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MEDICAL MARIJUANA IN THE WORKPLACE

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Do you get the question from candidates or current employees waving their newly minted Patient & Caregiver Registry card as to whether they can use medical marijuana? Well, maybe not waving the registry card, but surely communicating that they are medical marijuana users. Has one of your job candidates tested positive for marijuana? Has there been an on the job accident and your employee has tested positive for marijuana but claim they use it for medicinal purposes? If you answered yes to any one of those questions, you are not alone. Medical marijuana in the workplace has become a hot topic and does not appear to be going away anytime soon. Good news if you are an Ohio employer and are concerned about your workplace zero tolerance drug policies – Ohio's laws are much less friendly to employees than the laws of some other states.

Ohio Revised Code Section 3796.28 provides that an employer is not required to accommodate an employee's use, possession, or distribution of medical marijuana. There is also no requirement to hire a candidate or an employee that fails a drug screening. To that end, an employer can refuse to hire, discharge, discipline, or otherwise take an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's use or possession of medical marijuana. In other words, Ohio employers can enforce their zero-tolerance drug policies.

Take heed, you surely need to keep up with the law if you have operations in other states that are more employee-friendly as it relates to the use of medical marijuana. For example, in the Commonwealth of Massachusetts, the Supreme Judicial Court held in *Barbuto vs. Advantage Sales and Marketing, LLC* that "a qualifying patient who has been terminated from her employment because she tested positive for marijuana as a result of her lawful medical use of marijuana has a civil remedy against her employer." Employees in Massachusetts that use medical marijuana are able to avail themselves of remedies provided under anti-discrimination statutes that prohibit discrimination based on disability.

That ability may not necessarily ring true in Ohio. Unlike in the housing industry where in 2011 The U.S. Department of Housing and Urban Development issued guidance informing landlords that reasonable accommodations do not have to be granted for tenant use of medical marijuana, we have yet to see any guidance from the Equal Employment Opportunity Commission or the Ohio Civil Rights Commission on the issue for employers. At this time, it is very likely that these administrative agencies won't accept an employee's complaint that their employer failed to reasonably accommodate medical marijuana use or took an adverse action based upon the employee's use of medical marijuana. Keeping in mind that Ohio is relatively in the infancy stage of its medical marijuana law, there is no reported Ohio case law addressing whether an employer is required to accommodate an employee's use so it may remain to be seen how Ohio's courts address accommodation requests.

Given all the uncertainty, here are some tips an Ohio employer can do now in trying to grapple with medical marijuana requests by candidates and employees:

- Have a written policy addressing reasonable accommodation requests
- Train and educate your employees—especially those at the front lines that field the requests such as managers and human resource professionals
- Have a clear workplace drug policy
- If you do not have a written policy, draft and implement one
- Review and update your policies on a periodic basis
- Enforce your policies equitably
- Do not outright deny requests for use of medical marijuana. Follow your policy when such requests arise. This is to avoid any chance of denying other requests that the employee may have imbedded in the marijuana request that are disability-related and can be granted by the employer. For example, employee may request that her employer accommodate marijuana use for her glaucoma but also requests a larger computer screen and voice-activated computer equipment because of her compromised vision.