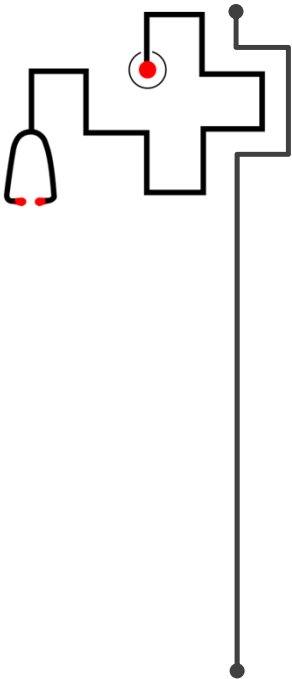


ISSUES AT THE INTERSECTION OF EMPLOYMENT LAW AND PA'S MEDICAL MARIJUANA ACT

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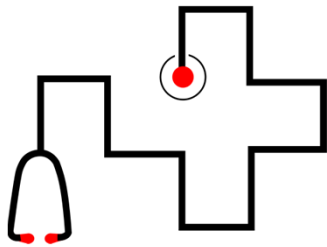
Presentation Overview



***PA Medical Marijuana Act:
Impact on Workforce***

Caselaw

Practical Employment Issues

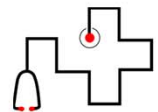


BACKGROUND

Medical Marijuana Act, 35 P.S. §§ 10231.101 *et seq.*
Enacted April 17, 2016; Prime Sponsor, Senator Folmer

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Lawful Use



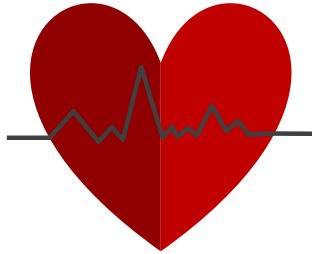
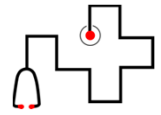
PENNSYLVANIA

- Notwithstanding any provision of law to the contrary, use or possession of medical marijuana as set forth in this act is lawful within this Commonwealth
- Medical marijuana may only be dispensed to:
 - Patient who receives a certification from a practitioner and is in possession of a valid ID card issued by DOH; and
 - Caregiver who possesses valid id card issued by DOH

FEDERAL

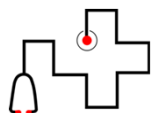
- Schedule I controlled substance under CSA: illegal to manufacture, distribution, dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance
- Jan. 4, 2018: Trump Administration rescinds Cole Memorandum: Obama-era policy not to prosecute lawful use of marijuana under state law
- April 11, 2018: President Trump assures Sen. Cory Gardner that he would support state legalization laws
- Various bills pending to amend Controlled Substances Act to recognize state rights to regulate marijuana

Serious Medical Conditions



**Conditions in red added based on Advisory Board recommendation*

- Amyotrophic lateral sclerosis
- Autism
- Cancer, including remission therapy
- Crohn's disease
- Damage to the nervous tissue of the central nervous system (brain-spinal cord) with objective neurological indication of intractable spasticity, and other associated neuropathies
- *Dyskinetic and spastic movement disorders*
- Epilepsy
- Glaucoma
- HIV / AIDS
- Huntington's disease
- Inflammatory bowel disease
- Intractable seizures
- Multiple sclerosis
- *Neurodegenerative diseases*
- Neuropathies
- *Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions*
- Parkinson's disease
- Post-traumatic stress disorder
- Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain
- Sickle cell anemia
- *Terminal illness*



LAWFUL FORMS



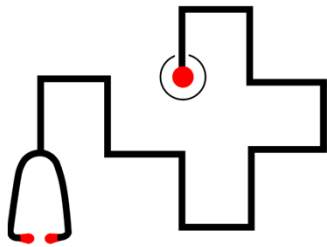
PERMITTED

- Pill
- Oil
- Topical forms, including gels, creams or ointments
- Tincture
- Liquid
- Form medically approved for vaporization or nebulization (*now includes dry leaf and flower based on recommendation of Advisory Board*)

PROHIBITED

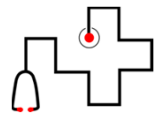
- Smoking
- Edibles unless it "aids in ingestion of medical marijuana by patient"
- Growing or dispensing unless received a permit





IMPACT ON WORKFORCE

Work Restrictions



CHEMICALS



ELECTRICITY



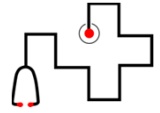
PUBLIC UTILITIES

§10231.510: Prohibitions

(1) A patient may not operate or be in *physical control* of any of the following while *under the influence* with a blood content of more than *10 nanograms of active THC per milliliter of blood in serum*:

- i. Chemicals which require a permit issued by the Federal Gov't or a state gov't or any agency of the Federal Gov't or state gov't.
- ii. High-voltage electricity or any other public utility.

Work Restrictions



HEIGHTS

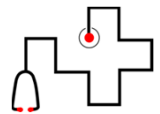


CONFINED SPACES

§10235.510: Prohibitions

(2) A patient may not perform any employment duties at heights or in confined spaces, including, but not limited to, mining while *under the influence* of medical marijuana.

