MHA
MISSOURI HOSPITAL ASSOCIATION

MEDICAL MARIJUANA AND YOUR EMPLOYEES

QUICK FACTS:

1. **Amendment 2 prohibits the use of medical marijuana in the workplace or attempting to work while under the influence.** Hospitals may discipline impaired employees under existing policies and procedures for addressing the use of alcohol or illegal drugs in the workplace.

2. **Amendment 2 does not address workplace drug testing policies.** At present, it does not prohibit employers from continuing to discipline current staff and refusing to hire prospective employees for positive drug tests. However, future court decisions could require employers to provide reasonable accommodations to employees using medical marijuana, including relief from the consequences of positive drug screens.

3. **Amendment 2 does not affect existing policies developed to comply with the federal Drug-Free Workplace Act.**

4. **An employee fired for having detectible amounts of medical marijuana in their system presently is barred from receiving unemployment benefits, so long as the employer followed statutory drug testing requirements.** Missouri courts could alter this interpretation by concluding that off-duty marijuana use is lawful and therefore should be treated the same as a controlled substance for which an employee has a valid prescription.

5. **Employees who test positive for marijuana following a workplace accident or injury likely will receive reduced benefits or forfeit them altogether under existing workers' compensation statutes, unless Missouri courts interpret Amendment 2 as providing greater protections for employees engaged in lawful use of medical marijuana.**

In November, Missouri voters approved Amendment 2, a constitutional amendment decriminalizing medical marijuana. Beginning in July 2019, the Missouri Department of Health and Senior Services must begin accepting applications for identification cards that permit individuals with a qualifying medical condition to possess and use cannabis. It is unlikely that dispensaries will sell medical marijuana in Missouri before late 2019, but individuals with valid I.D. cards are likely to begin using the drug before that time. Hospitals should assume employees with qualifying medical conditions will obtain an I.D. card and use medical marijuana.

AMENDMENT 2 OVERVIEW

Amendment 2 identifies the following medical conditions for which an individual may use medical marijuana.

- Cancer
- Epilepsy
- Glaucoma
- Intractable migraines unresponsive to other treatment
- Chronic medical conditions causing severe, persistent pain or muscle spasms, including but not limited to those associated with multiple sclerosis, seizures, Parkinson's disease and Tourette's syndrome
- Debilitating psychiatric disorders, including but not limited to post-traumatic stress disorder, if diagnosed by a state-licensed psychiatrist
- Human immunodeficiency virus or AIDS
- Chronic medical conditions normally treated with potentially addictive medications, when a physician determines that marijuana could be an effective and safer alternative
- Terminal illness
- Any other chronic or debilitating medical condition, including hepatitis C, amyotrophic lateral sclerosis, inflammatory bowel disease, Crohn's disease, Huntington's disease, autism, neuropathies, sickle cell anemia, agitation of Alzheimer's disease, cachexia and wasting syndrome, if a physician deems marijuana to be a potentially effective treatment

Individuals seeking I.D. cards from DHSS must submit a physician's certification that he or she has been diagnosed with one or more of these conditions. The department must provide application forms for I.D. cards no later than Tuesday, June 4, and begin accepting applications by Thursday, July 4. The department has 30 days after receipt of an application to issue an I.D. card or written reason(s) for denial. If the department fails to act on any application, the physician certification serves as an I.D. card for one year. I.D. cards must be renewed annually and accompanied by a physician certification less than 30 days old.

All employers, including hospitals, must assume that some portion of their employees will obtain valid I.D. cards to treat one or more qualifying conditions, raising a host of workplace safety and employment issues.

How can hospitals prepare?

WORKPLACE USE

Amendment 2 prohibits employees from using medical marijuana in the workplace or attempting to work while under the influence. It also prohibits individuals from bringing any claim for wrongful discharge, discrimination or similar cause of action because he or she was prohibited from or punished for being under the influence of marijuana at work. Therefore, hospitals do not need to change their present policies on drug use or impairment during work time. The primary issue hospitals must address is how to identify impairment in the workplace. Unlike alcohol, blood and urine tests for marijuana do not reliably demonstrate that the individual is presently impaired. Therefore, hospitals should apply their current practices for determining if an employee is under the influence of narcotics to detect impairment from medical marijuana.

