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In November 2000, Colorado voters approved Amendment 20, which authorizes patients with certain debilitating medical conditions to receive a state registry identification card allowing them to lawfully obtain and use marijuana. The procedure for obtaining a medical marijuana card is pretty simple: The individual completes an application and submits a $90 fee along with certification from a doctor stating that he has a qualifying debilitating condition that may benefit from medical marijuana.

Since 2001, the Colorado Department of Public Health and Environment has received more than 13,000 patient applications for medical marijuana cards. According to a recent *Denver Post* article, the Department is currently receiving an average of 400 requests for cards each day. So what's an employer to do when presented with an employee with a medical marijuana card?

Does Amendment 20 allow medical marijuana at work?
No. Amendment 20 specifically states that nothing in the medical marijuana law "requires any employer to accommodate the medical use of marijuana in any work place." Therefore, you have the right to prevent employees from smoking pot at work, regardless of whether they hold a medical marijuana card.

What about showing up to work under the influence?
Amendment 20 clearly allows you to prohibit medical marijuana users from smoking pot at work. However, a more difficult question is whether you can prohibit card-carrying medical marijuana employees from being under the influence or having detectable amounts of medical marijuana in their system as a result of smoking off-duty. In other words, does the prohibition of "use of marijuana in any work place" include (1) prohibiting medical marijuana users from reporting to work under the influence of marijuana or (2) not being actually impaired but having traces of the drug in their system due to off-duty use?

While Colorado courts have yet to address the issue, cases from other jurisdictions may be instructive in answering that question. Oregon, like 12 other states that have decriminalized the use of medical marijuana, tackled the issue in 2004 and 2006. In *Freightliner v. Teamsters Local 305*, the U.S. district court in Oregon held in 2004 that Oregon's Medical Marijuana Act didn't invalidate a collective bargaining provision that prohibited employees from showing up to work under the influence of marijuana or with detectable amounts marijuana in their system, even if they weren't actually impaired from their off-duty use of marijuana.

In 2006, the Oregon Supreme Court in *Washburn v. Columbia Forest*

Products reached a similar conclusion. In that case, the employer had a drug policy prohibiting employees from reporting to work with a controlled substance in their system. To enforce the policy, the employer administered a test that could determine whether a person used marijuana in the two to three weeks leading up to the test.

The employee in question, a medical marijuana user who regularly used the drug before going to bed to counteract leg spasms that kept him awake, tested positive and was placed on a leave of absence as a result. Soon after, he requested an accommodation—specifically, he asked to take different test that focused only on whether he was drug-impaired at work. Discussions of the proposed accommodation broke down, and the employee was fired.

The employee sued, claiming the employer failed to accommodate his disability under state disability law. The Oregon Supreme Court in *Washburn* resolved the issue by finding the employee wasn't "disabled" for purposes of the state disability law. In a concurring opinion, one of the justices held that marijuana – whether medically recommended or otherwise – remains a Schedule I drug under the federal Controlled Substances Act, 21 U.S.C. §§ 801 et seq.

The Controlled Substances Act prohibits possessing, manufacturing, dispensing, and distributing marijuana. According to the concurring justice, a person cannot "use" marijuana without possessing it, and because federal law preempts state law, the Controlled Substances Act prevents an interpretation of Oregon's state discrimination law that would require an employer to accommodate an employee's medical marijuana use, even if the actual ingestion occurred away from the work site.

You should also be aware that certain positions are subject to federal regulation regarding the use of drugs in and outside the workplace; and state medical marijuana laws have absolutely no impact on those federal regulations. For example, in October, the U.S. Department of Transportation (DOT) issued a release reminding regulated trucking companies, railroads, airlines, and transit system companies that state medical marijuana laws do not excuse the positive drug test of a transportation employee subject to DOT testing. To view a copy of the release, visit www.dot.gov/ost/dapc/.

Does it give medical marijuana users a cause of action if they are fired?
Again, Colorado courts have yet to address the specific issue of whether card-carrying medical marijuana users can sue under the medical marijuana law if they are fired for medical marijuana use. However, several states have found no explicit or implicit cause of action based on medical marijuana statutes or claims based on the theory of wrongful termination in violation of public policy.

For example, in *Roe v. Teletech Customer Care Management*, the Washington Court of Appeals analyzed the plain language of the Washington State Medical Use of Marijuana Act (MUMA) and the history of the initiative. The court found that MUMA neither explicitly nor implicitly

creates a legal remedy for employees fired for using medical marijuana. Rather, the purpose of the Act—like that of Colorado's Amendment 20—was to create an exception of the state's criminal law for the possession of marijuana by card-carrying medical marijuana patients and for physicians who recommend medical marijuana.

For similar reasons, the court also rejected the notion that MUMA expresses a public policy against employers that terminate employees for using medical marijuana on or off the job. The law simply doesn't speak to employment law, and nothing in the text or history of the statute indicates that those who voted in favor of MUMA intended to give medical marijuana users special employment protections.

