

EMPLOYMENT LAW COMMENTARY

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WHERE THERE'S SMOKE, SHOULD THERE BE FIRE? AN ANALYSIS OF EMPLOYER TERMINATION RIGHTS FOR EMPLOYEE OFF-DUTY MARIJUANA USE

By [Debra Urteaga](#)

INTRODUCTION

With the recent increase in the number of states that have “legalized” or decriminalized some form of marijuana use, more and more employers have asked themselves whether it continues to be permissible to terminate employees who use marijuana off-duty.

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The simple answer is “yes,” but whether or not an employee has any form of protection depends on the particular state in which the employee works. Twenty-seven states and the District of Columbia currently have laws permitting the use of medical marijuana under certain circumstances, but only nine of these states (Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, and Rhode Island) provide any employment protections for marijuana users.

Still, under federal law, marijuana is and remains an illegal drug,¹ meaning that any state protection regarding an employee’s marijuana use may be merely illusory or, at best, temporary, until federal law is amended to say otherwise.

THE FEDERAL BACKDROP

In 2005, the U.S. Supreme Court ruled that, under the Commerce Clause, Congress had the power to criminalize the production and use of homegrown marijuana even in states with laws allowing for medicinal use of marijuana.² Despite this ruling, the Supreme Court did not preempt state laws that decriminalized marijuana use and, to date, many states continue to pass legislation that seems to be in direct contravention of the Supreme Court’s ruling.

STATES PLAY BY THEIR OWN RULES

A. Medical Marijuana Is Growing

To date, 28 jurisdictions have legalized or decriminalized marijuana use for medicinal purposes.³ These state laws, however, either omit or expressly exclude protection against marijuana use during working hours, on public property, or if it would create a safety hazard.

B. Statutory Employee Protections

Nine state statutes expressly provide for employee protections, usually from discrimination on the basis of being a cardholder or for testing positive for marijuana during an employment drug screening. Some states even provide that an employer must accommodate a medical marijuana patient.

Below is a list of current state statutes providing employee protections:

- Arizona: “An employer may not discriminate against a person based upon the person’s status as a registered qualifying patient or testing positive for marijuana components.” Ariz. Rev. Stat. Ann. § 36-2801, *et seq.*
- Connecticut: “An employer may not refuse to hire, discharge, penalize or threaten an employee solely on the basis of the person’s status as a qualifying patient or primary caregiver.” Conn. Gen. Stat. § 21a-408, *et seq.*
- Delaware: “An employer may not discriminate against a person based upon the person’s status as a registered qualifying patient or testing positive for marijuana components . . .” Del. Code Ann. Tit. 16 §§ 4903A, 4905A.
- Illinois: “An employer may not discriminate against a person based solely upon the person’s status as a registered qualifying patient or registered designated caregiver . . .” 410 Ill. Comp. Stat. § 130/25, *et seq.*
- Maine: “An employer may not discriminate against a person based solely upon the person’s status as a qualifying patient or primary caregiver.” Me. Rev. Stat. Ann. Tit. 22 §§ 2383-B, 2423-A, 2423-E.
- Minnesota: “[A]n employer may not discriminate against a person based on their status as a registered qualifying patient or testing positive for cannabis components or metabolites . . .” Minn. Stat. Ann. § 152.22, *et seq.*
- Nevada: “[T]he employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card . . .” Nev. Rev. Stat. §§ 453A.200, 453A.300.
- New York: “Being a certified patient constitutes having a ‘disability’ under several New York state laws.” N.Y. Pub. Health Law 3360, *et seq.*
- Rhode Island: “An employer may not penalize a person solely on the basis of his or her status as a cardholder.” R.I. Gen. Laws §§ 21-28.6-4, 21-28.6-7.

