

Drug & Alcohol Testing Law Advisor

Developments in Regulating Workplace Drug and Alcohol Testing

Montana's Revised Medical Marijuana Law Survives Constitutional Challenge

By Roger S. Kaplan on March 16, 2016

The Montana Supreme Court has upheld against a state constitutional challenge the State's 2011 Montana Marijuana Act, a new statutory framework embodying the State's effort to limit abuses resulting from the 2004 Medical Marijuana Act, which was established by voter initiation. *Montana Cannabis Industry Ass'n v. The State of Montana*, 2016 Mont. LEXIS 168 (Feb. 25, 2016). The decision could benefit employers by limiting the availability of marijuana among persons not authorized to use it for medical purposes.

Relying principally on a substantive due process analysis, the Supreme Court vacated a state district court's injunctions against: (1) a provision in the 2011 law that requires the Department of Health and Human Resources to notify the Board of Medical Examiners of any physician who certifies 25 or more patients in a year for medical marijuana; (2) a provision limiting to three the number of registered patients providers of marijuana and marijuana-infused products can assist; and (3) a prohibition against providers advertising "marijuana or marijuana-related products in any medium, including electronic media". Contrary to the lower court, it found these statutory prohibitions to be constitutional on their face.

The Supreme Court, however, declared to be unconstitutional under the equal protection and due process clauses of the Montana constitution a prohibition against providers accepting remuneration for their products or services relating to medical marijuana. The statute barred providers from accepting reimbursement from a medical marijuana cardholder for more than the provider's application or renewal fee for a registry identification card, and from accepting "anything of value, including monetary remuneration, for any services or products provided to a registered cardholder," and from buying or selling marijuana plants or products. The court was concerned that a complete prohibition against compensation bore no rational relationship to the Legislation's apparent objective of preventing large-scale marijuana production operations from serving as fronts for illegal drug trafficking that could funnel money to cartels, gangs and other criminal enterprises. Such restriction also would be "invidious," the court found, because even when medical marijuana was approved by a physician, "it would have no commercially available source of supply." The court permanently enjoined enforcement of these provisions.

The State Supreme Court affirmed the lower court in upholding the facial validity of the new law's provision prohibiting probationers from becoming registered cardholders and a provision allowing warrantless inspections of medical marijuana providers' business by the Department and law enforcement agencies.

The court's decision generally sustaining the revised Medical Marijuana Act's provisions should help employers by limiting the likelihood of marijuana abuse. It bears noting that although the legality of the state law in the face of the federal Controlled Substances Act (which makes marijuana illegal as a Schedule I drug) was not before the court, the court's opinion repeatedly referenced this "elephant in the room," and it likely informed much of the court's opinion.

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