THE OPIOID CRISIS AND
CONNECTICUT'S WORKFORCE

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September 28, 2017

EMPLOYMENT RELATED
ISSUES – MEDICAL MARIJUANA

I. Medical Marijuana & the Workplace

A. Employer Obligations Under Connecticut's Medical Marijuana Statute

1. Connecticut's Medical Marijuana Law

a. Under Connecticut's medical marijuana law, the Palliative Use of Marijuana Act ("PUMA"), Connecticut residents who are at least 18 years of age and have been diagnosed by a Connecticut-licensed physician with a "debilitating medical condition," defined as cancer, glaucoma, HIV, AIDS, Parkinson's disease, multiple sclerosis, damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, epilepsy, cachexia, wasting syndrome, Crohn's disease, or post-traumatic stress disorder, may, after obtaining a physician's written certification for the palliative use of marijuana, register as "qualifying patients" with the Department of Consumer Protection. C.G.S. §21a-408a-q.

b. The law allows "qualifying patients" to engage in the palliative use of marijuana without being "subject to arrest or prosecution, penalized in any manner, including, but not limited to, being subject to any civil penalty, or denied any right or privilege, including, but not limited to, being subject to any disciplinary action by a professional licensing board…" C.G.S. §21a-408a.

2. Marijuana Prohibited in the Workplace

a. The law explicitly protects "an employer's ability to prohibit the use of intoxicating substances during work hours [and] an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours." C.G.S. §21a-408p(3).

i. Furthermore, the law does not allow the ingestion of marijuana in a moving vehicle, in the workplace, on any school grounds, in any public place, or in the presence of a person under the age of eighteen. C.G.S. §21a-408a(b)(2).

ii. ***NOTE****: The law does not define "workplace," so it will be up to the courts to determine whether the workplace includes areas such as the parking lot or other outdoor spaces, as well as employees working from their home or at the patients' home (i.e., home care agencies, especially companion agencies) or on business trips.*

b. The palliative use of marijuana is also prohibited when it "endangers the health or well-being of a person other than the qualifying patient." C.G.S. §21a-408a(b)(2).

3. Employers May Not Discriminate Against Medical Marijuana Users

a. Connecticut's law, unlike some other states, also explicitly protects "qualifying patients" from adverse employment action. "No employer may refuse to hire a person or may discharge, penalize, or threaten an employee solely on the basis of such person's or such employee's status as a qualifying patient . . ." C.G.S. §21a-408p(3).

b. Employees claiming employment discrimination are able to file a complaint with the Connecticut Commission on Human Rights and Opportunities ("CHRO").

4. Employers May Refuse to Hire or Discharge a "Qualifying Patient" if Required by Federal Law or Funding Requirements

a. Under PUMA, a Connecticut employer may not refuse to hire or discharge an employee based on the person's status as a "qualifying patient," "unless required by federal law or required to obtain federal funding." These exceptions to Connecticut law are premised on the fact that marijuana use (including the palliative use of the drug) remains illegal under federal law.

b. According to the United States Attorney's Office, "growing, distributing and possessing marijuana in any capacity, other than as part of a federally authorized research program, is a violation of federal law, regardless of state laws permitting such activities." Moreover, the United States Supreme Court has upheld federal marijuana penalties even where state laws authorize marijuana use for medical purposes. Gonzalez v. Raich, 545 U.S. 1, 29 (2005). The "federal law" exception applies when there are federal laws that restrict the use of marijuana in a particular industry (e.g., Department of Transportation).

c. The Federal Drug Free Workplace Act (the "Act") applies to federal contactors with contracts of $100,000 or more performed in the United States and not involving the acquisition of commercial goods (see Attachment A). The Act also applies to organizations and individuals that receive a direct contract or grant from the federal government. The Act requires covered employers to certify that they have a drug-free workplace and subjects employers to penalties, including suspension of payments under the federal contract or grant. Employers must have a policy prohibiting unlawful

manufacture, distribution, dispensation, possession or use of controlled substances in the workplace.

- According to the U.S. Department of Labor, everyone on the grantee's payroll who works on any activity under the grant is covered by the Act. A Medicare third party reimbursement contract is not subject to the Act because funds are not paid to the provider through a procurement contract or a grant.