THE EFFECT ON EMPLOYERS

A. Zero-Tolerance Policies

As a result of the recent surge in lax marijuana laws, many employers are confused as to whether their zero-tolerance drug policies remain permissible and enforceable. The good news is that, so long as marijuana use remains illegal under federal law, employers are, for the most part, allowed to implement any policy they choose. In fact, most state laws carve out exemptions for employers and expressly authorize policies prohibiting marijuana use on the premises or on-the-job.⁴

As noted above, however, some states, while authorizing termination or discipline for marijuana use or intoxication, prohibit *discrimination* against individuals on the basis of their having medical marijuana registration cards.

Below are a few notable cases demonstrating support for an employer's right to terminate employees for violating employment policies prohibiting marijuana use:

- *Roe v. TeleTech Customer Care Management*, 257 P.3d 586 (Wash. 2011). In *Roe*, the plaintiff sued TeleTech for terminating her after she failed a drug test. At that time, Washington had enacted the Medical Use of Marijuana Act (MUMA), which permitted the use of medical marijuana under state law. The Washington Supreme Court nevertheless ruled that MUMA does not protect medical marijuana users from adverse hiring or disciplinary decisions based on an employer's drug-testing policy. It further noted that MUMA "does not provide a private cause of action for discharge of an employee who uses medical marijuana" because it would not make sense "to allow an employee to engage in illegal activity" in the process of finding a public policy exception to the at-will doctrine. *Id.* at 588, 597.
- *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012). Plaintiff, a medical marijuana card holder, tested positive for marijuana after he was injured on the job and was required to submit to a drug test in accordance with company policy. Wal-Mart discharged him as a result, despite plaintiff's status as a legal cardholder.

Reform of the German Parental Allowance and Parental Leave Act Strengthens Rights of Employees With Children

By Dr. Lawrence Rajczak

German employees enjoy a high level of protection and benefits when it comes to parental leave. They are statutorily entitled to a long parental leave period of up to three years. Instead of going on full leave, parents can also—subject to certain conditions—unilaterally reduce their working hours for the same period of time. In addition, German employees are granted a government-paid allowance to make up for the loss of income during those times in which they are on leave or on a reduced working schedule (the so-called "*Elterngeld*"). The amount paid ranges from EUR 300 to EUR 1800 per month, depending on the income of the relevant parent during the last 12 months before birth. Until now, the maximum duration of entitlement was 12 months, or—if both parents went on a minimum of two months' parental leave—14 months for both parents combined.

The German parliament has now enacted a reform of these rights, aiming to further improve the compatibility of work and family.

One key element of the reform is the introduction of the so-called "Parental Allowance PLUS" model ("*Elterngeld PLUS*"). The new model now allows parents to "stretch" the period of government subsidized leave to 28 months by allowing them to convert one month of "full" allowance entitlement to two months of a partial allowance that is reduced by half. In addition, as an incentive for parents to share childcare responsibilities, the law grants an additional

Plaintiff then filed a claim alleging wrongful discharge in violation of Michigan’s Medical Marihuana Act. The court rejected plaintiff’s claims and held that the statute only provides protection against criminal prosecution; it does not regulate private employment.

- *Coats v. Dish Network, LLC*, 303 P.3d 147 (Colo. App. 2013), cert. granted, No. 13SC394, 2014 (Colo. Jan. 27, 2014). Plaintiff, a registered medical marijuana patient, was terminated when he tested positive for marijuana in violation of his employer’s drug policy. Plaintiff argued that Colorado’s Lawful Activities Statute prohibits employers from discharging an employee for “engaging in any lawful activity off the premises of the employer during nonworking hours.” The Court concluded that in order for the statute to provide plaintiff protection, his conduct must have been lawful under both state and federal law. Because the use of medical marijuana is illegal under federal law, the activity could not be “lawful” under Colorado state law. The statute was therefore not a bar to plaintiff’s discharge.⁵

Thus, because marijuana is illegal under federal law, employees may be disciplined or terminated for marijuana use even if a state statute prohibits discipline for engaging in lawful activity outside of work. Employers should nevertheless ensure that their drug-related policies correspond to their intended enforcement goals. See *Dickenson-Russell Coal Co. v. Int’l Union, United Mine Workers of Am.*, 840 F. Supp. 2d 961 (W.D. Va. 2012) (upholding arbitrator’s order reinstating employee because the employer’s policy did not provide for automatic termination upon positive drug testing).

