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UNDERSTANDING THE IMPACT OF LEGALIZATION OF MEDICAL MARIJUANA

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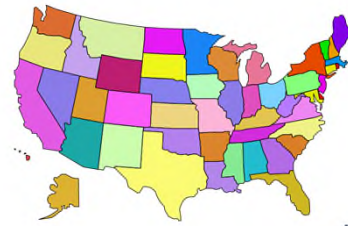
THE INTERSECTION OF MEDICAL MARIJUANA AND DISABILITY LAWS

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Overview: Where is Marijuana Legal?

- Medical marijuana is currently legal in 28 states and the District of Columbia, Guam and Puerto Rico
- The laws vary on:
 - How much marijuana can be possessed
 - Where marijuana can be used
 - What it may be used for



Comparison of Laws

	District of Columbia	Maryland	Virginia
Recreational Use	Lawful	Unlawful	Unlawful
Medical Marijuana	Lawful	Lawful	Unlawful
Drug Testing by Employers	No laws regarding employer's ability to test employees or applicants	Statutory laws on drug testing by employers	Laws only apply to employers who are contractors with state entities



Status of Medical Marijuana in Maryland

- Legislation establishing the Natalie M. LaPrade Maryland Medical Marijuana Commission (the “Commission”)
 - Purpose: establish and oversee the “investigational” use of marijuana for medical purposes by academic medical centers
 - Law then expanded to permit use of marijuana for the treatment of certain medical conditions
- In 2014, Senate Bill 923 signed into law which laid the foundation for legal distribution of “medical marijuana” in Maryland
 - Allows distribution of marijuana by licensed dispensaries for certain medical purposes proscribed by “certifying providers” to “qualifying patients.”



Important Definitions

- *Certifying providers* – must register with the Commission and provide reasons for prescribing medical marijuana to a particular patient
- *Qualifying patient* – one who has been provided with a written certification by a certifying provider in accordance with a bona fide provider-patient relationship
 - Patient must also apply to the Commission for an identification card
- Under the law the following are exempt from arrest or prosecution for use of cannabis as permitted by law:
 - Qualifying patients
 - Licensed growers
 - Certifying providers
 - Caregivers; and
 - Dispensaries and their agents



What Can Medical Marijuana Be Used For?

- Qualifying medical conditions is **NOT** defined in the statute or regulations
- However, statute allows approval of provider applications for:
 - Chronic or debilitating disease(s) or medical condition(s) that result in the patient being admitted into hospice or receiving palliative care
 - Chronic or debilitating disease or medical condition (or treatment of that condition or disease) that produces cachexia, anorexia, wasting syndrome, severe or chronic pain, severe nausea, seizures and/or severe or persistent muscle spasms
 - This list is **NOT EXCLUSIVE**
- Catch All- “any other condition that is severe and for which other medical treatments have been ineffective if the symptoms reasonably can be expected to be relieved by the medical use of cannabis.”



How Does this Affect You as an Employer?

- **How does this affect an employer?**
 - A portion of your workforce in Maryland may be using medical marijuana in a manner authorized by Maryland law
 - This will result in a **POSITIVE** urine sample
- However, marijuana is still illegal under **FEDERAL** law



Are Employers Required to Make Accommodations under a Drug-Free Workplace Policy?

- What should an employer do if an employee who is a “qualifying patient” uses marijuana in a manner consistent with the law to treat a disability tests positive on a urine sample for marijuana use?
- Does the fact that the employee is a qualifying patient using marijuana in accordance with the law prohibit the employer from disciplining or terminating the employee?
- Can an employer grant a reasonable accommodation to an employee who uses marijuana for legal, off-duty use notwithstanding the employer’s drug-free policy?

THIS IS ALL UP FOR DEBATE



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Maryland Disability Law

- The Maryland Fair Employment Practices Act (FEPA) covers employers with 15 or more employees and prohibits discrimination in employment based on physical or mental disability, as long as the individual can perform the job (or a reassignment position) with or without an accommodation
- How is **disability defined**?
 - A physical disability, infirmity, malformation, or disfigurement that is caused by bodily injury, birth defect, or illness, including epilepsy; or
 - A mental impairment or deficiency
- What is the employer’s obligation under the disability law?
 - Make a **reasonable accommodation** for a known disability of an otherwise qualified individual, if it would not cause **undue hardship** to the employer’s business



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How Can an Employer Comply with its Obligation Under the Disability Law?

