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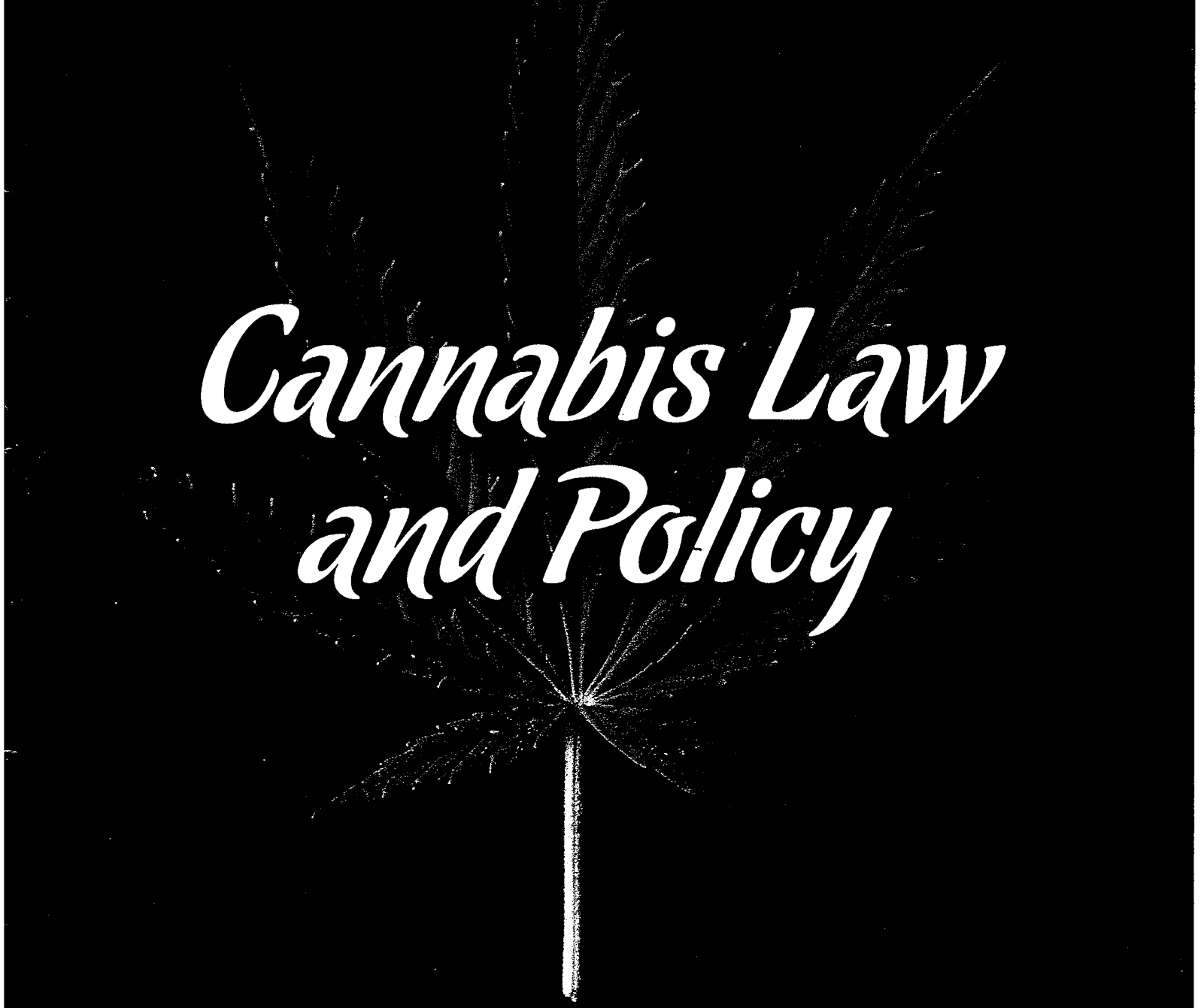

Cannabis Law and Policy

ARE EMPLOYMENT RULES GETTING HAZIER?

