The Impact of the Medical Marijuana Act on Employers

Lauri A. Kavulich, The Legal Intelligencer

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The Pennsylvania House and Senate have been abuzz in the last few weeks with SB3, the Pennsylvania Medical Marijuana Act, which was signed into law. Why is the Medical Marijuana Act important to Pennsylvania employers and employment law attorneys? Because employees have protections under this act in the workplace, and the law specifically sets forth parameters on how the use of medical marijuana by an employee shall be treated by an employer.

In the act, there are several provisions that impact the employment relationship:

• A medical marijuana card may only be issued to a patient with a "serious medical condition" or who is terminally ill as prescribed by the act.

• An employer may not discharge, threaten, refuse to hire, or otherwise discriminate or retaliate against an employee solely on the basis of such employee's status as an individual who is certified to use medical marijuana.

• An employer does not have to accommodate use of medical marijuana on the premises or property of the employer. Further, the act in no way limits the 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." In addition, nothing in the act shall require the employer to commit any act that would put the employer in violation of federal law.

• If an employee has a blood content of more than 10 nanograms of active THC per milliliter of blood, an employer may prohibit an employee from performing certain tasks that are deemed life threatening to the employee or the other employees, even if it results in financial harm to the patient. In addition, the employer may prevent the employee from performing any duty that is a safety risk regardless of the financial harm to the patient. The prohibition shall not be deemed an adverse employment decision.

So what do these provisions mean to Pennsylvania employers? It is obviously too early to tell how the courts will interpret the act, however, there is guidance from the act itself.

First, the act specifically enumerates the "serious medical condition" of the patient in order to qualify for medical marijuana. These include cancer, HIV or AIDS, ALS, Parkinson's, Multiple Sclerosis, epilepsy, damage to the nervous tissue of the spinal cord, neuropathies, inflammatory bowel disease, Huntingdon's disease, Crohn's disease, PTSD, seizures, glaucoma, sickle cell anemia, "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," and autism.

Therefore, the medical-marijuana-card-carrying employee would most likely be covered under the Americans with Disabilities Act (ADA). Employers may need to take into consideration accommodations under the ADA for anyone who carries a medical marijuana card because of their status of having a "serious medical condition" under the act.

An employer does not have to accommodate use of medical marijuana on the premises or property of the employer according to the act. The law does not expressly address accommodation of use of medical marijuana during work hours. The original bill used the terms "on the premises of the place of employment during ordinary hours of employment." The current version only discusses the premises or the property of the employer regarding accommodation. Even though the language did not survive the House amendments, the bill does not allow employees to be under the influence of medical marijuana or be impaired during the workday or while performing his or her duties without repercussion in the workplace.

The discrimination provisions of the act prohibit an employer from discharging, threatening, refusing to hire, or otherwise discriminate against an employee based solely on his or her status as a certified medical marijuana card holder. However, the provisions specifically state that an employer is allowed 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." Therefore, while the employer is not allowed to discriminate against an employee for qualifying for a medical marijuana card, it appears the legislature is not extending those protections to being under the influence of medical marijuana while on the job.

Since the employee is prohibited under the act from performing certain tasks if he or she has a specific blood content THC, the employer does not have to put the employee, the general public or other employees in harm's way.

Section 510 of the bill provides:

• "A patient may not operate or be in physical control of any of the following while under the influence with a blood content of more than 10 nanograms of active tetrahydrocannabis per milliliter of blood in serum: chemicals which require a permit issued by the federal government, state government or agency of the federal or state government or high voltage electricity or any other public utility.

• A patient may not perform any employment duty at heights or in confined spaces, including but not limited to mining while under the influence of medical marijuana.

• A patient may be prohibited by an employer from performing any task the employer deems life threatening, to either the employee or any of the employees of the employer, while under the influence of medical marijuana. The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.

• A patient may be prohibited by an employer from performing any duty which could result in a public health or safety risk while under the influence of medical marijuana. The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient."

The law, while protecting the patient from discrimination, does not protect the patient if that patient is under the influence of medical marijuana or does not perform up to the standards of the position. This will become the hotbed of litigation under this law, as the courts interpret what constitutes "under the influence" and the "standards of the position." Since the legislature removed the wording suggesting that an employer needs to prove the employee was abusing or misusing the cannabis, the standard appears to be lower for the employer. It is now simply "under the influence." Many states have protected a patient with a positive drug test for marijuana components or metabolites unless the patient used, possessed or was impaired by marijuana while on the premises. In the present legislation in the state, that was omitted. Some things are clear from the wording of the statute which mimics, in part, other statutes across the nation:

• Discrimination is prohibited because of the status of the employee as a card-carrying medical marijuana patient. However, that does not give the employee the right to possess marijuana on the employer's premises or perform his or her duties while under the influence of medical marijuana.

• An employer may still discipline an employee for work performance under this new law, regardless of whether the employee is certified as a medical marijuana patient.

• Because the Medical Marijuana Act does not permit medical marijuana in plant form or allow it to be smoked or ingested in edible form, any possession of marijuana in those forms is still illegal and still subject to the criminal statutes and considered an illicit drug.

• The statute may protect an employee from termination for a positive drug test, however, this is where the law is unclear. It appears to permit a positive drug test under 10 nanograms of active THC per milliliter of blood if the employee is certified to use medical marijuana. The discrimination clause and the THC levels for performance of certain job duties are in two different sections. Therefore, we will see how this plays out in the courts. Inevitably, a zero-tolerance policy for marijuana metabolites and components must include a second step of asking whether the employee is a certified medical marijuana patient. If the employee is certified, the levels of THC must then be taken into consideration, as well as whether the drug test was random or because the person was thought to be under the influence of marijuana.

We will be hearing a lot more about interpretations of this new law in the years to come. It is expected to take approximately two years for the licensing and regulations to be completed. In that time, we will have an opportunity to see how courts in other jurisdictions are handling similarly worded statutes. Stay tuned. •

Lauri A. Kavulich is a member in Clark Hill's labor and employment practice group where she serves as both a litigator and consultant to clients of the firm in the areas of labor and employment law, Section 1983 civil rights litigation, and workers' compensation. She handles employment practice litigation in state and federal administrative proceedings and courts for governmental entities and large and small employers.