LEGISLATION

Florida medical marijuana amendment leaves employers high and dry

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On November 8, 2016, voters overwhelmingly approved the Florida Medical Marijuana Legislative Initiative, also known as Amendment 2, which amended Florida's constitution to allow the medical use of marijuana for individuals with certain debilitating medical conditions as determined by a licensed Florida physician. The amendment also requires the Florida Department of Health (DOH) to register and regulate marijuana production and distribution centers. Unfortunately, Amendment 2 left many unanswered questions for employers. This article attempts to clear away some of the smoke and addresses some commonly asked questions concerning medical marijuana use. It also explains what legal issues are not covered by the amendment.

What we know

Doesn't Florida already have a law regarding the medical use of marijuana? Yes, Florida enacted the Compassionate Medical Cannabis Act of 2014, which became effective on January 1, 2015. However, this law only permits qualified patients with seizure disorders and cancer to use low-tetrahydrocannabinol cannabis (a noneuphoric strain of cannabis called "Charlotte's Web") prescribed by a physician. On March 25, 2016, Governor Rick Scott signed HB 307, which expanded the law to allow for terminally ill patients to ingest all forms of medical cannabis. Amendment 2 is much broader than the existing law.

Does Amendment 2 permit recreational use of marijuana? No, it only permits the medical use of marijuana by a qualifying patient (or personal caregiver administering to the patient), as determined by a licensed Florida physician.

Who is legally permitted to use medical marijuana? A "qualifying patient," which is defined as a person who (1) has been diagnosed with a debilitating medical condition, (2) has a physician certification, and (3) has a *valid qualifying patient identification card* (a document issued by the DOH that identifies a qualifying patient or a caregiver).

What qualifies as a debilitating medical condition under Amendment 2? The law specifies: cancer, epilepsy, glaucoma, positive status for human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), post-traumatic stress disorder (PTSD), amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, multiple sclerosis, or other debilitating medical conditions of the same kind or class as or comparable to those enumerated, and for which a physician believes that the medical use of marijuana would likely outweigh the potential health risks for a patient. The word "comparable" is not defined.

What is a "physician certification"? It's a written document signed by a physician, stating that in the physician's professional opinion, the patient suffers from a debilitating medical condition, that the medical use of marijuana would likely outweigh the potential risks for the patient, and for how long the physician recommends the medical use of marijuana for the patient. A physician certification may only be provided after the physician has conducted a physical examination and a full assessment of the medical history of the patient. A physician's certification issued to a minor must have a parent or legal guardian's written consent.

When could a patient start legally using marijuana? Amendment 2 goes into effect on January 3, 2017. If the DOH doesn't begin issuing identification cards within nine months, then a valid physician certification will serve as a patient's identification card.

How much marijuana could a patient legally possess? The DOH is responsible for issuing regulations defining the amount of marijuana that "could reasonably be presumed to be an adequate supply for qualifying patients' medical use, based on the best available evidence."

Where would patients purchase medical marijuana? Only from medical marijuana treatment centers that are registered by the DOH. Marijuana is not an FDA-approved medicine, so patients will not receive prescriptions for pot.

Can a patient's caregiver possess marijuana? Yes, if the person is at least 21 years old and has qualified for and obtained a caregiver identification card issued by the DOH. Caregivers are prohibited from consuming marijuana obtained for medical use by the qualifying patient. The DOH may limit the number of qualifying patients a caregiver may assist at one time and the number of caregivers that a qualifying patient may have at one time.

Is an employer required to accommodate medical marijuana use in the workplace? No. Amendment 2 does not require accommodation of any *on-site* medical marijuana use. The Amendment states: "Nothing in this section shall require any accommodation of any on-site medical use of marijuana in any correctional institution or detention facility or place of education or employment, or of smoking medical marijuana in any public place." So, employers can prohibit employees from smoking or ingesting marijuana in the workplace. In addition, the amendment does not allow for the "operation of a motor vehicle, boat, or aircraft while under the influence of marijuana."

