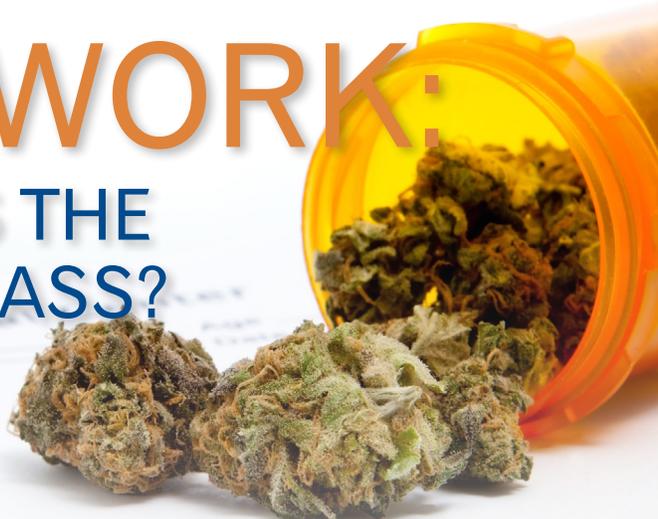


WEED AND WORK:

ARE MARIJUANA USERS THE NEWEST PROTECTED CLASS?

BY DALE L. DEITCHLER, ESQ., AND WENDY M. KRINCEK, ESQ.



While the federal Controlled Substances Act (CSA)¹ criminalizes marijuana,² at least 44 states, including Nevada, have enacted medical marijuana laws purporting to legalize marijuana for medicinal use. Nevada's medical marijuana statute decriminalizes medical marijuana usage and purports to create significant employee protections.

NRS 453A.800 requires that employers 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, if such reasonable accommodation would not:

- Pose a threat of harm or danger to persons or property, or impose an undue hardship on the employer; or
- Prohibit the employee from fulfilling any and all of his or her job responsibilities.

Notably, this statute does not require any employer to allow the use or possession of marijuana in the workplace. The statute also does not require an employer 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.

Nevada also recently joined the growing number of states that have decriminalized recreational marijuana usage. Nevada's recreational marijuana law, however, provides no affirmative employment law protections.

These developments have left both employers and employees in a haze of uncertainty regarding their rights and obligations to regulate and/or use marijuana in and outside of the workplace, with some employees mistakenly believing the decriminalization of marijuana invalidates employer policies prohibiting the use or possession of marijuana in the workplace. Some of that haze can be clarified, but some will remain until the Nevada Supreme Court provides definitive guidance. Here is some of what we know:

No Protection for Possession or Use of Marijuana on Company Premises or While on Duty

Nevada's laws permitting marijuana for both medical and recreational uses make clear that employers can prohibit the use or possession of marijuana while on duty and in the workplace. Nevada's Regulation and Taxation of Marijuana Act, regarding the legalization of recreational use, provides that the act does not prohibit an employer, "from maintaining, enacting, and enforcing a workplace policy prohibiting or restricting actions or conduct otherwise permitted under this chapter." NRS

453D.100(2). Likewise, in 2013 the Nevada Legislature clarified that Nevada's medical marijuana legislation does not require an employer to allow medical use of marijuana in the workplace. NRS 453A.800(2).

Federal Law Legal Standards and Limitations

No Protection for Recreational Use

Nevada's decriminalization of the recreational use of marijuana did not in any way impact Nevada employers' ability to maintain substance abuse policies, including those that call for the termination of employees testing positive for marijuana. Employers that maintain policies prohibiting the use or possession of marijuana in the workplace, or being under the influence of marijuana in the workplace, remain free to enforce those policies and take disciplinary action against employees violating those policies through recreational use of marijuana.

Arguably No Protection Under the Americans with Disabilities Act

The Americans with Disabilities Act (ADA) prohibits employers from discriminating against employees and applicants who are disabled, and it requires that employers provide reasonable accommodation to disabled employees and applicants. The question then arises whether the ADA requires an employer to make an exception to its substance abuse policies for disabled employees who use medical marijuana.



Given marijuana's illegal status at the federal level, courts have so far held that employers have no duty to accommodate its use under the ADA, as the ADA provides no protection for "current" illegal drug users (and marijuana remains illegal under federal law). See, e.g., *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012), cert. denied, 2013 U.S. LEXIS 3912 (2013). As a caveat, while the ADA appears to have a relevant exclusion from the definition of "illegal" drugs "taken under supervision by a licensed healthcare professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law," 42 U.S.C. § 12111 (6)(A), marijuana is not a substance that can be prescribed or authorized under federal law, nor has any court applied the exclusion in that manner.

Accordingly, we believe the ADA does not require that employers accommodate the use of medical marijuana by employees, notwithstanding this exclusion. However, state disability laws could be interpreted to provide protection.

Motor Carriers Subject to DOT Drug Testing Regulations Cannot Excuse Positive Marijuana Test Results Based on Use Under Nevada's Marijuana Laws

The U.S. Department of Transportation (DOT) has extensive regulations mandating drug testing of certain commercial motor vehicle drivers. DOT has repeatedly made clear that covered motor carriers may not accept marijuana use that occurs under state laws as a basis to excuse a positive drug test on a DOT-mandated test.

continued on page 13



WE KNOW HOW TO MAKE AN IMPACT

THEY MAKE THE IMPACT POSSIBLE

PARTICIPATING FINANCIAL INSTITUTIONS

- American First National Bank
- Bank of America
- Bank of George
- Bank of Nevada
- Bank of the West
- BMO Harris Bank
- Citibank
- City National Bank
- East West Bank
- Financial Horizons Credit Union
- First Foundation Bank
- First Independent Bank of Nevada
- First Savings Bank
- First Security Bank of Nevada
- Heritage Bank
- JPMorgan Chase & Co.
- Kirkwood Bank of Nevada
- Meadows Bank
- Mutual of Omaha
- Nevada Bank & Trust
- Nevada State Bank
- Northern Trust Bank
- Plaza Bank
- Plumas Bank
- Royal Business Bank
- Silver State Schools Credit Union
- Town and Country Bank
- Umpqua Bank
- US Bank
- Valley Bank of Nevada (BNLV)
- Washington Federal
- Wells Fargo

EVERY DOLLAR

generated from IOLTA is donated by Nevada's participating financial institutions to the Nevada Bar Foundation.

