Clouded Post-COVID Workplace? Employers Challenged by Growing Cannabis Use/Accommodation Issues

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With more than 30 states having legalized cannabis in one form or another employers have been revisiting their drug and alcohol policies. In recent years many employers were conflicted as they wanted to attract and retain employees while also seeking to promote workplace safety and job performance standards. That was before the pandemic. As with many workplace issues, COVID-19 has complicated an already cloudy issue.

It has been reported that the stressors of the pandemic have caused a spike in anxiety and depression incidences. Along with that increase in reported mental health issues there has also been a substantial increase in marijuana use. The availability of marijuana and the fact that many employees were either out of work or working from home certainly contributed to this increase. But health professionals have also reported that many individuals dealing with anxiety and depression have turned to cannabis for relief. As employees return to work and as cannabis is more popular as a medical treatment, employers have to decide how they want to handle this issue.

The answer to the question of whether employers must accommodate marijuana use has evolved in recent years, from, "No, it's illegal under federal law," to "It depends, based on the reason for use and the nature of the job." This article will discuss the legal challenges employers face as the pandemic hopefully wanes, and employees return to work.

Depression, Anxiety, and the Pandemic

The effects of the pandemic have taken a psychological toll. The CDC reports that, in June 2020, 40% of U.S. adults reported struggling with mental or behavioral health conditions. Over 30% of these respondents reported symptoms of anxiety or depression. These numbers are nearly triple those from early 2019. In 2020 prescription fills for anxiety and depression medications reached an all-time high. Many individuals with mental health issues look to cannabis to alleviate symptoms, and use of this treatment increased dramatically since the beginning of COVID-19. While evidence as to cannabis' effectiveness as a long-term treatment for anxiety or depression is mixed, many patients prefer cannabis to some pharmaceuticals.

Medical Marijuana – State Trends

While marijuana use is still illegal under federal law, a majority of states permit medical marijuana use. This discrepancy in the law creates ambiguities for employers seeking to implement legally compliant employer policies. The result of these conflicting and often oblique legal requirements is sometimes litigation. Courts previously tended to hold that employers are not required to accommodate medical marijuana use, but this trend has recently changed.

For example, in the 2017 case *Barbuto v. Advantage Sales and Marketing, LLC*, the Supreme Judicial Court of Massachusetts determined that an employer was required under state anti-discrimination laws to consider whether it could reasonably accommodate the off-site medical marijuana use of an employee with a disability. The Court suggested exploration of whether an alternative, equally effective medication was available. State legislatures attempt to clarify the ambiguities that give rise to this kind of litigation. In marijuana legalization statutes, states are now including employment protections prohibiting discrimination against off-duty cannabis use or requiring employers to accommodate medical marijuana.

Medical Marijuana in New Hampshire

Medical marijuana became legal in New Hampshire in 2013. Through the state's Therapeutic Cannabis Program, "qualifying patients" may obtain the drug through one of the state's four Alternative Treatment Centers. Qualifying patients must be New Hampshire residents diagnosed with qualifying medical conditions and registered with the state.

Depression and anxiety are not currently enumerated as qualifying medical conditions, but medical marijuana may frequently be prescribed in conjunction with these conditions. Moderate or severe post-traumatic stress disorder is a qualifying medical condition, and this disorder frequently co-occurs with depression and anxiety. New Hampshire does not have employee protection laws for therapeutic cannabis, but RSA 354-A requires employers to provide reasonable accommodations to an employee who has a disability, provided it is not an undue hardship.

New Hampshire case law has not directly addressed employer disability discrimination in the medical marijuana context, although commentators note that the New Hampshire Supreme Court's recent opinion in *Appeal of Andrew Panaggio* indicates its readiness to protect medical marijuana use. The Court held in that case that, where an employee's doctor prescribed cannabis for a work-related injury, the employer or its insurer could not deny reimbursement based

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on the federal illegality of cannabis.

Cannabis and the Workplace – A New Hampshire Employer's Guide

While the issue of accommodation remains cloudy and complicated, several considerations will help employers adhere to legal requirements, avoid litigation, and safeguard workplace safety and productivity.

When an employee requests an accommodation for medical marijuana use, a statutorily protected disability may be underlying. Under federal and state disability laws when a disabled employee requests a reasonable accommodation employers must engage in an "interactive process" with the employee. That process considers the essential functions of the position and whether accommodation is indeed reasonable. While the analysis can be involved, in short, an accommodation is reasonable unless it would represent an undue hardship to the employer or a direct threat of harm to the employee or others. In the case of cannabis use the question should be whether the use of medical marijuana use would impair work performance or impose a serious safety risk. However, the Americans with Disabilities Act still provides that the use of an illegal drug cannot be a reasonable accommodation. Marijuana is still considered a schedule 1 narcotic under federal law. But what about medical marijuana use off site and off work hours?

Employers may still prohibit marijuana use at work, deny on-site marijuana use as a reasonable accommodation, and discipline employees for being under the influence of cannabis at work. That said, off duty use of cannabis, especially in positions that are not considered safety sensitive, may be something that employers may soon no longer control or use to justify adverse employment decisions.

Given *Appeal of Panaggio*, it is hard to predict whether New Hampshire courts would recognize a claim for wrongful termination or retaliation for off-site marijuana use, where an employee is not actually impaired while working.

Employers subject to laws that require a drug-free workplace (such as for safety-sensitive or federally regulated positions) are still able to refuse to hire or take adverse action against an employee for marijuana use but *smoke signals* from Washington suggest that change, in the form of changes to federal drug laws with regard to marijuana, may be in the wind. In the meantime, as we emerge from the pandemic, return to the new normal in the workplace, and start to address employee mental health and wellness issues, employers may need to take a fresh look at their policies regarding marijuana use.

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crimination includes sexual orientation and sexual identity, Bostock swatted away confusion on how to prove regular (non-mixed-motive) discrimination and retaliation cases under Title VII. I call it "Civil Rights Jenga": one can pull out different sticks to topple the pile; each is a separate "but for" cause. Justice Gorsuch wrote:

> *" In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.*
> ***This can be a sweeping standard. Often, events have multiple but-for causes**. So, for example, if a car accident occurred both because the defendant ran a red light and because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. When it comes to Title VII, the adoption of the traditional but-for causation standard means **a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision.** So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law.*
> *No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added "solely" to indicate that actions taken "because of" the confluence of multiple factors do not violate the law. Or it could have written "primarily because of" to indicate that the prohibited factor had to be the main cause of the defendant's challenged employment decision. But none of this is the law we have."* (citations omitted) (Emphasis added)

Deb: So, do you interpret this to mean that summary judgment will not be granted for employers when there is *any* evidence of discrimination, regardless of solid evidence of a non-discriminatory reason for the action?

Nancy: Correct. Justice Gorsuch wrote, "*Often events have multiple but-for causes.*" Employees need not prove that discrimination was the primary, sole, main or even the most important trigger for the action. Mixed-motive pleading and McDonnell Douglas burden shifting may disappear. The employee can escape summary judgment and can receive full damages at trial *without having to offer any evidence disproving the employer's nondiscriminatory reason/s*, because both the discriminatory and non-discriminatory reasons can be true, "but for" motivations.

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