AGENCY ACTION

EEOC looks into implications of "big data." The use of "big data"—algorithms, "data scraping" of the Internet, and other means of evaluating information on individuals—has the potential to reduce employment discrimination, but it also can worsen bias, Jenny R. Yang, chair of the Equal Employment Opportunity Commission (EEOC), said after a public hearing on the issue in October 2016. A panel of industrial psychologists, attorneys, and labor economists told the EEOC that the use of big data is expected to grow. Yang cautioned that although innovation can reduce discrimination, "it is critical that these tools are designed to promote fairness and opportunity, so that reliance on these expanding sources of data does not create new barriers to opportunity."

Final rule issued for handling retaliation complaints under ACA. The U.S. Occupational Safety and Health Administration (OSHA) in October published a final rule that establishes procedures and time frames for handling whistleblower complaints under the Affordable Care Act (ACA). The ACA protects employees from retaliation for receiving marketplace financial assistance when purchasing health insurance through an exchange. It also protects employees from retaliation for raising concerns regarding conduct they believe violates the consumer protections and health insurance reforms found in Title I of the ACA.

EEOC updates Strategic Enforcement Plan. The EEOC announced in October that it has approved an updated Strategic Enforcement Plan (SEP) for fiscal years 2017-2021. Updates in the new SEP include the addition of two areas related to the emerging issues priority outlined in the previous SEP: (1) issues related to complex employment relationships in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relations, and the on-demand economy, and (2) backlash discrimination against those who are Muslim or Sikh or persons of Arab, Middle Eastern, or South Asian descent as well as persons perceived to be members of these groups.

Agencies study ways to advance diversity in law enforcement. The U.S. Department of Justice (DOJ) and the EEOC have released a report that examines barriers and promising practices—in recruitment, hiring, and retention—for advancing diversity in law enforcement. The report, developed with support from the Center for Policing Equity, aims to provide law enforcement agencies, especially small and midsize agencies, with a resource to enhance the diversity of their workforce by highlighting specific strategies and efforts in place in police departments around the country. ✤

What we don't know

If an employer has a zero-tolerance drug policy, can it terminate an employee who tests positive for medical marijuana use? It is unclear whether employers may terminate or discipline employees who use marijuana off-premises *but arrive at work under the influence of marijuana.* Until further guidance from the Florida Legislature or the courts, employers should consult with experienced legal counsel to address this issue.

Although this is an open question in Florida, employers seeking to enforce their zero-tolerance policies may find some support under federal law. Notably, the Controlled Substances Act (CSA) classifies marijuana as an illegal Schedule 1 drug. Despite the U.S. Department of Justice's (DOJ) decision not to enforce the CSA against medical marijuana users in other states that have legalized its medical use, marijuana still remains illegal under federal law. Consequently, courts in six other states with laws that are comparable to Amendment 2 (i.e., California, Colorado, Montana, New Mexico, Oregon, and Washington) have upheld an employer's right to enforce its drug-free workplace policy because marijuana is illegal under federal law.

At this point, it is difficult to predict how a Florida court would rule in a similar case. Moreover, it is unclear what impact the Trump administration will have on state marijuana laws. Although President-elect Donald Trump expressed during the campaign that regulating cannabis is a state issue, some of his advisors and proposed cabinet members think otherwise.

It is also worth noting that Amendment 2 does not require "the violation of federal law or purport to give immunity under federal law."

