS***

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