PLUNKETT COONEY

Dazed and confused about medical marihuana? Employers have rights, but still need to be cautious

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Although the Michigan Medical Marihuana Act (MMMA) is now approximately three years old, there are still "hazy" elements of the Act which can be proactively addressed to protect employees and to limit liability.

Critical for employers to be aware of is the statutory language that an employer is not required to accommodate the ingestion of marihuana in any workplace, or to allow an employee to work while under the influence of marihuana. It is the latter situation that is a potential pitfall for employers, since the Act does not define "under the influence." Therefore, it will be up to the employer to determine whether an employee is "under the influence" and also to publish and distribute the company's policy in order to mitigate and/or prevent liability.

The MMMA was created to help people legally use marihuana in treating or alleviating the pain, nausea and other symptoms associated with a variety of debilitating medical conditions. These medical conditions can include cancer, glaucoma, positive status for HIV, AIDS, hepatitis C, amyotrophic lateral sclerosis, Crohn's disease, agitation of Alzheimer's disease, and nail patella. However, the Act does not prohibit:

- an employee, determined to be under the influence of marihuana while working or discovered smoking marihuana in the workplace, from being subject to discipline even if the employee is a qualifying patient
- drug testing of a qualifying patient

The MMMA also does not directly address whether an employer may enforce its substance abuse policies regarding an employee or applicant who discloses that he or she is a qualifying patient or who has a positive drug test result that is not considered "under the influence" of marihuana.

While the case law in Michigan as to medical marihuana is still in its infancy, there has been one significant decision, *Casias v Wal-Mart Stores, Inc,* that has given employers a bit of clarity through the haze. This case involved a five-year Walmart employee who was terminated for failure of a post-injury drug test, which he claimed was due to his use of medical marihuana outside of work hours. Under the Act, the employee qualified as a certified user to treat his sinus cancer and brain tumor.

The plaintiff's case was dismissed at the trial court level because the court determined that the Act does not regulate private employment. The court further stated that it would be too large of a departure from the general rule of at-will employment in Michigan for medical marihuana users to become a new protected class, akin to classes based on characteristics such as race, sex or ethnicity.

While the *Casias* case is a positive decision for employers, its precedential value will be limited because it was a federal court case in the U.S. District Court for the Western District of Michigan and was not brought as a disability claim. Not surprisingly, the decision has already been appealed by the ACLU, who is representing the plaintiff.

So where does an employer go from here? The following are some "Do's and Don'ts" to help keep employers out of the weeds in relation to the Act:

DO:

- Obtain clear written consent from an employee to conduct a drug test before administering the test.
- Follow standard procedures for medical marihuana policy as you would with any employee policy by putting the policy in writing, distributing it to all employees, having employees provide written acknowledgement of receipt of the policy, and updating the policy when necessary.
- Document all information and reasoning surrounding the suspicion of an employee being under the influence, including, but not limited to, physical signs, changes in behavior or personality, and a decrease in quality or productive performance of job duties.
- Perform a drug test on any employee suspected of being under the influence.

DON'T

- Allow employees suspected of being under the influence to continue to work.
- Use an "off-the-shelf" policy rather than tailoring the policy to the business's corporate culture and methods of operation.
- Fail to provide all employees with adequate training to identify substance abusers and to deal with them effectively, including both supervisors and managers, who will be making the ultimate decisions, and employees who are "in the trenches"—who will likely be first to notice signs of an employee under the influence.

Plunkett Cooney will continue to keep you updated as this area of law develops and as some of the smoke surrounding the interpretation of the Act ultimately clears.