Employer takeaway

While we await clarifying regulations from the DOH and, hopefully, legislation from the state of Florida addressing some of the open issues not covered by Amendment 2, there are a few steps employers can take now to minimize their exposure under the new law:

- Educate supervisors not to rely on medical marijuana use as a pretext (excuse) for firing an employee with an underlying disability. When taking an adverse employment action, document the reasons to avoid a pretext argument.
- Employers that maintain "zero-tolerance" drug-testing policies should decide how they will handle registered medical marijuana users and clearly communicate the policies to employees.
- Ensure that any exceptions that might be made for medical marijuana users do not run afoul of any federal drug-testing requirements. For example, the U.S. Department of Transportation's (DOT) regulations do not permit the use of marijuana.
- Consult with experienced legal counsel to closely monitor the changing legal landscape in Florida. This unsettled area of law is ripe for future litigation.

Stay tuned. Any significant developments will be reported in future issues of *Florida Employment Law Letter.*

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WAGE AND HOUR LAW

FLSA and Florida Minimum Wage Act class actions can proceed concurrently

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Wage and hour cases continue to be a concern for employers. Employers with large numbers of both exempt and non-exempt employees under the overtime provisions of the Fair Labor Standards Act (FLSA) are particularly susceptible to class action lawsuits. The 11th Circuit (whose rulings apply to all Florida employers) recently addressed whether a group of employees may maintain a class action under both the FLSA and the Federal Rules of Civil Procedure (FRCP) for violations of the Florida Minimum Wage Act (FMWA) at the same time. The FRCP are technical rules that govern how civil litigation cases must be carried out and what is permissible when litigating them. In a blow to employers in the 11th Circuit, the court joined many other federal appellate circuits and held that this is appropriate. The case highlights compliance concerns for employers that could face such wide-reaching class claims in wage and hour cases.

The case

Employees of the Lee County Sheriff's office filed a class action lawsuit alleging violations of the FLSA and the FMWA. The FMWA sets a minimum wage in Florida that is tied to periodic automatic adjustments. The FLSA guarantees a minimum wage to employees for all hours worked and overtime pay for all hours worked over 40 in a workweek. The employees in this case alleged that their employer failed to pay them overtime and the minimum wage required under the FLSA. They alleged that they performed work off the clock for which they were not paid.

The district court initially approved a class action on the FLSA claims but denied the request to present the FMWA claims as a class action under the FRCP. The decision distinguished how members of a potential class action are included under the FRCP versus the FLSA, which has its own provisions that regulate class actions.

11th Circuit disagrees

On appeal, the 11th Circuit held that employees could maintain class actions under both the FLSA and the FMWA at the same time. At the crux of the arguments was the fact that the FLSA requires employees who are potentially part of the class action to "opt in," or consent to be part of the class. The initial requirements to opt in are not onerous, and employees need only show that they are similarly situated to other employees in the class.

However, the FMWA claims were filed under the class action provisions of the FRCP, which are distinct from the FLSA's class action rules. The rules for approving class actions under the FRCP are much more demanding than those found in the FLSA. Several factors must be met, and potential class members are automatically part of a class action unless they "opt out," or decide they do not want to be members of the class. They are bound by the judgment, whether favorable or unfavorable, unless they opt out. As the court explained, "this 'opt-out' requirement is what makes a [class action under the federal rules of civil procedure] a 'fundamentally different creature' than [an FLSA] collective action, which depends for its 'existence . . . on the active participation of [class members].'"

The district court had held that the differences are so fundamental that the two types of class actions could not be maintained at the same time. Disagreeing with the district court, the 11th Circuit reversed, holding that both actions could be maintained at the same time and explaining that there is nothing in the statutes' text or history to suggest that they couldn't be maintained concurrently. *Kevin Calderone, et al. v. Michael Scott, as the duly elected Sheriff of Lee County, Florida,* Case No. 15-14187 (11th Circuit, September 28, 2016).

Takeaway

Wage and hour actions have the potential to be litigated by many employees at once in the form of a class or collective action. This ruling makes clear that both FLSA and FMWA actions can be maintained at the same time, despite some procedural differences. While the new overtime rules instituted by the U.S. Department of Labor (DOL) have been temporarily halted (see the article on pg. 1), wage and hour litigation