B. Disability Accommodations

Another issue that has frequently been litigated is whether an employer must accommodate employees who are lawfully prescribed marijuana for medical use, particularly because it usually involves an accompanying disability.

As one would expect, the Ninth Circuit has ruled that medical marijuana use is not protected by the Americans with Disabilities Act (ADA).⁶ In *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir.

period of parental allowance, if both parents work part-time from 25 to 30 hours per week (the so-called “*Partner Bonus*”), thus bringing the possible maximum of government-subsidized leave up to 28 months for both parents combined.

The reform also gives parents more flexibility with regard to when, and in what kind of intervals, they can make use of their parental leave entitlement. While the old law generally forced most employees to go on parental leave during the first three years of their child’s life, parents may now take up to 24 months of parental leave between the child’s third and eighth birthday—now without the employer’s consent, which had always been required for such a transfer under the old regulations. Parental leave can now also be split up into three periods instead of only two, as was the case under the old rules. The employee is, however, still obliged to commit to a leave schedule for the first two years when making his or her first request for parental leave.

Overall, the reform will considerably strengthen and further extend the (already very strong) rights of German employees with children. Before the reform, dealing with these rights had already placed a considerable burden on employers—particularly on smaller businesses—who need to continuously concern themselves with finding temporary replacements for those employees on parental leave. In the future, handling parental leave requests will likely become even more onerous, as it is to be expected that the additional incentive of the new allowance model, paired with the further flexibility of parental leave, will in fact, as intended by the legislators, lead to more employees making use of their rights to an even further degree.

The changed regulations will become effective for parents with children born on or after July 1, 2015.

2012), plaintiffs, Costa Mesa residents and medical marijuana patients, sued the city of Costa Mesa for passing an ordinance that banned medical marijuana dispensaries within the city limits. Plaintiffs alleged that the city ordinance violated Title II of the ADA. The district court denied injunctive relief, holding that Title II of the ADA, which “prohibits discrimination in the provision of public service,” does not protect discrimination on the basis of marijuana use. Plaintiffs argued that a plain reading of Title II creates an exception, protecting “professionally supervised drug use carried out under any legal authority.” The Ninth Circuit rejected the argument and affirmed the lower court’s ruling, noting that because the ADA includes marijuana use under its illegal drug exclusion, medical marijuana use, even if it is permitted by state law and/or authorized by a medical professional, is not protected by Title II of the ADA.

Similarly, in *Ross v. RagingWire Telecomms., Inc.*, 42 Cal. 4th 920 (Cal. 2008), the California Supreme Court held that California’s Fair Employment and Housing Act (FEHA) did not provide protection to medical marijuana users, despite the fact that California “legalized” marijuana through the enactment of the Compassionate Use Act in 1996. In that case, RagingWire terminated plaintiff for testing positive for marijuana despite having been aware that he was a qualified medical marijuana patient. Thus, the plaintiff filed an action under FEHA, which requires California employers to reasonably accommodate qualified persons with disabilities unless it would result in undue hardship. The California Supreme Court held that “[n]o state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law.” California had only “decriminalized” rather than “legalized” marijuana, and the California legislation had no effect. Thus, the court noted, “FEHA does not require employers to accommodate the use of illegal drugs.”⁷

Many state statutes similarly provide that employers are not required to accommodate medical marijuana patients.⁸

THINGS TO CONSIDER

A. Unionized Employees

Unionized employees are parties to collective bargaining agreements that contain their own policies regarding drug testing, discipline, and termination and provide for “just cause” termination. In addition, their wrongful termination and discrimination claims are usually heard by more lenient arbitrators rather than the courts.

