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The Analyses of State and Federal Medical Marijuana Laws and How They Apply to Employment

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The Analyses of State and Federal Medical Marijuana Laws and
How They Apply to Employment

by

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ABSTRACT

The Analyses of State and Federal Medical Marijuana Laws and How They Apply to Employment

by

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The purpose of this study is to analyze and discuss the current discrepancies in the legal system as it applies to medical marijuana in the employment sector. The laws regarding the legalization of medical marijuana are relatively new and have many constraints when applied to employment. On the federal level, medical marijuana remains illegal. Many states have passed some form of legislation legalizing medical marijuana. Unfortunately only two states have laws that protect users from being discriminated in employment. This leaves employers and employees uncertain about what actions to take when dealing with medical marijuana in the employment sector.

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Part One

Introduction

The project will follow a literature review option to examine the impact of medical marijuana legislation on employment. The paper will introduce the subject by presenting a case where the difference in law created an issue for a medical marijuana user as well as their employer. The introduction section of the literature review will also explain the issues that arise from the differences in the law and how those issues came about. The history of medical marijuana is done by looking at articles that describe when marijuana was first used and for what purposes. The next section of the paper will review the federal law as it applies to medical marijuana and the state laws. The state law section will present court opinions that have taken place to form the law. Following the review of the law will be a review of Americans with Disabilities Act of 1990 (ADA) and the issues that specifically arise with the ADA. The methods section of this paper will summarize the finding of the literature review. The results sections of the paper will give recommendations to employers and employees on the medical marijuana issue. Some professional implications and examples of situations that might be helpful will be part of the recommendation section of the research study. The professional implications part will focus on advice to professionals in the hospitality industry.

Purpose

The purpose of this paper is to analyze the differences in the state vs. federal law as it applies to medical marijuana and to discuss the policy's relationship to employment and the accompanied issues (specifically in the context of the ADA).

Objective of study. The objectives of this study are to expose the conflict in the legal system and to identify how that creates a problem in the employment sector. Another objective

is to analyze the legal system differences when talking about federal and state laws. This study will discuss law suits that have resulted due to the medical marijuana legal differences.

Justification. It is important to conduct analyses of the differences in the state vs. federal law as it applies to medical marijuana because federal law prohibits the use of medical marijuana whilst some states have legalized the use of medical marijuana. So far 15 states have decriminalized medical marijuana on different levels and the specific law as it concerns marijuana differs by state. This created an issue not only for the user of medical marijuana, but also for the employers in the hospitality industry. There are a lot of conflicts on whether to abide by the federal or state law and what are some of the consequences that might result.

It is important to discuss how the law is affecting the ADA because it protects people with disabilities from employment discrimination. A large majority of the patients who are using medical marijuana qualify under the ADA as disabled; therefore there is a conflict whether the employment decision is based on their disability or their use of medical marijuana. Since medical marijuana is used to help their disability then, in theory, they should not be discriminated against on that basis. Currently there is a lot of conflict on the issue and more and more lawsuits are surfacing dealing with employment and medical marijuana.

Constraints. Some constraints that are foreseen in completing this project are the always changing legal status of many states. Some of the literature is going to be irrelevant due to the date it was published and extensive research will have to be done to make sure the information used to complete this study is relevant and accurate. Most of the information is very time sensitive; therefore, the sources have to be as current as possible. Another constraint is the lack of literature, since the topic is considerably new.

Glossary

- Legislation - the exercise of the power and function of making rules (as laws) that have the force of authority by virtue of their promulgation by an official organ of a state or other organization (Merriam-Webster Dictionary, 2011).
- Penalties - the suffering in person, rights, or property that is annexed by law or judicial decision to the commission of a crime or public offense (Merriam-Webster Dictionary, 2011).
- Narcotic - a drug (as marijuana or LSD) subject to restriction similar to that of addictive narcotics whether physiologically addictive and narcotic or not (Merriam-Webster Dictionary, 2010).
- Disability – An identifiable physical or mental condition whose function limitations, when manifested, are recognized and may be overcome with appropriate accommodations (Sperry, 2006).
- American with Disabilities Act (ADA) – Federal legislation enacted in 1990 that bars employers from discrimination against disabled persons in hiring, promotion, or other provisions of employment, especially in the provision of reasonable accommodation in response to their disability (Sperry, 2006).
- Impairment – The incapacity to perform specific functions because of a debilitating medical, substance-related or psychological condition, which results in diminished functioning from a previous higher level of functioning (Sperry, 2006).
- Reasonable Accommodation – Any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. It also

included adjustment to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities (Sperry, 2006).

Part Two

Introduction

Gary Ross is a California resident who served in the United States Air Force. While serving in the Air Force he injured his back which caused him continuous pain. Ross suffers from strain and muscle spasms. Because of his back pain, Ross is a qualified individual under the Fair Employment and Housing Act (FEHA), which is a California statute that protects the public from discrimination. Ross also receives government benefits because of his disability under the FEHA (*Ross v. RagingWire*, 2008).

