



DISCIPLINING POLICE OFFICERS RE: MEDICAL MARIJUANA

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EVERYONE'S DOIN' IT!

- DECRIMINALIZATION OF SMALL QUANTITY
- MEDICAL MARIJUANA
- RECREATIONAL
- TAXES
- NO ADA PROTECTION FOR CURRENT DRUG USE



DEBILITATING CONDITION?



NOT YOUR GRANDFATHER'S "HEAD SHOP"



PHARMACY?



MARKETING COSTS MONEY



THE “DOCTOR” WILL BE WITH YOU SOON



MY BACK HURTS



OFF-DUTY OPPORTUNITY?



TODAY'S GOALS

- DISCUSS LEGAL AND EMPLOYMENT ISSUES,
- GIVE A SAMPLE POLICY AND PROCEDURE, AND
- RECOMMEND HOW TO ADOPT AND ENFORCE RULES AND REGULATIONS IN BOTH UNION AND NON-UNION POLICE DEPARTMENTS.



FEDERAL LAWS CRIMINALIZE USE OR POSSESSION OF MARIJUANA

- 21 U.S.C. §§ 841(a)(1), 844(a)
- Schedule 1 controlled substance under the federal Controlled Substances Act, 21 U.S.C. Sec. 812(b)(1)
 - Same category as heroin, LSD, or Ecstasy
 - high potential for abuse
 - no currently accepted medical use in treatment in the U.S. and
 - lacks an accepted level of safety for use under medical supervision. 66 Fed. Reg. 20052 (2001).

FEDERAL & STATE CONFLICT?

- *County of San Diego v. San Diego NORML* (July 31, 2008)
- Congress has provided that states are free to regulate in the area of controlled substances, including marijuana, provided that state law does not positively conflict with the CSA. (21 U.S.C. § 903.)
- California did not “legalize” medical marijuana, but instead exercised the state’s reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition. (See *City of Garden Grove v. Superior Court (Kha)* (2007))

SUPREME COURT

- Controlled Substances Act does not contain a “medical necessity” exception that permits the manufacture, distribution, or possession of marijuana for medical treatment. *U.S. v. Oakland Cannabis Buyers’ Coop* - 2001
- Upheld the constitutionality of Congress using its Commerce Clause authority to prohibit the local cultivation and use of marijuana, even when it is in compliance with state law. *Gonzales v. Raich* - 2005

DOJ “GUIDANCE”

- Deputy Attorney General, on Oct. 19, 2009, issued a Justice Department memorandum to U.S. Attorneys in states with laws permitting the medical use of marijuana, allowing for the exercise of prosecutorial discretion to refrain from initiating federal criminal prosecutions when they determine that a patient’s use, or their caregiver’s provision, of medical marijuana “represents part of a recommended treatment regimen consistent with applicable state law.” Doing otherwise, the memo concluded, would be “an inefficient use of limited federal resources.”

EFFECT OF PROTESTS?



FOLLOW-UP “CLARIFICATION”

- This was followed-up by another such memorandum on June 29, 2011, clarifying that the intent of the first memo was not to shield commercial medical marijuana cultivators from federal prosecution, even if they are complying with state medical marijuana laws.
- This second memo was apparently issued because of concern about the growth of large scale marijuana farming operations in some states, as well as an explosion in the number of medical marijuana dispensaries, with some suggesting that medical marijuana was being used as a thinly veiled cover to promote recreational use of the drug for profit.
- Despite whatever prosecutorial discretion is exercised on the issue of medical marijuana, use, sale, distribution, or possession remains a federal crime.

FED'S UNLIKELY TO INTERVENE?



US ATTORNEYS' LETTERS

- SAME INFO



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Dear Mr. Russo:

I write in response to your letter dated January 14, 2011 seeking guidance from the Attorney General regarding the City of Oakland Medical Cannabis Cultivation Ordinance. The U.S. Department of Justice is familiar with the City's solicitation of applications for permits to operate "industrial cannabis cultivation and manufacturing facilities" pursuant to Oakland Ordinance No. 13033 (Oakland Ordinance). I have consulted with the Attorney General and the Deputy Attorney General about the Oakland Ordinance. This letter is written to ensure there is no confusion regarding the Department of Justice's view of such facilities.

As the Department has stated on many occasions, Congress has determined that marijuana is a controlled substance. Congress placed marijuana in Schedule I of the Controlled Substances Act (CSA) and, as such, growing, distributing, and possessing marijuana in any capacity, other than as part of a federally authorized research program, is a violation of federal law regardless of state laws permitting such activities.

