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Medical Marijuana and Public Safety Personnel

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❖ Introduction

A good number of states currently have laws permitting and regulating the use of marijuana for medical purposes. Under federal law, however, marijuana remains a controlled substance whose use, sale, and possession are federal crimes, regardless of any state laws to the contrary.

As a result, issues have arisen as to the right of employers, including public safety employers, to discipline and terminate employees for the use of medical marijuana when it is legally sanctioned by the laws of their own state.

This article will briefly review the current legal status of medical marijuana in the U.S. It will then examine what some courts have said regarding the right of employers to terminate employees for the use of medical marijuana.

This is followed by a discussion of recent developments and possible future issues concerning the impact of the use of medical marijuana by an employee on their legal right to possess and use firearms and ammunition. A look will then be taken at a specimen policy on medical marijuana as adopted by one public safety agency.

Finally, at the conclusion of the article, there is a listing of useful resources and references. The article does not address the general topic of drug screening of job applicants or employees or, in any detail, the impact of disability discrimination laws on employees who use drugs.

❖ Legal Status of Medical Marijuana

Marijuana is listed as a schedule 1 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).

Despite this, no less than 16 states and the District of Columbia have enacted state laws permitting and regulating the medical use of marijuana. Those states are Alaska, Arizona, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington. In some of these jurisdictions, the sale or dispensing of medical marijuana has become a major industry, reportedly generating sales of approximately \$2 billion in California, for example, in 2008, and also resulting in \$100 million in state tax revenue.

In [U.S. v. Oakland Cannabis Buyers' Coop.](#), #00-151, 532 U.S. 483 at 49 (2001), the U.S. Supreme Court concluded that the federal Controlled Substances Act does not contain a “medical necessity” exception that permits the manufacture, distribution, or possession of marijuana for medical treatment. Subsequently, in [Gonzales v. Raich](#), #03-1454, 545 U.S. 1 (2005), the U.S. Supreme Court 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.

A U.S. Deputy Attorney General, on Oct. 19, 2009, issued a Justice Department [memorandum](#) to U.S. Attorneys in states with laws allowing 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.”

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.

❖ **Medical Marijuana and Employment**

In the jurisdictions where state law allows the use of medical marijuana, employers have increasingly been faced with the question of whether they can terminate employees engaged in such drug use if they do so in compliance with state law.

Employees have argued that the state laws allowing such use implicitly protects them against employment related sanctions. Some employees facing termination for such drug use have also argued that they are protected from such sanctions under state disabilities discrimination laws requiring reasonable accommodation of disabling medical conditions.

Courts that have directly addressed these claims have rejected them, often relying, in large part, on the fact that medical marijuana use is still a federal crime, whether widely prosecuted or not.

In [Roe v. TeleTech Customer Care Mgmt.](#), #83768-6, 2011 Wash. Lexis 393, 257 P.3d 586, the Washington State Supreme Court confronted this issue. While 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 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.

Similarly, the Oregon Supreme Court held that employees who smoke marijuana to relieve pain or nausea can 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, the court stated. [*Emerald Steel v. Bur. of Labor & Indus.*](#), #S056265, 2010 Ore. Lexis 272, 348 Ore. 159, 230 P.3d 518. See also, [*Washburn v. Columbia For. Prod.*](#), #S52254, 2006 Ore. Lexis 354, 134 P.3d 161, in which the Oregon Supreme Court ruled, under its state disabilities law, that an employer is not obligated to retain workers who use medical marijuana

In the state with arguably the largest number of medical marijuana users, the California Supreme Court, in a 5-to-2 holding, allowed an employer to fire workers who use medical marijuana, even when the employee has a doctor's written approval. [*Ross v. Ragingwire Tel.*](#), #S138130, 2008 Cal. Lexis 784. 42 Cal. 4th 920; 174 P.3d 200; 70 Cal. Rptr. 3d 382. See also [*Johnson v. Columbia Falls Aluminum Co.*](#), #08-0358, 2009 Mont. Lexis 120, rejecting claims by an employee terminated after he tested positive for drug use while using medical marijuana.

While these cases did not involve public safety personnel, their reasoning would still apply to those employed as police officers, correctional officers, or firefighters. In addition to the question of not wanting to sanction such personnel regularly committing a federal crime, public safety agencies may also, of course, be concerned about the safety issues that can arise from attempting to perform dangerous job duties while an employee's senses may be impaired by drug use.

❖ Medical Marijuana and Firearms

Perhaps the most dramatic impact on the issue of the right of public safety agencies to terminate employees using medical marijuana in compliance with state law may be an [open letter to all federal firearms licensees](#) issued by the U.S. Dept. of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) on Sept. 21, 2011. Possessing and using a firearm and ammunition is an essential part of the job duties of many, although

not all, public safety employees. Police officers in particular, as well as some correctional personnel, are expected to routinely be able to possess and use such weaponry.

The federal agency charged with enforcing federal firearms laws, however, takes the clear and unambiguous position in this open letter, that 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.

It is true, of course, that some firearms dealers may not be aware that a particular customer seeking to purchase a gun or bullets is a medical marijuana user. But if someone seeking to buy a weapon or ammunition does inform a firearms dealer that they are a medical marijuana user, the ATF takes the position that completing the transaction is against federal firearms law.