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Marijuana prohibition in the United States began 80 years ago when the federal government banned the sale, cultivation, and use of the cannabis plant. It continues to remain illegal under federal law today. However, in recent years, marijuana legalization has swept the United States and the globe at a rapid rate. In 2018 alone, Vermont became the first state to legalize marijuana through its legislature rather than by ballot initiative; Canada legalized marijuana nationwide, becoming the first G7 country to do so; and Mexico's supreme court ruled that marijuana prohibition is unconstitutional. Currently, in the United States, 11 states and the District of Columbia allow recreational marijuana for adults over 21, and 33 states allow medical marijuana. These numbers are expected to continue to grow over the next few years as societal and political perspectives on cannabis continue to shift in favor of legalization. All signs point to the eventual legalization of marijuana at the federal level in the United States.

Despite this shift in perspective, marijuana still remains an illegal Schedule I drug under the federal Controlled Substances Act (CSA)—in direct contrast with legalized marijuana at the state level. Although federal law is superior to state law, businesses must comply with both—even if federal and state laws conflict with one another. The chronic dispute between state and federal marijuana laws has left many employers confused about how to handle marijuana use in the workplace. With federal legalization on the horizon, the issue has become hazier than ever.

The Laws

The foundation of cannabis law in the United States depends largely on three sources:

- Controlled Substances Act
- Food, Drug, and Cosmetic Act
- State law

U.S. employment law is drawn from many sources, including the following:

- Equal Employment Opportunity Act
- Family and Medical Leave Act
- Americans with Disabilities Act
- Drug-Free Workplace Act
- Occupational Safety and Health Act
- National Labor Relations Act
- Fair Labor Standards Act
- State law

Disability Laws and Use of Cannabis

Family and Medical Leave Act. The Family and Medical Leave Act (FMLA) requires covered employers to provide job-protected leave to eligible employees for certain qualifying reasons.[1] The FMLA requires employers that fall under its provisions to provide up to 12, or in some cases up to 26, workweeks of unpaid leave to those eligible employees who can establish an FMLA-qualifying reason for leave.[2] For employees eligible to take FMLA leave, a number of events can trigger the right to take time off. The employees can take this leave on an intermittent or reduced-work-schedule basis.

Drug addiction is a "serious health condition" under the FMLA, and employees may use FMLA leave to participate in a substance abuse program.[3] However, employees may not use FMLA leave to recover from the side effects of substance abuse (e.g., a hangover or drug-induced incapacity). Furthermore, the FMLA is not a shield if the employee has already violated the employer's drug-free workplace policy. And employers are allowed to seek a fitness-for-duty certification upon the employee's return to work (e.g., the employer may conduct drug testing).

On the other hand, if an employee uses medical marijuana while on leave and is required to take a drug test upon returning to work, the question is debatable regarding whether the employer would violate the FMLA if it refused the employee's desire to return to work. While the law is still developing in this area, there is a risk of a retaliation claim.

Americans with Disabilities Act. Employers with 15 or more employees are covered by Title I of the Americans with Disabilities Act (ADA), which prohibits private employers and state and local governments from discriminating against qualified individuals because of a disability.[4] The ADA further requires covered employers to provide reasonable accommodations to individuals with a disability if it would not impose an undue hardship on the employer.

Drug addiction is a disability under the ADA. However, the ADA indicates that a "'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs."[5] The Equal Employment Opportunity Commission (EEOC) has interpreted "current" use to mean recently enough to justify an employer's belief that drug use is an ongoing problem. Courts have stated that current use is not limited to "the day of" or even within a matter of days or weeks before the event. Thus, the ADA protects rehabilitated (i.e., nonusing) drug addicts but not employees using medical cannabis because the use of marijuana remains illegal under the CSA.[6]

Leave for rehab may be a reasonable accommodation if requested before a policy violation; however, this would not apply to current users of marijuana. Moreover, plaintiffs across the country have been unsuccessful in arguments that employers should accommodate their use of cannabis in the workplace. Not only is marijuana illegal under federal law, but, as a Schedule I substance, it is defined under federal law as having no accepted medical use. Courts have held this line with respect to cannabis's status under federal law. Federal courts in California and Washington and a state court in Montana have concluded that a medical professional cannot legally, as a matter of federal law, supervise medical cannabis

TIP: Businesses must comply with both federal and state laws regarding marijuana use in the workplace, even if the laws conflict.

use so as to bring an employee under the ADA's protection.[7] In 2012, the Ninth Circuit Court of Appeals held that the use of medical cannabis was not protected under the ADA;[8] and in 2013, a Colorado district court came to a similar conclusion.[9]

