

NSM Insurance Group

CONSIDERATIONS FOR EMPLOYERS REGARDING THE PENNSYLVANIA MEDICAL MARIJUANA ACT:

Pennsylvania's Medical Marijuana Act (MMA or the Act), 35 Pa. C.S.A. §10231.101, et seq., became effective May 17, 2016. The Act devises a structure for the entire medical marijuana industry, including setting standards for establishing new programs for patients, issuing permits for growers, processors, and dispensaries, registering health-care practitioners, and implementing administrative, regulatory, and enforcement mechanisms.

This framework, however, has not made clear all issues employers must face when adapting their workplace policies to account for employees' newly-granted rights and privileges under the MMA. This article seeks to address those potentially problematic issues and discuss how employers may handle such challenges, subject to the Act's employment-specific provisions and related legal implications.

As a preliminary matter, federal law still governs in many instances. Marijuana use, whether medicinal or recreational, remains illegal as

a Schedule I controlled substance. 21 U.S.C. § 802(16). **Federal law, in this situation, preempts the MMA. Section 2103(b)(3) specifically reads:** "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."

As a result, employers subject to federally mandated, drug-free workplace programs, including CDL drivers and federal contractors, must abide by the federal rules, such as reporting all drug tests positive for marijuana and prohibiting and not accommodating for marijuana use.

The implication here is that employers required to abide by federal laws may be able to terminate employees based on their marijuana use as part of that compliance.

ALL OTHER PA EMPLOYERS MUST FOLLOW THE MMA

Employees who may qualify for prescriptions under the MMA must meet certain criteria and present with a statutory medical condition. The patient/employee must be a resident of the Commonwealth, have a "serious medical condition" as certified by a physician, and obtain a valid permit (a "medical marijuana card") from the Pennsylvania Department of Health. The MMA provides a list of seventeen (17) ailments which constitute a "serious medical condition." A few of the more common conditions prevalent for employees choosing to continue working are cancer, IBS, and PTSD. Section 103(16) of the MMA also contains a "catch-all" condition for pain under its definition of a "serious medical condition" where a patient/employee may also qualify for a prescription if the person presents with "severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or ineffective."

The residency and application criteria identified above are limiting factors for employers; however, the critical issue will be dealing with employees who present with and/or claim to suffer from a "serious medical condition." It is very likely that the employee's "serious medical condition," especially as certified by a physician, will trigger overlapping considerations with the Americans with Disabilities Act and Pennsylvania Human Relations Act.

Therefore, employers should pay special attention to these laws regarding employees with disabilities and how they interact with the MMA's employment-specific provisions discussed below. As further discussed below, blanket policies surrounding hiring, discipline, drug testing, and termination are ill-advised. Employers required to abide by federal laws may be able to terminate employees based on their marijuana use as part of that compliance.

CONSIDERATIONS FOR YOUR WORKPLACE

One area of safety for employers under the MMA is found in Section 2103(b)(2). There the MMA states that the 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." It is important to note here that there is no smoking of marijuana permitted under the MMA; only pills, oils, and gels are allowed. An employee is considered to be under the influence of marijuana if he or she has a "blood content of more than 10 nanograms of active THC per milliliter of blood in serum." Consequently, an employer may have recourse against an employee who is under the influence at work, but the employer should be sure to check with its drug testing program and, if applicable, drug testing vendor, to ensure the correct test is being administered.

Aside from an employee being under the influence of medical marijuana in the workplace, an employer must not give adverse treatment

to an employee based on his or her status as a medical marijuana card holder. **Section 2103(b) (1) states "[n]o 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." This provision is one of the clear employment mandates within the MMA and should be acknowledged accordingly.**

Although Section 2103 offers broad protection for employees, the MMA also contains several narrow exceptions for how different treatment for card-holding employees is justified.

Section 510 prohibits patients from the following employment duties while under the influence of medical marijuana:

- Working with chemicals which require a permit issued by the Federal Government or a state government
- Working with high-voltage electricity or any other public utility

- Working at heights (height not defined) or in confined spaces, including, but not limited to, mining
- Performing any task which the employer deems life-threatening (life-threatening is not defined), to either the employee or any of the employees of the employer
- Performing any duty which could result in a public health or safety risk.

As with most statutory exceptions, employers should be conservative to construe and narrow to apply.

Finally, while the MMA states that an employer is not required to accommodate an employee's use of medical marijuana, an employer may be required to do so, because the employee's underlying "serious medical condition" may constitute a disability under the ADA and/or PHRA. Consequently, refusing to hire, terminating, or administering any other adverse employment action related to the employee's underlying "serious medical condition" may run afoul of the ADA and/or PHRA.

It is difficult to predict how case law might evolve on this issue in Pennsylvania. In other states where medical and/or recreational marijuana

is legal, case law is split; Colorado and Michigan have employer favorable decisions, while Massachusetts and New Mexico have employee-favorable decisions. Based on the text of each state's respective statute alone, it appears that Massachusetts' law is most similar to Pennsylvania's MMA.

As a result, Pennsylvania employers would be wise to at least explore whether an accommodation is appropriate for an employee with a "serious medical condition" and a prescription to use medical marijuana.

Moreover, some connection between marijuana use and on-site work conduct that is below the "normal performance standards for the position" should be established if an adverse employment action is sought, including during post-accident investigation. This entails employing flexible policies, giving attention to the unique aspects of each employee's situation, and, more specifically, examining your drug-testing policy and protocols to ensure an accurate test is administered and compliance with the MMA is achieved.

CONSIDERATIONS FOR YOUR WORK

One risk management item an employer must also recognize is that the MMA does not prevent a person or entity from criminal or civil liability resulting from "[u]ndertaking any task under the influence of medical marijuana when doing so would constitute negligence, professional malpractice or professional misconduct." Section 1309(1). Thus, like other employee acts within the scope of his or her duties,

an employer could still be held liable for an employee's misconduct, while using medical marijuana or not, that constitutes negligence or professional malpractice. An employer should consider dealing with this exposure through insurance and contractual risk transfer, especially if an employer knows it works alongside other contractors or vendors who share this risk.

KEY TAKEAWAYS

Employers are wise to

- Educate managers regarding the MMA
- Review your handbook and modify certain policies, such as your anti-discrimination policy to account for medical marijuana status, your substance abuse policy to address medical marijuana use in and outside the workplace, and your drug-testing policy to eliminate blanket, zero tolerance thresholds. Consider similar protocols for new hires and onboarding

- Keep documentation of signs of an employee under the influence, his or her conduct that falls below the normal standards for the position, and the nexus between the two
- Explore whether an accommodation may be appropriate for an employee who presents a valid medical marijuana card
- Keep an employee's medical information confidential.



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