The High Likelihood of Amendment 2 Passing is a Buzz Kill for Florida Employers

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Executive Summary: The fight over Amendment 2 is back! Voters snuffed out Amendment 2 the first time around after a tumultuous legal battle to the ballot, failing to approve the amendment by the required 60 percent. The "Use of Marijuana for Debilitating Medical Conditions" (Amendment 2) is now headed for the November 2016 ballot with less fanfare and, according to proponents, more clarity regarding regulations, possible malpractice claims against physicians who negligently prescribe marijuana, parental consent for minors, and what qualifies as a "debilitating condition." The concurrent presidential election will likely double voter turnout and increases the chances for the Amendment's passage. While Florida law currently permits limited use of non-smokable, low-THC marijuana for terminally ill patients or those with chronic seizures or severe muscle spasms, Amendment 2 would permit the use of a stronger form of marijuana and significantly expand the conditions for which it can be recommended.

If passed, Florida will become the 24th state plus Washington D.C. to legalize medical marijuana, with five of those - Colorado, Washington State, Alaska, Oregon and Washington D.C. - legalizing recreational use. While state laws vary, most focus on protection from prosecution under state criminal laws and not on the effect that use or possession has on employer policies. The state laws that have addressed employer obligations generally prohibit discrimination against a person because of their status as a medical marijuana user unless the employer would lose funding, contracts or licensing under federal law. What is less clear is whether employers must accommodate use or possession, whether employers can take adverse action against a person solely on the basis of a positive drug test, and potential liability for disability discrimination for failure to accommodate medical marijuana users (as opposed to use).

Amendment 2 gives little insight into its potential effect on Florida employers' policies, stating only that nothing "shall require any accommodation of any on-site medical use of marijuana in any … place of … employment, or of smoking medical marijuana in any public place." The Amendment only addresses "on-site" use but does not identify an employer's obligations regarding possession, impairment or the effect of positive drug tests on the ability to take adverse actions against applicants or employees. Florida employers will have to wait for the implementing regulations to determine their obligations to applicants and employees who legally use or possess medical marijuana. In the meantime, it is prudent for Florida employers to understand the potential implications and plan accordingly.

Employers Not Generally Required to Accommodate Use of Marijuana

The haziness of the application of state marijuana laws to private employers has led to increased litigation over the rights of applicants and employees in the workplace. Most courts that have addressed the issue have found that employers have no obligation to accommodate use, possession or impairment at work. Additionally, most states allow employers to maintain nondiscriminatory, drug-free workplace policies that allow discipline, termination or refusal to hire based solely on a positive drug test, although the specific provisions of the laws vary by state. While "impairment" can be inferred from a positive drug test in these states, several states' laws require additional evidence of impairment since THC (the active chemical in

marijuana) can be detected in urine tests for several weeks after use. Because the mere presence of these metabolites does not indicate “impairment,” employers in these states must prove impairment by other means.

Proving impairment without the presumption from a positive drug test can be a formidable task for an employer, and the text of most states' laws generally offer little guidance. Moreover, in the context of unemployment benefits, several states have required evidence of impairment of work performance or evidence that tested levels of drugs would affect the employee’s job performance before denying unemployment benefits to an employee terminated for a positive drug test based on marijuana metabolites. Comprehensive management training on detecting and documenting impairment will be necessary should Florida adopt a similar “impairment” or “under the influence” standard.

Medical Marijuana Use and Disability Discrimination Laws

State marijuana laws do not change the fact that the use and possession of marijuana continues to be unlawful under federal law. This has been critical in several court cases challenging adverse actions based on marijuana use legal under state law. For instance, the Americans with Disability Act ("ADA") does not protect individuals who claim discrimination because of medical marijuana use, since it excludes disabilities based on "illegal drug use," as defined by federal law. Additionally, several states, such as California and Colorado, have laws protecting employees from adverse action taken as a result of participation in "lawful off-duty activities." Courts addressing the issue have unanimously held that the activity must be lawful under both federal and state law and that medical marijuana use is, therefore, not a protected activity.

Although the use of medical marijuana is not protected under the ADA, the underlying condition for which the employee is using medical marijuana may be considered a disability requiring accommodation under the ADA or state disability discrimination laws such as the Florida Civil Rights Act. Thus, once the employer becomes aware of an employee's status as a registered medical marijuana patient and, by implication, having a disability, the employer may have an obligation to discuss reasonable accommodations for the underlying disability prior to taking adverse action.

Employers' Bottom Line:

If Amendment 2 is approved, employers should be prepared to revisit and revise their policies if necessary to ensure compliance with the new law. Employers with operations in multiple jurisdictions should ensure that their policies comply with Florida's law as well as the laws of the other states in which they operate. In those states where positive drug tests are not considered conclusive of impairment, employers will need to provide management training to detect signs of employee impairment and respond appropriately, including accurately documenting any investigation. Of course, if drug testing is the subject of collective bargaining, employers will be required to comply with notification and bargaining obligations before changing their policies. Employers also should keep employees updated and educated on their drug testing policies and should specifically discuss any effect the legalization of marijuana has on those policies and any consequences of travel among offices in states where legalization has not occurred.

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[i] If you have any questions regarding Amendment 2 or this article, please contact the author, Shannon Lee Kelly, skelly@fordharrison.com, who is a partner in our Tampa office. You may also contact the FordHarrison attorney with whom you usually work.