LEGAL PERSPECTIVE

MEDICAL MARIJUANA SAFETY EXCEPTIONS: WHAT CONSTRUCTION INDUSTRY EMPLOYERS NEED TO KNOW

BY DENISE ELLIOTT AND DAVID LEVINE

The Pennsylvania Medical Marijuana Act (MMA) was passed in 2016. At the time of passage, and still now, the number one question employers ask: what do we do with employees who use medical marijuana and who perform safety sensitive positions? Employers tend to be most concerned about employees who drive as an essential function of their job and those who operate heavy equipment and machinery.

While the MMA contains what has come to be known as "safety sensitive exceptions"; these exceptions do not provide employers with the answers or certainty they would like. Before we dive into the exceptions, here's a brief recap of Pennsylvania's current medical marijuana system.

First, the MMA uses the term "patient" to refer to anyone who has gone through the steps to become a certified medical marijuana user. This means the individual has done the following: (1) registered online and received a patient ID number; (2) attended an appointment with a certified physician who has confirmed that the patient suffers from one of the enumerated health conditions set forth in the statute (which include conditions like PTSD, chronic and intractable pain, seizure disorders, irritable bowel syndrome and anxiety) and that the patient will be under the continuing care of a medical professional; and (3) paid a fee to the state to obtain the PA Medical Marijuana Patient ID Card. Patients may select a physician with whom they have no prior relationship, and attend the visit via telehealth, to satisfy this portion of the process.

Second, once a patient is certified and has their ID card, they do not receive a prescription or a recommendation from their provider for the type of medical marijuana they should use to treat their condition. Rather, the patient takes their ID card to the dispensary of their choice, and it is the medical professional and other staff on site at the dispensary who helps the patient select their product.

Finally, while patients may obtain up to a 90-day supply, the cost of medical marijuana makes obtaining such amounts unlikely. Dispensaries offer frequent buyer programs, sales and discounts, making it more likely that patients will visit the dispensary more frequently to purchase smaller quantities of product.

Is an Employee "Under the Influence"?

When considering safety sensitive exceptions, Section 510(3) of the MMA states that "a patient may be prohibited by an employer from performing any task which the employer deems life-threatening, to either the employee or any employees of the employer, while under the influence of medical marijuana." Further, Section 510(4) states that "a patient may be prohibited by an employer from performing any duty which could result in a public health or safety risk while under the influence of medical marijuana." Arguably, either of these sections could apply to employees who drive a vehicle or operate heavy equipment/machinery as part of their work duties. So, what is the problem? "Under the influence" is not defined! The Pennsylvania Superior Court has provided guidance; but it is still not definitive under the MMA.

In the summer of 2022, the Superior Court issued decisions in three criminal DUI cases — Commonwealth v. Dabney and Commonwealth v. Haney (published decisions) and Commonwealth v. Gordon (unpublished decision) — that specifically caught the attention of employers with employees who drive. The Superior Court addressed whether Pennsylvania's zero-tolerance DUI law includes an exception for drivers legally using marijuana under the MMA. In each case, the driver was stopped and questioned, the police officer established probable cause to administer a drug test, the test was positive for THC and the driver was charged with DUI. The drivers argued that they were certified to use medical marijuana in accordance with the MMA and but for their legal medical use of marijuana, they would not have tested positive for THC.

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In analyzing whether an exception should be made to Pennsylvania's DUI laws, the courts noted language of the DUI statute which provides, "an individual may not drive, operate or be in actual physical control of the movement of a vehicle" when "there is in the individual's blood any amount

of a … Schedule I controlled substance" or a "metabolite" of a Schedule I controlled substance (75 Pa. C.S. Section 3802(d)(1)(i), (iii)). The court noted that all marijuana, medical or otherwise, is a Schedule I controlled substance under the Controlled Substances Act and nothing in the MMA changed this classification.