In 1999, after failing to receive relief from pain with other medications, the physician recommended Ross medical marijuana for chronic back pain under the California's Compassionate Use Act (*Ross v. RagingWire*, 2008). In 2001, Ross received a job offer from RagingWire Telecommunications, Inc., as a lead systems administrator. RagingWire required a drug test and, prior to taking the test, Ross gave the clinic his physician's recommendation for medical marijuana. Ross took the test on September 14 and started work at RagingWire on September 17. On September 20, RagingWire informed Ross that he was being suspended because he had tested positive to tetrahydrocannabinol (THC), which is found in marijuana. Ross presented RagingWire Telecommunications with a copy of his physician's recommendation and explained to the human resource director that his use of medical marijuana was to relieve chronic back pain. Ross was told by his employer that they would call his physician to verify the recommendations. After a meeting with the board of directors on September 21, the chief executive officer informed Ross that he was being fired due to his use of medical marijuana (*Ross v. RagingWire*, 2008).

Ross sued RagingWire for discrimination under the FEHA and for wrongful termination in violation of public policy but the California Supreme court rejected Ross's claim on January 24, 2008 (La Fetra, 2009). Ross claimed that his use of marijuana to treat his disability did not affect his ability to perform the essential functions of his position at RagingWire and that he has been working in the same field since he began using medical marijuana and received no unsatisfactory complains about his job performance (*Ross v. RagingWire*, 2008). Gary Ross is one of many Americans who use medical marijuana for a variety of medical ailments and are forced to decide between alleviating their pain and employment due to the differences in the state and federal law.

Fifteen states in the U.S. as well as the District of Columbia allow doctors to recommend medical marijuana for various illnesses ("15 Legal," 2011). Those 15 states have enacted legislation legalizing the possession, cultivation and use of marijuana for the treatments of certain illnesses (Sekhon, 2010). Many other states have reduced the penalties for possession of marijuana. Thirty-one states and the District of Columbia have some law recognizing the medicinal value of marijuana. Some of the ailments that medical marijuana is used by patients for include: cancer, AIDS or HIV, glaucoma, Crohn's disease, multiple sclerosis and hepatitis (Armour, 2007). As of January 22, 2010, Alabama, Delaware, Illinois, Iowa, Massachusetts, Mississippi, Missouri, New York, North Carolina, Pennsylvania, Tennessee, and Wisconsin have legislation pending for medical marijuana (Greenwald, 2010).

According to the Americans for Safe Access (ASA), a non-profit that pushes for acceptance of medical marijuana, an estimated 300,000 people in the U.S. use medical marijuana for various "debilitating" medical conditions (Armour, 2007). According to the Office of National Drug Control Policy (ONDCP) 100 million Americans have tried marijuana and 15

million have used it in the past month (Duncan, 2009). Marijuana is less addictive than alcohol and tobacco (Duncan, 2009). Nevertheless, under federal law marijuana is still illegal. The maximum punishment ranges from one year to life in prison and maximum fines that range from one to eight million dollars (Sekhon, 2010). Marijuana is the most popular drug in America after tobacco and alcohol (Duncan, 2009). Medical marijuana is not accepted by the Federal Drug Administration and they consider it a controlled substance with a very high potential for abuse (Armour, 2007).

Out of the 15 states that have legalized marijuana on some level, only Arizona's, Rhode Island's and Maine's laws protect medical marijuana users from discrimination by employers (Haygood, Hensley, & Field, 2010). This means that in the other 12 states, a patient with a positive test for medical marijuana prescription may still be subject to either termination or not getting employed due to a failed drug test. California's Supreme Court specifically ruled that those users of medical marijuana are not protected in the employment sector (Komoroski, 2010).

The issue that remains is what employers must do when faced with the differences in the legal system. If an employer tries to not allow employees to use medical marijuana and discipline those that do, they might be faced with a discrimination issue on the basis of Americans with Disabilities Act (ADA). On the other hand, if the employer allows the use of medical marijuana and an employee injures himself or others, the employer might face legal liability (Greenwald, 2010). This article will discuss each state's medical marijuana laws as well as their implications. It will also include supporting legal cases for different states. Since medical marijuana is prescribed to seriously ill patients, this paper will also look into the law as it applies to the Americans with Disabilities Act. If an employee who is legally using medical marijuana under state law gets either terminated from employment or not hired, he can bring

action to court under the ADA by establishing the prima facie elements for disability discrimination. This article will close by discussing professional implication and what an employer should do to avoid legal action.

History of Marijuana

Marijuana was viewed as a valuable therapeutic tool that was useful in the treatment of a “wide variety of medical maladies” (Ransom, 1999). Cannabis was listed as a medicine by the United States Pharmacopeia, which is responsible for setting quality standards for over-the-counter and prescription medication (Bala, 2010). In fact “marijuana,” which is the name for dried parts of the Cannabis sativa plant, has been used for thousands of years by medical practitioners to cure a variety of ailments (Bala, 2010). India, Southeast Asia and the Middle East have used marijuana for medicine, the Chinese used marijuana in 4000 B.C., and Native Americans and New World settlers used marijuana not only for medicinal purposes but also for the mundane (Newitt, 2002). Europeans were growing “industrial hemp” for the use of its fiber. The hemp plant has very strong and sturdy fibers which are valuable in the cloth and textile industries. Raw materials like certain paper is made out of the lighter fiber particle of hemp while the heavier fibers are used for things like cloth and rope (Ransom, 1999).

