

## Legal marijuana creates new problems for employers

By Dennis G. Collins, Esq., and Amy L. Blaisdell, Esq.,  
Greensfelder, Hemker & Gale

In November 2018, Missouri became the 33rd state to approve the use of medical marijuana. (Ten states have approved marijuana for recreational purposes for adults.) In Missouri, rules and regulations related to medical use are currently being completed, and medical marijuana will be available in the state beginning in 2020.

continue to grow in the future until federal and state laws are aligned.

A recent case highlights the struggle.

In *Whitmire v. Wal-Mart Stores Inc.*, 359 F. Supp. 3d 761 (D. Ariz. 2019), the court on Feb. 7 granted summary judgment, in part, in favor of a customer service supervisor who

Just before 2 a.m. on May 24 she smoked medical marijuana prior to going to sleep. She clocked into her shift just 12 hours later at 2 p.m. and reported that her wrist still hurt. She was referred to an urgent care clinic for an X-ray and she also underwent drug testing incident to her workplace injury.

Her drug test was positive for marijuana metabolites. After testing positive for marijuana use, Whitmire disclosed that she had a medical marijuana card.

She continued to work full time until she was suspended due to her positive drug test July 4, 2016. She was subsequently fired for her positive drug test.

She sued, claiming wrongful termination and/or discrimination in violation of the state's Medical Marijuana Act, the Arizona Civil Rights Act, the Arizona Employment Protection Act, and the Arizona workers' compensation statutes. Both parties moved for summary judgment.

The Medical Marijuana Act provides that a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites, or components of marijuana, that appear in insufficient concentration to cause impairment.

It also bars employers from discriminating in hiring, terminating or imposing any term or condition of employment or otherwise penalizing a person based on either the person's status as a registered qualifying patient or positive marijuana test — unless the person used, possessed or was impaired by marijuana on the premises of employment or during hours of employment.

The District Court construed the act to create a private cause of action. The court then analyzed whether there was credible evidence of impairment, ultimately finding that there was no such proof as Walmart had only offered a declaration from its personnel coordinator as proof of impairment.

"Without any evidence that plaintiff 'used possessed or was impaired by marijuana'

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Although proposed regulations for the use of medical marijuana are pending in Congress, under federal law marijuana is still illegal and is considered a Schedule I controlled substance. Under the Controlled Substances Act, 21 U.S.C.A. § 801, the federal government views a Schedule I drug as having a high potential for abuse and no legitimate medical use.

As a result of the conflict between federal and state law, employers throughout the country are grappling with how to address disciplinary issues arising from an employee's legal use of medical marijuana. It is anticipated that these struggles will

was terminated by Walmart after testing positive for marijuana metabolites during working hours and who sued claiming discrimination under Arizona's Medical Marijuana Act, Ariz. Rev. Stat. § 36-2813(B).

Carol M. Whitmire was a registered qualifying patient under the act, although she had not disclosed this fact to her employer. She smoked marijuana as a sleep aid to help treat chronic pain.

She was injured at work May 21, 2016, when a bag of ice fell on her wrist. She reported the incident to management that same day, but did not seek medical attention. On May 23 she notified human resources of continued swelling of her wrist.



**Dennis G. Collins** (L) is an officer in the Employment & Labor practice group at **Greensfelder, Hemker & Gale** in St. Louis. He represents employers throughout the United States in the defense against employment discrimination matters and class-action claims. He frequently handles employment and labor issues resulting from mergers, closings and relocations. He can be reached at [dgc@greensfelder.com](mailto:dgc@greensfelder.com). **Amy L. Blaisdell** (R) is an officer in the Employment & Labor practice group at the firm in St. Louis. She has represented employers nationwide in the defense of employment and employee benefits litigation, including in the U.S. Supreme Court. She also provides practical day-to-day human resources and employee benefits advice and drafts handbooks and various employment agreements. She trains employers on topics including discrimination and harassment, management of employee absence and compliance with federal and state laws. She can be reached at [apb@greensfelder.com](mailto:apb@greensfelder.com).

at work on May 24, 2016, it is clear that defendant discriminated against plaintiff in violation of ... [the Medical Marijuana Act] by suspending and then terminating plaintiff solely on the basis of her positive drug screen," the court said.

different facts and circumstances, and different states have different laws and regulations concerning marijuana.

### ***Do you employ workers in safety-sensitive positions?***

Workplace Act would be wise to consider state laws legalizing marijuana use in formulating drug-testing policies.

Such a decision presents a multitude of complex employment questions in states where medical marijuana is legal and an employer operates, including:

- Does state law protect the off-duty use of medical marijuana?
- Are there state laws and/or regulations that protect employees from suspension/termination for the lawful off-duty use of medical marijuana?
- Are there state laws and regulations that prohibit refusal to hire an applicant that uses medical marijuana?
- Are there any state rules or regulations under which an employee can be tested for medical marijuana? (Occupational Safety and Health Administration regulations limit post-accident testing to situations where there is a "reasonable possibility" that either alcohol or drugs contributed to the reported injury or illness.)

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It is essential for an employer to complete an analysis of the laws and regulations in states where it operates and the use of medical or recreational marijuana is permitted.

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As the *Whitmire* decision indicates, drug testing that reveals the use of medical marijuana will continue to present significant challenges for employers. This is particularly true because positive results can occur for many weeks after the use of marijuana. As a result, establishing "impairment" from testing is a complicated process.

In addressing potential employment issues, an employer may need to consider the following questions.

### ***Are you subject to the federal Drug-Free Workplace Act?***

The Drug-Free Workplace Act, 41 U.S.C.A. § 81, covers federal contracts of \$100,000 or more and requires federal contractors and employers receiving federal grants of any size to certify that they have a zero-tolerance policy for employee use of illegal drugs. Marijuana is classified at the federal level in the same category as heroin.

Covered employers must comply with the act and follow the zero-tolerance policy regardless of whether state law permits the use of medical marijuana.

### ***What are the laws and regulations involving medical marijuana in each state where you operate?***

Although some employers will be subject to the Drug-Free Workplace Act, others will not be. In those cases, it is essential for an employer to complete an analysis of the laws and regulations in states where it operates and the use of medical or recreational marijuana is permitted. Each case presents

There are many industries where the legalization of marijuana poses substantial risk. For example, in the transportation industry and the heavy machinery industry, strict compliance with drug-free workplace policies is imperative.

There are other positions, such as the customer service position at issue in the *Whitmire* case, where employers will be much harder pressed to assert that a strict no-tolerance policy must be enforced.

In any event, employers should consider the extent to which various jobs present safety concerns in formulating their drug-testing policies.

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An employer that is not required to comply with the federal Drug-Free Workplace Act would be wise to consider state laws legalizing marijuana use in formulating drug-testing policies.

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### ***What should you consider in deciding to establish a medical marijuana policy for employees?***

As is reflected above, there are several considerations for employers, including:

- Since marijuana is still illegal under federal law, employers that wish to enforce a zero-tolerance policy may want to state in their employee handbook that federal law supersedes state law. Such an addition may help ward off litigation under state law, where certain uses of marijuana are legal.
- An employer that is not required to comply with the federal Drug-Free

- Is there state legislation for medical marijuana testing?
- Are there established state law standards for determining impairment?
- Is there state legislation that protects individual employment status as a medically prescribed user of medical marijuana?
- Does the state require employers to provide reasonable accommodations for medical marijuana users?

Because the issues are complex, varied and rapidly changing, employers would be well advised to work with legal counsel in order to ensure ongoing compliance with federal and state laws. **WJ**