The prosecution of individuals and organizations involved in the trade of any illegal drugs and the disruption of drug trafficking organizations is a core priority of the Department. This core priority includes prosecution of business enterprises that unlawfully market and sell marijuana. Accordingly, while the Department does not focus its limited resources on seriously ill individuals who use marijuana as part of a medically recommended treatment regimen in compliance with state law as stated in the October 2009 Ogden Memorandum, we will enforce the CSA vigorously against individuals and organizations that participate in unlawful manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law. The Department's investigative and prosecutorial resources will continue to be directed toward these objectives.

Consistent with federal law, the Department maintains the authority to pursue criminal or civil actions for any CSA violations whenever the Department determines that such legal action is warranted. This includes, but is not limited to, actions to enforce the criminal provisions of the CSA such as Title 21 Section 841 making it illegal to manufacture, distribute, or possess with intent to distribute any controlled substance including marijuana; Title 21 Section 856 making it

NO MENTION OF DEALING WITH EMPLOYEES



FIREARMS PROHIBITION

- **FEDERAL LAW PRECLUDES MARIJUANA USERS FROM POSSESSING FIREARMS OR AMMUNITION.**
- **ESSENTIAL JOB DUTY?**
- **INCLUDES RECENT USE**
- **CONVICTION IN PAST YEAR**
 - **MULTIPLE ARRESTS IN PAST 5 YEARS, MOST RECENT IN PAST YEAR**
- **MILITARY DISCIPLINE ALSO COUNTS**

ATF “OPEN LETTER”

- Sent to all federal firearms licensees
- “those who are users of medical marijuana, including those in scrupulous compliance with state law, should not be allowed to purchase, possess or use firearms or ammunition.”

DEALERS UNAWARE?

- UNLESS PURCHASER INFORMS DEALER
- CRIME TO SELL OR “DISPOSE”
- There “are no exceptions in federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by state law,” medical marijuana users may not be sold or possess firearms or ammunition.

CHIEFS ALSO PROHIBITED FROM SUPPLYING OFFICERS WITH GUNS AND AMMO

- Federal law further makes it a crime to sell or otherwise dispose of a firearm or ammunition to anyone knowing “or having reasonable cause to believe” that the person unlawfully uses a controlled substance, such as marijuana. 18 U.S.C. Sec. 922(d)(3). A federal regulation, 27 C.F.R. Sec. 478.11, allows an inference of current illegal use of a controlled substance to be drawn from “evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time.”

ATF Form 4473

Firearms Transaction Record

- a person who uses medical marijuana, even in compliance with state law, should answer “yes” to question 11.e. (“Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?”)
- Violation, even if say “no” if you know they have medical marijuana card.

DV “PROHIBITED PERSON”

- “Disqualified” or “Disabled”
- No exception for persons who must carry a firearm on their jobs: law enforcement officers, security guards, or members of the Armed Forces. Courts have upheld this restriction.

2nd AMENDMENT ISSUE?

- NOT LIKELY

- *District of Columbia v. Heller*, #07-290, 554 U.S. 570 (2008)

- Oregon Supreme Court in *Willis v. Winters*, 2011

- MAY TRUMP DECISION ORDERING SHERIFF TO ISSUE LICENSES TO MEDICAL MARIJUANA PERSONS

Practice Pointers

- *If cannot legally possess a firearm or ammunition, clearly they cannot perform some of the essential job functions of many public safety jobs, and this can be a legitimate basis for their termination.*
- *The ATF memo's reasoning makes it highly questionable as to how a department could be legally justified in issuing a firearm or ammunition to a known user of medical marijuana.*

ACCOMMODATION REQUIRED?

- ADA (STATE LAWS) - reasonable accommodations for qualified individuals with a disability
- Most such laws state, in part, provide that it does “not require any accommodation of the medical use of marijuana in any workplace, school bus or grounds, youth center, or correctional facility.” In addition, the ADA does not require an accommodation for the “illegal use of drugs.”
- The ADA defines “illegal drug use” by reference to federal rather than state law; some accommodation for past drug dependency and labor counsel should be consulted

WHAT MAY BE PROHIBITED?

- No requirement to accommodate officers with a medical marijuana card, nor are departments required to allow officers to be a caretaker or have any role in the operation of a medical marijuana distribution facility or network.
- Similarly, there is no obligation to offer treatment in place of discipline to officers found using or in possession of marijuana.

MOST STATES MM LAWS DON'T REQUIRE ACCOMMODATION

- Connecticut, Maine, and Rhode Island
 - prohibit employers from discriminating against medical marijuana users based on their use, unless required by federal law
- Arizona and Delaware
 - prohibit employers from taking adverse action including termination of applicants and employees who test positive for marijuana unless they used, possessed, or were impaired by marijuana in the workplace, or unless a failure to do so would result in the employer losing a monetary or licensing benefit under federal law or regulations.