However, the legal implications of medical marijuana use are continually evolving, and challenges to this seemingly settled premise are working their way through the federal courts. Several cases have been filed looking to protect an employee's lawful use of medical marijuana under federal law in the same manner that the use of prescription medications is protected. In the U.S. District Court for the District of Arizona, for example, a former UPS employee filed a lawsuit alleging that his use of medical cannabis may be permissible under the ADA and Arizona state law, challenging precedent.[10]

Although the ADA does not protect the use of medical cannabis, savvy employees can avoid federal court by filing claims against national employers without referencing the ADA. Recently, a former warehouse employee sued Amazon after he was fired for testing positive for tetrahydrocannabinol (THC) as a result of his medical marijuana use. The employee initially filed the case in New Jersey Superior Court and referenced the ADA in the complaint. Amazon moved the case to federal court but recently lost a key decision that permitted the employee to return to the more favorable state arena after the employee amended his complaint to remove references to the ADA.[11]

State disability laws. A total of 34 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have authorized cannabis for medical use to a lesser or greater extent, but only some of those medical cannabis programs prohibit employment discrimination on the basis of medical cannabis use, registration, or identification cards.

Some states that allow medical cannabis use expressly reserve the employer's right to discriminate based on an employee's marijuana use. For example, Montana's statute provides that the law does not permit a cause of action against an employer for wrongful discharge or discrimination based on an employee's use of cannabis.[12]

By contrast, other states have included antidiscrimination provisions in their medical marijuana statutes. Typically, these provisions prohibit employers from discriminating against employees for being medical marijuana cardholders (some states, such as Illinois, also offer reciprocal protection for employers that employ cardholders).[13] For example, in New York, certified medical marijuana patients are deemed as having a "disability" for purposes of civil rights laws (although employers may still prohibit such employees from performing their duties while impaired by a controlled substance).[14] Recently, the New Jersey Supreme Court affirmed that a funeral director who was a cancer patient treating with medical marijuana, fired after failing a drug test, could at least at the pleading stage assert a claim for disability discrimination under New Jersey's state discrimination law (New Jersey Law Against Discrimination).[15] Similarly, Nevada has included a provision in its medical cannabis program requiring employers to

> attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card, provided that such reasonable accommodation would not: (a) Pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or (b) Prohibit the employee from fulfilling any and all of his or her job responsibilities.[16]

Nonetheless, these antidiscrimination protections generally do not apply to companies or employees that (1) receive federal funds (e.g., most, if not all, state universities); (2) receive funds that are guaranteed by the federal government (e.g., Medicare payments); (3) are parties to federal government contracts (e.g., Boeing); (4) are employed by an employer falling into any of the above categories; or (5) contract with an employer falling into any of the above categories. In addition, companies receiving a federal grant of any amount or a contract of at least $100,000 are also subject to the Drug-Free Workplace Act, which requires them to maintain a drug-free workplace policy and drug-free awareness program. Companies that fall into these categories are required by federal law to have a drug-free workplace, and their employees may not invoke state protection.[17]

However, in Connecticut, the federal district court recently held that the refusal of a federal contractor to hire an

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individual who tested positive on a preemployment drug test but had a medical marijuana card was a violation of the state's medical marijuana law. The court rejected the employer's argument that the federal Drug-Free Workplace Act barred it from hiring the employee. Specifically, the court noted that the law does not require drug testing, nor does it regulate employees' off-duty use of illegal drugs outside of the workplace.[18] The court also rejected the employer's argument that hiring the employee would violate the False Claims Act.

Although the state judicial system is generally more supportive of medical cannabis use than the federal judicial system, state supreme courts can also be unsympathetic to medical cannabis use. The Colorado Supreme Court upheld the termination of an employee who tested positive for cannabis despite having used the drug off duty to treat a legitimate debilitating medical condition. The court affirmed that both state and federal compliance are required under the state's "lawful activities" statute; therefore, employees consuming cannabis for medical purposes who are complying with state law but not federal law are not protected by the statute.[19] And in Massachusetts, the supreme court held that there is no separate private right of action for employees subject to adverse employment actions related to their use of medical cannabis. However, allowing off-site use of medical cannabis despite an employer's drug-free workplace policy may be a reasonable accommodation under Massachusetts's disability discrimination law, if it is not an undue hardship on the employer's business.[20]

