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New Minnesota Medical Cannabis Law Protects Employees From Discrimination For Medical Marijuana Use

By Kathryn J. Russo on June 3, 2014

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Minnesota's new Medical Cannabis Act, signed into law on May 29, 2014, differs from many other state medical marijuana laws in that it narrows the kind of medical cannabis permitted. It also offers considerable protections to applicants and employees in the workplace.

The law does not cover marijuana that can be smoked. It defines "medical cannabis" as any species of the genus cannabis plant that is "delivered in the form of" liquid, including but not limited to oil, pill, vaporized delivery which does not require the use of dried leaves or plant form, or any other method, excluding smoking, approved by the Minnesota Commissioner of Health. So, a person using a marijuana cigarette is not protected by this law.

Qualifying patients must have a qualified medical condition from a list limited to the following: cancer, if the underlying condition or treatment produces severe or chronic pain, nausea, cachexia or severe wasting; glaucoma; HIV; Tourette's; amyotrophic lateral sclerosis; seizures, including those characteristic of epilepsy; severe and persistent muscle spasms, including those characteristic of multiple sclerosis; Crohn's disease; terminal illness, with a probable life expectancy of under one year, if the illness or treatment produces severe or chronic pain, nausea, cachexia or severe wasting. The Commissioner may also approve other medical conditions or treatments.

The Act includes specific employment protections for qualified patients. It states that "an employer may not discriminate against a person in hiring, termination or any term or condition of employment, or otherwise penalize a person," if the discrimination is based upon the person's status as a qualified patient or a qualified patient's positive drug test for cannabis components or metabolites, "unless the patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment." This protection has an exception if the failure to discriminate "would violate federal law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations[.]" Of course, if an employee "used, possessed, or was impaired" by marijuana on the job, under many employer substance abuse policies, drug testing would be unnecessary prior to the imposition of discipline.

The consequences of the law for Minnesota employers seeking to maintain a drug-free workplace can be onerous. Arguably, an applicant who is a qualified patient could not be rejected for testing positive for marijuana, even if he or she was applying to work in a safety-sensitive position (other than as a driver of a commercial motor vehicle, pilot or other position regulated by federal drug testing law). Solace for employers may be found in the narrow restrictions on the population that can use medical cannabis, and the means by which the drug may be administered. The total number of patients, especially those who are not completely disabled and can work, may remain low for the time being. In fact, some patient advocates are refusing to participate or become enrolled because the act does not allow them to smoke marijuana leaf, although a drug test result cannot distinguish between use from smoking and the use of oil or vapor.

Drug testing in Minnesota is governed by the Minnesota Drug and Alcohol Testing in the Workplace Act ("DATWA") which has strict requirements for testing, including the requirement of a compliant written policy and a prohibition on termination of employees who test positive for the first time unless they refuse or fail to attend and complete treatment. The Medical Cannabis Act does not directly amend DATWA, but by de-criminalizing marijuana for qualified individuals under the criminal statutes upon which DATWA is built, it may limit the reach of the drug testing statute with regard to qualified patients under the Act. Employers who drug test in Minnesota should take the opportunity to review and revise their policies to ensure compliance.

Minnesota also has a "lawful consumable products" act which prohibits employers from taking an adverse employment action against an employee who consumes lawful products on his or her own time. It remains to be seen whether or how the Medical Cannabis Act will impact that statute, but the explicit protections in the new Act probably make an attempt to invoke the lawful consumable products act unnecessary or redundant, and possibly vulnerable to an argument that it has been preempted by the new Act insofar as medical marijuana is concerned.

The Act became effective upon enactment, but it will take time for a system to be created to allow the use of medical cannabis. Minnesota is the 22nd state (plus the District of Columbia) to approve medical marijuana in some form. Other states with some form of employee protection for use of medical marijuana include Connecticut, Illinois and Nevada, among others.

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