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Lawyer: Potential employer issues posed by medical marijuana

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Missouri voters have signed off on legalizing medical marijuana, and that will create new questions for employers in the state.

It's a dynamic familiar to Chris Ottele, an employment law attorney with Husch Blackwell LLP in Denver. He has spent several years working on this issue with employers in Colorado, where medical and recreational use of marijuana has been legal since 2012. The gist of what he's learned: It's really up to each individual employer to decide how to handle it.

"Most take the stance that it's none of their business what you do off site on your own time," Ottele said. "Their main concern is just wanting to be sure their workforce is safe and accountable. If you are in a safety-sensitive position, they'll absolutely say you are not even allowed to be perceived as even having a risk of being impaired because the consequences are so dire. So companies with major safety concerns are taking more of a zero-tolerance approach. But for the employees in non-safety-related functions, your receptionist for example, employers typically don't dig into it. They just want to know that you can show up on time and do your job."

One key provision

In Missouri, Ottele said, the key provision is Section 7(d), which states that nothing permits a person to bring a claim against an employer for wrongful discharge or discrimination based on the employer prohibiting employees from working or attempting to work while under the influence of marijuana. Although this provision is designed to protect employers, similar laws in other states have been tested.



Chris Ottele is an employment law attorney with Husch Blackwell LLP in Denver.

In one Colorado case, *Coats vs. Dish Network*, an employee who used marijuana for a medical condition was selected for a random drug test, failed and was fired. He sued.

"He lost in the trial court, the appeals court and the state supreme court," Ottele said. "He brought a case under Colorado's lawful off-duty activity statute, which says employers should respect the privacy rights of their employees. However, it has to be lawful activity. Federal law still classifies cannabis as a Schedule 1 controlled substance, which means there is no utility to it whatsoever."

The latest test to these types of employer protections are coming from New England, where attorneys are using anti-discrimination laws that protect disabled employees. In one instance, a state judge ruled that employers need to engage in an interactive process with the employee wanting to use medical marijuana to treat their disability.

'Under the influence'

The wording of the Missouri provision seems to protect employers in the state from this kind of ruling on disability discrimination. The biggest problem however is the phrase, "under the

influence of marijuana."

Marijuana resides in the body for as long as 30 days, and no breathalyzer test exists for cannabis. So employers have no simple way to determine whether somebody is under the influence. Until a test is developed, debate will persist about being under the influence of marijuana.

"Say you smoked a joint 30 days ago, and your employer chooses you for a random drug test and then says you failed," Ottele said. "They could say they don't care if you smoked it 30 days ago, it's still detectable in your system. But I think most courts would agree that doesn't mean a person is under the influence of marijuana while at work. You have to rely on other indicators such as slurred speech, bloodshot eyes, incoherence and all the things police look at for impaired driving. But now you're asking employers to do that, and they are ill-suited to do it."

A federal twist

Employers may encounter two other federal laws when it comes to medical marijuana.

Federal contractors are subject to the Drug Free Workplace Act, which says federal contractors of a certain size are required to publish a policy prohibiting the use of illegal drugs. That law was tested on the East Coast, and a federal judge said an employer is not required to prohibit off-duty use of medical marijuana.

The other federal law involves truckers, specifically the U.S. Department of Transportation's stringent requirements for random drug testing and prohibitions against using illegal drugs.

"For those companies, it's a pretty black-and-white issue that they need to prohibit any use of medical marijuana," Ottele said.