John De Verrazano is responsible for the first report of hemp in the New World, where he discovered it growing wild in 1524 Virginia (Ransom, 1999). Ironically, the first marijuana laws were for colonial farmers, who were actually required to grow a certain amount of the hemp plant since it was found to be so useful. The drafts of the U.S. Declaration of Independence were actually written on paper made from hemp. In the 1800s, the hemp plant was not as common, since it was so much more expensive to harvest and grow (Ransom, 1999).

Only in the 20th century did marijuana actually become popular as a recreational drug (Newitt, 2002). The state of California was the first to criminalize marijuana in 1915, followed by the states of Louisiana and Colorado, which outlawed marijuana in 1930s. By 1937, 46 states and the District of Columbia outlawed marijuana (Newitt, 2002).

The Cannabis sativa plant contains at least 400 different compounds but is most known for its delta-9-tetrahydrocannabinol, or THC. THC is connected with treating a number of medical conditions due to its high absorbency into the blood stream when inhaled (Bala, 2010). The American Medical Association (AMA) still opposes the legalization of marijuana but does acknowledge the substance's potential therapeutic effects. The AMA reported that some of those that could benefit from "smoked marijuana" are those that are suffering from headaches, menstrual cramps, and abdominal pain from tubal ligation, and that 15 mg of THC could provide significant analgesic effects. The AMA also acknowledges that marijuana could effectively treat AIDS-wasting syndrome, chemotherapy-induced nausea and vomiting, multiple sclerosis, side effects from cancer, and other conditions involving chronic pain (Bale 2010). Marijuana comes into play when FDA-approved prescription and over the counter medication are not as effective. Marijuana is effective for treating nausea and has been used by cancer patients getting treated with chemotherapy. AIDS, HIV, and anorexia patients also benefit from marijuana's ability to relieve nausea. Marijuana is also used by glaucoma sufferers to relieve ocular pressure. Patients with multiple sclerosis use marijuana to relieve muscle spasticity (Newitt, 2002).

The war against marijuana did not begin until Harry Anslinger took over the Federal Bureau of Narcotics. It was under Anslinger's direction that the Federal Bureau of Narcotics created a large scale propaganda campaign against marijuana. The campaign was to convince the public that not only marijuana was highly addictive but also that it causes violent crimes and

mental deterioration. Anslinger's campaign was the influence behind all the information the public was receiving in the 1930s and 1940s. It was Anslinger's campaign that eventually led to the Marijuana Tax Act of 1937, which made it illegal to use marijuana for any purpose (Ransom, 1999).

The efforts to legalize medical marijuana began in the 1980s when the AIDS epidemic took place. Organizations tried to legalize marijuana for AIDS patients to help with nausea (Armour, 2007). The federal government actually allowed some patients to use medical marijuana in 1978 due to "medical necessity" being recognized in court. It created an Investigational New Drug (IND) compassionate access program which allowed patients to receive medical marijuana from the government. Due to the overwhelming applications from AIDS patients the program was closed in 1992, but seven patients are still receiving medical marijuana from the government ("Medical marijuana," 2010).

Federal Marijuana Law

Under federal law, possession, cultivation and use of marijuana remain illegal under the Controlled Substances Act (CSA) (2010). Marijuana is a Schedule 1 drug under the CSA, which prohibits the possession, dispensing and distributing of marijuana (Holland & Hazard, 2009). Congress passes the Controlled Substances Act in 1970, which criminalized and labeled marijuana as a narcotic (Bala, 2010). The CSA replaced the Marijuana Tax Act in controlling and making marijuana illegal (Ransom, 1999). Marijuana was categorized as Schedule 1, along with heroin, which defines a substance to have a high potential for abuse, not known medical value and lacks accepted safety for use under medical supervision (Bala, 2010). The Controlled Substance Act classifies controlled substances under one of five schedules. The schedules depend on the substances potential for abuse and the probability for developing a dependency

either psychological or physical, Schedule 1 being the most controlled (Bale, 2010). Since the Controlled Substance Act classified marijuana as a Schedule 1 drug, there have been many attempts to reclassify it as a Schedule 2 drug, but all of them failed (Ransom, 1999). Cocaine is a Schedule 2 drug, which means it also has high potential for abuse but can be administered by a physician for legitimated medical use (CSA, 2010).

Since the Controlled Substances Act of 1970 was passed by Congress, billions of dollars have been spent on enforcing marijuana prohibition. Even with the large federal spending, there has been almost no success in controlling the amount of marijuana available (Duncan, 2009). Only under a strict controlled research project registered with the Drug Enforcement Administration (DEA) can a physician authorize a Schedule 1 drug. The difference between a Schedule 1 and Schedule 2 drug is the accepted medical use in the U.S. (Newitt, 2002).

