**Medical Marijuana in the Workplace**

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**A. Medical Marijuana Under West Virginia Law**

1. Basic Rules Regarding Controlled Substances and Discipline:

i. Disability discrimination law does not require employers to accommodate misconduct.

ii. Disability discrimination law does not require employers to accommodate someone who is under the influence while at work.

iii. Even if an employee has a valid prescription for Mary Jane (medical), if that employee reports to work under the influence, you can discipline and discharge him.

iv. Even if an employee has a valid prescription for Mary Jane (medical), if that employee falls asleep on that job you can discipline and discharge him.

2. West Virginia’s Medical Cannabis Statute prohibits discrimination against someone simply because they have a medical marijuana card.

i. Employers are prohibited from discharging, threatening, refusing to hire or otherwise discriminating or retaliating against an employee regarding compensation, terms, conditions, location or privileges solely on the basis of an employee’s status as a card holder.

*See* W. Va. Code § 16A-15-4(b)(1)

3. West Virginia’s Medical Cannabis Statute still preserves an employer’s ability to control its workplace.

i. Employers are not required to accommodate someone using Mary Jane at work.

*See* W. Va. Code § 16A-15-4(b)(2)

ii. Employers can discipline an employee who is under the influence of medical marijuana in the workplace so long as the employee’s conduct falls bellows the standard of care normally accepted for that position.

*See* W. Va. Code § 16A-15-4(b)(2)

iii. The Medical Cannabis Act does not require an employer do something that is illegal under federal law.

*See* W. Va. Code § 16A-15-4(b)(3)

iv. Employers are free to prohibit an employee from performing any duty that may pose a risk to others if that employee is under the influence of medical marijuana,

*See* W. Va. Code Ann. § 16A-5-10(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 cannabis. The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.

**B. Accommodating Medical Marijuana Users: Do Employers Have to?**

1. Americans with Disabilities Act/W.Va. Human Rights Act

a. One View: Arguably, yes.

1. To the same extent you would have to accommodate an employee with a prescription for any other controlled substance.
2. How do you accommodate Mary Jane?
3. Examples:
   1. Leave of absences
   2. Certification from provider: ability to work
   3. Job restructuring

b. The Other View: Are employers required to accommodate someone who has a prescription for a drug that is otherwise illegal under federal?

May depend on jurisdiction and the type of claim:

Example:

* 1. State court defending a reasonable accommodation claim under the W. Va. Rights Act, and state law allows Mary Jane (medical).

versus

* 1. Federal court defending a reasonable accommodation claim under the Americans with Disabilities Act, and federal law disallows Mary Jane (medical).

**Cases**:

*Harrisburg Area Community College v. Pennsylvania Human Relations Commission*, 2020 WL 6742819 (Pa. Commw. Ct. 2020) (annual urine screen; community college refused nursing student’s request for accommodation to use medical marijuana based upon PTSD and IBS; Court held that failure to accommodate request was not discriminatory under the MMA because statute did not preclude an employer from prohibiting use of MM if it posed a public health or safety risk while under the influence)

*Lambdin v. Marriott Resorts Hospitality Corp.*, 2017 WL 4079718 (D. Hawaii; Sept. 14, 2017) (summary judgment granted on ADA claim where employee had state medical marijuana card, but employer had drug policy that prohibited being under the influence of marijuana because it remained illegal under federal law; employer’s policy specifically referenced federal law)

*Coats v. Dish Network, LLC*, 350 P.3d 849 (Colorado 2015) (affirmed summary judgment of wrongful termination claim where employee was authorized by Colorado medical marijuana statute to use marijuana; finding that employee’s off-duty conduct was still unlawful under federal law)

*Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 348 Or. 159 (2010) (state medical marijuana law did not require employer to accommodate employee)

**C. Drug Testing Considerations for Current and Prospective Employees**

1. West Virginia Common Law

Three categories of permissible drug testing (private employers):

a. Pre-employment

b. Reasonable Suspicion

c. Random Testing (safety sensitive)

2. West Virginia Statute: West Virginia Safer Workplace Act

*See* W.Va. Code § 21-3E-1, *et seq.*

a. eliminates distinctions

b. permits drug testing at any time, for any reason

c. permits same-sex direct observation drug testing

d. procedural requirements

e. confirmatory drug screens

f. disqualification (workers’ comp, unemployment)

The problem with testing for medical marijuana? No reliable method to determine whether someone is impaired.

Employers can still consider signs of impairment.