5. ADA Issues – Is Allowing an Employee to Use Medical Marijuana a Reasonable Accommodation?

   a. The Federal Controlled Substances Act, 21 U.S.C. §811, provides that marijuana is illegal and has "no accepted medical use."

   b. Sec. 12114(a) of the ADA states that a qualified individual with a disability shall not include any employee who is currently engaging in the illegal use of drugs. There is a defense under federal law that the employee filing an ADA claim, who is discharged due to smoking marijuana, is not protected by the ADA. However, the employee may be protected under Connecticut's Fair Employment Practices Act ("CFEPA").

   c. The ADA defines "illegal use of drugs" as the use of drugs that are prohibited under the Controlled Substances Act, but excludes the use of a drug taken under supervision by a licensed healthcare professional as authorized by federal law (e.g., Oxycontin or Percocet).

   d. The federal courts have not yet addressed whether the use of medical marijuana is protected by the ADA in the employment context, but, the employee-friendly Ninth Circuit Court of Appeals, which covers California, did address this issue under Title II of the ADA, which deals with state and local governments in the provision of public services. In James v. City of Costa Mesa, the Court held that the ADA's exception for use of drugs taken under the supervision of a licensed healthcare profession does not apply to medical marijuana because the drug is not authorized by federal law, even though it was authorized by California law.

   e. The ADA reasonable accommodation investigation and interactive process requirement should be conducted in cases of medical marijuana or opioids.

B. Connecticut District Court Holds that PUMA's Employment Discrimination Provision is Not Preempted By Federal Law

   1. In its first legal challenge in Noffsinger v. SCC Niantic Operating Co., PUMA withstood an employer's claim that the state law is preempted by federal law, and therefore, the employer cannot be held liable for allegedly refusing to hire a qualifying patient who tested positive for marijuana on a pre-employment drug screen.

   2. After accepting a job offer from the employer, the Plaintiff disclosed that she uses medical marijuana to treat PTSD, but that she only takes Marinol (a synthetic form of cannabis

ingested in pill form) at night, so she would never be impaired during the work day. The employer continued to process the Plaintiff's pre-employment paperwork and submitted her urine sample to a third-party lab for drug screening, as it does with all new hires. The day before the Plaintiff was scheduled to begin her orientation, the employer rescinded her job offer because she had tested positive for marijuana on the drug screen.

3. The Plaintiff sued pursuant to PUMA's employment discrimination provision, and <u>the employer, a nursing home, argued that PUMA is unenforceable because it is preempted by three federal statutes</u>: (1) the Controlled Substances Act; (2) the ADA; and, (3) the Food, Drug, and Cosmetic Act. <u>The Court disagreed on all three, holding that</u>:

    a. The Controlled Substances Act does not preempt the employment discrimination provision of Connecticut's law because it does not prohibit employers from hiring applicants who may be engaged in illicit drug use;

    b. The ADA only authorizes an employer to prohibit the use of illegal drugs and alcohol <u>at the workplace</u>, not outside of the workplace; and

    c. The Food, Drug and Cosmetic Act does not purport to regulate employment, so the anti-discrimination provision in Connecticut's medical marijuana law cannot be preempted by it.

4. <u>The employer also argued that it is exempt from PUMA because it receives federal funding</u> and is subject to federal regulations that require compliance with federal, state, and local laws generally, and because marijuana use violates the federal Controlled Substances Act, it would be violating federal law (and federal nursing home regulations that require compliance with federal law) by hiring Plaintiff. <u>The Court disagreed, stating, "This argument borders on the absurd. Because the act of merely hiring a medical marijuana user does not itself constitute a violation of the CSA or any other federal, state, or local law, defendant is not exempt</u>."

    - *<u>Caveat</u>: We do not have all of the details about the type of federal funding this employer receives, but clearly this judge rejected the notion that simply receiving federal funding (e.g. Medicare) is <u>not</u> sufficient to exempt an employer from PUMA.*

5. Interestingly, the employer did not appeal this decision denying its motion to dismiss. <u>Instead, in a highly unusual move, the employer filed a counterclaim against the Plaintiff based on a "detrimental reliance" theory. We will continue to follow this case</u>.

6. <u>***Take Away for Employers***</u>*<u>: This decision reinforces the existing principle in employment law that if state law is more favorable to the employee, it will usually be followed and not preempted by federal law, with the exception of ERISA</u>*.

C. Massachusetts Supreme Court Holds that Employer Must Engage in the Interactive Process to Determine if Reasonable Accommodations Can be Made for Medical Marijuana User

1. Unlike PUMA, Massachusetts' medical marijuana law does not include a provision protecting qualified patients from employment discrimination. However, in Barbuto v. Advantage Sales & Marketing, LLC, the Massachusetts Supreme Court held that a qualifying patient can sue for "handicap discrimination" under the Massachusetts Fair Employment Practices Act ("MFEPA"), which is similar to CFEPA's disability discrimination protection and the ADA.

2. Like the Noffsinger case, after the Plaintiff accepted the employer's job offer, she was told she would have to submit to a mandatory pre-employment drug screen. The Plaintiff disclosed that she uses medical marijuana to treat Crohn's disease, but does not use it daily and would not use at during or before work. After completing her first day of orientation, the employer told the Plaintiff that her employment was terminated because she tested positive for marijuana on the drug screen.