In June 2005, the United States Supreme Court made it clear in its ruling on *Gonzales v. Raich* that even with a state medical marijuana card, you still run risk of being prosecuted for the violation of federal law for possessing, cultivating, or using marijuana (Sekhon, 2010). Federal law always preempts state law and certain jobs are subject to federal regulation. The U.S. Department of Transportation (DOT) sent out a release stating that regulated trucking companies, railroads, airlines and transit systems are not excused by state medical marijuana laws and still can be drug tested by the DOT (Hazard, 2009). However, in March 2009, United States Attorney General Eric Holder stated that the federal policy would be to go after people who violate both state and federal law and that use the medical marijuana law to try to protect themselves from prosecution for actions that are not in compliance with state law (Sekhon, 2010).

State Medical Marijuana Laws

Fifteen states have passed legislature legalizing marijuana on some level (“15 Legal,” 2011). Typically, the underlying purpose of the state medical marijuana law is to allow those with “debilitating “medical conditions a source of relief. The state statutes provide an affirmative defense to patients, physicians and primary caregivers (Newitt, 2002). However, the only states that have a provision protecting employee rights are Arizona, Rhode Island, and Maine (“15 Legal,” 2011). The other 12 states are having action brought into the court on the basis of medical marijuana and employment.

State law enabling the use of marijuana started showing up in the 1970s and by the end of 1982, 31 states and the District of Columbia had some sort of law addressing the use of medical marijuana. Most early state laws only allowed the development of marijuana therapeutic research programs (TRPs). TRPs like the IND were federally approved but continued under very strict regulations. Physicians were allowed to provide medical marijuana to their patients who were part of the research programs. There were 22 states participating in TRP programs between 1978 and 1981. Since TRPs were controlled by the federal government, the regulations were extremely strict. Six states tried a new approach by rescheduling marijuana out of the Schedule 1 drug classification. This allowed physicians to prescribe marijuana to patients but the limitation was that the federal government was responsible for administering licenses for prescription medication (Pacula, Chiriqui, Reichmann, & Terry-McElrath, 2001).

For the purpose of this study the state laws have been divided into three categories: states not providing employment protection, states providing employment protection, and states that have not addressed the medical marijuana issue in employment.

States not providing employment protection. The following section will discuss the states that have specifically made the law to not give protection for employees by their employers. The following section will also present court cases that have made the decision not to give medical marijuana users protection in the employment sector. The states that will be discussed are California, Montana, Oregon and Washington.

California. California was the first state to deviate from federal approach to marijuana by allowing the use of marijuana for medical reasons (Bala, 2010). The state of California passed the Compassionate Use Act (CUA) on November 5, 1996. The act was passed by a 56% majority (Newitt, 2002). The act was created to ensure that seriously ill people had the right to use and obtain medical marijuana when recommended by a physician who was determined that the person will benefit from use in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief (California Health and Safety Code, 2010). The CUA was also passed to make sure that patients and physicians were not subject to criminal prosecution for the use of medical marijuana provided they obtain a medical marijuana card. The statute only protects primary caregivers from criminal prosecution if they only make a “recommendation,” but if they actually write the prescription, they can face charges. The use of medical marijuana is also only protected when in no way can it harm another individual. (Bala, 2010).

The CUA, however, did not state anything about medical marijuana and employment in its original state. The issue of medical marijuana and employment in California was first analyzed in *Ross v. RagingWire Telecommunications, Inc.* (Lieberman & Solomon, 2008). Gary Ross sued RagingWire Telecommunications for wrongful termination under the California’s Fair Employment and Housing Act (FEHA) (*Ross v. RagingWire*, 2008). On January 24, 2008, the

California Supreme Court held that an employee was not immune from termination even if the medical marijuana was prescribed by a physician. The court reviewed the language in the CUA and pointed out that it makes no mention of employment. The CUA was mainly to protect cancer patients from state criminal charges and going to jail, and could not completely legalize marijuana since it was still illegal under federal law (La Fetra, 2009). The court also stated that the CUA was to give effect to the voters' intent without speculation, and if the court stretched the proposition's immunity to cover something that the language does not apply to, then the act would lose voters' approval (La Fetra, 2009). Under FEHA, the court stated that it does not provide protection for illegal drugs under federal law. Two justices dissented in *Ross*, with the majority ruling to force patients to choose between medical marijuana and employment (*Ross v. RagingWire*, 2008).

On February 20, 2008, the California Legislature introduced a bill to overturn the ruling of *Ross* (Lieberman & Solomon, 2008). Assembly Bill 2279 was passed in 2008 and was sought to protect employees with a valid medical marijuana prescription from employment actions. Assembly Bill 2279 did include an exception for those who operate heavy machinery and are in safety-sensitive positions (McManus, 2009). Soon afterward, Governor Schwarzenegger vetoed the bill and the decision in *Ross* remains the law in California (Lieberman & Solomon, 2008).

