

Medical Marijuana: Where are we now? What might the future hold?

By: Steve Smith on October 11, 2018 on graydon.law

Employers in Ohio are entitled to a drug free workplace and the enforcement of a zero-tolerance policy. That does not make it easy, however, to control. To date, there is not a real-time test to indicate whether a person is “high” in the present tense, only to know if they have used in the past. And not all testing is equal. What will employers will do when trusted and valued employees and executives are known to have used marijuana legally? That is a tricky question and a moving target. For now, however, it is important to know that Ohio employers are protected, and need not tolerate even one ounce of marijuana in their workplace. Stated conversely, no Ohio citizen has the right to use legal medical marijuana and consider their employment secure.

As I predicted in my July, 2018 interview with [Ohio Cannabusiness Magazine](#), however, the fight over legal marijuana use and the workplace is on. The full interview [can be found here](#). Businesses in states with varying types of legal marijuana production and use laws are grappling with the regulation of the workplace. Couple the desire for a drug free workplace with the expansion of legal marijuana and extremely low unemployment, and the tension rises. No employer wants to terminate valued employees.

The states with legal marijuana laws are almost certainly going to see challenges, over and over again, until the states laws are in sync with one another, and collectively in sync with federal laws. This could literally take decades. Employers are caught in the middle of trying to do the right thing for safety, efficiency, insurability, and regulatory compliance, and also not discriminate. And the discrimination aspect varies so employers with facilities in multiple states confront different issues still. In Ohio, employers are less at risk because the statute, known as House Bill 523, explicitly denies an employee’s right to use legal cannabis against an employer’s policy, and explicitly cuts off all avenues for employees to seek redress if they feel discriminated against, are injured while using marijuana, or suffer any adverse employment action. Nationwide, however, statutes differ, and there are nine states where the worker’s right to use marijuana, legally under that state’s system, is protected activity.

Connecticut is one of those nine states. There, for example, a woman named Katelin Noffsinger, with a job offer in hand from a nursing home called Bride Brook, was honest

about using medical marijuana in the evening to relieve lingering effects of an automobile accident. The employer rescinded the offer of employment after the required drug screen came back positive. *Bride Brook's* rationale, oversimplified, was that because there are federal dollars and regulations at play in the nursing home industry, employing a person who uses a federally illegal substance can put funding at risk, etc. It makes sense, but not so fast, Connecticut has an anti-discrimination provision built into the marijuana legislation. The federal court ruled that the employer violated anti-discrimination provisions in Connecticut's medical marijuana law. This is a first. The court ruled that the Drug Free Workplace Act, oft cited by employers for policies on drug testing, does not require testing, nor does it prohibit federal contractors from employing people using legal marijuana under a state's authority.

Nationwide, however, there are only nine states in line with Connecticut's protection of a citizen's right to use legal marijuana. In the rest of the continental 50 states, employees are at risk for legal use of marijuana pursuant to state law. The issue promises to percolate nationally until the federal government either declassifies marijuana, or enforces the laws on the books today. Just as likely, split decisions from United States Circuits will eventually reach SCOTUS for an old fashioned 10th Amendment fight. The latter would be a different fight altogether.