3. The Plaintiff argued that she was a qualified handicapped person under MFEPA because she was able to perform the essential functions of her job with a reasonable accommodation – i.e., waiver of the employer's policy barring anyone from employment who tests positive for marijuana.

4. The employer argued that the only accommodation the Plaintiff sought is a federal crime, and therefore, it is facially unreasonable, and because such accommodation is facially unreasonable, the employer was not required to participate in the interactive process to identify a reasonable accommodation before terminating her employment.

5. The Court held that accommodation of the use of medical marijuana is *not facially unreasonable*, and the employer was obligated to engage in an interactive progress with the Plaintiff to explore whether there was an alternative, equally effective medication she could use that was not prohibited by the employer's drug policy, and its failure to do so alone is sufficient to support a claim of handicap discrimination provided that the Plaintiff proves that a reasonable accommodation exists that would have enabled her to be a qualified handicapped person.

   - The same analysis would need to be applied for any opioid use or even possibly an abuse situation.

6. *However, the Court stated that that the employer may be able to defeat the employee's claim by showing the allowing that Plaintiff to use medical marijuana is not a reasonable accommodation because it would impose an undue hardship on the employer's business, and even listed possible examples of undue hardship, including*:

   a. Continued use of medical marijuana would impair the employee's performance of her work;

b. Continued use of medical marijuana would pose an "unacceptably significant" safety risk to the public, the employee, or her fellow employees;

c. Use of marijuana by an employee would violate an employer's contractual or statutory obligation, thereby jeopardizing its ability to perform its business;

d. Transportation employers are subject to the US DOT regulations that prohibit any safety-sensitive employee subject to drug testing from using marijuana;

e. Federal government contractors and the recipients of Federal grants are obligated to comply with the Drug Free Workplace Act, which requires them to make "a good faith effort . . . to maintain a drug-free workplace" and prohibits any employee from using a controlled substance in the work place.

7. **Take Away Points**

a. The Massachusetts court treated this case like an ADA case, requiring the employer to at least engage in an interactive process with the employee to determine whether there is a reasonable accommodation.

b. However, because the Massachusetts medical marijuana law does not bar employers for discriminating against an employee for use of medical marijuana, the employee had to bring her claim under the Massachusetts version of the ADA. On the other hand, Connecticut's medical marijuana law does include a provision barring employers from discriminating against a qualifying patient "solely on the basis" of her status as a qualifying patient, so it is not clear that the Connecticut courts will necessarily use the ADA framework to analyze claims brought under the medical marijuana law (though it would be logical to do so).

c. *The fact that this Court went out of its way to provide the employer with examples of possible defenses may be an indication that the Court would look more favorably at an undue burden defense, which traditionally is very difficult to prove.*

D. Connecticut Supreme Court Reinstates Employee Discharged for Smoking Marijuana

1. The Connecticut Supreme Court's decision in State of Connecticut v. Connecticut Employees Union Independent et al., involved a State employee who was terminated for violating UCONN Health Centers' drug-free workplace policy and the smoke-free workplace policy. The employee was found smoking marijuana in a State van parked in a secluded area of the health center's campus. The employee was smoking approximately two hours into his shift at 5:50 p.m. The employee was scheduled to work from 4:00 p.m. to 12:00 a.m. on the evening of the incident. The employee had a positive work history and was not on a progressive disciplinary path.

- *Note: While the employee claimed he was smoking marijuana to ease his anxiety, there is no indication that he was a "qualifying patient" under PUMA, and employment discrimination provision of PUMA was not at issue here.*

2. The employee contested his termination and subject to the collective bargaining agreement it eventually proceeded to arbitration. The arbitrator found that the employer had met its burden of proving misconduct, and that the employee's explanation was disingenuous. Regardless, the arbitrator found that termination was not for just cause in accordance with the union contract.

3. The arbitrator reasoned that the employee's conduct was not such a breach of trust, or lack of character to create a danger to persons on the property, or be unable to return to a satisfactory employee. The arbitrator overturned the termination, and found that a six-month suspension without pay was sufficient.

4. On appeal, the Connecticut Supreme Court has upheld the finding of the arbitrator, that a six-month suspension was a sufficient penalty. In upholding this decision, the Court found that public policy based second guessing an arbitrator's award to reinstate an employee is very uncommon, and reserved for extraordinary situations. The Court went on to state that the deference given to the arbitration process is essential to preserve the effectiveness, and efficiency of this forum for employment disputes.

    - Although, this Connecticut case made headlines because the employee was terminated in part for smoking marijuana, the Connecticut Supreme Court decision does not address whether the termination due to marijuana should be treated differently, rather it just reinforced the dereference given to the arbitration process.

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