Practice Pointers

- *Employers may not have to accommodate medical marijuana use under a state’s “medical marijuana” law, but they will most likely have to accommodate the disability that led to the physician’s recommendation of medical marijuana, assuming the employee is still able to perform the position’s essential functions and so long as doing so would not constitute an undue hardship on the employer.*

MORE POINTERS

- *The anti-discrimination laws of many states and the Americans with Disabilities Act's most recent regulations are quite broad and require an interactive process and potential accommodations for a wide range of medical conditions.*
- *Chiefs should make certain the department's policies and their enforcement clearly reflect that any adverse employment actions taken are not because of an employee's disability, but for a clear violation of the department's drug and alcohol policies that are in writing and were properly noticed, disseminated and understood.*

STATE COURT DECISIONS

- REJECTED ACCOMMODATION CLAIMS
- “intent of the statutes in question was to decriminalize medicinal marijuana use and not to protect private rights of employees in the workplace”

Roe v. TeleTech Customer Care Mgmt., 2011 Wash

- Washington state law allows the medical use of marijuana for patients with a certificate for certain conditions, the court ruled that this does not bar employers in the state from firing employees with such certificates for marijuana use, nor does the law require employers to “reasonably accommodate” medical marijuana users. The decision prohibits the state's Human Rights Commission from investigating complaints about such firings. The court reasoned that, despite the allowance for medical use under state law, it would violate public policy to require employers to sanction criminal conduct by retaining such workers, since use of the drug is a federal crime.

Emerald Steel v. Bur. of Labor & Indus., 2010 Ore

- Employees who smoke marijuana to relieve pain or nausea may be fired for drug use even if they have a state-issued medical marijuana card. Laws requiring employers to accommodate disabled workers do not extend to medical marijuana use,
- *Washburn v. Columbia For. Prod.*, 2006 Ore. Lexis 354, 134 P.3d 161
 - The Oregon Supreme Court ruled, under its state disabilities law, that an employer is not obligated to retain workers who use medical marijuana.

Ross v. Ragingwire Tel., 2008 Cal. 2008

- CA may have the largest number of medical marijuana users in US?
- Allowed an employer to fire workers who use medical marijuana, even when the employee has a doctor's written approval

*Johnson v. Columbia Falls Aluminum Company,
LLC, 2009 Mont*

- Rejected claims by an employee terminated after he tested positive for drug use while using medical marijuana.
- The MMA specifically provided that it could not be construed to require employers to accommodate the medical use of marijuana in a workplace. Thus, the court concluded that failure to accommodate use of medical marijuana does not violate the MHRA or the ADA, because an employer is not required to accommodate an employee's use of marijuana.

Michigan (*Casias v. Wal-Mart Stores, Inc.*, 2011
U.S. Dist.)

- Michigan Medical Marijuana Act (MMMA) does not regulate private employment
- *All the MMMA does is give some people limited protection from prosecution by the state, or from other adverse state action in carefully limited medical marijuana situations.*

LAW ENFORCEMENT CASES SHOULD BE SIMILAR

- Ability to drive a vehicle at high speeds, being able to fire a weapon, being able to work rotating shifts, being able to run after and subdue fleeing suspects, being able to drive at night and a host of similar functions may seem to “go without saying.”
- However, by not “saying” them in a written job description, chiefs may have trouble proving them at a court or discrimination agency hearing.

Practice Pointers

- *Having up to date job descriptions for all positions is crucial to prevailing in a variety of discrimination cases.*

POLICE DEPARTMENT RULES OR POLICIES & PROCEDURES

- All police departments have a rule against criminal conduct
- Berrien Springs Oronoko, Michigan, Township Police Department entitled “Prohibited Substances – Drug Free Workplace,” begins by noting that marijuana remains an illegal controlled substance under both Michigan state law and federal law, and that the presence of any detectable amount of any controlled substance in an employee’s system while at work is prohibited.
- Receives, or has been denied a medical marijuana card must inform the police chief of this fact in writing

MICHIGAN PD POLICY

- Employees who test positive for any detectable amount of marijuana, or any other prohibited or illegal substance shall be immediately relieved of duty, and must surrender any and all department issued firearms, identification cards, etc. and shall not be permitted to perform any police function or possess any firearm in connection with their employment.
- Other provisions address officers acting as “caregivers” to family members under the state’s medical marijuana law, and bar them from owning or being involved in any way in a marijuana dispensary or business, in the growing of marijuana for medical use, or in the distribution of drug paraphernalia.

