

LEGAL ALERT

November 10, 2008

PROPOSAL 1: WHAT EMPLOYERS NEED TO KNOW

By: Maria T. Saez, Attorney

On November 4, 2008, Michigan voters overwhelmingly voted in favor of Proposal 1 which will allow qualified patients to use medical marijuana to treat certain debilitating and chronic diseases, including but not limited to cancer, glaucoma, HIV, AIDS, hepatitis C, and Crohn's disease. Although Proposal 1 goes into effect on December 4, 2008, the Department of Community Health has until April 4, 2009 to issue regulations to help implement the new law. It is important to note, however, that marijuana use and possession are still illegal under Federal law and cases have shown that where state and Federal law conflict on this issue, Federal law prevails. This article summarizes the new law and identifies situations that may be challenging for employers as they attempt to comply with the law.

What the New Law Allows

The law, which will be known as the Michigan Medical Marijuana Act ("MMA"), allows patients who have been diagnosed with a covered debilitating medical condition to apply for a registry identification card that will permit them to acquire, possess, cultivate, deliver, transfer or transport marijuana (under 2.5 ounces) or marijuana paraphernalia without penalty.

In order to obtain a registry identification card, the patient must provide the Michigan Department of Community Health ("MDCH") with signed written certification from a physician identifying the patient's debilitating condition

and stating that, in the physician's professional opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana. The law also protects the patient's caregiver if the patient requires medical assistance in using medical marijuana.

The MMA specifically prohibits the qualified patient's use of medical marijuana in certain situations, such as:

- undertaking a task under the influence of marijuana, when doing so would constitute negligence or professional malpractice;
- possessing or using marijuana in a school bus or on the grounds of any preschool, primary or secondary school;
- smoking marijuana in a public place or on any form of public transportation; or
- operating or being in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marijuana.

Under the law, a qualifying patient cannot be penalized or disciplined by a business or occupational or professional licensing board or bureau for the medical use of marijuana, or for "being in the presence or vicinity of the medical use of marijuana." This may present some problems for employers, particularly those who employ professionally licensed personnel.

Issues for Employers

Pre-Employment Drug Testing: Many employers require pre-employment drug testing. Under the new law, an applicant who is a registered qualified patient may not be denied employment for testing positive for marijuana. Testing positive for other illegal substances is still grounds for denial of employment.

After-Accident Drug Testing: Often, employers have a policy that requires drug testing of the involved employee after a workplace accident. If the employee is a registered patient under MMA, they may test positive for marijuana depending on their last medicinal use of marijuana as marijuana may remain in a person's system from 3 to 90 days depending on their frequency of use.

The MMA does not require an employer to accommodate an employee working under the influence of marijuana. But the law also provides that a registered patient may not be penalized for use of medical marijuana pursuant to the MMA. Therefore, while an employer does not have to allow an employee to use marijuana at work or allow them to work while under the influence, the employer may not discipline or terminate an employee on the basis of their medical use of marijuana alone. However, because medical use of marijuana is only allowed to the extent that it is done in accordance with the law and no person may undertake a task under the influence when doing so would be negligent or professional malpractice, there may be situations where an employee who tests positive for marijuana can be disciplined or terminated. If the employee's actions while under the influence would constitute negligence or malpractice, these

actions would violate the MMA and therefore would not be protected.

Marijuana Possession at Work: While an employer does not have to accommodate a registered employee's ingestion of marijuana at work, the MMA is silent about possession of marijuana at work. Pursuant to the MMA as it currently stands, employers would not be able to discipline or terminate a registered patient employee for possession of medical marijuana at work so long as the employee is not attempting to ingest the medical marijuana in the workplace.

Many other scenarios exist that will test the limits of the MMA. The regulations to be developed by April 4, 2009, will hopefully provide much more information about how the program and law will work. There will undoubtedly be situations that will require careful consideration of the law before choosing a course of action.

Some of the questions raised by the MMA are: can an employer discipline a registered employee for using marijuana in the workplace; how does the law define "under the influence of marijuana;" how will employers verify that a registry identification card is valid; what can employers do if an employee cannot produce a registry identification card; how does the law affect an employer's drug-free workplace policy.

Although the MMA will apply to a very small number of employees in Michigan, given the lack of clarity in the new law, it is advisable to consult legal counsel when dealing with workplace issues involving employees who may be qualified patients under the new law.

Maria can be reached directly at 734.913.5517 or msaez@shrr.com.