Some number of employees currently are abusing narcotics on the job. Some may be using illegal substances such as marijuana or prescription drugs for which they do not have a valid prescription. Others may take a validly prescribed drug, the use of which compromises workplace safety. Policies and procedures for preventing and detecting medical marijuana use at work essentially will be the same as those used to deter and detect other substances. Red or glassy eyes, lethargy, lack of concentration or coordination, memory impairment, and delayed reaction all may be indicative of cannabis impairment. As with other substances, supervisors should be trained to evaluate whether there is a reasonable suspicion that an employee is under the influence of an illegal substance or drug that is not safe for use at work.

Generally, disability discrimination laws prohibit employers from asking about an employee's use of legally prescribed drugs unless he or she is employed in a safety-sensitive position. If the hospital has not already identified those positions for the purpose of its existing policies on prescription drug use, management should work closely with human resources to do so and may apply the same processes to the suspected use of medical marijuana. An employer also may craft a nondiscriminatory policy asking employees to notify the employer when he or she is using legal substances that may interfere with the ability to perform his or her job.

Additional implications on workplace use are addressed below.

DRUG TESTING AND EMPLOYMENT DISCRIMINATION

Amendment 2 is silent on workplace drug testing and the ability of employers to apply existing policies for discipline of, or refusal to hire individuals for, positive test results. Federal laws, such as Department of Transportation regulations, require employers to conduct drug screens to ensure workplace safety, and Missouri employers should continue to follow those requirements. Amendment 2 expressly bars individuals from operating a dangerous device or motor vehicle while under the influence of marijuana. Similarly, the law does not excuse negligent conduct while under the influence. Therefore, hospitals may continue to apply policies that impose drug testing as necessary for safety-sensitive positions.

A number of employees in other states have challenged the adverse consequences of employment-related drug screens, with results largely dependent on the text of the law at issue. Typically, employees have claimed that the applicable medical marijuana law protected them from wrongful discharge for legal marijuana use or that the employer was required to allow off-duty use as an accommodation for their disability.

For example, a New Mexico court held that because the state's medical marijuana law did not expressly require use as an accommodation, an employer could fire an employee for violating its existing drug testing policies. *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225 (D.N.M. 2016). The court went on to state that mandating use as an accommodation would violate the federal Controlled Substances Act. Similarly, a New Jersey employer was not required to waive its drug testing policies as an accommodation. *Cotto v. Ardagh Glass Packing, Inc.*, No. 18-1037, 2018 U.S. Dist. LEXIS 135194 (D.N.J. Aug. 10, 2018). The New Jersey law was silent on any accommodation requirement, and the court also noted marijuana use remains illegal under federal law. Finally, the Supreme Court of Washington found its medical marijuana law did not give rise to a wrongful discharge claim over the employer's refusal to waive a drug test. *Roe v. TeleTech Customer Care Mgmt.*, 171 Wash. 2d 736 (2011). The court rejected arguments that the law established a public policy requiring employers to accommodate use of medical cannabis, relying on language similar to that in Missouri barring use in the workplace.

Conversely, some courts have concluded their state's medical marijuana laws do relieve employees from drug testing policies. Connecticut's Palliative Use of Marijuana Act expressly prohibits discrimination of qualifying patients by their employers. Thus, a lawsuit over the rescission of a job offer because of a positive

drug screen was allowed to proceed. *Noffsinger v. SSC Niantic Operating Co., LLC d/b/a Bride Brook Nursing & Rehabilitation Center*, No. 3:16-cv-01938 (D.Conn. Aug. 8, 2017) (ruling on defendant's motion to dismiss). The court specifically found the anti-discrimination provisions of PUMA were **not** preempted by the federal Controlled Substance Act, as nothing in the latter regulates the employment relationship. A Delaware court issued a similar opinion, noting the state's medical marijuana act explicitly prohibits employers from disciplining users who fail drug tests. *Chance v. Kraft Heinz Foods Co.*, No. K18C-01-056, 2018 Del. Super. LEXIS 1773 (2018).

One case has turned on a strict analysis of the state's disability discrimination law without heed to the text of its medical marijuana statute. The Massachusetts Supreme Judicial Court held that a prospective employee suffering from Crohn's disease had a qualifying disability under state law, and the employer was obligated to consider her request to be excepted from its drug testing policy. *Barbuto v. Advantage Sales and Marketing*, 477 Mass. 456 (Mass. 2017). It is important to note that the court did not require the employer to implement the accommodation but held that an employer is required to analyze whether such a request is reasonable under the circumstances.

