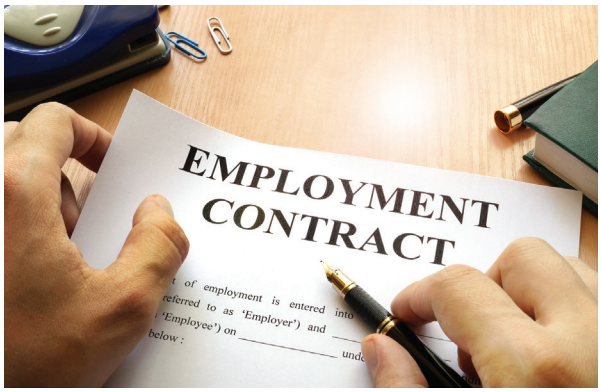
Interpreting Arkansas' Medical Marijuana Statute: An Uncertain Landscape for Employees and Employers Alike

By Robbin S. Rahman



On January 4, 2018, the United States Attorney General, Jeff Sessions, sent the marijuana industry into a panic. In a memorandum addressed to all U.S. Attorneys, Mr. Sessions reminded America that marijuana remains illegal under federal law and, in the process, rescinded the "Cole Memorandum," an Obama-era directive to federal prosecutors to de-prioritize the prosecution of marijuana industry participants in states where it has been legalized. Importantly, the Cole Memorandum served as a sort of safe harbor around which much of the marijuana industry had been built. Whether intentional or not,[1] the effect of Mr. Sessions' memo was to dump a bit of cold water on an industry that, for the past several years, has enjoyed growing bipartisan support[2] and an increasingly large footprint. For example, approximately 44 states, the District of Columbia and the territories of Puerto Rico and Guam, have enacted laws permitting the cultivation, sale and use of marijuana in some form, culminating most recently in the launch of California's fully legal recreational marijuana market on January 1, 2018.

In light of Mr. Session's memo, the industry and the nation has been forced to turn their attention back to fundamental issues of federalism: whether the federal government's authority to outlaw marijuana through its power to regulate interstate commerce remains superior to the powers reserved to the states under the Tenth Amendment to protect the welfare, safety and health of the public.[3] Against the backdrop of a potential Constitutional crisis, state regulators are making final preparations for Arkansas' nascent medical marijuana industry to become a living, breathing reality.[4] Very soon, the interpretation and application of the Arkansas Medical Marijuana Amendment of 2016 (the "AMMA") will be of critical importance to business owners, employees, regulators, lawyers and ordinary citizens. Nowhere are these issues more difficult and more important than in the Arkansas workplace. This article takes a brief look at the AMMA's workplace provisions, how similar provisions have been addressed by courts in other states, and what such interpretations may mean for Arkansas.

Robbin S. Rahman is an attorney at the Barber Law Firm in Little Rock and has over 17 years of experience as a corporate lawyer helping businesses solve critical financial, operational and legal problems.

The AMMA's Workplace Rules

Outside of the medical marijuana context, the Arkansas workplace is governed by a collection of state and federal laws, including, for example, the Americans with Disabilities Act and the Arkansas Civil Rights Act. However, because marijuana use and possession remains illegal under federal law, the applicability of these laws becomes substantially less clear in the context of legal marijuana use. In recognition of this uncertainty, the AMMA includes a collection of provisions addressing medical marijuana in the Arkansas workplace. Notably, Arkansas is one of only 10 other states with a marijuana statute that attempts to address workplace issues and relationships.[5] In general, these provisions offer rights, protections, safe harbors and guidelines for employees and employers alike.

The AMMA's Employee Protections: a Powerful Tool

One of the most significant employee protections provided by the AMMA is the so called "anti-discrimination provisions set forth in section 3(f)(3)(A), which provides that "[a]n employer shall not discriminate against an applicant or employee in hiring, termination, or any term or condition of employment, or otherwise penalize an applicant or employee, based upon the applicant or employee's past or present status as a qualifying patient or designated caregiver." In addition, section 3(a) provides that a qualifying patient may not be denied any "right or privilege" as a result of the medical use of marijuana in accordance with the AMMA. When combined, these provisions may offer the best hope for retaining some of the traditional rights and protections granted to employees, even in the context of medical marijuana. Although the effectiveness of these provisions will remain largely uncertain until Arkansas courts have an opportunity to consider them, several observations can be made.