Drug testing and the ADA. Employers may still conduct drug tests if they are required by law to maintain a drug-free workplace. Furthermore, in general, employers may require applicants to undergo drug tests. However, as state and local laws are quickly evolving, employers should evaluate whether including cannabis in preemployment drug tests is still advisable. For example, the District of Columbia Council passed the Prohibition of Pre-Employment Marijuana Testing Act of 2015, which prohibits employers from testing potential employees for marijuana use until after an offer for employment has been made.[21]

One thing to keep in mind: current technology does not match the law. Most drug tests detect THC that has been in the system for several days, but they often cannot detect very recent use. However, clinical trials are underway. Furthermore, many states have conduct laws protecting legal off-duty use of marijuana. As a result, employers in states that prohibit discrimination based on an individual's "card status" but allow employers to prohibit use during work face an uphill battle in enforcement.

Employers should be careful to ensure that their drug-testing programs do not violate federal law as the ADA prohibits employers from discriminating against employees and applicants based on any disabilities. Because drug testing may reveal the disabilities of an employee or applicant, employers must conform to ADA requirements to avoid liability. Although the ADA, a federal statute, does not protect illegal drug use, which includes marijuana under federal law, employers that conduct preoffer testing may unintentionally obtain more medical information about an applicant than the employer is entitled to have. This was the case in *EEOC v. Grane Healthcare Co.*, where the employer's preoffer urine test revealed four applicants' lawful use of prescription medications and constituted a prohibited preoffer "medical examination" under the ADA.[22]

Employers that accommodate an employee's use of medical cannabis may still require the employee to meet the same performance standards as other employees.

Various state laws also regulate employers' drug-testing programs and tend to be more comprehensive than the ADA. State laws generally do not require private employers to test their employees for drugs. However, in the event that an employer chooses to implement a drug-testing program, the majority of states provide legal guidance on how to do so properly. In addition, some states require drug testing for certain industries. For example, in Utah, employers must test employees if the employer's organization stores or transfers high-level nuclear or radioactive waste within the exterior boundaries of the state.[23] In Kentucky, drug- and alcohol-testing laws apply to both school bus drivers[24] and miners.[25]

In some states, an employee's use of medical cannabis outside of work may be a reasonable accommodation to an employer's drug-free workplace policy.[26] Delaware law provides protections for medical cannabis users that prohibit employers from assuming that an employee is under the influence of cannabis merely because it is detected in a drug test.[27] However, even those employers that choose to accommodate an employee's use of medical cannabis may require such employees to meet the same performance standards as other employees, regardless of whether poor performance is related to their use of medical cannabis. Furthermore, companies in industries with safety-sensitive employees that must comply with Department of Transportation regulations, such as pilots,

school bus drivers, truck drivers, train engineers, subway operators, and emergency response personnel, among others, cannot accommodate an employee's use of medical marijuana under state law.[28]

With society's growing acceptance of marijuana and the legal risk that arises from drug testing or taking disciplinary action against marijuana users, many employers are now questioning whether their workplace marijuana policies and practices should be revised. It is important that employers acknowledge that times have changed and adjust accordingly by adopting effective drug-testing policies that take into consideration their interest in minimizing drug-related problems and maintaining a safe, adequate workforce. Employers should focus on prevention rather than punishment in order not to scare away potential applicants. Drug-testing policies should (1) test only as necessary to protect safety and productivity, (2) encourage early intervention, and (3) leave room for management discretion.

Although illegal drug use may provide a basis for denial of a workers' compensation claim, employers should consider medical cannabis insurance issues.

Workers' Compensation and Medical Cannabis

Most employers are covered by state workers' compensation laws. A majority of states require private employers with one or more employees to carry workers' compensation insurance, but some states have an exception for small employers with less than a threshold number of employees. Some states allow employers to be self-insured for workers' compensation. Workers' compensation is generally the exclusive remedy for employees who are negligently injured during the course and scope of their employment, and it can insulate employers from many tort claims by their employees based on workplace injuries.

