Medical marijuana in the Sunshine State: what employers doing business in Florida need to know

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For nearly half a century, "marijuana" has been classified as a Schedule I controlled substance pursuant to the Controlled Substances Act (CSA). Although cannabis remains illegal at the federal level, a total of 41 states as well as the District of Columbia and Puerto Rico, have successfully legislated medical marijuana programs, 19 states have adopted recreational cannabis programs and 23 states have decriminalized cannabis entirely.

Currently, more than 730,000 patients have obtained a medical marijuana card in Florida and registered with the MMU. In addition, approximately 2,401 physicians have registered to prescribe medicinal marijuana throughout the state of Florida.

Among those, Florida enacted the "Medical Use of Marijuana Act" in 2017, which is codified in Florida's statutes, specifically governing the state public health system, and it implements rules for making medicinal marijuana available to qualified state citizens. As of 2022, nearly 3% of Florida's population is recorded on the state's medical marijuana registry.

Florida's cannabis legislation history

Florida's journey to provide patient access to medicinal marijuana began when the Compassionate Medical Cannabis Act of 2014 (also referred to as 'Charlotte's Web Act' or 'Act') was enacted. The act provided that terminally ill cancer patients or epilepsy patients would be allowed to consume low-THC cannabis without penalty.

To administer the medicinal cannabis program, the Florida Department of Health established the Office of Compassionate Use and the Compassionate Use Registry to serve as an online database for patients and treatment providers to register. However, many supporters of the Act found its language to be too restrictive and provided a minimal foray into medical marijuana access.

To widen applicability of the Act, The Florida Right to Medical Marijuana Initiative (Amendment 2) was proposed to expand access provided by the Act. After failing to successfully become law in 2014, Florida's Amendment 2 became part of Florida's Constitution on Jan. 3, 2017, seeking to expand access to medical marijuana to "persons diagnosed with a debilitating medical condition" such as cancer, epilepsy and "other debilitating medical conditions ... for which a physician believes that the medical use of marijuana would likely outweigh the potential health risks for a patient."

The Florida Legislature subsequently passed enabling legislation titled "Medical use of marijuana." Moreover, the Florida Department of Health established the Office of Medical Marijuana Use (OMMU) to implement the rules and regulations of the statute and maintain the Medical Marijuana Use Registry (MMU) (previously referred to as the "Compassionate Use Registry").

In addition, the OMMU licenses Florida businesses to cultivate, process and dispense medical marijuana to qualified patients and certified marijuana testing laboratories to ensure the health and safety of the public as it relates to marijuana use.

Florida's medical marijuana statute

Florida's medical marijuana statute specifically provides that those who suffer from the following qualifying medical conditions may obtain a physician certification for the medical use of marijuana: cancer, epilepsy, glaucoma, HIV, AIDS, PTSD, ALS, Crohn's disease, Parkinson's disease, MS, "medical conditions of the same kind of class as or comparable to those," terminal conditions diagnosed by a prescribing physician and chronic nonmalignant pain.

Modifying the previously enacted Charlotte's Web Act, Florida's medical marijuana statute removes the previous 90-day waiting period to obtain medicinal products and does not limit the maximum concentration of THC that medical marijuana products may contain.

Pursuant to the statute, Florida residents must be at least 18 years old to obtain a medical marijuana card. Persons below 18 may use cannabis through their parents or legal guardians who have been assigned as caregivers or who have provided written consent to the OMMU. Further, a minor cannot smoke marijuana unless the minor

has been diagnosed with terminal diseases or has received a referral from a pediatrician.

Currently, more than 730,000 patients have obtained a medical marijuana card in Florida and registered with the MMU. In addition, approximately 2,401 physicians have registered to prescribe medicinal marijuana throughout the state of Florida. According to the statute, patients can only legally purchase cannabis through regulated and established Medical Marijuana Treatment Centers (MMTC) licensed via the OMMU.

Interestingly, the statute specifically states that it does not "create a cause of action against an employer for wrongful discharge or discrimination." Further, and importantly, Florida's Legislature chose to make it clear that the statute "does not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy."

Impact on the workplace

A review of Florida's Medical Marijuana Statute makes it evident that the Florida Legislature addressed several employment issues employers may face as more and more Floridians continue to register on the MMU.

Although failing to ultimately define "employer," the Legislature expressly states that employers are not required to accommodate an employee's use of medical marijuana at work. In addition, the statute expressly prohibits medical marijuana patients from using cannabis at their place of employment without their employer's express permission. However, and most importantly, the statute is silent about whether employers must accommodate off-site or off-work use of marijuana.

Florida statutes that provide protections at the workplace, such as the Florida Civil Rights Act (FCRA) and Florida's Drug-Free Workplace Act, do not currently address an employee's use of medical marijuana specifically. However, the express language of the medical marijuana statute establishes that there is no "carve out" exception under either the FCRA or the Drug-Free Workplace Act for employees attempting to bring discrimination or wrongful termination claims in connection with their medical marijuana use.

Since Florida's civil rights laws and drug free workplace laws are paralleled after federal statutes and federal interpretive case law, employers will most likely be able to skirt having to accommodate the use of medical marijuana in the workplace because cannabis is still considered an illegal Schedule I drug under the CSA.

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However, Florida employers should be on the lookout for federal legislation regarding the legalization of marijuana. On July 25, 2022, Senate Majority Leader Chuck Schumer introduced a proposed bill entitled "The Cannabis Administration and Opportunity Act" which seeks to decriminalize marijuana and enable states to create their own cannabis-related laws. This bill could potentially affect the CSA's current classification of marijuana as an illegal schedule I substance, and in turn, potentially affect a disabled employee's right under the Florida Medical Marijuana Statute.

Takeaways

Florida's Medical Marijuana Statute has attempted to provide guidance for Florida employers. However, unless the CSA is amended to exclude marijuana as a schedule I drug and illegal substance, employers do not have to accommodate employees who seek to consume medical marijuana on or off the job. Under current state and federal regulations, Florida employers do not have to tolerate an employee's possession or use of medicinal marijuana in Florida.

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