# East Coast Medical Marijuana Lessons For Nev. Employers

By **Laura Jacobsen** September 15, 2017, 10:12 AM EDT

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The legalization of recreational and medical marijuana under various states' laws continues to create legal issues for employers. Because marijuana remains a Schedule I controlled substance under the federal Controlled Substances Act, and because an employee can test positive for marijuana weeks or months after use, employers who must also comply with state law are subject to conflicting rules. Varying decisions across the nation illustrate that the accommodation of employee medical marijuana use presents a difficult challenge, unique to the wording of each state's medical marijuana laws. Because Nevada courts have yet to rule on this issue, Nevada employers can learn from decisions from other states whose medical marijuana laws most closely resemble Nevada's.

Nevada law requires employers to "attempt to make reasonable accommodations for the medial needs of any employee who engages in the medial use of marijuana" under Nevada law, unless the accommodation would pose a threat of harm or danger to persons or property, impose an undue hardship on the employer, or prevent the employee from fulfilling any of his or her job responsibilities.[1] It is safe to say that employers need not allow medical marijuana use or impairment on the job or in the workplace.[2] The difficulty lies with off-duty, off-premises medical marijuana use that results in a positive drug test at work. Unlike alcohol, an employee who uses marijuana can test positive weeks or even months after his or her last use. Chronic users, such as medical marijuana patients, are especially likely to test positive for extended periods of time.

In the past, employers were generally free to institute zero-tolerances policies and discipline employees for testing positive for marijuana use, even where the positive test resulted from off-duty, off-premises use. Such policies survived challenges under so-called "lawful use" statutes, such as Colorado's, which generally prohibit employers for terminating employees due to that employee's engaging in any "lawful activity" off-premises during nonworking hours. When the Colorado Supreme Court ruled in 2015 that Colorado's lawful use did not allow for medical marijuana use because medical marijuana remains unlawful under federal law,[3] employers in Nevada proceeded on the assumption that Nevada courts would interpret Nevada's similar lawful use statute to also conclude that it does not protect the off-duty use of marijuana.[4] Until the Nevada Supreme Court is called upon to interpret Nevada's lawful use statute, the Colorado decision remains persuasive, albeit nonbinding, authority.

Similarly, the California Supreme Court held in 2008 that California's disability statute does not require employers to accommodate medical marijuana use, and that employers are generally free to terminate employees who fail drug tests.[5] The other Western states to encounter disability and wrongful termination suits based on off-duty medical marijuana use — Montana,[6] New Mexico,[7] Oregon[8] and Washington[9] — have ruled similarly. Again, without an answer from the Nevada courts, Nevada employers could look to these decisions in implementing their own drug policies, assuming that

Nevada's disability discrimination statute would also not protect medical marijuana use.

However, while Nevada's "lawful use" and disability discrimination statutes are similar to those of these Western states, Nevada's medical marijuana law is unique among them. Specifically, unlike Nevada, the medical marijuana laws of these states do not impose a duty upon employers to reasonably accommodate the medical needs of medical marijuana patients.

In this regard, Nevada is more like those of certain Midwestern and Eastern states which contain explicit protection against employment discrimination on the basis of medical use of marijuana in compliance with state law.[10] And contrary to expectations, recent court decisions from the East Coast have held that medical patients terminated for positive test results have valid causes of action against their employers for disability discrimination. These courts have held that marijuana's remaining illegality under federal law is no excuse for employers to enforce zero-tolerance policies against employees who engage in off-duty medical marijuana use in accord with their states' laws. Because Nevada's medical marijuana law contains a duty to accommodate, Nevada employers should take heed.

In July, the Massachusetts Supreme Judicial Court handed down Barbuto v. Advantage Sales & Marketing LLC,[11] holding that a medical marijuana patient who was terminated for a positive test result has a valid cause of action against her employer for disability discrimination under Massachusetts law, reversing the lower court's dismissal of plaintiff Cristina Barbuto's suit. Barbuto had notified her prospective employer that she used medical marijuana at night to treat symptoms associated with Crohn's disease and would therefore test positive on the pre-employment test. The employer represented to Barbuto that a positive test "should not be a problem," but then later rescinded her job offer due to the positive result.

In court, the employer argued that it should not be required to accommodate what amounts to a federal crime. The court found the argument unpersuasive in light of Massachusetts' medical marijuana law stating that patients shall not be denied "any right or privilege" based upon medical marijuana use, and the fact that an employee's use imposed no risk of prosecution under federal law for the employer, but only the employee. The court stopped short of stating that under the circumstances of Barbuto's case, she was entitled to a reasonable accommodation of allowing for positive test results, ruling only that the employer had a duty to engage in the interactive process and to determine whether Barbuto's requested accommodation was reasonable. Nevada's medical marijuana law goes even further than Massachusetts' in that it explicitly imposes a duty to accommodate under certain circumstances. Thus, a Nevada court encountering a similar case could find the reasoning of Barbuto persuasive, and allow a similar disability discrimination suit to proceed.

In August, the federal court for the district of Connecticut ruled similarly on the basis of Connecticut law in Noffsinger v. SSC Niantic Operating Co. LLC.[12] Just like Barbuto, the prospective employer told an applicant, plaintiff Katelin Noffsinger who took a marijuana compound at night to treat post-traumatic stress disorder, that it would accommodate a positive test that resulted from her medical marijuana use in compliance with Connecticut law. In spite of its promise, the employer fired her just days after she started the job because she failed the pre-employment drug screen. Noffsinger then sued under Connecticut's marijuana law, which explicitly prohibits discrimination against qualifying patients. The court rejected the employer's arguments that federal law preempted Connecticut law and that illegality under federal law prevents the employer from accommodating positive test results, allowing the suit to proceed, including a claim for negligent infliction of emotional distress. Again, because Connecticut's medical marijuana statute provides explicit protections for employees, a Nevada court would likely find

Noffsinger's reasoning persuasive.

Because Nevada law provides some protection for employees who engage in off-duty medical marijuana use, Nevada employers should take important lessons from these case. First, because Nevada law imposes a duty to accommodate the medical needs of employees who engaged in marijuana use, Nevada employers should be prepared to engage in an interactive process with any employees who possess a valid medical marijuana registry card issued by the state and fails a drug test as a result of off-duty use. The employer and employee should explore whether other medications may provide viable alternatives and, if not, whether allowing for positive test results is reasonable based upon the circumstances of the employer and the job duties of the employee.

Nevada employers should understand that a zero-tolerance policy or a different one-size-fits-all approach may result in liability, in spite of the federal Controlled Substances Act. Whether accommodation is required will vary by industry, by the particular employer and its circumstances, and by the particular employee and his or her job duties and medical condition. Second, employers should scrutinize their drug policies and consider updating them. Third, employers should educate employees as to the drug policy and ensure that the policy is accurately conveyed to applicants or employees. Both Barbuto and Noffsinger involve the unfortunate circumstance where the employer told an applicant that it would allow for a positive test, and then did the opposite after the applicant had left her previous job. One can only speculate that those decisions may have come out differently if not for the bait and switch. Fourth, Nevada employers should proceed with caution before taking an adverse employment action on the basis of a drug screen that tests positive for marijuana.

Finally, to be clear, none of these cases hold that an employer must accommodate medical marijuana use or impairment at work. Even better, Nevada law explicitly states an employer is not required to allow use in the workplace.[13]

As state laws related to the legalization of marijuana continue to evolve and as courts continue to issue rulings from coast to coast, it is becoming increasingly important for employers in Nevada and beyond to stay up to date on developments not only in their state, but throughout the country.

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