In many states, a worker's use of illegal drugs provides a basis for the employer to deny a workers' compensation claim. However, given the increasing number of states legalizing medical cannabis, an employer should pay attention to medical cannabis insurance issues. For example, the Connecticut Workers' Compensation Commission in *Petrini v. Marcus Dairy, Inc.* determined that medical cannabis rose to the level of necessary and reasonable care and should be reimbursable.[29] The *Petrini* case was set to be heard by the Connecticut Supreme Court but is rumored to have settled during mediation.[30] In contrast, the Maine Supreme Judicial Court in *Bourgoin v. Twin Rivers Paper Co., LLC* held that federal law preempted the conflicting state law; thus, it vacated the Workers' Compensation Board Appellate Division's pro-employee decision on reimbursement for medical cannabis.[31] These costs can be substantial, rising to the tens of thousands of dollars for just one year's coverage for an employee's prescription.

The conflicts between various state decisions regarding medical marijuana and workers' compensation continue to grow. In New Jersey, a workers' compensation judge ordered a municipality to pay for an employee's medical marijuana after the judge concluded that medical marijuana constituted reasonable and necessary care while being a much safer treatment option than opioids.[32] The New Jersey Appellate Division subsequently decided a similar case, *Hager v. M & K Construction*,[33] affirming the order of a workers' compensation judge requiring an employer to reimburse its employee for the costs of medical marijuana treatment—a decision contrary to that reached in the *Bourgoin* decision in Maine. Unlike the *Bourgoin* court, the New Jersey appellate panel in *Hager* found no conflict between requiring reimbursement of medical marijuana costs and the federal CSA because reimbursement does not require an employer to possess, manufacture, or distribute marijuana—the conduct illegal under the CSA. Nor would it be aiding and abetting the employee in the commission of a federal crime because the employer "is never in possession of the marijuana" and "cannot aid and abet a completed crime."[34] The *Hager* panel also noted that the "federal attitude towards marijuana is equivocal. M & K has not demonstrated any intention by the federal government to enforce the CSA in any state that has decriminalized medical marijuana."[35] *Bourgoin* and other opinions have rejected this argument as conflating the likelihood of enforcement with legality.

On May 5, 2020, the highest state court in Massachusetts heard telephonic argument on the latest case examining the interplay between workers' compensation and the CSA.[36] Several of the Massachusetts justices expressed concern over ordering an insurance company to pay for medical marijuana on the sole basis that the federal government has not recently enforced the CSA.[37] A decision will most likely be released during the summer of 2020.

The inconsistent state rulings will continue to create difficult situations, particularly for multistate employers, until definitive guidance is issued by the federal government.

Health and Safety Regulations and Zero Tolerance

Employers have a duty to protect employees and customers by providing a safe and healthy work environment. Historically, that meant that employers could develop and administer a zero-tolerance policy against workplace substance abuse and reserve the right to test for the presence of these substances.

For multistate employers, it may be confusing to determine how to apply policies in a consistent fashion when there are operations with differing state laws on cannabis. There is no universal answer for all employers, and policies must take into account the goods and services that each employer offers. For states without cannabis laws, employers can keep their current zero-tolerance policy and rely on federal law.

Employers also should be aware of and comply with the Occupational Safety and Health Act (OSHA),[38] as well as other laws and regulations governing safety in the workplace. While OSHA does not have a defined safety standard relating to employee drug and alcohol use, there is a "general duty clause," which requires an employer to provide a workplace free from recognized safety and health hazards. OSHA recognizes that impairment by drugs (legal, prescribed, or illegal) can constitute an avoidable workplace hazard. OSHA strongly supports comprehensive drug-free workplace programs. Thus, permitting employees who are under the influence of marijuana to work, especially in safety-sensitive jobs, could create serious risks in the workplace and violate OSHA requirements. In some cases, drug testing may be necessary to provide a safe workplace under the general duty clause. This depends on the nature of the work and how drug use might affect safety.

OSHA is also of particular import to cannabis farmers and processors because both growing and processing facilities may have chemical hazards and toxic substances[39] as well as indoor air quality issues.[40] Processors often have confined spaces[41] and potentially dangerous equipment, such as extraction equipment and compressed gases, and farmers should comply with the agricultural provisions where applicable.[42]

Traditional Labor Issues

The term "traditional labor" typically implicates labor unions, but its relevance spills over to nonunionized workforces, too. The primary laws governing this area are the Railway Labor Act (RLA) and the National Labor Relations Act of 1935 (NLRA).[43] The NLRA covers all employers engaged in interstate commerce above specified minimum standards. The two primary purposes of the NLRA are to protect employees' rights to engage in concerted activity and to regulate the collective bargaining agreement process. A common misunderstanding is that the NLRA only applies to unionized employers. Although many of the cases before the National Labor Relations Board (NLRB) deal with a union environment, the NLRA applies equally to nonunion employers—and, in recent years, the NLRB has been more aggressively applying principles under the NLRA to nonunion settings.

