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Marijuana in the Workplace

By William Floyd and Denver Smith

Introduction

For many years, South Carolina employers have prohibited drugs in the workplace and tested applicants and employees for illegal substances, such as marijuana. Recently, Congress and many states have enacted new laws regarding marijuana, covering everything from cultivation to consumption, for both medical and recreational reasons. Many states have legalized marijuana, while others – like South Carolina – have taken a more conservative approach and allowed the use of cannabidiol (CBD) products derived from industrial hemp. Employers in South Carolina must consider how recent changes in the law will impact them and recognize that more changes are likely—including the possibility that medical marijuana may soon become legal.

Federal laws regarding marijuana and hemp

According to federal law, marijuana is illegal. The Controlled Substances Act categorizes marijuana as a Schedule I substance, defined as a substance with “a high potential for dependency and no accepted medical use.”¹ Nevertheless, there is a growing conflict between federal law and those states that have legalized marijuana for

medical or recreational purposes. Thirty-three states and the District of Columbia have legalized marijuana for medical use.² In order to obtain medical marijuana in these states, a licensed physician must issue the patient a medical marijuana certificate, which enables access to local dispensaries. Eleven states have legalized marijuana for recreational use. Illinois recently became the latest state to fully legalize marijuana, which allows consumers 21 years or older to enter local dispensaries at will.³

South Carolina laws regarding marijuana and hemp

Marijuana and hemp are derived from the same plant species, *Cannabis sativa L.* While the plants look very similar, the hemp variety of the plant contains only very low quantities of the psychoactive ingredient in cannabis, delta-9-tetrahydrocannabinol (THC). Accordingly, the legal definition of hemp focuses on the quantity of THC: less than 0.3% of THC currently classifies the plant as hemp (also known as industrial hemp). More than that amount of THC means the plant is marijuana and, therefore, illegal in South Carolina.

South Carolina has long prohibited the possession and use of marijuana. Pursuant to S.C. Code Ann.

PHOTO BY GEORGE FULTON

§44-53-1810, "marijuana" broadly covers all types of the marijuana plant, growing or not: its seeds, resin, and every related compound, manufacture, salt, derivative or mixture.⁴ Furthermore, possession of drug paraphernalia associated with marijuana use is also illegal.⁵ The code defines paraphernalia as any instrument, device, article, or contrivance used, designed for use, or intended for use in ingesting, smoking, administering, manufacturing, or preparing a controlled substance.⁶

The law clearly outlines the consequences for those who possess marijuana. Persons charged with possessing marijuana in the amount of one ounce or less may be permitted to enter the pretrial intervention program under the provisions of §17-22-10 through §17-22-160.⁷ For a second or subsequent offense, the offender is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than one year or fined not less than \$200 nor more than \$1,000, or both.⁸ Possession of over an ounce of marijuana constitutes a felony in South Carolina.⁹

On the other hand, growing and processing hemp is now legal in South Carolina. In 2018, President Donald Trump signed the Agricultural Improvement Act of 2018 into law, generally legalizing hemp subject to state regulation. This law reclassified hemp as an "agricultural commodity."¹⁰

On March 8, 2019, Governor Henry McMaster signed the Hemp Farming Act into law, codified at S.C. Code §46-55-10 *et seq.* According to the statute, "industrial hemp" must not contain more than 0.3% of the chemical THC; otherwise, it falls beyond the statutory protections. Hemp can be used for making paper and clothing and is the primary ingredient in many CBD-products.

There are hundreds of different chemical compounds within the marijuana plant.¹¹ The most well-known chemical, THC, causes the mood altering, psychological effects that most people associate with marijuana. CBD, on the other

hand, is a non-psychoactive cannabinoid that provides similar results as THC, but without the "high."