Addressing the argument that the legalization of medical marijuana necessarily conflicts with the DUI statute, the Dabney decision disagreed. The court referenced the actions specifically permitted by the MMA — growth, processing, manufacture, acquisition, transportation, sale, dispensing, distribution, possession and consumption of medical marijuana. Notably absent from the list of permissible actions is driving. In the Gordon decision, while acknowledging that the decision "may lead to harsh consequences for patients with a valid medical marijuana prescription," the Superior Court nonetheless upheld the DUI conviction noting that the DUI statute prohibits driving with marijuana metabolites in the blood, not the mere usage of medical marijuana. Finally, in Haney, the Court reiterated that "driving after using medical marijuana, a Schedule I controlled substance, is not included in the 'lawful use of medical marijuana' under the MMA." Accordingly, a driver convicted of DUI is "not denied any privilege solely for 'lawful use of medical marijuana.'"

Questions Remain Unanswered for Employers

Naturally, these court decisions caused concern among employers and the question arose: if medical marijuana patients can be arrested for DUI simply for having trace amounts of marijuana in their system, how can companies ethically allow employees who use medical marijuana (and will therefore test positive) to operate vehicles? If allowed to drive, wouldn't the company be knowingly allowing them to violate the law? Moreover, if they restrict medical marijuana users from driving vehicles, how can companies allow them to operate potentially more dangerous heavy equipment and machinery?

While these questions are logical and inherently reasonable, the answers weren't exactly clear, because Dabney, Gordon and Haney did not address the employment relationship or the safety sensitive exceptions in the MMA. Rather, they were criminal cases; and a judge evaluating a claim for employment discrimination in violation of the MMA would not be bound by their holdings.

That left employers still uncertain as to obvious questions; Are we allowed to have an employee operate construction equipment, if we know that they are legally using medical marijuana? And equally important, are we required to allow them to operate equipment?

Common Pleas Court Applies the Superior Court Guidance to the MMA's Safety Sensitive Exception

In January 2023, a Court of Common Pleas judge in Lancaster County extended the holdings of the DUI cases to dismiss a claim against an employer for employment discrimination in

violation of the MMA. In the case of Clark v. J.R.K. Enterprises, Clark, a traffic flagger, was terminated when he advised his employer that he could not pass a drug test due to his use of medical marijuana each evening. The employer designated the traffic flagger position as safety sensitive and terminated Clark's employment in accordance with Section 510 of the MMA, arguing that Clark's admission that he would test positive for THC was an admission that he would be under the influence. In his holding, Judge Jeffrey Wright cited the challenges of using testing to determine impairment from cannabis and reasoned that to "construe 'under the influence' to mean anything other than having any amount of marijuana in a safety sensitive patient-employee's system would be altogether unreasonable." Judge Wright relied on the decisions in Dabney, Gordon and Haney to support his holding. He noted "Dabney and Haney emphasize that for all the protections that the MMA provides to cardholders, the 'lawful use' of medical marijuana does not include driving after using medical marijuana. Lawful use of medical marijuana cannot, likewise, include dressing in safety gear, entering the roadway and directing drivers through precarious construction zones after using medical marijuana. Any other conclusion would be utterly irrational." Further supporting his holding, Judge Wright noted that the MMA's "catch-all" safety sensitive exceptions (Section 510(3) and (4)) do not include definitions of "under the influence."

Accordingly, he reasoned that by making a clear decision to omit a specific definition of under the influence, the General Assembly left employers to define the term. Without any scientific method to test or monitor for impairment, Judge Wright found that it is reasonable that employers would define "under the influence" as it is defined in the DUI statutes.