By agreeing to hear cannabis-related cases, the NLRB—and thus the federal government—has acknowledged the legitimacy of the ever-developing and expanding cannabis industry. In 2013, for the first time ever, the NLRB agreed to hear a cannabis-related case. Plaintiff United Food and Commercial Workers International Union brought suit against Wellness Connection of Maine over a matter involving a medical cannabis hemp division. Although the Maine case settled prior to the NLRB hearing, the industry as a whole found confusing the NLRB agreement to hear the case given that the CSA makes operations in cannabis unlawful under federal law. The NLRB's Office of General Counsel, Division of Advice, issued a memorandum detailing its recommendation to the regional NLRB to hear the Wellness Connection matter despite federal law. It included an explanation about why those working in the field of cannabis are "employees" for NLRA coverage purposes and specified that NLRB jurisdiction was appropriate in the arena of medical cannabis for the following reasons:

- Jurisdiction is prohibited only when explicitly exempted by Congress.
- Even intended interstate commerce should not be a bar to NLRB jurisdiction.
- Labor disputes in this industry may have a meaningful impact because of the size and growth of its interstate commercial practices. Wellness Connection acquired enough supplies outside of its state to rise to the level of NLRB nonretail standards for jurisdiction and had sufficient revenue to achieve the standards for retail as well. In addition, medical cannabis labor disputes might interfere with intrastate regulation.[44]

The NLRB took a second case involving a medical cannabis dispensary in 2015. The United Food and Commercial Workers International Union filed an NLRB complaint after alleged antilabor activity by New Jersey's Compassionate Care Foundation. The union alleged retaliation against those who favored unionizing by cutting their wages and work hours. As with the other case, this case did not result in an NLRB hearing because the union withdrew its petition.

These NLRB cases highlight that cannabis industry employers must be careful with respect to their employment policies and procedures. The NLRB memo is not binding and does not have the force of law. However, it is uniquely persuasive guidance on NLRB priorities with respect to the topic. As a result, cannabis employers must account for the possibility of unionization and create policies that would withstand NLRB scrutiny.

Wage and Hour Laws and Cannabusiness Workers

One of the most complex issues in labor and employment, wage and hour law, may present additional challenges with respect to cannabis. For employees with the kinds of

conditions requiring the use of medical cannabis, accounting for working and nonworking time may be tricky, for example, with those taking intermittent leave or making up for lost time with overtime hours. Those working in startup environments common to the cannabis industry may work long hours with ill-defined positions, often performing the functions of multiple jobs within a given day or week. Many startups never contemplate paying overtime to their employees, operating under the false assumption that the overtime laws are inapplicable to startups. Key considerations for all industries, including cannabusinesses, include the following:

- Properly classifying workers as exempt or nonexempt
- Complying with minimum wage and overtime laws
- Ensuring that workers are not improperly classified as independent contractors

The Tenth Circuit recently held that employers are not excused from labor law obligations simply because they may be committing other federal violations.

Both federal and state laws impose strict requirements on the payment of minimum wage and overtime pay for most employees. Unless the employer can demonstrate that an employee qualifies for an exemption from the overtime requirements under the federal Fair Labor Standards Act (FLSA)[45] and applicable state law, the employer must pay all nonexempt employees at least minimum wage and overtime in accordance with applicable wage and hour laws. Overtime is generally calculated at a rate of 1.5 times the employee's regular rate of pay for all hours worked over 40 hours in a workweek under federal law but may be calculated differently under state law, such as in California.[46]

The FLSA applies to all private employers and employees who in any workweek are either (1) engaged in interstate commerce or in the production of goods for commerce (individual coverage) or (2) employed by an enterprise engaged in commerce or the production of goods for commerce with gross annual sales or business of at least $500,000 (enterprise coverage).[47] Each of these tests is interpreted broadly. Most private and public employers, with the exception of family businesses, are covered.[48]