\$2.5 MILLION

in IOLTA dollars is granted to qualified legal aid providers. Annually, that money provides

ACCESS TO JUSTICE

for **37,000 NEVADA HOUSEHOLDS** and for **38,000 LEGAL MATTERS** including:

9,500 DOMESTIC VIOLENCE cases

8,400 FAMILY LAW cases

6,400 HOUSING cases

1,400 CHILD ABUSE cases

LEARN MORE

about the work of the Nevada Bar Foundation and how you can give at: www.nevadabarfoundation.org

WEED AND WORK

Medical Marijuana Usage is Largely Irrelevant to the Family Medical Leave Act

The Family Medical Leave Act (FMLA), in part, obligates employers to provide up to 12 weeks of unpaid, job-protected leave in a 12-month period, due to the serious health condition of an employee. In essence, the only “accommodation” mandated by the FMLA is time off from work. While there may be an obligation to provide leave due to the underlying medical condition, including for treatment that could potentially include the use of medical marijuana, there is no obligation to accommodate medical marijuana usage explicitly in the FMLA. For example, there is no obligation under the FMLA to allow an employee impaired by medical marijuana to work, to provide an exception to a policy prohibiting possession or use of medical marijuana on company premises or while on duty, or to provide an exception to a substance abuse testing policy. Although terminating an employee for testing positive for marijuana should not give rise to a claim for violating the FMLA, state law considerations, discussed below, should also be taken into account.

State Law Protections for Marijuana Use by Employees are Less Clear

Two important issues related to marijuana usage by employees in Nevada remain less than clear. First, it is unclear whether NRS 613.333 protects employees’ lawful, off-duty use of marijuana, both medical and recreational. That statute makes it an unlawful employment practice for an employer to refuse to hire an applicant or to terminate or discriminate against an employee because the employee “engages in the lawful use in this state of any product outside the premises of the employer during the employee’s nonworking hours, if that use does not adversely affect the employee’s ability to perform his or her job or the safety of other employees.” Nevada attorneys practicing in the area of employment law continue to debate whether this statute prohibits the termination of an employee for off-duty use of marijuana, largely focusing on the meaning of the “in this state” language in the statute, given that marijuana remains illegal under federal law.

In 2015, the Colorado Supreme Court ruled that its similar, but not identical, lawful activities statute did not render medical marijuana usage a “lawful activity,” because marijuana remains illegal under federal law. *Coats v. Dish Network*, 350 P.3d 970 (Colo. 2015). More recently, in *Noffsinger v. SSC Niantic Operating Company LLC*, d/b/a Bride Brook Nursing & Rehabilitation Center, a Connecticut federal district court held that various federal laws prohibiting use and sale of marijuana do not preempt Connecticut’s Palliative Use of Marijuana Act, which protects employees and job applicants from employment discrimination based on medical marijuana use permitted under state law, because the CSA does not prohibit the employment of illegal drug users. In contrast, in *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518 (Or. 2010), the Oregon Supreme Court ruled that employers are not required to accommodate employee’s use of medical marijuana because it is illegal under federal law. For Nevada employers, until this issue is definitively resolved there will be some risk associated with the termination of an employee for off-duty use of marijuana.

The second issue that remains unclear arises from an employer’s obligation to accommodate medical marijuana usage in Nevada as required by NRS 453A.800. Significantly in July 2017, in the first case of its kind nationwide, *Barbuto v. Advantage Sales*, 2017 Mass. LEXIS 504 (Mass. 2017), the highest court in Massachusetts determined, though the state medical marijuana law provided criminal protections only, a cause of action was available for disability discrimination under state law for employees using marijuana lawfully.

Because of the remaining uncertainty, Nevada employers struggle with issues related to:

1. Employees or applicants that use medical marijuana off duty and test positive for marijuana on pre- or post-employment testing;

2. Determining when off-duty medical marijuana usage impairs an employee during work time, such that an adverse action, like termination, can lawfully be taken; and
3. Employing workers in safety-sensitive positions that use medical marijuana.

Employers struggle with these issues, because the appropriate course of action for an employee often depends upon whether the employee’s medical marijuana usage results in the employee being impaired at work.

Practically speaking, there is no universally accepted method of proving whether, or to what extent, an individual is impaired by marijuana, because there is no consensus as to what THC concentration correlates to impairment. Drug tests do not measure impairment. Therefore, taking adverse action against an employee creates a risk of violating Nevada’s laws. Meanwhile, not taking action and allowing an employee that could be impaired to continue to work, particularly in safety-sensitive positions, creates risks of its own (for example, negligent hiring or retention claims relating to employees who regularly drive for their jobs). Consequently, employers faced with such issues should consult with knowledgeable counsel prior to taking action. **NL**

1. 21 U.S.C. §§ 801-971.
2. 21 U.S.C. § 812.



DALE L. DEITCHLER is a shareholder with Littler Mendelson, practicing employment and labor law exclusively. He has extensive experience in the areas of drug and alcohol testing.



WENDY M. KRINCEK is also a shareholder with Littler Mendelson, where she practices exclusively in the area of employment law, representing employers.