First, Arkansas' inclusion of statutory workplace rules protecting employees in its medical marijuana program may signal that it will join a recent and growing state-law trend to recognize workplace protections, even in the context of legal marijuana use. Historically, courts in jurisdictions with a legal marijuana program have declined to interpret the relevant statutory scheme to include workplace protections. The United States Courts of Appeal for the Sixth[6] and Ninth Circuits,[7] and the State Supreme Courts for California,[8] Colorado,[9] Montana[10] and Oregon[11] each have dismissed wrongful termination or disability-based discrimination claims where the employee was terminated by his or her employer for using marijuana even though such use was legal under applicable state law. These courts rejected employment-law-based causes of action based on a finding that either: (a) federal law preempted such rights or (b) the relevant statutory scheme was silent on workplace protections. In these jurisdictions, employers largely are free to take adverse actions with respect to employees who are legal marijuana users without fear of liability.

In contrast, in states with marijuana statutes that address the workplace and employee protections, courts have been more willing to consider employee claims. For example, in 2017, courts in Rhode Island,[12] Massachusetts[13] and Connecticut[14] each signaled a willingness to accept wrongful termination or employment discrimination claims as a result of an employee's (or applicant's) use of marijuana pursuant to a state marijuana program. In each case, the court's willingness stemmed from stronger language in the relevant marijuana statute indicating legislative intent to regulate the workplace. Arkansas' inclusion of a comparatively robust set of rules governing the workplace, including an explicit anti-discrimination provision, may signal to Arkansas courts that the AMMA was intended to retain the rights and responsibilities traditionally enjoyed by Arkansas employees.

Second, as a corollary to the concept that the AMMA intended to confer protections upon Arkansas employees, Arkansas employers may find it more difficult to argue that federal law (primarily, the Controlled Substances Act) preempts the AMMA. The clear trend in states lacking explicit workplace protections has been to find that federal law preempted any employee protection under state marijuana laws.[15] However, preemption arguments have been rejected in states that, like Arkansas, have included explicit anti-discrimination provisions in their marijuana laws.[16] As the court in *Noffsinger v. SCC Niantic Operating Co., LLC* noted, "courts and commentators alike have suggested that a statute that clearly and explicitly provided employment protections for medical marijuana users could lead to a different result" from the historical practice of refusing to enforce a state marijuana statute's employee protections on the basis of federal preemption.[17] It is worth noting, however, that at least one of the courts that rejected federal preemption as a basis to not enforce an employee protection viewed the continued existence of the Rohrabacher–Blumenauer Amendment (a 2014 amendment to the federal spending bill that prevents funds appropriated to the Department of Justice from being used to interfere with the implementation of state medical marijuana laws) as a "direct and unambiguous indication that Congress has decided to tolerate the tension, at least for now, between the federal and state

regimes."[18] President Trump has signed a temporary spending bill that extends the Rohrabacher-Blumenauer Amendment through March 23, 2018. To the extent this measure is not included in any final spending bill, one justification for the rejection of federal preemption arguments may disappear. Ultimately, until the law is more settled on this issue, federal preemption may be a difficult case to make in Arkansas, but it likely will be part of every employer's defense to claims brought under the AMMA.

Finally, it remains unclear whether a private right of action exists under the AMMA. Although it includes a collection of provisions limiting the liability for damages for violating the anti-discrimination provisions of the AMMA,[19] no provision explicitly vests an aggrieved party with a cause of action under the AMMA. Unlike other statutes with an explicit private right of action,[20] the Arkansas legislature omitted such language from the AMMA. Courts in other states considering this issue have found that a private right of action exists in medical marijuana statutes notwithstanding the absence of explicit vesting language.[21]

The AMMA's Employer Protections: Legislatively Created Safe Harbors

Arkansas employers face a similarly uncertain landscape with respect to rights and protections set forth in existing workplace laws. In an effort to remove some of this uncertainty, Arkansas Legislators approved Act 593 in early 2017, which amended the AMMA. Act 593 included several important employer protections, the most important of which are the statutory safe harbors found in sections 3(f)(3)(B) & (C). For example, one of the most fundamental employer protections in the AMMA is that an employer is not required to accommodate the ingestion of marijuana in the workplace or an employee working while under the influence of marijuana. Act 593 further strengthens this protection by creating a safe harbor that allows an employer to act on its "good faith belief" that a qualified patient is "under the influence" at the workplace.[22] The AMMA defines "good faith belief" in an expansive manner, permitting the employer to rely on virtually any evidence it reasonably believes to be reliable, subject only to the requirement that the evidence cannot be so obviously without basis that accepting it as truth would constitute "gross negligence."[23] "Under the influence" is defined in a similarly expansive manner, allowing an employer to look to a wide variety of physical cues to assess whether an employee is currently using marijuana—including the employee's choice of clothes and odor.[24] Critically, however, the AMMA does not permit an employer to base its "good faith belief" of workplace use solely on a positive drug test. Similarly, a positive drug test is excluded from the list of things that can serve as an indication that the employee is "under the influence" at work. Perhaps in recognition of the inherent problems with using the results of a urine test (the most common method of drug testing) to determine whether an employee is impaired by marijuana,[25] Act 593 makes clear that a positive drug test must be accompanied by one or more of the other types of evidence described in the definition of "good faith belief" in order to qualify for the safe harbor.