Six Considerations for Construction Industry Employers

So, what does all of this mean for employers who have employees in safety sensitive positions, specifically those who drive or operate construction equipment as part of their jobs? Simply, it means there is a compelling argument to be made that employees may be prohibited from doing so if they are using medical marijuana, and either actually test positive or will test positive on a drug test. The reasoning? Driving and operating heavy equipment are tasks that an employer could deem to be "life-threatening"; and "under the influence" can mean having any amount of marijuana in the employee's system. Accordingly, under Section 510(3) of the MMA, the employer can arguably prohibit the employee from performing those jobs. While this argument is quite compelling in light of the DUI decisions and decision in Clark, a few notes of caution:

1. While an argument can be made, employers should be mindful that the law remains unsettled in this space. Dabney, Gordon and Haney are criminal cases; the Clark decision is a county level case; not a state appellate court case. The decisions are not binding on the Commonwealth Court, the Superior Court or a federal

court addressing the impact of Section 510 on a claim for discrimination under the MMA.

2. The DUI cases turned on the language in the DUI statute, which references marijuana as a Schedule I drug. Notably, however, the federal government is actively engaged in the process of rescheduling marijuana to Schedule 3. Though this has not happened yet, it is anticipated that the rescheduling will happen by the end of 2024. What impact this will have on these holdings and the arguments available to employers based on those holdings is not yet known.

3. While the argument is strong — at least for now — for prohibiting an employee who utilizes medical marijuana from driving, due to the clear definition of "under the influence" in the DUI statutes, it is unclear whether other courts will be persuaded by Wright's argument for an extension of the rationale to other safety sensitive positions like operating construction equipment or traffic protection.

4. Employees who utilize medical marijuana likely have a serious health condition that would qualify as a disability. Accordingly, employers must consider whether the employee can perform the essential functions of the job with or without reasonable accommodation. Ignoring the employee's use of medical marijuana may not be a reasonable accommodation, but that does not mean other accommodations should not be considered. For example, is there another job to which the employee can transfer, or might a leave of absence be reasonable?

5. The language in Section 510 is that employers 'may prohibit,' not that they must prohibit. Moreover, because "under the influence" is not specifically defined, employers remain able to define it as something other than a positive drug test. Accordingly, if an employee is able to provide certification from their healthcare provider that off-duty use of medical marijuana will not cause them to be impaired or otherwise pose a risk to their safety or the safety of others while working, an employer may consider relying upon such certification and allowing the employee to consider performing their job. But an employer might also ask whether such reliance is in the best interest of the project, other employees or the public.

6. Finally, for any positions that require a commercial driver's license (CDL) or are otherwise regulated by the U.S. Department of Transportation (DOT), there remains zero tolerance for use of marijuana, medicinal or otherwise, by such drivers. The DOT has published memoranda making it clear that it will not make exceptions to its drug testing policies for either medical or recreational marijuana. The MMA includes a provision that employers do not have to engage in activities that would violate federal law. Accordingly, employers may prohibit medical marijuana users from performing jobs that require a CDL.

Seek Legal Counsel

With so many questions related to medical marijuana and its impact on the workplace, employers must stay up to date on the latest developments. Companies should consult with their legal counsel to make decisions that minimize the risk of liability, protect the safety of employees and the public and are respectful of the rights and privileges of their employees. The legal landscape is frequently changing in this space, within states and from state to state. Employers should consider the following steps to ensure they stay compliant with the current laws:

- Review and revise drug testing policies
- Review and amend job descriptions to highlight essential functions that are safety sensitive
- Implement a robust reasonable suspicion drug testing program, which includes training of managers and supervisors on how to detect impairment, how to document suspicion of impairment and steps to take to send a potentially impaired employee for testing
- When in doubt, call your legal counsel BG

Denise Elliott is a labor and employment attorney at McNees Wallace & Nurick and a member of the PA Chamber's Medical Marijuana Task Force where she is actively involved in discussions on medical marijuana in the workplace. Denise can be reached at delliott@mcneeslaw.com or 717-581-3713. David Levine is a construction law attorney in McNees Wallace & Nurick's Pittsburgh office. David can be reached at dlevine@mcneeslaw.com or 412-227-2501.