- Evaluate each employee and his/her disability on an individual basis
 - **THERE IS NO ONE SIZE FITS ALL APPROACH**
- Generally, the process involves:
 - Employee making a request
 - Employee does not have to use the word “reasonable accommodation”
 - Request can be verbal
 - Open a dialogue
 - Get doctor’s input, if necessary

REMEMBER: The interactive process is *ONGOING*.



Handling ADA Requests for Accommodation

- Does the employer have to permit use of medical marijuana as a reasonable accommodation?
 - **MAYBE**.....but the employer certainly should engage in the interactive process
- Are there any alternatives?
 - Modified work schedule
 - Leave of absence
 - Modified job duties
 - Transfer out of safety-sensitive tasks (ex. Driving, operating heavy machinery)
 - Allowing for use of marijuana products with **LOW** tetrahydrocannabinol (THC), the ingredient that can impair someone’s judgment



Takeaways

- The laws are still developing in this area
- In the wake of a growing number of laws legalizing medical marijuana on the state level, there may be protection for disability claims under state anti-discrimination laws
- Conflict between state and federal law makes developing and enforcing workplace drug policies complicated



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MEDICAL CANNABIS MEETS FAIR HOUSING: SPECIAL CONSIDERATIONS FOR ASSISTED LIVING HOMES

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Seniors and Medical Cannabis: Basic Facts

- From 2006 to 2016, cannabis use among seniors is up 300%
- Seniors use more than 30% of all prescription drugs prescribed annually
- Seniors show highest and most rapidly growing prevalence of opioid use disorder
- Studies show significant opioid reduction in seniors treating chronic pain conditions with medical cannabis
 - Recent study shows 20% of survey pool reduced or discontinued opiate tx
- In 2017, Medicare saved more than \$165 million in prescription drug costs in DC and 17 medical states
 - If legalized for medicinal use nationwide, estimated \$468 million in savings



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Federal Law Regarding Cannabis Use

- Controlled Substances Act (“CSA”):
 - Prohibits use, possession, and sale of cannabis, medical or otherwise
 - Classifies cannabis as having no accepted medical use and a high likelihood for abuse
- Federal law preempts contrary state law



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Federal Fair Housing Act

42 U.S.C. § 3601, et seq.

- Prohibits disability discrimination by owners/landlords
- “Disabled” means physical or mental impairment that substantially limits one or more major activities of daily living
- Authorizes Fair Housing complaint seeking “reasonable accommodation” to permit equal opportunity to use and enjoy a dwelling unit or common space
- HOWEVER,
- Such disability “does not include current, illegal use of or addiction to a controlled substance” as defined in the CSA



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Medical Cannabis and Fair Housing

- Federal cannabis prohibition preempts state law efforts in the Fair Housing arena
- Preemption occurs both in federally subsidized housing (Section 8 and rent control), and in facilities receiving federal funding (Medicare/Medicaid appropriations)
- Cannabis use in such facilities is not a reasonable accommodation, even if recommended for treatment of a disability
- Courts routinely enforce federal prohibitions over state and local laws
- Courts routinely look to employment discrimination cases for guidance



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Medical Cannabis and Assisted Living Frequently Asked Questions

- Can a community ban all use of medical cannabis?
- Can a community fire an employee, or evict a resident, for using medical cannabis?
- If a community permits medical cannabis use, what limits can it implement?



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Outright Ban?

- Generally, yes
- Federal law provides cover for facilities seeking to ban cannabis use
- However, state law may protect patients/residents from discrimination
- *Compare Alaska (no accommodation for residents in state facilities) with Maine (statute permitting nursing home workers to act as registered caregivers for cannabis patients)*



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Fire Employee or Reject Applicant?

- Generally, yes – with caveats
- First, must check state law protections for cannabis patients
 - Do laws protect against adverse action solely because of patient status?
- Likely no issue implementing drug-free workplace prohibiting use of drugs by on-duty employees
 - Structure policy as prohibiting work while impaired
- But, extension to off-duty activities depends on state law and whether that use impairs performance at work
- CAREFUL THOUGH – recent case re “solely on the basis of her status as a qualifying patient”



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Evict Resident?

