

## Maryland law still unclear on medical cannabis use by employees

By: Heather Cobun December 3, 2019



### MEDICAL CANNABIS A report card

*This item is part of The Daily Record's occasional series examining Maryland's medical cannabis program.*

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Maryland employers, employees and job seekers who wonder what protections and rights, if any, medical cannabis patients have in the workplace are still waiting for guidance from legislators or a court.

Though legislatures and courts across the country have addressed questions about medical cannabis use by employees, Maryland law is silent on the topic and attorneys are still waiting to see a lawsuit — or a law change — that will shed light on the issue.

"Certainly something is going to happen," said attorney Lindsey White, of Shawe Rosenthal LLP in Baltimore. "I think it would be helpful to have regulations to have guidance."

While the regulations promulgated by the Maryland Medical Cannabis Commission and the law legalizing medical cannabis don't address employee rights, some other states have included provisions extending protection to employees.

Sixteen states have some kind of law banning retaliatory actions by employers against medical cannabis patients, according to the National Organization for the Reform of Marijuana Laws, or NORML.

"Some of the laws across the country do have expressed protections so it's more clear for people, but we don't have an expressed duty to accommodate under the Maryland statute," White said. "That leaves things unsettled."

According to the Maryland Medical Cannabis Commission website, Maryland law does not prevent an employer from testing for use of cannabis (for any reason) or from taking action against an employee who tests positive for use of cannabis (for any reason).

William C. Tilburg, acting executive director of the commission, said he hears questions from patients and potential patients about the possible impact of using medical cannabis on their employment.

"It's something that absolutely requires legislation," Tilburg said. "It's a complex area because of the continued Schedule I status of the drug."

The federal government continues to categorize marijuana as a drug that has no accepted medical use and a high potential for abuse. Federal employees and contractors must comply with the Drug Free Workplace Act of 1988, which effectively prohibits employers from accommodating medical cannabis use. Tilburg said the large presence of the federal government in Maryland makes it particularly difficult to legislate employee protections.

"It's easy to say that there needs to be a law, but because of the federal prohibition it's not that simple," he said.



Timothy F. Maloney, an attorney with Joseph Greenwald & Laake, says that when it comes to employees' use of medical cannabis, employers should balance the needs of the employees with the needs of the workplace.

The General Assembly has considered bills that would prohibit discrimination in employment, but none have passed. With no guidance in the law and no appellate court opinions yet, medical cannabis patients and employers in Maryland are left feeling uncertain about where they stand.

"I don't think any employer wants to be the first test case for this in Maryland," employment law attorney Joyce Smithey said.

Cases in other states have involved "unreasonable" actions by an employer, said Smithey, of Smithey Law Group LLC in Annapolis.

An Arizona court held that an employee could not be terminated solely for a positive test for THC in pursuit of a worker's compensation claim for an injury not linked to medical cannabis usage. In New Jersey, a court ruled that employers may not discriminate against patients consuming medical cannabis away from the job. In Connecticut, a patient was allowed to sue an employer who refused to hire her based on her use of marijuana for medicinal purposes.

Of interest to Maryland lawyers: A Massachusetts court interpreted language in the state's medical cannabis law, which states that a patient cannot be "denied any right or privilege" based on his or her use of medical cannabis, to allow an employee to sue for discrimination.

Maryland's law contains the same phrase.

Smithey said that Maryland also has state anti-discrimination protections — the federal Americans with Disabilities Act does not cover medical cannabis use because marijuana is illegal at the federal level — and that it is an open question whether state law will be interpreted to require an accommodation.

"I think the big unknown is going to be something (where it's) found that medical marijuana use is something that must be accommodated under one of these state or local laws," she said.

The Maryland Commission on Civil Rights (MCCR) is prepared to handle complaints by citizens who believe an employer refused to make a reasonable accommodation for their disability, according to general counsel Glendora Hughes.

"I think our position is if someone comes and raises that they're being discriminated against because of their disability, we would take that complaint and look into the facts," she said. "We would analyze it just like we would any other disability case."

However, the MCCR has jurisdiction only for individuals with diagnosed disabilities, not for anyone who has simply been recommended medical cannabis.

## Best practices

Employers are allowed to have reasonable workplace safety rules and are never required to allow an employee to be impaired on the job, both White and Smithey said. Many states with laws protecting employees have "carve outs" for safety-sensitive positions such as law enforcement or jobs that involve working with vulnerable populations.


Timothy F. Maloney, principal at Joseph Greenwald & Laake PA in Greenbelt, said employers should balance the needs of their employees with the needs of the workplace.

"There are two different ways to look at it," he said. "One is, 'I don't want anyone in my workplace who takes marijuana whether it's prescription or not.' The other one is, 'I respect that medical cannabis is now legitimate, but just like any other prescription drug I don't want it to impact performance on the job.'"

Smithey said if an employee is performing well and using medical cannabis off the job, it might make sense to accommodate the person's usage. As more people seek out medical cannabis for health issues, employers that flatly refuse to hire them may be depriving themselves of talent in a tight job market, she said.

Employers should have policies in place for how they will treat a positive drug test, if such tests are part of their operations, and a way for employees to seek an accommodation and be treated fairly. A lawsuit in another state

was based on a medical cannabis user being fired for a positive drug test result while another employee who tested positive for cocaine was not.

Smithey advised employers not to ask about medical cannabis use but to wait for an employee to bring it to their attention. 

"Employers don't want to be making direct inquiries to employees," she said. "Definitely, leave it to the employee to disclose a medical marijuana use."

Maloney said there can be valid questions about when an individual is ingesting medical cannabis and its effects.

"I think (employees) should consult with their physician to get a clear statement of not only how and when they should take medical cannabis but how that usage impacts their job performance, and if it becomes an issue they should have a frank discussion with their employer about it," he said. "The dilemma is I'm sure a lot of employees don't want their bosses to know they're taking medical cannabis. It's always a judgment call."

Hughes said part of the MCCR's work is educating the public, including employers, about the history and science of medical cannabis to assist people in determining best practices.

"People's reaction is sometimes controlled by their knowledge, and when you don't really understand certain concepts you have a knee-jerk reaction to it," she said.

The MCCR wants employers and employees to make informed decisions about medical cannabis.

"Part of our (goal) is to educate so that people will make good decisions and not have to deal with complaints," Hughes said. "Everybody's trying to get their handle on things in terms of what does this mean in a workplace. What does this mean in housing. And what is the best way to deal with this in a manner that is not discriminatory and not putting people out of work or kicking people out of their homes without fully understanding (the situation)."

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