POLICY & PROCEDURE

MEDICAL MARIJUANA USE

POLICY & PROCEDURE NO. X.XX	ISSUE DATE: _____
	EFFECTIVE DATE: _____
MASSACHUSETTS POLICE ACCREDITATION STANDARDS REFERENCED: None	REVISION DATE: _____

Practice Pointers

- *Probably do not need new Rules or Policies before disciplining employees that are otherwise protected by this state's medical marijuana laws since virtually all departments have a rule that prohibits criminal conduct*
- *Consult with competent local legal counsel, as the legal requirements and details of what will work best will vary from jurisdiction to jurisdiction. Collective bargaining agreements may also have an impact on the details of such a policy.*

MORE RECOMMENDATIONS

- *Chiefs should not make the mistake of including a “rehab” requirement in a collective bargaining agreement for officers using, selling or otherwise involved in illegal drug activity. It is better to have no drug testing clause than to have one that waters down a chief’s ability to enforce a zero tolerance policy.*
- *However, without waiving the ability to assert that there is no change and this is a management right in any event, I do recommend that chiefs meet with the union if a timely request to do so is received. By agreeing to discuss any questions or concerns, and keeping an open mind and making a good faith effort to reach agreement, a chief will avoid prolonged litigation that can be costly and disruptive.*

Sample Memo to Union re: Medical Marijuana

MEMO

Date: _____

To: Local _____

From: Chief of Police

Re: Medical Marijuana

I want to take this opportunity to remind all employees that this department has a rule prohibiting criminal misconduct, and that includes the use or possession of marijuana. Regardless of what a state does to allow its use for so-called “medical” purposes, under federal law marijuana remains a controlled substance whose use, sale, and possession are federal crimes. In addition, possession of a certain quantity of marijuana, without a medical marijuana “prescription” or caregiver certificate, is still a crime under this state’s law. Growing, processing or selling marijuana, except in connection with a medical marijuana facility, is also still illegal. Moreover, any involvement by a police officer in the medical marijuana business amounts to conduct unbecoming a police officer.

Marijuana is listed as a Schedule I controlled substance under the federal Controlled Substances Act, 21 U.S.C. Sec. 812(b)(1). It is on the most restricted schedule, along with such drugs as heroin, LSD, or Ecstasy. Its sale, use, or possession is a federal crime. Further, the U.S. Food and Drug Administration has determined that marijuana has a high potential for abuse, has no currently accepted medical use in treatment in the U.S., and lacks an accepted level of safety for use under medical supervision. 66 Fed. Reg. 20052 (2001).

State laws allowing such use do not protect department members against employment related sanctions. Similarly, employees using marijuana for “medical” reasons are not protected from such sanctions under the Americans with Disabilities Act (ADA) or this state’s disability discrimination laws requiring reasonable accommodation of disabling medical conditions.

NON-WAIVER

Without waiving my rights, and consistent with my belief that I am simply spelling out or clarifying the department's existing prohibition against illegal conduct, be advised that effective thirty (30) days from now, i.e., _____, 201_, I intend to put the attached policy into effect.

If you would like to negotiate the impact of such action on members of your bargaining unit, please let me know -- in writing -- within five (5) days of receipt of this notice.

The following dates and times are available:

Please select one (or more) date(s) and times and include such selection in your written reply as well. If you are unable to meet on any of the dates offered, please supply me with three (3) alternatives (during normal business hours), the last of which should be no later than _____, 201_.

If I have not received a written request for bargaining within five (5) days, I will consider this a waiver and implement the proposed policy.

INVESTIGATING EMPLOYEE DRUG USE



INVESTIGATING SUSPECTED DRUG USE

The manner in which a police officer's suspected drug use is reported may influence the way an internal affairs investigation is conducted. Chiefs may learn of a possible drug problem in a number of ways. A shift supervisor might get a complaint that an officer is using or selling drugs. A citizen might report that an officer smelled of burned marijuana or seemed dazed and inattentive during a traffic stop or when approached by the civilian looking for assistance or directions. A patrol supervisor might report suspicions that an officer's recent problems with attendance or performance could be related to substance abuse. A cruiser or transport vehicle accident, sexual harassment, or domestic violence investigation might lead to evidence of alcohol or drug use. A report might even come from another law enforcement agency (for example, if an officer is arrested for driving under the influence, selling drugs or assaulting a spouse or significant other).

Indicators of Drug or Alcohol Use

Police officers all receive some amount of training in drug recognition, as well as indicators of drug and alcohol use. Part of that training includes a warning that these behaviors don't necessarily mean that an employee is using alcohol or drugs. Investigators should be careful since acting on the basis of these signs alone could lead to serious trouble. Since the Americans with Disabilities Act and many state anti-discrimination laws protect persons "regarded as" disabled, investigators should treat these signs only as indications that additional inquiry or investigation is warranted.

The federal government's Working Partners for an Alcohol- and Drug-Free Workplace has identified some behaviors that might signal a drug or alcohol problem:



ANY QUESTIONS?

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