Depends on two primary considerations:

1. Does the facility receive federal funding?
 - If so, can evict (citing CSA and HUD guidelines)
2. What, if any, state protections exist?
 - State law may prohibit or otherwise restrict eviction
 - Must also conform with any existing policy or protocol



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Limiting Acceptable Forms of Cannabis

- Clear, written policy
- Universal non-smoking policy
- Secure storage within apartment
- Allow designated caregiver to deliver and assist resident
- Designate outdoor areas for use
- Always check state law for additional protections and requirements



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2018 SUMMARY OF MEDICAL MARIJUANA RELATED LEGISLATION

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House Bill 2: Natalie M. LaPrade Medical Cannabis Commission Reform Act

- Sponsor: Delegate Glenn; Status: Returned Passed (Senate: 40-5; House: 118-15); Effective Date: Effective upon the Governor's signature
- Background:
 - Original legislation
 - Application process problems and lack of diversity
 - Lawsuits
 - New Commission Leadership



House Bill 2 Continued

Summary:

- Increase number of grower's licenses from 15 to 22;
- Increase number of processor's licenses from 15 to 28;
- Require outreach to small, minority, and women businesses, including, (1) training programs for employment, and (2) educational information on licensing process;



House Bill 2 Continued

Summary:

- Make grants to educational and business development organizations to assist small, minority, and women businesses interested in the medical cannabis industry;
- Reduce the number of Commissioners from 16 to 13, beginning on October 1, 2019;
- Develop regulations to establish the Compassionate Use Fund program (MDH), which will provide access to medical cannabis for individuals enrolled in the Maryland Medical Assistance program or the Veterans Administration Maryland Health Care System;



House Bill 2 Continued

Summary:

- Submit emergency regulations to implement remedial measures to promote diversity in the medical cannabis industry;
- Submit a report on the: (1) fees and revenues necessary to implement the Compassionate Use Fund; (2) providers, product demand, and consumer price; (3) progress of emergency regulations; (4) advertising and marketing practices of licensees; and (5) use of medical cannabis to treat opioid use disorder;
- Submit emergency regulations that permit and regulate the use of crop protection agents (MDA); and



House Bill 2 Continued

Summary:

- Grant stage one pre-approval to: (1) next two numerical selections on the August 2016 Resi grower list; (2) any licensed grower with a top-30 processor ranking; and (2) any licensed processor with a top-30 grower ranking. Increase number of grower's licenses from 15 to 22;



House Bill 1035: Natalie M. LaPrade Medical Cannabis Commission – Certifying Providers - Referrals

- Sponsor: Delegate Glenn/Senator Carter Conway;
Status: Returned Passed (HB 1035 – Senate: 47-0;
House: 135-2; SB 1063 – Senate: 47-0; House 130-2);
Effective Date: October 1, 2018

Summary:

- Prohibit compensation for the referral of a qualifying patient to a medical cannabis certifying provider.
- Referral restrictions extend to persons or businesses compensated for registering a qualifying patient, completing an application for a qualifying patient, or submitting an application for a qualifying patient.



SB 874: Natalie M. LaPrade Medical Cannabis Commission – Immunity

- Sponsor: Senator Zirkin; Status: Returned Passed (Senate: 47-0; House 133-4); Effective Date: October 1, 2018

Summary:

- Expand legal protections from arrest, prosecution, or other penalties for a qualifying patient, caregiver, certifying provider, medical facility, grower, processor, and dispensary to include “possession” of medical cannabis (previously limited to “use”); and
- Provide legal protections to independent testing laboratories, secure transportation companies, waste disposal companies, and other entities authorized by the Commission to test, transport, and dispose of medical cannabis and medical cannabis waste.



Emergency Regs Under HB2

- SG 2-1246: Progress report due every 30 days – Last report on August 15, 2018
- Status: “...despite its continuing efforts...” the Commission has been unable to finalize the regulations



The Future?

Legalization of Recreational Marijuana



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Questions

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Please note that the information expressed herein is based upon our current evaluation of these issues. Given the nascent and fluid nature of cannabis law, Leading Age should regularly monitor these areas to ensure that it is fully apprised of any developments or changes. Whiteford, Taylor & Preston is happy to assist in this monitoring. Should you have any questions in this regard, please do not hesitate to contact us.



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