Whether a Missouri hospital must accommodate current or prospective employees by waiving the consequences of positive drug screens ultimately will be resolved by the courts and their interpretation of the text of Amendment 2. The act is silent as to whether an employer must accommodate use occurring outside the workplace so long as the employee does not come to work impaired. So far, courts interpreting medical marijuana laws without an affirmative obligation to accommodate employees have held that employers may discipline or fire individuals who test positive for marijuana use. However, at least one commenter suggested that language, such as that in Amendment 2 protecting medical cannabis users from "sanction," can be used to support wrongful termination or failure to hire claims arising from positive drug tests. Elizabeth Rodd, *Light, Smoke, and Fire: How State Law Can Provide Medical Marijuana Users Protection from Workplace Discrimination,* 55 B.C. L. Rev. 1759, 1768 (2014).

Missouri courts traditionally have interpreted the Missouri Human Rights Act to give broad protections to employees and easily could render a decision similar to that of the high court in Massachusetts, without regard for the text of Amendment 2. They also have held that off-duty marijuana use that does not affect job performance should not be considered misconduct associated with work in the unemployment context. *Baldor Electric Co. v. Reasoner*, 66 S.W.3d 130 (Mo. App. E.D. 2001). Therefore, it is quite possible that Missouri courts will conclude it reasonable for employees to be accommodated for off-duty marijuana use under Amendment 2.

It is important to note that the passage of Amendment 2 did not remove marijuana from the list of Schedule I drugs, and it is still considered an illegal narcotic under federal law. The federal Americans with Disabilities Act does not require an employer to accommodate an employee's use of medical cannabis. Because medical marijuana use now is decriminalized under state law, hospitals may be required to make reasonable accommodations for employees with qualifying conditions under the state law.

Under state law, a qualifying disability is a "physical or mental impairment which substantially limits one or more major life activities," which, with or without a reasonable accommodation, does not interfere with an employee's ability to perform his or her job. *Section 213.010(5), Mo. Rev. Stat. (Supp. 2017)*. An employee with a qualifying disability is entitled to an interactive process to determine if a reasonable accommodation of their condition can be made. Courts consider the nature and cost of a requested accommodation, as well as the burden on an employer when deciding whether it is reasonable. *8 C.S.R. § 60-3.060(1)(G)*.

The conditions qualifying an individual to possess medical marijuana under Amendment 2 probably would be considered qualifying disabilities under the Missouri Human Rights Act. Since the law prohibits employees from using marijuana at work or working while under the influence, the two most likely accommodations include altered schedules to allow for off-duty use and immunity from discipline for positive drug screens.

State regulations and court decisions indicate altered schedules may be a reasonable accommodation in certain circumstances. *8 C.S.R. § 60-3.060(1)(G)(2)(B)*; *Medley v. Valentine Radford Communications, Inc.*, 173 S.W.3d 315, 320 (Mo. App. 2005). Therefore, hospitals should not reject such requests without fairly assessing if the request can be accommodated without causing undue burden to its workforce and operations. Requests for altered schedules related to medical marijuana use should be evaluated in the same manner as management would assess the same request for any other qualifying disability.

Hospitals that wish to avoid liability under the state's disability discrimination law should apply current state standards for determining whether excusing a current or prospective employee from drug testing is a reasonable accommodation: The nature and cost of the accommodation, the organization's size, and whether it previously has granted similar accommodations for other qualifying conditions. *8 C.S.R. § 60-3.060(1)(G)(3)*. Accommodations that impose undue financial or administrative burdens are not reasonable. *Lomax v. DaimlerChrysler Corp.*, 243 S.W.3d 474, 480 (Mo. Ct. App. 2007).

DRUG-FREE WORKPLACE POLICIES

The Drug Free Workplace Act requires entities receiving federal grants and contracts to maintain a drug-free workplace policy and a drug-free awareness program. The policy must prohibit the use, manufacture, distribution, dispensation or possession of controlled substances in the workplace and require employees to notify the employer within five days of any criminal conviction relating to drug use, possession or distribution in the workplace. The employer must discipline employees who are criminally convicted of a drug offense or require them to participate in a treatment program. The provisions of the Drug Free Workplace Act technically apply only to those employees working under a federal contract or grant, but many employers apply their drug-free workplace policies to the entire workforce.