If a business otherwise meets the test for enterprise or individual coverage, the employer cannot avoid liability for wage and hour violations by citing common industry practice of working more than 40 hours per week with no payment of overtime. Even if not technically covered by the FLSA, an employer forced to defend a claim for wage and hour violations likely will incur significant costs, even if it prevails on the merits. Moreover, business owners and management executives such as CEOs may be held individually liable as an "employer" under the FLSA if they exercise a sufficient level of operational control over the employees.[49]

Employers also must comply with state wage and hour laws with regard to nonexempt employees because the laws often impose (1) a higher minimum wage, (2) more stringent overtime payment requirements, and/or (3) required meal and rest break periods. For example, in California, nonexempt employees are entitled to overtime pay if they work more than eight hours in one day. In other words, the overtime rate in California is calculated on a daily, rather than a weekly, basis. Employers must keep records of all hours worked by nonexempt employees, or suffer harsh penalties for noncompliance.[50]

The Tenth Circuit Court of Appeals recently issued a landmark decision determining that a Colorado armed guard hired to protect cannabis growers and sellers was entitled to overtime pursuant to the FLSA.[51] The panel reasoned that employers are not excused from labor law obligations simply because the employers may be committing other federal violations. On May 15, 2020, the employer, Helix TCS, filed a petition for a writ of certiorari with the U.S. Supreme Court in the hopes that the decision will be overturned. As of June 12, 2020, the Supreme Court has not indicated whether or not it will hear the case. In the event that certiorari is granted, a decision would hopefully provide some much-needed guidance as to what components of the FLSA, if any, are applicable to employees in cannabusiness.

Conclusion

Marijuana in the workplace remains a hazy issue for employers. Employers would be well-advised to never assume that federal and state employment obligations do not apply to marijuana businesses and employees using marijuana just because marijuana remains federally illegal. ◀

Notes

1. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6.

2. Generally, the FMLA provides eligible employees up to 12 workweeks of unpaid leave a year. Additionally, they may take up to 26 weeks of FMLA leave in a single 12-month period to care for a covered service member with a serious injury or

illness. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 585, 122 Stat. 3, 128–32 (2008).

3. 29 C.F.R. § 825.119(a).

4. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, tit. I, 104 Stat. 327, 330–37.

5. *Id.* § 104(a), 104 Stat. at 334 (codified at 42 U.S.C. § 12114).

6. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified at 21 U.S.C. §§ 801 *et seq.*).

7. *See, e.g.*, James v. City of Costa Mesa, No. 8:10-cv-00402, 2010 U.S. Dist. LEXIS 53009, at *8–11 (C.D. Cal. Apr. 30, 2010); Barber v. Gonzales, No. CV-05-0173, 2005 U.S. Dist. LEXIS 37411, at *2–5 (E.D. Wash. July 1, 2005); Johnson v. Columbia Falls Aluminum Co., No. DA 08-0358, 2009 WL 865398, at *4 (Mont. Mar. 31, 2009). This and other lists of jurisdictions herein may not be comprehensive. Please research your state, county, and local laws to determine what provisions apply to you or your clients.

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

9. Curry v. MillerCoors, Inc., No. 12-cv-02471, 2013 WL 4494307 (D. Colo. Aug. 21, 2013).

10. Terry v. United Parcel Servs., Inc., No. 2:17-cv-04972 (D. Ariz. filed Dec. 29, 2017).

11. D.J.C. v. Amazon Com DEDC, LLC, No. 2:19-cv-19985 (D.N.J. Apr. 9, 2020) (granting the plaintiff's motion to remand to state court because the federal court was deprived of diversity jurisdiction due, in part, to the plaintiff's removal of ADA references in the complaint).

12. Mont. Code Ann. § 50-46-301.

13. *See, e.g.*, 410 Ill. Comp. Stat. 130/1 *et seq.*

14. N.Y. Pub. Health Law § 3369.

15. Wild v. Carriage Funeral Holdings, Inc., 205 A.3d 1144 (N.J. Super. Ct. App. Div. 2019), *cert. granted*, 213 A.3d 172 (N.J. 2019), *aff'd*, No. 082836 (N.J. Mar. 10, 2020).

16. Nev. Rev. Stat. § 453A.800(3).

17. 41 U.S.C. §§ 8101–8106.