This not only provides unionized employees with stronger protection against termination, but also increases the likelihood that a discharge will not be upheld by the arbitrator. *See Premier Mfg. Support Servs. Inc.*, 127 Lab. Arb. Rep. (BNA) 1679 (2010) (concluding that the employer did not have just cause to terminate employee because the union and the employer had not bargained over drug testing); *County of Solano*, 128 Lab. Arb. Rep. (BNA) 1703 (2011) (determining that the county did not have just cause because it failed to show a nexus between the employee’s usage and her job performance); *Freightliner, LLC v. Teamsters Local 305*, 336 F. Supp. 2d 1118 (D. Or. 2004) (refusing to follow arbitrator’s ruling that the employer did not establish “just cause” to terminate plaintiff, who the arbitrator concluded was protected under Oregon’s Medical Marijuana Act).

B. Testing Issues

For employers who may choose to implement a more relaxed drug-testing policy, another wrinkle is the ability to verify whether an employee is intoxicated at the time of testing. Unlike blood alcohol-level tests, for instance, there is currently no set measure that is used to determine how much marijuana is in someone’s system. Thus, employers do not have a sure-fire way of testing an employee to determine whether the employee is “impaired” or “under the influence” while on the job. As such, employers should consider providing management training to learn the potential signs of marijuana intoxication.

C. Unemployment Benefits

Finally, state unemployment agencies usually apply a “willful misconduct” standard for benefits disqualifications and, thus, tend to award unemployment benefits to terminated medical marijuana users who would not find wrongful termination protection for their marijuana use in

a lawsuit. *See Burger v. Unemployment Comp. Bd. of Review*, 801 A.2d 487 (Pa. 2002); *Sosa v. Indus. Claim Appeals Office of State*, 259 P.3d 558 (Colo. App. 2011) (claimant not disqualified to receive unemployment benefits by reason of a positive marijuana test). Thus, employers should not automatically assume that federal prohibitions against marijuana use will preclude an employee's right to obtain unemployment benefits.

IN THE PIPELINE: *COATS V. DISH NETWORK*

On September 30, 2014, the Colorado Supreme Court heard oral argument in *Coats v. Dish Network*, discussed above. In taking up the case, the Colorado Supreme Court announced on January 27, 2014 that it will decide: "Whether the Lawful Activities Statute, section 24-34-402.5, protects employees from discretionary discharge for lawful use of medical marijuana outside the job where the use does not affect job performance [and] [w]hether the

Medical Marijuana Amendment makes the use of medical marijuana 'lawful' and confers a right to use medical marijuana to persons lawfully registered with the state."⁹ Employers are advised to follow the progression of the case as it could result in nationwide changes regarding the legality of state marijuana-protection statutes.

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1 The Controlled Substances Act, 21 U.S.C. § 801, *et seq.*

2 *Gonzalez v. Raich*, 545 U.S. 1 (2005).

3 Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, Washington, Wisconsin, and Washington D.C.

4 *See, e.g.*, Wash. Rev. Code § 69.51A.005, *et seq.* ("an employer may terminate an employee based on a failed drug test even where the employee is a qualifying patient engaged in only at-home use of medical marijuana"); N.H. Rev. Stat. Ann. §§ 126-X:2, 126-X:3 ("An employer retains the ability to discipline an employee for ingesting marijuana in the workplace or for working while under the influence of marijuana").

5 As more fully analyzed below, the Colorado Supreme Court granted writ of certiorari and is expected to rule on the enforceability of Colorado's marijuana laws.

6 *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012).

7 *See also Emerald Steel Fabricators, Inc., v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010) (holding that an employer is under no obligation to accommodate an employee's use of medical marijuana under federal law).

8 *See, e.g.*, Alaska Stat. § 17.37.010, *et seq.* ("An employer is under no obligation to accommodate the medical use of marijuana in any workplace"); Wash. Rev. Code § 69.51A.005, *et seq.* (same); R.I. Gen. Laws §§ 21-28.6-4, 21-28.6-7 (same); Or. Rev. Stat. §§ 475.319, 475.340 (same); N.J. Stat. Ann. § 24:6I-1, *et seq.* (same).

9 http://www.courts.state.co.us/Courts/Supreme_Court/Case_Announcements/Files/2014/FE473EJAN.27.14.pdf.

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