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More On Medical Marijuana – Will Ohio Protect Employers' Zero-Tolerance Policies?

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When I wrote my last post on medical marijuana, I stated that once Ohio's new medical marijuana law goes into effect in September, employers will still have a right under state and federal law to enforce zero-tolerance policies regarding marijuana use. Since then, people have pointed out to me that employees in other states have found exceptions to these laws that protected marijuana use and have questioned whether such loopholes exist in Ohio's new law. While no courts have yet ruled on any cases regarding medical marijuana use and we cannot know the answer for sure until they do, it appears that the answer is likely no. A

lthough many states have moved to legalize medical marijuana in seemingly-similar manners, the devil is in the details, and every state has different statutory language that will affect employers and employees in that state in a unique manner. Let's look at an example from a well-publicized Connecticut case, *Noffsinger v. SSC Niantic Operating Co. LLC*, No. 273 F. Supp. 3d 326, that was decided in August 2017.

Connecticut law allows qualifying patients with certain medical conditions to use medical marijuana, and although the statute allows employers to prohibit intoxication or the use of marijuana at work, it does not allow an employer to refuse to hire a person or to penalize an employee because he or she is a qualified patient. In *Noffsinger*, a qualifying patient who used prescription marijuana only at night and never at work was denied employment for testing positive for cannabis following her job offer. She sued under the antidiscrimination clause of Connecticut's medical marijuana law, and the employer moved to dismiss, claiming Connecticut law was preempted by the federal Controlled Substances Act (CSA) and the Americans with Disabilities Act (ADA). However, the court ruled that federal law did not preempt Connecticut law in this situation.

The CSA makes it a federal crime to use or possess marijuana, but it does not make it unlawful to employ a marijuana user. There was no conflict between federal and state laws because Noffsinger did not claim in her lawsuit that Connecticut law gave her the right to use marijuana – she merely claimed that it prohibited an employer from taking an adverse action because of her marijuana use. She further argued that the ADA only stated that an employer may prohibit drug use and intoxication *inside* the workplace, which did not apply to her evening use. The court agreed with Noffsinger's reasoning and denied the defendant's motion to dismiss, leading many to believe that federal prohibitions on marijuana use may not always help employers enforce zero tolerance drug policies. Ohio law appears to be different though.

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While Connecticut law allows employers to prohibit intoxication or marijuana use *at work*, this qualifier is absent from Ohio's law. Ohio's law states that nothing requires an employer to permit or accommodate an employee's use, possession, or distribution of medical marijuana, period. The law further explicitly states that nothing prohibits an employer from enforcing a zero-tolerance drug policy. There is nothing differentiating off-duty use from use or intoxication in the workplace. As such, it is highly likely that nothing will prevent Ohio employers from enforcing their drug policies. But nothing is for sure until the statute is in effect and courts have issued opinions, so we will continue to monitor this issue.