In addition, Act 593 created a second safe harbor that permits an employer to implement a substance abuse or drug-free workplace policy and take action against any employee/applicant who fails a drug test implemented under such policy.[26] On its face, the drug-testing safe harbor seems to allow an employer to completely eliminate marijuana use from its workplace as part of a written drug policy, including legal medical marijuana use after hours or off-duty. However, recent case law from other jurisdictions suggests that Arkansas employers may be required to consider accommodations for medical marijuana use, even in the face of drug policies prohibiting it.

For example, in *Barbuto v. Advantage Sales and Marketing, LLC*,[27] the Supreme Judicial Court of Massachusetts allowed claims of handicap discrimination by a registered patient under Massachusetts' medical marijuana program to survive a motion to dismiss. In particular, the court rejected the argument that the employer had the right to terminate the employee based upon a failed drug test, and instead held that the plaintiff was a qualified handicapped person and permitting her legal use of medical marijuana was not a *per se* unreasonable accommodation.[28] Citing the Massachusetts' medical marijuana law's guarantee that qualified patients may not be denied any "right or privilege," the court permitted the discrimination claim to proceed, but noted that the employer still had the opportunity to introduce evidence that the plaintiff's use of medical marijuana would impose an undue hardship on the defendant's business.[29] Similarly, in *Callaghan v. Darlington Fabrics Corp.*,[30] the Superior Court of Rhode Island granted summary judgment to an employee who was denied employment based on her inability to pass a drug screening and interpreted the Rhode Island anti-discrimination provision to impose an implied obligation of the employer to accommodate off-premises medical marijuana use.[31]

Although not binding authority, Arkansas courts may be influenced by the similarity in the statutory provisions at issue in the *Barbuto* and *Callaghan* decisions and may require employers to accommodate off-site use of medical marijuana, notwithstanding drug policies that prohibit such use. For example, as in *Barbuto* and *Callaghan*, section 3(a) of the AMMA prohibits the denial of any "right or privilege" to a qualified patient, including, for example, the right to be free from disability discrimination. In addition, section 6(b)(2) of the AMMA provides that an employer is not required to accommodate the ingestion of marijuana *in a workplace* or an employee working *while under the influence* of marijuana. As noted by the *Barbuto* and *Callaghan* courts, the negative inference of this section may be that accommodation outside of the workplace or while the employee is not under the influence is not only permissible, but may actually be required.[32] Ultimately, it is possible that the AMMA's drug-testing safe harbor may be sufficient to overcome a *Barbuto*- or *Callaghan*-like outcome (neither court considered a similar statutory safe-harbor), but until an Arkansas court rules on these issues, a cautious approach is warranted.

Finally, consistent with an overarching desire to ensure safety in the workplace, the AMMA added a safe harbor permitting an employer to categorically exclude qualifying patients from "safety sensitive" positions.[33] The Amendment defines safety sensitive broadly to incorporate essentially any position identified by any federal or state agency as safety sensitive, as well as any position designated in writing by an employer as safety sensitive, including, for example, any position that requires carrying a firearm, performing "life-threatening procedures" or operating machinery.[34] Importantly, for purposes of excluding an employee from a safety-sensitive position, a positive test result for marijuana creates a presumption that the

employee is engaging in the "current use of marijuana" and can therefore be excluded without additional evidence or consideration. In addition, although the AMMA includes a requirement that the safety sensitive designation be in writing, at least one court has suggested that a written policy may not be necessary. In particular, in *Barbuto*, the court observed that the employer could overcome any requirement to accommodate a claim of disability necessitating medical marijuana use if it could offer evidence that marijuana use would pose an "unacceptably significant safety risk to the public, the employee or fellow employees."[35] Whether such an argument would work in Arkansas, where a statute sets forth specific guidelines to qualify for the safe harbor, remains unclear.