Legalization of medical marijuana should not affect a hospital's ability to comply with the Drug Free Workplace Act. Missouri law prohibits employees from using medical marijuana in the workplace, and a hospital may prohibit employees from bringing marijuana on the premises. While Amendment 2 decriminalizes use and possession of marijuana by qualifying patients, it does not protect individuals who violate its provisions or any other drug law. Therefore, any employee who is criminally convicted of a drug-related offense in the workplace has violated state or federal law, and the hospital may report such convictions to the government as required by the act.

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UNEMPLOYMENT COMPENSATION

A terminated employee is entitled to unemployment compensation unless he or she commits misconduct connected with work. An employee who is discovered to have a "detectible" amount of a controlled substance in their system while at work, in violation of the employer's known policy, has committed misconduct connected with his or her work. An employee does not commit misconduct if a controlled substance was used "under and in conformity with the lawful order of a health care practitioner." *Section 288.045, Mo. Rev. Stat. (2016)*.

Detectible amounts of marijuana can remain in an individual's system long after the effects of the drug have worn off. However, the General Assembly enacted the current law in 2004 through House Bill 1268 with the intent to abrogate the Baldor Electric Company case (66 S.W.3d 130), in which an employee who had been discharged for positive drug tests was granted unemployment benefits on the grounds of insufficient evidence that use had occurred at work or affected job performance.

The language allowing unemployment benefits for lawful use of controlled substances was intended to protect employees who test positive for drugs for which they have a valid prescription. Medical marijuana is not prescribed, and an employee is not using it under an "order" from a health care practitioner. However, an employee's off duty use is lawful. Additionally, Amendment 2 states that actions and conduct by qualifying patients authorized by the new law shall not subject them to criminal or civil liability, or "sanctions," under Missouri law. An argument can be made that the denial of unemployment compensation is the type of sanction Amendment 2 protects against.

Courts in other states with legalized medical marijuana have addressed these issues. A Michigan court held language protecting qualifying patients from the denial of any "right or privilege" under the state's medical marijuana law overrode unemployment statutes denying benefits for employees who failed a drug test. *Braska v. Challenge Mfg. Co.*, 861 N.W.2d (Mich. Ct. App. 2014). A Colorado court held the opposite, concluding that its medical marijuana law insulated individuals from criminal liability, but did not alter the state's unemployment statutes. *Beinor v. Industrial Claim Appeals Office of Colorado and Service Group, Inc.*, 262 P.3d 970 (Colo. Ct. App. 2011)

While the text of Amendment 2 clearly states the law should be interpreted broadly in favor of allowing patients to use medical marijuana, it is not clear how that intent can be harmonized with existing statutes, including those providing for unemployment benefits. The tension between these laws will need to be resolved by Missouri courts.

WORKERS' COMPENSATION

Missouri's workers' compensation laws reduce benefits when an employee tests positive for drugs in violation of a drug-free workplace rule and sustains an injury in conjunction with the use of a controlled substance. The law creates a presumption that the injury was sustained in conjunction with the identified drugs, so long as the statutory testing procedures are followed.

Under this framework, an employee who tests positive for marijuana following a workplace injury will be presumed to be under the influence at work, with benefits reduced accordingly, unless the employee can demonstrate by a preponderance of the evidence that he or she was not impaired. Since cannabinoids remain in the system for a period of time, especially in chronic users, conventional drug testing technology is insufficient to prove or disprove impairment at work.

Therefore, it is unlikely that an employee could rebut the presumption, and medical marijuana users who suffer workplace injuries uniformly are likely to receive reduced benefits, unless the statute is revised or the courts interpret Amendment 2 to supersede the existing workers' compensation statute. Amendment 2 does protect qualifying patients from suffering any "sanction" under Missouri law, which provision could be relied upon to allow full benefits to injured employees with valid medical marijuana cards.

Amendment 2 also states it is not to be construed as requiring health insurance coverage of medical marijuana, but does not speak to workers' compensation coverage. Numerous state courts have assessed whether coverage is required under their medical marijuana laws, with varying results. Until a Missouri court rules otherwise, medical marijuana would not be covered for employees with workplace injuries.

CONCLUSION

Amendment 2 will affect numerous workplace policies on controlled substance use. Employers' legal obligations to accommodate off-duty use for individuals with qualifying conditions are unclear at this time and ultimately will be resolved by the courts. Amendment 2 unambiguously prohibits marijuana use and impairment in the workplace. It is not clear as to the consequences of off-duty use. At present, the text of Amendment 2 does not require employers to alter their current drug testing policies, but judicial interpretation of the law may change its application over time.

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