Employers in the state of California have motivators to maintain a drug-free workplace. In order to receive federal funding in the state of California, recipients must comply with California's Drug-Free Workplace Act of 1990. The companies receiving the contract or grant must provide certification that they prohibit their employees from using controlled substances. They must provide the employees with information about dangers and penalties of using drugs as well as counseling. The drug-free policy has to be a condition of employment. If the employer

fails to meet the requirement for a drug-free workplace, the employer will face suspension of the grant or contract (La Fetra, 2009).

Colorado. Colorado voters approved Amendment 20 in November 2000. Amendment 20 allowed patients with debilitating medical conditions to obtain a state registry identification card to lawfully obtain and use marijuana. All a patient needs to do is submit an application, a \$90 fee, and certification from a physician that states that he could benefit from the use of medical marijuana. Even though Amendment 20 allows for the use of marijuana, it does not protect employees from employment action. In fact, Amendment 20 states that nothing in the medical marijuana law requires employers to accommodate the use of medical marijuana in the work place (Hazard, 2009). The question in Colorado arises as to whether Amendment 20 does not allow the use of marijuana while “at work,” or rather having marijuana in a person’s system at all.

Montana. Montana’s Medical Marijuana Act took effect in November 2004. The act, like many other state’s acts, applies to patients and their caregivers. The law lists certain “debilitating” medical conditions that qualify the patient to use medical marijuana. The patient and their caregiver must obtain a registry identification card through the Montana Department of Public Health and Human Resources to receive protection. The card enables caregivers to acquire, possess, cultivate, manufacture, deliver, transfer or transport marijuana for their patients. Of course there are limits on the amounts of marijuana. The users of medical marijuana do not get reimbursement from government medical assistance programs. And like many other states, employers do not have to accommodate medical marijuana use in the workplace, which was confirmed in *Johnson v. Columbia Falls Aluminum Company* (Holland & LLP, 2010).

Mike Johnson was an employee of Columbia Falls Aluminum Company (CFAC). He was treating pain from injuries with medical marijuana, which did not affect his work performance due to a lack of any disciplinary actions. After failing a drug test, Johnson was dismissed, since SFAC has a drug and alcohol policy that subjects employees to discipline action and termination for testing positive for marijuana. Johnson refused to sign a “last chance” agreement because it required him to test negative for marijuana to keep his job (Holland & LLP, 2010). Following his dismissal, Mike Johnson filed a suit under the ADA and Montana’s Human Rights Act (MHRA). He claimed that the ADA and MHRA failed to reasonably accommodate his disability. Relying on the language of the MMA and ADA, the Supreme Court noted that the MMA did not provide an employee with a private right of action against the employer (*Johnson v. Columbia Falls Aluminum Company*, 2009). The ruling was in CFAC’s favor (Holland & LLP, 2010).

Oregon. In 2004, the U.S. District Court in Oregon ruled in *Freightliner v. Teamsters Local 305* (2004) that Oregon’s Medical Marijuana Act did not protect employees from discipline for not only being under the influence of marijuana at work but also from having any detectable amount of THC in their system.

In another Oregon case, Robert Washburn was terminated for having marijuana in his system (*Washburn v. Columbia Forest Prods*, 2005). Washburn worked for Columbia Forest Products as a millwright. Some of his responsibilities included maintaining dangerous heavy equipment. He was recommended medical marijuana for muscle spasms that occurred at night and wouldn’t let him sleep. Since marijuana relieved his sleeping disorder, Washburn requested that his employer accommodate his disability. The accommodation would be a drug test that did not just test for marijuana in his blood system, but if he was under the influence of marijuana at

the time of his drug test. Columbia Forest Products refused to accommodate, and Washburn was terminated for a failed drug test. Robert Washburn brought action against his employer under Oregon's disability law (Lieberman & Solomon, 2008).

The trial court granted a summary judgment on the basis that Washburn was not disabled and that his employer was not required to accommodate the use of medical marijuana. The definition of a disability under Oregon law was to be interpreted just as disability under the ADA. Since marijuana got rid of Washburn's insomnia, he was no longer considered disabled due to mitigating factors. Also, an employer did not have to accommodate medical marijuana in the workplace, according to Oregon's medical marijuana law (Lieberman & Solomon, 2008).

Following the trial court's decision, the Court of Appeals reversed the finding on both issues. The court argued that Oregon's disability law did not define "disabled" the same as the ADA and that mitigating measures should not be taken into account. Second, the Court of Appeals questioned whether the plain language in the Oregon Medical Marijuana Act was interpreted correctly. The act stated that nothing shall require "an employer to accommodate the medical use of marijuana in any workplace" (Uniform Controlled Substances Act 2009, §475.340, para. 2). In Washburn's case, he did not actually "use" marijuana in the workplace. "Medical use of marijuana" was defined by Oregon law as "the production, possession, delivery, or administration of marijuana, or paraphernalia used to administer marijuana, as necessary for the exclusive benefit of a person to mitigate the symptoms or effects of his or her debilitating medical condition" (Uniform Controlled Substances Act, 2009, § 475.302, para. 8). The issue arose on whether having marijuana in your bloodstream would be considered the same as possessing marijuana. Since in criminal law a person was not considered to be in possession of something when it is in the bloodstream, the court held that Washburn did not use the drug in the

workplace (Lieberman & Solomon, 2008). The Oregon Supreme Court took Washburn's medication into consideration when deciding the issue of disability and concluded he did not receive protection under Oregon's disability law (Lieberman & Solomon, 2008).