Medical marijuana in South Carolina

While both recreational and medical marijuana are illegal in South Carolina, that could potentially change next year. The legislature may vote on a bill, the South Carolina Compassionate Care Act, introduced by Senator Tom Davis. The bill would legalize medical marijuana and allow doctors to authorize marijuana to patients who meet specific requirements.¹²

Drug testing

South Carolina encourages but does not typically mandate drug testing in the workplace.¹³ Drug testing policies are generally left up to the discretion of the employer, however, there are some exceptions. For example, employers who require individuals to maintain a commercial driver's license as a condition of employment are subject to various reporting requirements if an employee or applicant refuses to submit to a drug test or has a positive drug test result.¹⁴ Furthermore, employers who voluntarily implement a drug prevention program may receive a 5% discount on their workers' compensation rates.¹⁵

The potential impact of legalized medical marijuana on drug testing is not clear and subject to statutory provisions and court interpretation. For example, Illinois does not forbid or encourage the implementation of drug tests in the workplace; however, it does bar employers from discriminating against employees who legally use drugs outside of the workplace.¹⁶

Workers' compensation

Intoxication – whether through drugs or alcohol – can bar an injured employee from recovering workers' compensation benefits. "No compensation shall be payable if the injury...was occasioned by the intoxication of the employee..."¹⁷ South Carolina courts have described intoxication as rendering

"an employee impaired in his or her faculties to the extent that the employee is incapable of carrying on the accustomed work without danger to the employee."¹⁸ While the potency of medical marijuana varies, studies suggest that using marijuana can have an effect on a user for several hours after ingestion.¹⁹ The issue for both employees and employers arises when testing for intoxicating agents after an accident has occurred. In most instances, marijuana is detectable in hair for up to 90 days and three to 30 days in urine.²⁰ Currently, there is no way to determine precisely when the drug was ingested. The challenge of determining whether an employee was under the influence of marijuana at the time of an accident is one that employers will have to address if the drug becomes legalized.

OSHA

Marijuana usage may have several different impacts on a company's workplace environment. One of the most common concerns is the health and safety issues associated with marijuana. The Occupational Safety and Health Administration (OSHA) does not have a specific standard that prohibits drug use or impairment from drug use on a job site. Nevertheless, OSHA's General Duty Clause requires: "Each employer shall furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees."²¹ Some view this requirement as being inconsistent with allowing employees to use marijuana.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) is a federal law prohibiting discrimination against individuals with a disability. Whether the ADA requires employers to accommodate medical marijuana use by employees has become increasingly controversial as more states begin to legalize marijuana. The ADA states that an individual

with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs as defined under the Controlled Substances Act.²² Despite the effort of the states who have legalized marijuana, the federal government continues to classify the drug as illegal under the Controlled Substance Act.

While there have not been reported cases in South Carolina regarding the issue, several other courts have considered whether the ADA permits and perhaps condones legalized marijuana. For example, in *James v. City of Costa*, the Ninth Circuit ruled on the definition of illegal drug as applied to the ADA. The court held that "doctor-recommended marijuana use permitted by state law, but prohibited by federal law, is an illegal use of drugs for purposes of the ADA, and that the plaintiffs' federally proscribed medical marijuana use therefore brings them within the ADA's illegal drug exclusion."²³ The Ninth Circuit also rejected a second argument based on a separate

provision of the ADA permitting illegal drug substances taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provision of federal law.²⁴ So, for now, the ADA will likely not cover marijuana use as long as it remains classified as a controlled substance.

While federal law and the ADA do not currently require accommodation for marijuana, some states, such as Rhode Island and Massachusetts, have ruled that employers are required to accommodate their employees for their medical marijuana use.²⁵ Some states are starting to write employment protections into their legislation regarding the legalization of marijuana.²⁶ For instance, Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, New York, Pennsylvania, and West Virginia have all explicitly required employers to recognize medical marijuana under their laws regarding employment protection.²⁷ Until the final version of the Compassionate Care Act is

presented and enacted, South Carolina employers are left speculating about employment protection requirements.

Balancing factors

All of the issues mentioned to this point leave South Carolina employers in a haze. The decision to test employees will vary from company to company, which will require the consideration of a series of factors to reach a sound decision. The workers' compensation discount is clearly an incentive that may persuade the implementation of drug tests in the workplace. Additionally, pursuant to OSHA, employers have a duty to provide a safe work environment, which could include drug testing. Nevertheless, with the unemployment rate in the United States at the lowest level in nearly 50 years,²⁸ some employers cannot afford to be too picky when finding and hiring qualified applicants for specific jobs.

Another variable that may dissuade employers from drug



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testing, especially those employers who have offices nationwide, is the reciprocity of branches in states which do not allow marijuana with those in states that do. For instance, should a South Carolina employer fire an employee who transfers from California because they test positive for marijuana? What if the California branch allowed this employee to use marijuana? These questions pose a challenge to corporations that do not have a companywide drug policy. A scenario that further frustrates a policy decision is an employee who travels out of state for vacation and legally ingests marijuana, then returns home and tests positive for a drug test. Should they be disciplined? There is not a generalized answer to these questions, and it is likely that they would need to be considered on a case-by-case basis.

