

## Publications

### **Labor and Employment Alert: Maine Supreme Court Refuses to Order Employer to Pay for Injured Worker's Medical Marijuana**

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In 2009, Maine enacted the Maine Medical Use of Marijuana Act (MMUMA), permitting qualifying patients to use medical marijuana. By contrast, marijuana use and possession remains illegal under the federal Controlled Substances Act (CSA). In a case of first impression, the Maine Supreme Judicial Court recently analyzed whether an employer can be required to pay for its injured worker's acquisition and use of marijuana—conduct that is proscribed by federal law but allowed by the state under the MMUMA. In *Gaetan v. Bourgoin v. Twin Rivers Paper Company*, the Court concluded that, “where an employer is subject to an order that would require it to subsidize an employee's acquisition of medical marijuana— there is a positive conflict between federal and state law, and as a result, the CSA preempts the MMUMA as applied here.” Therefore, the employer is not required to reimburse an employee for the costs of medical marijuana.

Bourgoin worked for Twin Rivers when he sustained a work-related back injury and was placed on total disability. As a result of his injury, Bourgoin suffers from severe chronic pain syndrome. Due to adverse side effects associated with the continued use of opioids, and on his physician's recommendation, Bourgoin stopped using narcotic medications and, instead, obtained a medical marijuana certification. He has since used medical marijuana to manage his chronic pain. Bourgoin sought to force Twin Rivers to pay for the cost of the medical marijuana as a cost resulting from his work-related injury. The lower courts granted his petition and ordered the payment. In June 2018, however, the Maine Supreme Judicial Court reversed.

After analyzing preemption principles, the history of the CSA, and the fact that aiding and abetting a violation of the CSA is a crime, the Court explained that compliance with both the MMUMA and the CSA “is an impossibility.” If an employer complies with an order to reimburse an employee for the cost of the medical marijuana as permitted by the MMUMA, “the employer would necessarily engage in conduct made criminal by the CSA because [the employer] would be aiding and abetting [the employee]—in his purchase, possession, and use of marijuana—by acting with knowledge that it was subsidizing [his]

purchase of marijuana.” Conversely, if the employer complied with the CSA by **not** reimbursing its employee for the costs of medical marijuana, the employer would necessarily violate the MMUMA-based order of the hearing officer.

This creates a positive conflict between the CSA and the MMUMA with respect to the reimbursement of medical marijuana. While the MMUMA can exempt qualifying patients from state prosecution for the use of medical marijuana, the Maine Legislature “does not have the power to change or restrict the application of federal law that positively conflicts with state law.” “So long as marijuana remains a Schedule I substance under the CSA, an employer that is ordered to compensate an employee for medical marijuana costs is thereby required to commit a federal crime defined by the CSA.” The Court concluded that “a person’s right to use medical marijuana cannot be converted into a sword that would require another party...to engage in conduct that would violate the CSA.”

A growing number of states currently have medical marijuana laws and there is no one-size-fits-all approach to crafting an effective workplace drug policy. As this case illustrates, there is considerable – and increasing – diversity among courts in interpreting medical marijuana laws. Last year, the Massachusetts Supreme Judicial Court and a federal district court in Connecticut held that neither the Controlled Substances Act nor the Americans with Disabilities Act (which excludes current users of illegal drugs from protection) preempt state medical marijuana laws. Courts in New Mexico have ordered employers to reimburse employees who sustained work-related injuries for their costs associated with medical marijuana; the Court in *Bourgoin* discussed these cases and found their analysis “less than compelling.” Contact your Vorys lawyer if you have questions about the evolving state of marijuana in the workplace.

*Vorys recently published a guide titled, “Marijuana in the Workplace” that details the current marijuana laws in all 50 states. Download a copy of the guide [Download a copy of the guide here](#).*