Similarly, Amendment 20 contains no explicit or implicit cause of action allowing medical marijuana users who are terminated for off-the-job medical marijuana use to sue their employers. Like Washington's statute, Amendment 20 merely prohibits state criminal prosecution of medical marijuana cardholders and certain others for the possession of marijuana. Finally, nothing in the statute expresses a clearly stated public policy protecting employees who happen to be medical marijuana users. Accordingly, it is doubtful that Colorado would find in Amendment 20 a remedy for individuals terminated from the job for medical marijuana use.

Colorado has a law that prevents employers from firing workers who engage in lawful off-duty activities. However, that law would seem to provide little job protection for employees using medical marijuana because while medical marijuana use is legal in Colorado, it remains illegal under federal law.

Do injured employees under the influence get workers' comp?
Colorado's workers' comp statute provides for a 50 percent penalty on wage-loss benefits when the injury results from the presence of "not medically prescribed controlled substances" in the worker's system. However, the penalty does not apply when the employee is under the influence of "medically prescribed controlled substances." Is medical marijuana a "medically prescribed controlled substance"? The answer is no.

Medical marijuana remains a Schedule I drug under the federal Controlled Substances Act, which means it cannot be prescribed by a health care professional. Under Amendment 20, doctors can recommend the use of medical marijuana, but they cannot prescribe it. Because medical marijuana cannot be prescribed, employees shouldn't be able to rely on Amendment 20 to avoid the 50 percent penalty on indemnity benefits if they suffer an injury as a result of having it in their system.

Do I have to allow off-duty use of medical marijuana?
In other words, if a person has a disability recognized by the Americans with Disabilities Act (ADA) or state disability law and medical marijuana has been recommended to treat the disability, must an employer, as a form of reasonable accommodation, exempt the employee from mandatory drug testing or abstain from terminating him if he tests positive for marijuana? This is perhaps the toughest issue presented by medical marijuana

statutes, including Colorado's. Colorado courts have not addressed this specific issue, but decisions from other states with medical marijuana laws suggest the answer is no.

In *Barber v. Gonzales,* a case heard by the Eastern District of Washington in 2005, the individual argued that as a disabled individual protected by the ADA, his use of medical marijuana under Washington's Medical Marijuana Act prohibited law enforcement from prosecuting him under the federal Controlled Substances Act, which prohibits the use of marijuana. Without much analysis, the court dismissed his claim, holding that marijuana remains illegal under federal law and the ADA does not protect individuals who are currently engaged in the use of illegal drugs. Since that decision, the Washington State Human Rights Commission has issued a directive indicating that the agency will not investigate any claims of discrimination involving the use of medical marijuana. To view a copy of the directive, visit www.hum.wa.gov/Documents/Guidance/medical%20marijuana.doc.

In *Ross v. RagingWire Telecommunications, Inc.,* the California Supreme Court last year handed down a similar decision. An employee alleged that his employer violated California's disability discrimination law by discharging him because of his medical marijuana use and by failing to provide him reasonable accommodation. In rejecting the employee's claim, the California Supreme Court said the employee's position might have some merit if California's medical marijuana law gave marijuana the same status as any legal prescription drug. However, while decriminalized under state law, the court noted that medical marijuana remains illegal under the Controlled Substances Act, and the state's disability discrimination law, like the ADA, does not protect individuals who currently use illegal drugs.

However, an opposite result was reached in *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries,* decided last year. An employee was participating in Oregon's medical marijuana program because of severe nausea, stomach cramps, and vomiting. After disclosing his condition and use of medical marijuana to his employer, he was fired. The employee then filed a complaint with the Oregon Bureau of Labor and Industries (BOLI), alleging disability discrimination under state law and the employer's failure to accommodate his disability. After the parties presented evidence, BOLI issued its order, finding that the employer failed to reasonably accommodate the employee's disability.

The employer appealed, but the appellate court affirmed BOLI's decision. The court's decision, however, wasn't based on the logic or merits of BOLI's analysis, but rather on a technicality that the employer failed to preserve various defenses at hearing, including the argument that the use of medical marijuana couldn't be accommodated because it is illegal under the Controlled Substances Act. The precedential value of this decision is therefore very limited.

So what's an employer to do?
First, you should review your drug policy to make sure it not only prohibits employees from possessing, selling, and using drugs at work, but also prohibits them from being under the influence or having detectable amounts of illegal drugs in their system while at work. Addressing the issue

of medical marijuana in the policy is also recommended.

Second, if the job is safety-sensitive or you are subject to regulations prohibiting on- or off-the-job drug use, you should apply a drug-free workplace policy uniformly and without exception, regardless of whether you have workers who are authorized to use medical marijuana.

Third, if an employee has a disability and is authorized to use medical marijuana, consider meeting with the employee and consulting medical professionals to determine whether there are medications or therapies other than medical marijuana that he can use to deal with his disability. Medical marijuana may be the employee's therapy of choice, but if there are equally effective treatments or medications other than marijuana that can relieve the employee of their condition, you may be able to require him to pursue them.

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