18. Noffsinger v. SCC Niantic Operating Co. LLC, 273 F. Supp. 3d 326 (D. Conn. 2017); *see also Noffsinger*, 338 F. Supp. 3d 78 (D. Conn. 2018) (granting summary judgment for the plaintiff's claim of employment discrimination, in addition to granting the employer's motion for summary judgment precluding the plaintiff from recovering attorney fees, punitive damages, and negligent infliction of emotional distress).

19. Coats v. Dish Network, LLC, 350 P.3d 849, 852 (Colo. 2015).

20. Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37 (Mass. 2017).

21. D.C. Code § 32-931.

22. 2 F. Supp. 3d 667 (W.D. Pa. 2014).

23. Utah Code Ann. § 34-38-3.

24. 702 Ky. Admin. Regs. 5:080(2)(2)(a), (c).

25. Ky. Rev. Stat. Ann. §§ 351.102(2), .182(2).

26. Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37 (Mass. 2017).

27. Del. Code Ann. tit. 16, § 4907A.

28. 49 C.F.R. § 40.151(e).

29. No. 6021 CRB-7-15-7 (Conn. Workers' Comp. Comm'n May 12, 2016), https://wcc.state.ct.us/crb/2016/6021crb.htm.

30. *See Connecticut Workers' Comp Update*, Strunk Dodge Aiken Zovas (2018), https://www.ctworkcomp.com/wp-content/uploads/2016/08/Winter-2018-Connecticut-Workers%E2%80%99-Compensation-Update-Connecticut-Legislative-and-Workers%E2%80%99-Compensation-Commission-News.pdf.

31. Bourgoin v. Twin Rivers Paper Co., LLC, 187 A.3d 10 (Me. 2018).

32. McNeary v. Freehold Twp., No. 2008-8094 (N.J. Dep't of Labor Div. Workers' Comp. June 28, 2018); *see also* Watson v. 84 Lumber, No. 2009-15740 (N.J. Dep't of Labor Div. Workers' Comp Dec. 15, 2016) (holding same).

33. 225 A.3d 137 (N.J. Super. Ct. App. Div. 2020).

34. *Id.* at 148.

35. *Id.* at 151.

36. Wright v. Cent. Mut. Ins. Co., No. SJC-12873 (Mass. argued May 5, 2020).

37. *See Medical Pot Insurers Face Prosecution Risk, Mass. Court Says*, Law360 (May 5, 2020), https://www.law360.com/articles/1270139/medical-pot-insurers-face-prosecution-risk-mass-court-says.

38. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651 *et seq.*).

39. *Chemical Hazards and Toxic Substances*, Occupational Safety & Health Admin., https://www.osha.gov/SLTC/hazardoustoxicsubstances/index.html (last visited Aug. 5, 2020).

40. *Indoor Air Quality*, Occupational Safety & Health Admin., https://www.osha.gov/SLTC/indoorairquality/index.html (last visited Aug. 5, 2020).

41. *Confined Spaces*, Occupational Safety & Health Admin., https://www.osha.gov/SLTC/confinedspaces/index.html (last visited Aug. 5, 2020).

42. *Agricultural Operations*, Occupational Safety & Health Admin., https://www.osha.gov/dsg/topics/agriculturaloperations/generalresources.html (last visited Aug. 5, 2020).

43. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

44. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Nat'l Labor Relations Bd. Div. of Advice, to Jonathan B. Kreisberg, Reg'l Dir., Nat'l Labor Relations Bd. Region 1 (Oct. 25, 2013), https://www.managementmemo.com/files/2014/08/01_CA_104979_10_25_13_.pdf.

45. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.*

46. *See, e.g.*, Cal. Lab. Code § 510.

47. 29 U.S.C. §§ 203(r)–(s), 206(a), 207(a).

48. *See, e.g., id.* § 203(d); Reich v. Stewart, 121 F.3d 400 (8th Cir. 1997).

49. *See, e.g.*, Irizarry v. Catsimatidis, 722 F.3d 99 (2d Cir. 2013).

50. For example, in 2014, LinkedIn agreed to pay nearly $6 million in settlement of a Department of Labor audit. *See* Press Release, U.S. Dep't of Labor, LinkedIn Pays Nearly $6M in Unpaid Overtime Wages and Damages to 359 Employees following U.S. Labor Department Investigation (Aug. 4, 2014), https://www.dol.gov/newsroom/releases/whd/whd20140804.

51. Kenney v. Helix TCS, Inc., 939 F.3d 1106 (10th Cir. 2019).