
# STOKED ABOUT MARIJUANA RELATED ACCOMMODATIONS IN THE WORKPLACE?

## THE PROBLEMS WITH NRS 453A.800 REQUIRING ACTION BY THE 2015 NEVADA LEGISLATURE

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In what can only be deemed an ironic coincidence, effective on April Fool's Day 2014, Nevada employers are legally mandated to provide reasonable workplace accommodations to employees using medical marijuana. A dark haze surrounds this new statutory obligation, thanks to the hastily constructed language used by the 2013 Nevada Legislature to amend NRS 453A.800, which confounds employers and employees alike as to its full scope and application.

Employers and employees will find no help from the Nevada Division of Public and Behavioral Health (the government entity tasked with implementing the state's medical marijuana system), as the division stated on October 20, 2014, that it will not take any action related to NRS 453A.800, citing the absence of specific authority from the Nevada Legislature to do so.[1] Yet, the Nevada Legislature appears poised to consider legalizing recreational marijuana during its 78th Session, which began on February 2, 2015, with little attention given to what could become a burgeoning legal quagmire unless the Legislature gets "stoked" about sorting out the confusion it created by requiring the accommodation of employees using medical marijuana.

The prior version of NRS 453A.800 expressly provided that an employer was not required to accommodate the medical use of marijuana in the workplace; this was consistent with the amendment to Nevada's Constitution compelling the Legislature to provide laws for the use and distribution of medical marijuana, but expressly excluding requirements

for the "accommodation of medical use in a place of employment."[2] The present version of NRS 453A.800, while initially providing that an employer is not required "to allow the medical use of marijuana in the workplace," or "to modify the job or working conditions of a person who engages in the medical use of marijuana that are based upon the reasonable business purposes of the employer..."[3] now contains language stating that:

> "...the 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, provided that such reasonable accommodation would not: (a) [p]ose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or (b) [p]rohibit the employee from fulfilling any and all of his or her job responsibilities."[4]

These modifications to NRS 453A.800 were added as an apparent afterthought to Senate Bill 374 — legislation rushed through the 2013 Nevada Legislature to add a means of lawful distribution to Nevada's existing medical marijuana laws before the Nevada Supreme Court ruled on several pending appeals concerning the Legislature's existing self-grow plan of supply and its tacit adoption of a "don't ask, don''t tell" policy.[5] In fact, the amendments to NRS 453A.800 were not part of the original draft of Senate Bill 374; they were added later by the Senate Committee on the Judiciary and supplemented by the Assembly's Committee on the Judiciary.

## Internal Inconsistencies

It is clear to many that when the 2013 Legislature decided to compel employers to make reasonable accommodations for the medical needs of marijuana-using employees, it ventured well beyond any mandate imposed by Article 4, Section 38 of the Nevada Constitution. Setting that issue aside for the moment, when focusing on the mechanics of this new accommodation obligation, one is immediately struck by a conspicuous inconsistency within NRS 453A.800. On one hand, the statute provides that an employer does not need to modify those "job or working conditions" that are "based upon the reasonable business purposes of the employer," when providing an accommodation (language added by the Nevada Senate), but, on the other hand, states that an accommodation is not reasonable if it would prohibit an employee from fulfilling any and all job responsibilities (language added by the Nevada Assembly). Two different accommodation standards are expressed in NRS 453A.800(3). Which one controls? If this issue ends up in litigation, the Nevada courts are obligated to give each of the terms their plain meaning and consider the statutory provisions as a whole, so as to read them in a way that would not render words or phrases superfluous or nugatory;[6] yet harmonizing these two distinct standards will be difficult.

## Undefined Scope of Protected Individuals

Nowhere in NRS Chapter 453A is the term employee defined, leaving open the issue of whether NRS 453A.800(3) applies to applicants for employment, so as to require employers to modify their zero-tolerance, pre-employment drug testing policies and reasonably accommodate applicants who test positive for marijuana due to authorized medical use. However, it is highly doubtful NRS 453A.800(3) can be interpreted to apply to applicants, given that Nevada's equal employment laws, such as NRS 613.330, expressly call out applicants for employment as a separate type of protected person from employees, as do other federal fair employment statutes like Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, *Et seq*.

