

# EMPLOYEES SELF-MEDICATING WITH ADULT USE MARIJUANA CREATES PITFALLS FOR EMPLOYERS AND EMPLOYEES

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Currently, 38 states have permitted use of medical marijuana in their states and many of those states provide some level of protection to employees who use medical marijuana from being discriminated against in their employment as a result of their use of it outside of work.<sup>1</sup> In addition, there has been an increase in the number of states that now also permit adult use or recreational use of marijuana and currently 24 states have permitted this at some level and other states are considering doing the same, but many of those states do not address employment implications in their statute.<sup>2</sup> This puts employers and employees in a difficult spot for an employee who self-medicates with adult use marijuana, given that most states provide clear direction as to what protections, if any, employees who use medical marijuana have, but these protections may not apply in the context of adult use or state law may not address this issue at all. This issue could be more prevalent than expected. For example, a study found that in Canada, which has both medical and adult use marijuana, more than half of employees using marijuana to treat symptoms of a work-related injury were doing so through adult use laws rather than medical marijuana.<sup>3</sup> It has been suggested that about one-fourth of people in North America have self-medicated with the use of marijuana outside of state sanctioned medical marijuana programs.<sup>4</sup> This raises important issues for both employees and employers in this context as recreational use marijuana becomes legal in more and more states and thus more widely available.

First, on its face it is conceivable that a jury or judge may find it troubling that an employee who obtains a medical marijuana card in their state will have legal protections from adverse employment actions, but another employee who self-medicates using the same or similar product for the same condition by purchasing it legally through a state's adult use law will have no legal protections in their employment. That said, most states provide additional protections for employees who use medical marijuana that are not provided to those who use recreational marijuana or state law is silent if there are any protections. As a result, employees who self-

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<sup>1</sup> "State Medical Cannabis Laws" National Conference of State Legislatures Report (Jun. 22, 2023) (available at <https://www.ncsl.org/health/state-medical-cannabis-laws>) (last accessed Feb. 2, 2024).

<sup>2</sup> *Id.*

<sup>3</sup> "Injured workers are using cannabis to self-medicate, study shows" Safety + Health (Oct. 16, 2023) (available at <https://www.safetyandhealthmagazine.com/articles/24598-injured-workers-are-using-cannabis-to-self-medicate-study-shows>) (last accessed Feb. 8, 2024).

<sup>4</sup> "Survey: More Than One in Four North Americans Self-Report Having Used Cannabis for Medical Purposes" NORML (Jan. 20, 2022)(available at <https://norml.org/news/2022/01/20/survey-more-than-one-in-four-north-americans-self-report-having-used-cannabis-for-medical-purposes/>) (las accessed Apr. 6, 2024).

medicate with adult use marijuana could be taking a significant risk that may jeopardize their employment. For example, in the case of King v. HCA,<sup>5</sup> it was found that an employee was properly fired when he admitted that he was self-medicating with adult use marijuana and did not have a medical marijuana prescription. In addition, depending upon the state medical marijuana may be more expensive than recreational use and are often more expensive than illegally purchased products.<sup>6</sup> On the flip side, employers could run a risk of sympathy taking over in any type of litigation and where state law is silent concern about employees being terminated for off hour conduct and should ensure that employees are well advised as to the employer's policy regarding adult use marijuana and that it will not be treated in the same manner as medical marijuana, to the extent that is permissible under your state law.

Second, even if an employee self-medicating with adult use marijuana does not have the legal protections afforded under the medical marijuana statute, the employee may have some protections if the condition that they use the marijuana for is a disability under the ADA, Section 504, or a state law anti-discrimination law.<sup>7</sup> This puts employers in a tough spot as the question that will be asked: was the employee fired for use of marijuana, which may be permissible reason to fire, or where they fired because of the disabling condition for which they were using the marijuana, which is not a permissible reason for termination.<sup>8</sup> This is especially problematic if the employer knew of the disabling condition prior to learning of the marijuana use.<sup>9</sup> In any context, even if it is found the employer acted properly, most of the time this factual dispute may be enough to get the case to a jury, which time consuming, costly, and risky for both the employee and employer, irrespective of who ultimately prevails.

As a result, when state legislatures legalize adult use marijuana, they should consider how this issue will impact employment and the interplay between medical marijuana laws and adult use marijuana laws and address these issues clearly in their statutes, although many currently do not. In addition, employers should be sure to advise employees of policies around both medical marijuana and adult use marijuana, understanding that these rules will vary from state to state and should be clear, to the extent permitted under your state law, that recreational use of medical marijuana will be addressed differently than medical use in the workplace. In addition, employees who are or are considering self-medicating with adult use marijuana should

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<sup>5</sup> King v. HCA, 825 F. App'x 733, 735 (11th Cir. 2020).

<sup>6</sup> Merritt Enright, Nigel Chiwaya and Robin Muccari, "Ridiculous' price of medical marijuana leaves patients scrambling" NBC News (Jul, 17, 2022)(available at <https://www.nbcnews.com/news/us-news/ridiculous-price-medical-marijuana-leaves-patients-scrambling-n1274085>) (last accessed on Apr, 6, 2024).

<sup>7</sup> See Jacobson v. City of W. Palm Beach, No. 16-CV-81638, 2017 WL 6366841, at \*5 (S.D. Fla. May 16, 2017), aff'd, 749 F. App'x 807 (11th Cir. 2018); Barbuto v. Advantage Sales & Mktg., LLC, 477 Mass. 456, 457, 78 N.E.3d 37, 40 (2017).

<sup>8</sup> Id.

<sup>9</sup> Id.

be well aware of their employer's policies regarding this issue, comply with them, and may very well be advised to take steps to comply with applicable medical marijuana laws instead if they wish to ensure that they will qualify for the protections of medical marijuana laws in their employment.