Work Restrictions

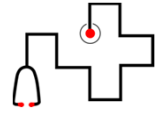


**LIFE THREATENING
TASKS**

§10235.510: Prohibitions

(3) A patient may be prohibited by an employer from performing any task which the employer deems life-threatening, to either the employee or any of the employees of the employer, while under the influence of medical marijuana. The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.

Work Restrictions



PUBLIC HEALTH



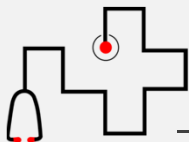
SAFETY RISKS

§10235.501: Prohibitions

(4) A patient may be prohibited by an employer from performing any duty which could result in a public health or safety risk while under the influence of medical marijuana. The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.

Job Descriptions

- Identify safety-sensitive positions
 - Chemicals, electricity, public utility
 - Heights/Confined Spaces
 - Life threatening to employee or other employees
 - Result in public health or safety risk
 - **Driving?**
- Positions on the edge
 - Consider third party job assessments of position
 - Documentation for decision
 - Industry best practices
 - Governmental safety regulations

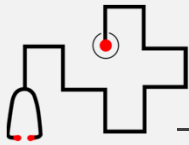


Anti-Discrimination Provision

§10231.2103: *Protections for Patients and Caregivers*

No employer may *discharge, threaten, refuse to hire or otherwise discriminate or retaliate* against an employee *solely* on the basis of medical marijuana certification

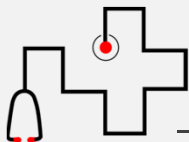
New protected class in Pennsylvania?



Accommodation Limitations

§10231.210: *Protections for Patients and Caregivers*

(b)(2) Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment.



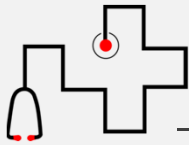
Accommodation Obligations

Americans with Disabilities Act

- 15 or more employees
- Protects qualified individuals with a disability who can:
 - Satisfy requisite skill, experience, education, other job-related requirements; and
 - Perform essential functions of job with or without reasonable accommodation
- Requires an “interactive process”
- No medical marijuana accommodation because marijuana is violation of federal law

PA Human Relations Act

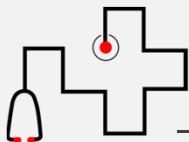
- 4 or more employees
- Protects qualified individuals with a handicap
- Typically, same standards as ADA
- Obligation to accommodate under PHRA since medical marijuana is permitted in PA?



Employee Discipline

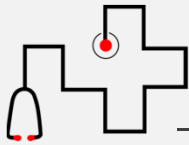
§10231.2103: Protections for Patients and Caregivers

(b)(2) This act shall in no way limit an employer’s ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee’s conduct falls below the standard of care normally accepted for that position.

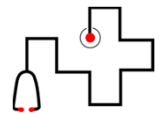


Job Descriptions

- Identify the standard of care normally accepted for the position:
 - Physical requirements, soft skills, mental acuity
- **Inquiry:** What is required of other similarly situated employees who do not hold medical marijuana cards?



Work Restrictions



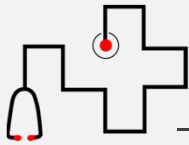
**Violation of Federal
Law**

§10231.2103: Protections
for Patients and Caregivers

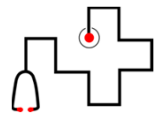
(b)(3) Nothing in this act shall require an employer to commit any act that would put the employer or any person acting on its behalf in *violation of Federal law*.

Drug Free Workplace Act

- Some Federal contractors, and all Federal grantees, required to provide drug-free workplaces as a precondition of receiving a contract or grant from a Federal Agency.
- Enforce zero-tolerance policies regarding use in workplace.
- All drug tests positive for marijuana must be reported.



Department of Transportation



Federal DOT

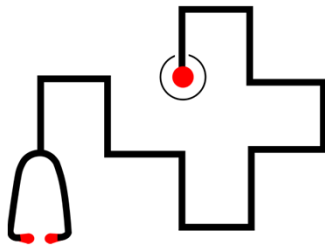
*DOT Office of Drug and Alcohol
Policy and Compliance Notice
October 30, 2017*

MROs will not verify a drug test as negative based upon information that a physician recommended that the EE use "medical marijuana." Marijuana remains a drug listed in Schedule I of the Controlled Substances Act. It remains unacceptable for any safety-sensitive employee subject to drug testing under the DOT's drug testing regulations to use marijuana.

PENNDOT

*Employee Guide to CDL
Drug and Alcohol Testing
February 2015*

Medical marijuana, even if legally prescribed in a state, is an illegal drug under federal law. The use of medical marijuana is thus prohibited conduct for CDL-covered employees.