Washington. In *Roe v. Teletch* (2007), Washington Court of Appeals analyzed the language of the Washington State Medical Use of Marijuana Act (MUMA) and found that it does not create a legal remedy for employees that are fired for traces of THC in their system. Instead, it only protects those users of medical marijuana from criminal action (Hazard, 2009). In 2010, The Washington State Human Rights Commission stated that since the federal government has a prohibition on possession of marijuana, it is not considered a reasonable accommodation of a disability for an employer to violate federal law. In response, the Washington State Human Rights Commission will no longer investigate any claims that involved discrimination against medical marijuana (Lindstrand, 2010).

States providing employment protection. The following section will discuss the law and court cases in states that have expressly forbidden employers from refusing to employ or penalize a person based on their medical marijuana use. The states that are going to be discussed in the following section are Arizona, Rhode Island and Maine.

Arizona. Arizona is the last state to pass a medical marijuana law on November 2, 2010. Proposition 203 was passed by 50.13% of voters ("15 Legal," 2011). The Arizona Medical Marijuana Act (2010) protects employees from employment action. It states that "an employer may not discriminate against a person registered pursuant to this proposition in hiring, terminating or imposing employment conditions unless failing to do so would cause the employer to lose a monetary or licensing benefit under federal law. Further, an employer may not penalize a qualifying patient registered pursuant to this proposition for a positive drug test for

marijuana, unless the patient used, possessed or was impaired by marijuana on the employment premises or during hours of employment” (§ 36-2818, para. B).

Rhode Island. Employers cannot discriminate against patients who use medical marijuana under Rhode Island’s medical marijuana law (Lieberman & Solomon, 2008). Rhode Island’s law has a provision to ensure that medical marijuana be treated similarly to other medications. The provision states “no school, employer or landlord may refuse to enroll, employ or lease to or otherwise penalize a person solely for his or her status as a cardholder” (Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, 2011, § 21-28.6-4, para. b). Although the state does provide protection, the statute is not clear whether a positive drug test would be treated under “status as a cardholder.” The law does not make it clear whether the use of marijuana is allowed at work, off-duty or in the system.

Maine. Maine’s Ballot Question 2 became effective on December 22, 1999 (“15 Legal,” 2011). The Maine Medical Marijuana Act (2009) gives protection to employees by stating that no employer may discriminate against a person solely because of the person’s status as a registered qualifying patient. Although, the act does give protection, it does not address the issue of a failed drug test.

States that have not addressed the issue of employment. The following section will discuss the law in the states that have not addressed the issue of employment and medical marijuana. Those states are Alaska, Hawaii, Michigan, Nevada, New Jersey, New Mexico, Oregon, and Vermont. Although the question in the remaining eight states has not been addressed directly by the courts, employers should be aware that terminating employees based on their medical marijuana use is not without risk (Haygood, et al, 2010).

New Jersey. New Jersey is the 14th state to legalize the use of medical marijuana in the United States. Governor Jon S. Corzine signed the New Jersey Compassionate Use Medical

Marijuana Act into law on January 18, 2010. The act went into effect on July 1, 2010, but like many other states does not address the issue of medical marijuana in employment, but does state that the employers are not required to accommodate the medical use of marijuana in any workplace (Wiwi & Crifo, 2010). Like the other 14 states that have legalized medical marijuana use, New Jersey's law was designed to protect medical marijuana users from criminal prosecution (Wiwi & Crifo, 2010). New Jersey Compassionate Medical Marijuana Use Act gives protection to people using medical marijuana to treat and alleviate the symptoms of certain debilitating medical conditions. Some of the debilitating medical conditions that are covered by the act include epilepsy, HIV, AIDS, cancer, ALS, and multiple sclerosis.

Americans with Disabilities Act of 1990 (ADA)

The laws that are currently in place to prohibit marijuana have been in place for over 35 years (Duncan, 2009). The Americans with Disabilities Act of 1990 was created to protect employees from discrimination. The ADA plays a big part in the employment issue, because many states have acts stating that people with a "debilitating medical condition" are allowed to use medical marijuana with a recommendation from a physician. If an employer is presented with the information that an employee is suffering a "debilitating medical condition" and treating it with medical marijuana, in theory the employer has notice that the employee is suffering from a condition that qualifies as a disability under the ADA (Wiwi & Crifo, 2010). The ADA protects the employee from discrimination based on actual or perceived disability. The ADA can also require an employer to provide a reasonable accommodation to an employee or an applicant. The only time the employer is not required to provide a reasonable accommodation for a disability is when doing so can cause undue hardship for the employer (Wiwi & Crifo, 2010). If

an employee is terminated due to the use of medical marijuana, that employee might be able to state a claim under the ADA (Lieberman & Solomon, 2008).

