AN EMPLOYER'S SOPHIE'S CHOICE: WHETHER TO ACCOMMODATE MARIJUANA USE UNDER THE FMLA AND ADA

GREENSFELDER, HEMKER & GALE, P.C.

With Illinois permanently legalizing medicinal marijuana under the Compassionate Use of Medical Cannabis Program Act (the "Act"), many Illinois employers are facing yet another dilemma when addressing marijuana related issues in the workplace: how does an employee's use of medical marijuana affect an employee's rights (and an employer's responses) under the Family Medical Leave Act ("FMLA") and the Americans with Disabilities Act ("ADA")?

The FMLA Dilemma

The FMLA allows eligible employees up to 12 weeks of unpaid leave for treatment of a serious health condition and provides various definitions of what constitutes a serious health condition. Among those, a serious health condition is any condition which incapacitates a person from work for more than three consecutive days and includes an in-person visit with a medical provider who administers a regimen of continuing treatment, such as prescription medication. So, if an employee meets those qualifications, the employee likely qualifies for a leave of absence under the FMLA.

Let's say an employee claims to be suffering from "depression," and qualifies for intermittent FMLA leave since he previously could not work (i.e. incapacitated) for one full work week because of the depression, and during this time period was treated by a psychiatrist who prescribed him medical marijuana as part of his treatment regimen. Let's also say the psychiatrist directs the employee to use medicinal marijuana, as needed, to treat the symptoms of depression when they manifest, and the employee requests a half day of FMLA intermittent leave to treat the depression and by using medicinal marijuana. Because the employee qualifies and has been certified for intermittent FMLA leave, his employer would have to grant that request, or risk an FMLA interference and/or retaliation claim. Importantly, the fact that the employee is treating with medical marijuana at home and during his FMLA leave of absence, even if the employer has knowledge of this, generally should not subject the employee to discipline. Indeed, the Act prohibits an employer

About the Author: Scott Cruz is an Officer at Greensfelder, Hemker & Gale, P.C. and can be reached at scruz@greensfelder.com, or (312) 345-5008.

from discriminating against a medicinal marijuana cardholder based on his status as a registered qualifying patient of medical marijuana. However, and notwithstanding the employee's card holder status, the Act permits employers to enforce their zero tolerance and/or drug free workplace policies should a cardholder be impaired or under the influence of medicinal marijuana at the workplace and while performing his job duties. The Act also permits employers to consider an employee's medical marijuana cardholder status if failing to do so requires the employer to be in violation of Department of Transportation regulations.

What if the employee only wanted to take two hours of intermittent leave (e.g. 12:00 p.m. to 2:00 p.m.) to use the medicinal marijuana, then return to work? Would his employer be required to permit the employee to return to work at 2:00 p.m.? Probably not (nor should it), as the employee would likely be impaired and/or under the influence of marijuana and, thus, in violation of the employer's zero tolerance and/or drug-free workplace policy.

But what if the employee insisted, claiming he would not be impaired, and the employer acquiesced and permitted the employee to return to work the rest of his shift (until 5:00 p.m.)? That decision would be fraught with peril, and potential liability. Even putting aside the potential for injury to the employee (or others), particularly if the employee held a safety sensitive position, what if the employer has a good faith belief (and it likely would) that the employee is in fact impaired or under the influence after returning to the workplace, required the employee to submit to a drug test, pursuant to the employer's zero tolerance/drug testing policy, then terminated the employee following a positive test and after giving the employee an opportunity to rebut the presumption of impairment, which the Act requires? One would think the employer would be on solid ground and immune from legal liability, right? The employer's actions may not be risk free. The employee could argue, despite the compelling evidence of a positive drug test and other objective indicators supporting impairment, that his employer terminated him in retaliation for his taking FMLA intermittent leave; or is attempting to interfere with his use of FMLA intermittent leave. If a judge or jury believed either was the employer's true motivation, those actions (interference and retaliation) are illegal under the FMLA, and the employee could be awarded damages, attorney fees, and reinstatement.

In practice, employers must be aware that under the FMLA, even for an employee using medicinal marijuana during his FMLA leave, the employer must accommodate and grant FMLA leave for the underlying serious health condition.

The ADA Dilemma

The ADA requires employers to make reasonable accommodations for qualified workers with disabilities. What about the ADA and medicinal marijuana use, as a reasonable accommodation for an underlying condition that qualifies as a disability under the ADA? Well, the ADA provides that a person currently using illegal drugs is not a qualified individual with a disability and, thus, is not protected by the ADA. The ADA defines "illegal drug use" by reference to federal law rather than state law, and federal law does not authorize medical marijuana use. Indeed, marijuana remains a Schedule 1 illegal substance. And, the ADA provides no exception for medicinal use of marijuana.

However, the Act legalizes medicinal marijuana and, the Illinois Privacy in the Workplace Act makes it a "lawful product" for which an employer cannot discriminate. Notwithstanding, the Act states that nothing "shall prohibit an employer from enforcing a policy concerning drug testing, zero tolerance, or a drug free workplace;" and, "nothing shall prohibit an employer from disciplining a registered qualifying patient for violating a workplace drug policy." So long as the employer has a written zero tolerance and/or drug free workplace policy in place, employers are not required to permit an employee to be under the influence of medicinal marijuana in the workplace and during working hours, or while performing the employee's job duties. And, therefore, an employer is not required to permit a medicinal marijuana cardholder to use and/or possess medicinal marijuana in the workplace and during working hours (this includes meal periods) as a reasonable accommodation, even if prescribed by the employee's doctor for an underlying condition that qualifies as a disability.

However, employers should be aware of the requirement to engage in the interactive process for the underlying medical condition necessitating medicinal marijuana use. Thus, although illegal drug use is not protected under the ADA, an employer's obligation to accommodate a qualified worker with a disability remains in place, just not by permitting the employee to smoke medicinal marijuana at work. So, while an employer may act adversely against an employee for violating the company's zero tolerance and/or drug free workplace policies while at work (no protection under the ADA or the Act), the employer may not subject the employee to an adverse action because of the underlying disability (protected under the ADA). Employers who fail to distinguish these two scenarios may find themselves in litigation with one side arguing it has the right to enforce a drug-free workplace, and the other arguing the employer's enforcement of its drug-free policy was merely a pretext to discriminate against his or her disability.

Ultimately, although marijuana is both legal (under state law) and illegal (under federal law), it does not change employment law, but it should change employment practices. Employers are well advised to review their policies and consult employment counsel on a case-by-case basis. ◆