HR Considerations

in the Age of Medical Marijuana

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The enactment by Pennsylvania legislators of the Medical Marijuana Act (Act of Apr.17, 2016, P.L, 84, No.16 codified at 35 Pa.C.S.A. 10231.101 et seq.) (MMA), creates challenges for all employers. Must employees who can legally use medical marijuana be treated differently than other employees? Does the fact that an employee needs medical marijuana render that employee disabled under the law? How do employers manage such employees? Does this change drug testing procedures? What other considerations associated with an employee who utilizes medical marijuana must employers address?

While the MMA became effective in May of 2016, the courts in this commonwealth have yet to address these types of questions. While courts in other states authorizing the use of medical marijuana can be a source of guidance on the legal implications arising in the employment context, at this point, it is appropriate for all Pennsylvania employers to "proceed with caution." Human resource professionals should remain vigilant when addressing matters related to employee use of medical marijuana.

QUALIFYING

The MMA permits the issuance of a medical marijuana card to a person who has a serious medical condition (delineated in the Act) and who has been certified by a physician as qualifying for the card. Outside the context of the MMA, a determination of having a serious medical condition triggers many considerations under federal and state law, prohibiting employers from discriminating based on a disability or the perception of a disability. A provision in the MMA though prohibits adverse treatment of employees on the basis of being certified to use medical marijuana. However, the propriety of treating an employee who can use medical marijuana differently may be dependent, in part, on the role the employee plays, the positions the employee holds and the applicable law for the circumstances.

Presently, federal law still makes illegal the use of marijuana as a Schedule 1 controlled substance. Therefore, federal law preempts the MMA. "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". (See Section 2103 (b) (3)) So if a county is subject to federal mandates in any area, it must follow those federal rules; employees would not be "saved" from adverse action by virtue of any protections against

discrimination in the MMA if federal rules were violated. For example, failure to comply with drug-free workplace programs funded by the federal government, failure to follow CDL licensing requirements. To the extent the federal law is changed, and recreational marijuana is deemed legal, at least in certain quantities or circumstances, these issues may be resolved differently.

Looking at state law, the Pennsylvania Human Relations Act (PHRA) prohibits discrimination against a person with a disability. Like claims made under the federal Americans with Disabilities Act, claims under the PHRA for disability discrimination require a showing that somebody has been treated differently due to their disability or being perceived as being disabled. For a person who uses medical marijuana, and who cannot be subject to discrimination under the MMA due to that status, an analysis of whether any adverse action relates to their status as "disabled" or being certified to have a medical marijuana card must be undertaken. For example, was the employee able to perform the functions of the job with the same standard of care normally accepted for the position? Was the employee treated differently because of knowledge of the cardholder status?

INTERACTIVE PROCESS

In terms of accommodating employees with disabilities, which arises in the context of employees with serious medical conditions generally, applicable law requires employers to follow a process to determine if an accommodation is possible and appropriate after engaging in an interactive process with the employee. This same process should be followed for medical marijuana-eligible employees.

While the MMA clearly prohibits discrimination against an employee who is a permitted user of medical marijuana, an employer may still implement and enforce policies which address and even restrict medical marijuana-eligible employees in certain ways while in the workplace. One size may not fit all in this context. Portions of the MMA specifically prohibit patients who have a card from performing certain functions, including working in public utilities or other high voltage electricity areas, working at heights or in confined spaces, performing anything which could be deemed life threatening to either the employee or any other co-worker, or performing duties that could result in a public health or safety risk.

Employers may, and frankly, should formulate policies which identify the circumstances under which someone with a medical marijuana card could still be in the workplace, setting limits on employees who serve particularized functions that could create liability for the employer if the employee was under the influence. Counties routinely employ persons in the types of jobs identified above, which would be prohibited by the MMA, and therefore, could restrict persons who use medical marijuana from holding these positions.

Employers need to focus their attention on the duties of a position to the extent the functions may be performed by the employee who will use medical marijuana. Positions which involve safety or security roles certainly could be restricted for a person who has a medical marijuana card, limiting them from having marijuana in their system that could impact their ability to perform their job functions. Critical functions with significant detail identifying if the position involves safety or security concerns should be included in job descriptions, giving the county employer protection when making a decision about who to hire for a particular role or when taking action against a cardholder employee.

The status of an employee possessing a medical marijuana card is another form of personal private health information. Accordingly, HR professionals must ensure that this form of employee data is also appropriately protected and maintained as confidential.

STANDARDS AND LANGUAGE

Drug testing standards for employers should be reviewed in light of the limits the MAA proscribes for those using medical marijuana. Aside from the federal law issues raised above, an employee who uses medical marijuana may have a limited amount of active THC in their system and still not be considered under the influence by the MMA standards, precluding adverse action based upon a drug test result. HR professionals and the third party vendors used for such testing should be wary of these unique requirements. One court in another state permitting the use of medical marijuana did find that failing a mandatory pre-employment drug test could be the basis for denial of employment, but that decision was based on a finding that no property right in the job yet existed.

Language in the MMA also restricts health insurers from reimbursing costs associated with the use of medical marijuana or costs related to an employer having to make accommodations for the use of medical marijuana in the workplace. Benefits personnel should be familiar with these limitations on coverage to ensure compliance and to verify if this might impact any employer paid programs like flexible spending accounts.

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Becoming better versed in the MMA, therefore, is critical both for addressing current HR matters as well as serving as a foundation for future issues arising out of possible full legalization of marijuana.