To have a claim under the ADA, the employee has to establish the prima facie case for discrimination (Lieberman & Solomon, 2008). Under the ADA, a person can claim protection when a disability substantially limits a life activity (La Fetra, 2009). If an employee decides to sue, he needs to establish that he is disabled within the statute and fall under the definition of the term “disability.” In order to be qualified as a disabled person she needs to prove three conditions. The conditions are the following: “1) a physical or mental impairment which substantially limits one or more of that person’s major life activities; 2) has a record of such an impairment; 3) is regarded by the employer as having such an impairment” (Bala, 2010, p. 17). Marijuana is commonly used to relieve many symptoms that limit a major live activity. HIV infection, cancer, chronic or acute pain, insomnia, glaucoma, multiple sclerosis, anorexia, and epilepsy have all been considered as “impairments” by the courts. A major life activity of seeing is impaired by a person with glaucoma. A major life activity is limited for a person with nausea from cancer treatment or wasting effect from AIDS, or who is anorexic. A major life activity of sleeping is impaired when a person is suffering from insomnia (Lieberman & Solomon, 2008).

A person is qualified if he can prove that the disability restricts him from doing a class of jobs or a broad range of jobs (Bala, 2010). One can suggest that the use of medical marijuana is keeping that person from doing a class of jobs since marijuana impairs a major life activity of learning or concentrating. Also, one can argue that medical marijuana use limits a major life activity of employment itself (Lieberman & Solomon, 2008).

The ADA requires an employer to reasonably accommodate a disabled employee if it doesn’t cause undue hardship for the employer. In the case of medical marijuana, some states

specifically stated in the law that an employer is not required to accommodate medical marijuana use. A change of policy is one example of a reasonable accommodation in the ADA. An employer can change the policy of pre-employment or random drug testing to accommodate a medical marijuana user without changing a policy for everyone. One way to accommodate is to test the disabled employee by blood or saliva test and not urinary analyses. Since urinary analyses shows use anywhere from two to six weeks, it is not a correct test to determine whether the employee is actually under the influence of medical marijuana at work. Blood and saliva tests can show whether the drug has been used in the past few hours (Lieberman & Solomon, 2008).

Another issue that arises is the distinction between termination of employment because of misconduct and termination of employment because of a disability. Employers try to justify terminating an employee for using medical marijuana on the basis of misconduct, since employers can terminate employees for misconduct even if they have a disability. Medical marijuana is an interesting situation because conduct resulting from a disability is considered part of the disability, rather than a separate basis for termination.

Section 12114 of the ADA (1990) addresses illegal use of drugs. According to ADA Section 12114 (1990), anyone engaging in illegal use of drugs is not considered a qualified individual with a disability. Illegal use of drugs is defined as drugs that are unlawful under the Controlled Substances Act (2010). Illegal use of drugs does not include drugs taken under supervision of a licensed health care professional. One of the questions that arises is whether a recommendation by a physician qualifies as drugs taken under supervision of a physician?

Part Three

Introduction

Due to the currency of the presented issue, it is hard to make conclusions on the basis of the literature review. The literature review section discussed current research, federal and state laws and some of the current cases that have arisen from the medical marijuana laws. The only solution is to know the law and to know how to interpret and apply the legal status of medical marijuana in each state. Whether you are an employer or an employee you should know your rights and the law especially in your residing state. The differences in the federal and state laws have presented a dilemma for not only employers but for employees as well. The last part of this paper will summarize and discuss some of the findings and well as give advice to employers and employees. It will also present some recommendations to the professionals in the workforce to avoid legal action.

Results

Since medical marijuana in employment is a current issue that has not been dealt with extensively, it is important to group and summarize all the different laws state by state and create an organized way to research the options that employers and employees have. The primary goal of this research has been to expose and summarize the different laws relating to medical marijuana in employment and to discuss some of the current issues that work professionals might encounter. Most of the literature on medical marijuana is regarding the fact that the states are overlooking federal law and discussing the differences in state and federal law. In the literature review section, this paper reviewed the works of other authors that have written to educate others on the issue.

It is important to note that marijuana remains illegal under federal law although some states have passed legislation legalizing some forms of use. Marijuana remains a Schedule 1 drug under the Controlled Substances Act (CSA), despite many failed efforts by advocates to reschedule marijuana as a Schedule II drug (Bala, 2010). The question whether an employer can fire an employee based on their medical marijuana use remains a legal gray area (Lieberman & Solomon, 2008).

In California, the Supreme Court ruled in *Ross v. RagingWire Telecommunications, Inc.* that an employer has the right to fire an employee based on their marijuana use. Over half of medical marijuana users currently live in California, and California was the first state to have a medical marijuana law in 1996 (Lieberman & Solomon, 2008). Proposition 215, which has been codified as the Compassionate Use Act (CUA), protects patients and their primary caregivers from criminal prosecution. The CUA only protects physicians if they give a recommendation for medical marijuana. If they actually write a prescription, primary caregivers will face charges. The CUA does not protect people in the employment sector as was decided in *Ross*. The court found the defendants' reasons for discharging Gary Ross valid (Bala, 2010).