## Vague and Undefined Terms

NRS Chapter 453A also does not define the type, or extent, of reasonable business purposes employers might have that would allow them to decline the modification of a medical-marijuana-using employee's job duties. Neither does it explain what constitutes a sufficient "threat of harm or danger," or "undue hardship," making it difficult to determine the extent of an employer's accommodation obligations. The issue of marijuana impairment is not specifically addressed either, and no standards are provided to guide employers in making accommodation and disciplinary decisions related to employee use of medical marijuana. Arizona recently addressed similar ambiguities associated with its medical marijuana statutes by passing much-needed supplemental legislation in 2011 — the Nevada Legislature should consider doing the same.[7]

## No Enforcement Mechanism

One of the most glaring problems with NRS 453A.800 is the absence of any method of enforcement, along with the lack of express language providing employees with a private right of action. Employees and plaintiffs' counsel are left to try out various legal theories that may be ill-suited to effectively address a violation. An aggrieved employee could argue that the statute provides for an implied private cause of action, but such an argument requires an analysis of legislative intent, a difficult task given the dearth of legislative history. Further, as the Nevada Supreme Court has found in cases such as *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 959 (2008), "the absence of an express provision providing for a private cause of action to enforce a statutory right strongly suggests that the Legislature did not intend to create a privately enforceable judicial remedy." Other common law

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causes of action for tortious conduct in violation of public policy or negligence per se might be viable, but the courts are reluctant to recognize new public policy tort theories, and the ambiguous statutory language makes it difficult to define the appropriate standard of conduct.

To avoid such problems, at least one state legalizing the use of medical marijuana has mapped out an enforcement process for employees who are allegedly discriminated against by their employers, based on their lawful use of medical marijuana. Under the Compassionate Care Act, signed into law by New York's governor on July 7, 2014, certified patients, using marijuana in the course of treatment for certain serious conditions, have express employment anti-discrimination protections, as they are deemed to have a disability protected by New York's civil rights laws.[8]

On top of lacking a state enforcement mechanism for NRS 453A.800, Nevada employees using medical marijuana, even for disabling conditions, have no federal protections to fall back on, as marijuana remains an illegal drug under the Controlled Substances Act, 21 USC § 801 *Et seq*. As such, the United States Court of Appeals for the Ninth Circuit has concluded that the Americans with Disabilities Act (ADA) of 1990, does not protect against discrimination on the basis of medical marijuana use, regardless of its permissibility under state law.[9]

## *Tip of the Iceberg*

The above issues are just the most glaring problems associated with NRS 453A.800's new accommodation obligation and represent only the tip of the proverbial iceberg. The potential conflicts between NRS 453A.800's accommodation obligation and both state and federal occupational safety laws, as well as the potential conflicts with the state's gaming regulatory process, call for thoughtful consideration, as do the more practical problems of identifying reasonable impairment standards and acceptable testing methods for determining when someone is unduly under the influence of marijuana in the workplace. Of further concern are reports that Senator Tick Segerblom plans to bring forward all of the recommendations submitted by a subcommittee of the Advisory Committee on the Administration of Justice, for legislative hearings, including a recommendation to remove all prohibitions in the employment context for employees lawfully using medical marijuana.10 Hopefully, this time around, the Nevada Legislature will carefully evaluate and fix the many shortcomings of NRS 453A.800 before blazing forward on the issue of recreational marijuana use. NL

1. Letter from Catherine Cortez Masto, Nevada Attorney General, on behalf of the Division, to Nicole A. Young, Esq. of Kamer Zucker Abbott (Oct. 20, 2014) (on file with authors).
2. *Compare* NRS 453A.800(2) (2013) *with* Nevada Constitution, Art. 4, Sec. 38(2)(b).
3. NRS 453A.800(2), (3) (emphasis added).
4. NRS 453A.800(3) (emphasis added).
5. *See* S.B. 374, 77th Leg. (Nev. 2013); *State v. Schwingdorf*, Case Nos.: 60464, 60466, 2014 WL 502557 (Nev. Jan. 24, 2014) (unpublished order).
6. *Southern Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (internal citations omitted).
7. *See* H.B. 2541, 50th Leg., Reg. Sess. (Ariz. 2011).
8. *See* N.Y. PUB. HEALTH LAW § 3360(3),(7); § 3369(2) (McKinney 2014); Michael J. Volpe & Nicholas M. Reiter, Five Things NY Employers Need to Know About Legal Marijuana, *Forbes* (July 8, 2014, 10:06 AM), http://onforb.es/1n3OWJX.
9. *James v. City of Costa Mesa*, 700 F.3d 394, 397 (9th Cir. 2012).
10. Sean Whaley, *Legislators to Face Pot Challenges*, *Las Vegas Review Journal*., Nov. 3, 2014, at 1B, 6B.

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