

Dazed and Confused: What School Districts Should Know About Legalized Medical Marijuana

Articles October 9, 2019

Under Pennsylvania's Medical Marijuana Act ("MMA"), 35 Pa. C.S.A. §10231.101, *et seq.*, individuals with certain serious medical conditions can apply for a medical marijuana card from the Pennsylvania Department of Health. (Minors cannot obtain a medical marijuana card, but their parent or guardian may be able to obtain it for them). If approved and issued a medical marijuana card by the Pennsylvania Department of Health, these individuals can obtain medical marijuana at a licensed dispensary.

The MMA provides access to medical marijuana to individuals with the following serious medical conditions: Amyotrophic lateral sclerosis; Autism; Cancer, including remission therapy; Crohn's disease; Damage to the nervous tissue of the central nervous system (brain-spinal cord) with objective neurological indication of intractable spasticity, and other associated neuropathies; Dyskinetic and spastic movement disorders; Epilepsy; Glaucoma; HIV / AIDS; Huntington's disease; Inflammatory bowel disease; Intractable seizures; Multiple sclerosis; Neurodegenerative diseases; Neuropathies; Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions; Parkinson's disease; Post-traumatic stress disorder; Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain; Sickle cell anemia; and Terminal illness.

The MMA restricts an employee's use of medical marijuana in the workplace and provides employers with certain rights as follows:

- Employees are not permitted to use medical marijuana in the workplace;
- Employees are not permitted to report to work "under the influence" of medical marijuana;
- An employer can discipline an employee for working while "under the influence" of medical marijuana, including when the employee's conduct falls below the standard of care normally accepted for the position; and
- An employer can prohibit an employee from performing the following duties while "under the influence" of marijuana:
 - Operating or controlling government-controlled chemicals or high-voltage electricity;
 - Performing duties at heights or in confined spaces;
 - Performing any tasks that threaten the life of the employee or his/her coworkers;
 - Performing any task which the employer deems life-threatening, to either the employee or any of the employees of the employer;
 - Performing any duty which could result in a public health or safety risk while under the influence of medical marijuana.

School districts should consider revising their Drug and Substance Abuse policies to address these specific employment provisions under the MMA.

While not directly addressed in the MMA, school districts likely can prohibit an employee from bringing medical marijuana onto its premises because marijuana is still considered a federally illicit substance. Also, employers may require employees to disclose if they are currently taking any medication (including medical marijuana) that would affect or inhibit their ability to safely perform their job duties.

Drug Testing under the MMA

Because employees who habitually use medical marijuana can test positive for several days (or even weeks) after they last used marijuana, employers cannot rely solely on a positive drug test to establish that an employee reported to work “under the influence” of medical marijuana. To show that an employee who has a medical marijuana card reported to work under the influence, in addition to a positive drug test, an employer should be able to establish that the employee’s conduct also fell below the applicable standards for his/her position. For example, did the employee have slurred speech or blood shot eyes? Did the employee smell of marijuana, stumble when walking or fall asleep during class?

When taking any disciplinary action against an employee for reporting to work under the influence of medical marijuana, it is recommended that the school district be able to 1) show that the employee tested positive for marijuana; and 2) describe how the employee’s conduct fell below the standards required for the employee’s position.

A school district should not rescind a contingent job offer based only upon an applicant’s positive drug test for medical marijuana. There are at least two cases from other states that have held that rescinding a job offer for an applicant who holds a medical marijuana card would violate the anti-discrimination provisions of those states’ laws. See, *Callaghan v. Darlington Fabrics Corp.*, 2017 WL 2321181 (R.I. Super. May 23, 2017); *Noffsinger v. SSC Niantic Operating Co., LLC*, 2017 WL 3401260 (D. Conn. Aug. 8, 2017). Those courts held that rescinding a job offer based upon an applicant’s positive drug test for medical marijuana was akin to discrimination “on the basis of” the applicant’s status as a medical marijuana card holder because an applicant would never have reported to work under the influence.

Employees Working in Safety Sensitive Positions

School employers should engage in the “interactive process” with an employee who has a medical marijuana card and is working in one of the above listed safety sensitive positions. It should determine if the employee can perform his/her safety sensitive job duties without being under the influence of medical marijuana. The employer can consult with a Medical Review Officer or other occupational professional to determine if the employee’s then-regimen of use would result in the employee reporting to work under the influence of medical marijuana. A school employer cannot preemptively remove an employee from working in the above listed safety sensitive positions simply because he/she has a medical marijuana card.

Federal Law Regarding Marijuana

The above employment protections under the MMA (a state law) do not apply to certain employees who are subject to federal laws or regulations because medical marijuana is still illegal under federal law. Specifically, school bus drivers (and any other employee that needs a Commercial Driver’s License to perform his/her job duties) are subject to the U.S. Department of Transportation’s (“DOT”) Drug and Alcohol Testing Regulations. These DOT regulations state that Medical Review Officers will not verify a drug test as negative based upon information that a physician recommended that the employee use medical marijuana. The DOT’s regulation states:

§ 40.151 “As an MRO, you are prohibited from doing the following as part of the verification process:

(e) You must not verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the “medical marijuana” laws that some states have adopted.)

(e) You must not verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the “medical marijuana” laws that some states have adopted.)

Therefore, a school district is not required to allow individuals, like school bus drivers, who hold a Commercial Drivers' License to use medical marijuana and can take adverse employment action if the employee (or applicant) fails a drug test.

Students Using Medical Marijuana in Schools

Pennsylvania school districts face a unique challenge that other employers do not; mainly, how to deal with *students* who seek to use medical marijuana on school grounds. The MMA does not directly address this issue, but the Pennsylvania Department of Health has provided the following guidance:

- The student's parent or guardian must provide the school principal with a copy of the "Safe Harbor Letter," which allows a parent or caregiver to obtain medical marijuana on behalf of a minor;
- The student's parent or guardian should notify the school principal, in advance, of each instance in which the parent or caregiver will administer the medical marijuana to the student;
- The school principal shall provide notice to the school nurse for each instance in which a parent or caregiver will be administering medical marijuana to the student;
- The parent or caregiver shall follow all applicable protocols to enter the school as a visitor;
- The school shall provide a secure and private location for the parent or caregiver to administer the medical marijuana to the student.
- The parent or caregiver can administer the medical marijuana to the student, as long as it does not create a distraction and all excess medical marijuana and related materials are promptly removed from the school premises.

The Department of Health has stated that its recommended guidance will remain in effect until the Pennsylvania Department of Education promulgates regulations regarding the possession and use of medical marijuana in the commonwealth's schools.

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