Although 15 states have legalized marijuana on some level, many state laws specifically state that the law does not protect the employee in the employment sector. Many state laws state that the law was created to protect individuals from criminal liability. Montana Supreme Court ruled in 2009 that the medical marijuana law does not provide protection for the employee by giving the employee the right of action against his employer (YOU PROBABLY SHOULD CITE THE CASE). In 2009, Washington appellate court ruled that the medical marijuana law did not provide protection to employees in the private employment sector (*Roe v. Teletech*, 2007). The New Jersey Compassionate Use Medical Marijuana Act went into effect on July 1,

2010. The New Jersey law is not required to accommodate the medical use of marijuana in any workplace (Wiwi & Crifo, 2010). Arizona, Rhode Island, and Maine are the only states that have taken the extra precaution to state that it is unlawful for the employer to take legal action against an employee for the use of medical marijuana. The Rhode Island Medical Marijuana Act offers protection to students, employees, and tenants who are medical marijuana card holders and require that employers to make accommodations for those with medical marijuana cards ((Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, 2011, § 21-28.6-4, para. b). Arizona and Maine also offer protection to qualifying users in the employment sector. California, Montana, Oregon and Washington have made employers not required to accommodate medical marijuana use. In the remaining 8 states, the law is not clear and has not been addressed by the courts.

Conclusions

The question that remains is: What should an employer and the employee do? Most states still ban the use and possession of medical marijuana, but it is important for employers and employees to familiarize themselves with the law in the state of their residence (Haygood, Hensley, & Field, 2010). The federal law prohibits the use of marijuana for any purpose under the CSA, which classifies marijuana as a Schedule I drug. The federal law always preempts state laws, which means that even in those states that have passed some form of medical marijuana legislation, a person could still be prosecuted under federal guidelines. The 15 states that have enacted laws protecting people from prosecution are Alaska, Arizona, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington (Haygood, Hensley, & Field, 2010). The questions that remain: How far must an employer go to accommodate medical marijuana in the 14 states that have legalized

marijuana on some level? Only a few courts have addressed the issue in the employment sector. California, Washington, Oregon, and Montana courts have ruled that an employer has the right to terminate or refuse employment to anyone who tests positive for marijuana. Rhode Island and Maine have laws prohibiting employers from refusing to employ medical marijuana users. The other nine states' laws are less clear and until the courts address the issue directly, employers should be cautious when addressing qualifying patrons in the workforce (Haygood, Hensley, & Field, 2010).

A Home Depot spokesman said that they allow employees to take a leave to treat their condition with marijuana, but upon return THC has to be out of their system (Mascia, 2010). Since all 14 states that have legalized medical marijuana in some way have different laws, employers should read the policy as well as any news pertaining on the subject at hand. Many states that have not legalized medical marijuana are in the process of doing so, so employers need to keep up to date with the legal changes happening in their particular states. The most appropriate course of action in this situation, is hiring a legal professional to walk them through the law and the changes that have recently occurred. The employer should also ensure that all human resource personnel are familiar with the company's medical marijuana policies (Wiwi * Crifo, 2010).

Some options to consider are meeting with employees who are authorized to use medical marijuana and discussing other options for dealing with their medical condition. It might be a relief to know that all 15 states do not allow any use of medical marijuana while at work (Haygood, Hensley, & Field, 2010). If an employer should wish to allow the use of medical marijuana in the workplace, the employer should consider whether an individual's inclusion on the registry can be verified due to high legal risk. If the employer does choose to allow medical

marijuana use by employees on the registry, the employer needs to create a procedure for maintaining the confidentiality of employees on the registry (Wiwi & Crifo, 2010).

Another thing to consider is whether medical marijuana is appropriate in that specific workplace and what are some of the safety concerns for those who are using medical marijuana (Wiwi & Crifo, 2010). In the case that the job is safety-sensitive or falls under federal regulation, the workplace should enforce a drug-free zone. Even in states that allow medical marijuana, if an employee hurts someone at work, the employer might face legal liability (Hazard, 2009).

The main decision when dealing with medical marijuana is to be consistent. Whatever policy employers sets forth, they need to make sure that they are consistent and do not inadvertently end up discriminating against a protected class. If an employer is consistent, the possible penalties and damages will be far less than if the employer does end up discriminating (Wiwi & Crifo, 2010).

Recommendations

Based in the research, the ADA should be amended to address the conflict. Currently the ADA does not required accommodation based on illegal drug use. The ADA does specify that you have to accommodate drugs taken under physicians supervisions. This creates a conflict since medical marijuana is recommended by a physician in 15 states but remains illegal under the CSA. The ADA guidelines should address the issue of medical marijuana specifically to reflect the legal gray area.

Recommendations for future research are to keep current with the law. Since medical marijuana laws are constantly changing, it is very important to keep updated on the status of each state's legislation. One way to stay current is to keep current with any lawsuit that is dealing with medical marijuana. There are still many clouds of confusion that hang in the air in regard to

medical marijuana and employment. In states where there are no court rulings, it is important to wait for the courts to make decisions in regard to medical marijuana and employment to clear the confusion.

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