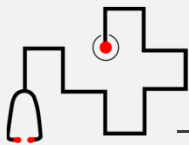
CASELAW

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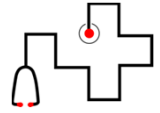
Legal Challenge

PharmaCann Penn, LLC v. BV Development Superstition RR, LLC, No. 4625 (E.D. Pa. March 14, 2018)

- HOLDING: case presents substantial federal question regarding whether a medical marijuana dispensary is “unlawful” under the Controlled Substances Act (CSA)
 - Case “tee[s] up fundamental clash between PA law and CSA”
 - Not the Court’s role to “second-guess the political wisdom of the federal legislation on marijuana”
 - Court mindful that ruling could “cast doubt on the validity of dozens of state marijuana schemes”
- Action voluntarily dismissed by PharmaCann on March 27, 2018



Test Case – Federal Law



James v. City of Costa Mesa 700 F.3d 394 (9th Cir. 2012)

- Plaintiffs were severely disabled Californians with medical clearance to use medical marijuana
- City of Costa Mesa enacted ordinance to prohibit dispensaries within city limits
- Plaintiffs sued arguing that city ordinance violated ADA, which prohibits discrimination in the provision of public services
- **HOLDING:** Marijuana use under state law not protected by ADA

Applicability of ADA could change if Congress passes bill amending Controlled Substances Act

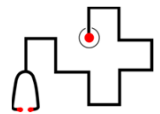


PENDING

Terry v. United Parcel Service 2:17-cv-04792-DJH (D. Ariz 2017)

- Plaintiff used medical marijuana at home for pain condition
- Sent for drug test based on “observable behavior”
- Terminated for positive drug test result
- Alleging claims for disability discrimination under ADA and Arizona MMA

Test Cases – State Law Decisions



Barbuto v. Advantage Sales & Marketing, LLC 477 Mass. 456, 78 N.E. 37 (2017)

- Employee should be allowed opportunity to demonstrate that her medical marijuana use could be a *potential accommodation*, and, at minimum, employer should have gone through interactive process under *state* discrimination laws

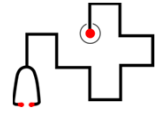
Noffsinger v. SSC Niantic 273 F.Supp.3d 326 (D. Conn. 2017)

- Connecticut MMA not preempted by federal law
- MMA permits a private cause of action
- Complaint survives motion to dismiss

Callaghan v. Darlington Fabrics/Moore Company No. PC-2017-56802017 R.I. Super. LEXIS 88 (Super. Ct. May 23, 2017)

- Employer cannot refuse to employ a person for his/ her cardholder status
- If person qualifies for medical marijuana card, necessarily follows that he/she has a debilitating condition that qualifies them a disabled

Test Case – Neighbors



Cotto v. Ardagh Glass Packing
CV-18-1037 (D.N.J. August 10, 2018)

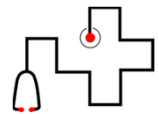
MMA and NJ anti-discrimination law do not require employer to waive drug testing requirements for MM users.

IMPORTANT – NJ statute has no anti-discrimination Language.

McNeary v. Freehold Township
(NJ- Worker's Compensation)

Employer must pay the cost of medical marijuana treatment for an employee's work related injury.

Test Case – Neighbors

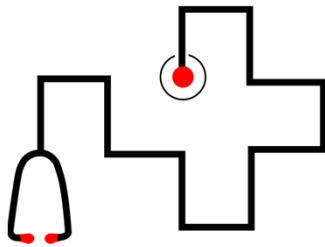


Delaware - Chance v. Kraft Heinz Foods Co.
(Del. Super. Ct. Dec. 17, 2018)

Injured employee, a medical marijuana user, was required to take drug test, failed, and was terminated. Court held that employee could proceed on his claim that employer violated the Delaware Medical Marijuana Act for his termination.

Delaware Statute is arguably stronger than PA - "an employer may not discriminate against a person in hiring, termination, or any term or condition of employment . . . if the discrimination is based upon either of the following:

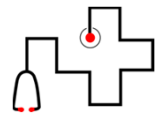
- a. The person's status as a cardholder; or
- b. A registered qualifying patient's positive drug test for marijuana . . . unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during his hours of employment.



PRACTICAL EMPLOYMENT ISSUES

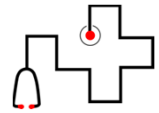
Ethan O'Shea, Esq.
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Employment Issues



- What does it mean to “operate” or “be in control of” chemicals, high voltage electricity or any other public utility under §510(1)?
- How do you know when an employee has over 10 nanograms of active THC per ml of blood under §510(1)?
- What information should request from the testing facility if an employee fails a test due to medical marijuana?
- What are the requisite heights or confined spaces in which employees cannot perform any employment duties per §510(2)?
- What tasks can be deemed life-threatening or would pose public health or safety risks per §510(3) and (4)?

Employment Issues



- Chemical testing – how to know if employee is using marijuana medicinally or recreationally? Will testing reveal requisite level of TCH per §510(1)?
- May/should employees be permitted to drive?
- Must employees who are precluded from performing certain tasks be accommodated?
- What is the exposure for employers who violate the Act? Is there a cause of action?
- Does violation of the Act imply evidence disability discrimination?