Some purchasers, the ATF notes, might even present a state issued medical marijuana card as either identification or proof of residency.

Under [18 U.S.C. Sec. 922\(g\)\(3\)](#), the ATF reminds firearms dealers, it is unlawful for any person who is an unlawful user of or addicted to any controlled substance” (as defined by the Controlled Substances Act) to ship, transport, receive or possess firearms or ammunition.

Since marijuana is a schedule 1 controlled substance, and 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.

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.”

A person who uses medical marijuana, even in compliance with state law, the ATF states, 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?”) on [ATF Form 4473](#), Firearms Transaction Record,. And licensed firearms dealers may not transfer firearms or ammunition to them. Even if the person answers “no” to this question concerning the use of controlled substances, the ATF takes the position that it is a violation of federal law to transfer a weapon or ammunition to them if a person has “reasonable cause to believe” that they use medical marijuana, such as if they have a card authorizing them to possess medical marijuana under state law.

If a public safety employee 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. And 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.

Similar issues have previously arisen concerning officers barred from possessing weapons because of prior convictions for domestic violence offenses. In 1996, the Congress passed a Defense Appropriations Act. [Sec. 658](#) of that enactment made it unlawful for any person who has been convicted of a domestic violence misdemeanor to possess a firearm or ammunition. There is 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.

The ATF position is likely to be challenged by some gun rights advocates as constituting a [Second Amendment](#) violation, but such a challenge is unlikely to succeed. See [District of Columbia v. Heller](#), #07-290, 554 U.S. 570 (2008), finding an individual right to possess handguns for home defense under the Second Amendment, but stating that reasonable firearms regulations would be upheld, and [McDonald v. City of Chicago](#), #08-1521, 130 S. Ct. 3020 (2010), applying those principles to the states and municipalities through the [Fourteenth Amendment](#).

The ATF’s position would appear to contradict and is likely to trump the position taken by the Oregon Supreme Court in [Willis v. Winters](#), #SCS058645, 2011 Ore. Lexis 445, 350 Ore. 299, 253 P.3d 1058, holding that two county sheriffs should not have denied concealed handgun licenses to applicants who were otherwise qualified but who admitted to the regular use of medical marijuana. While this court found that the sheriffs’ statutory duty to issue the permits under state law as not preempted by federal firearms law, if the

use of medical marijuana makes an individual ineligible for any possession of a firearm, it is difficult to imagine how they could qualify for a conceal carry permit.

❖ A Specimen Policy

Michigan is one of the 17 U.S. jurisdictions providing for legal use of medical marijuana. A [policy](#) adopted on May 12, 2009 by the Berrien Springs Oronoko, Michigan, Township Police Department is instructive on how a police department could address some of the concerns raised in this article.

Entitled “Prohibited Substances – Drug Free Workplace,” the policy 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.

It goes on to state that any member of the department who is using, smoking or ingesting marijuana for medical purposes shall be considered unfit for duty, even if that use is sanctioned by state law, and they shall not be permitted to work or perform any job function.

The policy further requires any employee or volunteer of the department who applies for, receives, or has been denied a medical marijuana card must inform the police chief of this fact in writing.

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.

Any department drafting such a policy, of course, should 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.

❖ Resources

1. [Drug Abuse & Rehabilitation](#). Summaries of cases reported in AELE's Fire, Police & Corrections Personnel Reporter.
2. [Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use](#), Memorandum for U.S. Attorneys, by U.S. Deputy Attorney General James M. Cole (June 29, 2011).
3. [Inter-Agency Advisory Regarding Claims That Smoked Marijuana Is a Medicine](#), U.S. Food and Drug Administration (FDA) (April 20, 2006).
4. [Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana](#), Memorandum for Selected U.S. Attorneys, by David W. Ogden, Deputy Attorney General (Oct. 19, 2009).
5. [Marijuana and Medical Marijuana](#). Articles appearing in the New York Times.
6. [Medical cannabis](#). Wikipedia article.
7. [Medical cannabis in the United States](#). Wikipedia article.
8. [NORML](#) (National Organization to Reform Marijuana Laws).
9. [Open letter to all federal firearms licensees](#), U.S. Dept. of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (Sept. 21, 2011).
10. [Prohibited Substances – Drug Free Workplace Policy](#), Berrien Springs Oronoko, Michigan, Township Police Department (May 12, 2009).
11. [State by State Marijuana Laws](#).

❖ Relevant Prior Monthly Law Journal Articles

1. [Courts Uphold Closure of California Medical Marijuana Dispensaries](#), 2010 (7) AELE Mo. L. J. 501.
2. [Supreme Court rules that a city's ban on handguns is unconstitutional](#), 2010 (8) AELE Mo. L. J. 401.

❖ References

1. "[Medical Marijuana User Not Protected From Termination](#)," by Darren A. Felder and William Kastner, National Law Review (Oct. 5, 2011).
2. "[Arizona Employers Must be Ready for New Medical Marijuana Use Law](#)," by Dinita L James, National Law Review (Jan. 3, 2011).
3. "[Medical Marijuana Litigation Offers Full-Time Employment for Lawyers](#)," by Donna Bader, National Law Review (Aug. 11, 2010).

4. "[Employers in a Haze Over Medical Marijuana Use](#)," by Tresa Baldas, National Law Journal (Nov. 19, 2009).
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