Conclusion

South Carolina has not legalized medical marijuana to date, but pressure is mounting to do so. The public perception regarding marijuana is quickly changing nationwide. Over 30 states have already legalized marijuana in some fashion, forcing employers to act quickly to adjust their policies. The uncertainty surrounding the Compassionate Care Act has thrown South Carolina employers into uncharted territory. With the possibility of legalized marijuana in South Carolina nearing, employers must consider how legalization could impact their workplace.

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Endnotes

¹ 21 U.S.C.A. § 811 (2018).

² See Interactive Map at <http://arccg.is/iGXX0>.

³ Will employers still drug test for marijuana once recreational use is legal in Illinois? Chicago Tribune (May 31, 2019) (available at <https://www.chicagotribune.com/business/ct-biz-marijuana-in-the-workplace-20190321-story.html>).

⁴ S.C. Code Ann. § 44-53-110(27)(a) (2018).

⁵ S.C. Code Ann. § 44-53-110(33) (2018).

⁶ *Id.*

⁷ In 2014 Julian's Law created a limited exemption for the possession and use of CBD oil from the criminal definition of marijuana. The CBD oil must be at least 15% CBD and no more than 0.9% THC. The law requires a physician's note to obtain the CBD and is only given to patients with severe seizure disorders. See S.C. Code Ann. § 44-53-1810 (2018).

⁸ S.C. Code Ann. § 44-53-370(d)(4) (2018).

⁹ *Id.*

¹⁰ DEA Internal Directive Regarding the Presence of Cannabinoids in Products and Materials Made from the Cannabis Plant, Drug Enforcement Agency (May 22, 2018) (available at https://www.deadiversion.usdoj.gov/schedules/marijuana/dea_internal_directive_cannabinoids_05222018.html).

¹¹ What is Medical Marijuana?, National Institute on Drug Abuse (June 1, 2018) (available at <https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine>).

¹² SC Senators Push Medical Marijuana Vote to Next Year, The State (April 25, 2019).

¹³ Several federal laws mandate drug testing of workers, such as truck drivers, in certain industries.

¹⁴ S.C. Code Ann. §§ 56-1-2210(2) & 56-1-2220(A) (2018).

¹⁵ S.C. Code Ann. § 38-73-500 (2018).

¹⁶ Will employers still drug test for marijuana once recreational use is legal in Illinois? Chicago Tribune (May 31, 2019) (available at <https://www.chicagotribune.com/business/ct-biz-marijuana-in-the-workplace-20190321-story.html>).

¹⁷ S.C. Code Ann. § 42-9-60 (2018).

¹⁸ Jones v. Harold Arnold's Sentry Buick, Pontiac, 376 S.C. 375, 379, 656 S.E.2d 2d 772, 774 (S.C. Ct. App. 2008).

¹⁹ Marijuana at Work, National Safety Council (Aug. 1, 2019).

²⁰ How Long Does Marijuana Stay in Your System?, American Addictions Centers (October 7, 2019).

²¹ Workplace Safety Issues Clouded by Medical Marijuana, ISHN, (April 12, 2018) (available at <https://www.ishn.com/articles/109122-clearing-the-smoke-workplace-safety-issues-clouded-by-medical-marijuana>).

²² 42 U.S.C.A. § 12114(a) (2017).

²³ James v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012).

²⁴ 42 U.S.C.A. § 12114 (2017).

²⁵ Courts in Massachusetts and Rhode Island Permit Medical Marijuana Users to Pursue Disability Discrimination Claims, Employer Law Report (Oct. 22, 2018).

²⁶ *Id.*

²⁷ Must Employers Accommodate Medical Use? SHRM (Feb. 19, 2019) (available at <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/must-employers-accommodate-medical-marijuana.aspx>).

²⁸ United States Unemployment Rate, Trading Economics (May 19, 2019) (available at <https://tradingeconomics.com/united-states/unemployment-rate>). <https://medium.com/cbd-origin/hemp-vs-marijuana-the-difference-explained-a837c51aa8f7>.