Conclusion

The AMMA attempts to address many of the inherent problems with medical marijuana in the workplace, problems that states like California, Colorado, Oregon and Washington opted to ignore. Nonetheless, significant questions of interpretation and application remain. Until Arkansas courts have evaluated some of the issues identified above, employers and employees alike would be wise to take into account the lessons learned from some of the more recent cases and tread carefully. However, even if Arkansas courts follow the lead of courts in states like Massachusetts which have been more willing to protect medical marijuana use in the workplace, the specter of federalism and the U.S. government's ability to disable the entire industry is ever-present.[36]

Endnotes:

1. Author's note: It was totally intentional.
2. *See* Justin McCarthy, *Record-High Support For Legalizing Marijuana Use in the U.S.*, Gallup (Oct. 25, 2017), http://news.gallup.com/poll/221018/record-high-support-legalizing-marijuana.aspx (reporting on the results of a survey conducted in October 2017 that revealed record high levels of support for marijuana legalization, including over 51% support by those who identified as Republican).
3. The Supreme Court already has ruled in favor of the federal government in *Gonzales v. Raich*, 545 U.S.1, 125 S. Ct. 2195 (2005). Accordingly, any change to the balance of power between state marijuana laws and the federal prohibition set forth in the Controlled Substances Act must come from Congress.
4. The first licenses to cultivate medical marijuana are anticipated to be awarded in late February 2018, with dispensary licenses to follow approximately 90 days later.
5. The other states are Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York and Rhode Island.
6. *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012).
7. *James v. City of Costa Mesa*, 684 F.3d 825 (9th Cir. 2012).
8. *Ross v. RagingWire Telecomm., Inc.*, 174 P.3d 200 (Cal. 2008).
9. *Brandon Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015).
10. *Johnson v. Columbia Falls Aluminum Co., LLC*, 2009 Mont. LEXIS 120 (Mont. Mar. 31, 2009).
11. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Ore. 2010).
12. *Callaghan v. Darlington Fabrics Corp.*, 2017 R.I. Super. LEXIS 88 (R.I. Sup. Ct. May 23, 2017).
13. *Barbuto v. Advantage Sales and Mktg.*, 78 N.E.3d 37 (Mass. 2017).
14. *Noffsinger v. SSC Niantic Operating Co. LLC*, 2017 U.S. Dist. LEXIS 124960 (D. Conn. Aug. 8, 2017).
15. *See, e.g., Emerald Steel*, 230 P.3d 518.
16. *See, e.g., Callaghan*, 2017 R.I. Super. LEXIS 88; *Noffsinger*, 2017 U.S. Dist. LEXIS 124960.
17. 2017 U.S. Dist LEXIS 124960, at *14.
18. *See Callaghan*, 2017 R.I. Super. LEXIS 88, *44.
19. *See* AMMA at § 3(f)(3)(D).
20. *See, e.g.*, Ark. Code Ann. § 16-123-107(b) (providing explicit private right of action for employment discrimination.)
21. *Barbuto*, 78 N.E.3d at 48; *Callaghan*, 2017 R.I. Super. LEXIS 88, *5; *Noffsinger*, 2017 U.S. Dist. LEXIS 124960, *22.
22. AMMA at § 3(f)(3)(B)(ii).
23. *Id.* at § 2(23)(C).
24. *Id.* at § 2(26)(B).
25. *See* Stacy A Hickox, *Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment*, 29 Hofstra Lab & Emp. L. J. 273, 299 (2012).
26. AMMA at § 3(f)(3)(B)(i).
27. 78 N.E.3d 37 (Mass. 2017).
28. *Id.* at 45–47.
29. *Id.* at 47–48.
30. 2017 R.I. Super. LEXIS 88 (R.I. March 23, 2017).
31. *Id.* at *25–27.
32. *Barbuto*, 78 N.E.3d at 46; *Callaghan*, 2017 R.I. Super. LEXIS 88 at *21–22.
33. AMMA at § 3(f)(3)(C).
34. AMMA at § 2(25).
35. *Barbuto*, 78 N.E.3d at 47–48.
36. Stephanie Francis Ward, *New US Attorney Issues Apparent Warning as Massachusetts Prepares For Legalized Marijuana*, ABA Journal (Jan. 9, 2018), http://www.abajournal.com/news/article/ (reporting that the Trump-appointed U.S. Attorney for Massachusetts stated that legal marijuana sellers could face criminal prosecution in Massachusetts, consistent with Attorney General Sessions' recent memo.) ■