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Briefly

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STATES ARE GOING TO POT: MEDICAL MARIJUANA LAWS POSE INCREASED RISKS FOR UNWARY EMPLOYERS

L. Eric Ebbert

"The conflicting laws between the federal and state governments, and the lack of uniformity in these laws, creates potential traps for the unwary employer."

Legislation allowing marijuana use is sweeping across America. And it may have unexpected consequences for employers. Currently 33 states plus the District of Columbia have legalized medical use of marijuana. These states typically require patients to be certified by a physician and to register with the state. Some states provide workplace protections to employees who lawfully use marijuana for medicinal purposes.

In addition, ten states and the District of Columbia have approved recreational use of marijuana for adults who are 21 years and older. These laws may even allow individuals to grow their own marijuana. To date, none of these statutes provides workplace accommodations.

Federal law still prohibits the distribution and possession of marijuana, regardless of its use. Notwithstanding federal law, the Obama administration issued a memo directing federal prosecutors not to target adults who grow and use marijuana in compliance with state laws. Prosecutors, though, were encouraged to prevent marijuana sales to minors. Although the Trump administration rescinded the memo, states continue to pass laws legalizing marijuana use.

Chance v. Kraft Heinz Foods Company

The conflicting laws between the federal and state governments, and the lack of uniformity in these laws, creates potential traps for the unwary employer. The case of *Chance v. Kraft Heinz Foods Company* demonstrates this problem.

Kraft Heinz Foods Company employed Jeremiah Chance as a yard equipment operator. Chance suffered from numerous medical problems including various back problems. Because of his health issues, he obtained a valid medical-marijuana card in 2016 pursuant to Delaware's Medical Marijuana Act. He also took leaves of absence on several occasions under the Family and Medical Leave Act and used short-term disability benefits.

As a yard equipment operator, Chance operated a shuttle wagon on the company's railroad tracks. Chance derailed a shuttle wagon. Because of the incident and presumably pursuant to company policy, management requested that Chance take a drug test. The test was inconclusive which caused the company to request a second drug test. Three days after the first drug test, the second test was administered. Four days later, a company medical review officer informed Chance that he had tested positive for marijuana use. Chance advised the medical review officer that he was authorized to use medical marijuana pursuant to Delaware's Medical Marijuana Act and provided the medical review officer with a copy of his state-issued card. Approximately ten days later, the company terminated Chance for failing the drug test.

Thereafter, Chance filed a discrimination charge with the Delaware Department of Labor Office of Anti-Discrimination and with the federal Equal Employment Opportunity Commission. Both government agencies issued Chance a right-to-sue letter. Accordingly, Chance filed suit within 90 days. He sued Kraft Heinz Foods Company for violation of Delaware's Medical Marijuana Act among other causes of action. Unlike the medical marijuana statutes of most other states, the Delaware act prohibits employers from discriminating against employees who use medical marijuana as authorized by the Act.

Kraft filed a motion to dismiss the claim under the Delaware Medical Marijuana Act. A motion to dismiss challenges a cause of action on legal grounds assuming that the allegations of the complaint are true. In this case, Kraft asserted that the Medical Marijuana Act claim failed because it is preempted by federal law: specifically, the Controlled Substances Act. Pursuant to the Supremacy Clause of the U.S. Constitution, federal laws override state laws. So Kraft argued that Delaware's

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THE EVER-EVOLVING RULES OF ARBITRATION AGREEMENTS - AND IMPLICATIONS FOR EMPLOYERS

Mary Celeste Moffatt

"[T]hese cases illustrate the importance of ensuring well-crafted and enforceable arbitration provisions."

The Supreme Court recently issued two arbitration decisions of potential significance to employers. As background, the Federal Arbitration Act of 1925 (FAA) allows parties to agree to resolve their disputes through arbitration rather than taking action through the court system. While there are limits to compelling arbitration, the FAA generally requires courts to enforce private arbitration agreements, as illustrated by the following discussion.

Employers may recall in recent years, the Supreme Court has shown a favorable approach to arbitration, as reflected in the 2018 decision of *Epic Systems Corp. v. Lewis*, where the Supreme Court upheld individualized arbitration agreements between an employer and its employees, finding neither the "savings clause" under the FAA, nor the National Labor Relations Act override that enforcement. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

On January 8, 2019, the Supreme Court issued another pro-arbitration opinion in *Schein et al. v. Archer and White Sales, Inc.*, 586 U.S. __ (2019). The *Schein* case arose from a contractual dispute between two parties wherein the Plaintiff, Henry Schein, alleged violations of federal and state antitrust law and sued Archer and White Sales, Inc. for money damages and injunctive relief.

The contract between the parties provided for arbitration but Archer and White argued the dispute was not subject to arbitration because the complaint sought injunctive relief, which was an exception to the contractual arbitration provision. Schein argued the arbitrator, not a court, should decide whether the arbitration agreement applied. The District Court agreed with the Defendant and denied Schein's motion to compel arbitration; the Fifth Circuit Court of Appeals affirmed. However, the United States Supreme Court reversed, holding that arbitration is a matter of contract and that courts must enforce arbitration contracts according to their terms with no ability to override the contract even if a court of law finds the arbitrability claim to be "wholly groundless." Thus, the Supreme Court ruled that the decision of arbitrability in this case rested with the arbitrator, not a court.

In its second 2019 opinion regarding arbitration provisions, the Supreme Court ruling took a slightly different turn. In the case of *New Prime Inc. v. Oliveira*, 586 U.S.____, (2019), the Court determined that independent contractors who work in transportation, such as truck drivers, may not be forced into mandatory arbitration. As an exception to its broad application, Section 1 of the FAA provides that "nothing herein…shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Based on its interpretation of Section 1, the Court found in favor of Oliveira in this case, a truck driver who worked for New Prime under an operating agreement in which he was identified as an independent contractor. The Court noted that when the FAA was originally written in 1925, it did not distinguish between employees and contractors, and thus the Court interpreted the exception under Section 1 to encompass independent contractors. The decision was considered a victory for employees because it enables individual contractors who work in transportation to avoid mandatory arbitration provisions.

While the two cases may appear to be at odds, they are in fact distinguishable. *Schein* required the Court to interpret the contractual agreement between the parties, while *New Prime* called upon the Court to interpret and apply a statutory exception in the FAA itself.

Businesses in general, and particularly employers, often prefer arbitration over litigation in court because it tends to be faster and less expensive. Cases such as these demonstrate how complex procedural issues can create disputes over arbitration provisions and thus, these cases illustrate the importance of ensuring well-crafted and enforceable arbitration provisions.

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KNOW YOUR ATTORNEY
ANDREW J. HEBAR

ANDREW J. HEBAR is a Member in the Knoxville, Tennessee office of the firm, joining in June 2008. His law practice includes an emphasis on workers' compensation defense, employment law, general civil practice and subrogation. Andrew is a native of Black Creek, Wisconsin and a 1997 graduate of the National Academy of Railroad Sciences in Overland Park, Kansas. He worked several years with the Burlington Northern and Santa Fe Railway as a switchman, foreman, conductor, and locomotive engineer. Andrew graduated *summa cum laude* with a B.B.A. in Business Management from the University of Memphis in 2002, as the top student in the Business Management program. He also minored in Political Science and received top student recognition in that program. He obtained his Doctor of Jurisprudence degree from the University of Tennessee College of Law in Knoxville, Tennessee, graduating in 2005. Andrew worked in various positions in the subrogation department of a large insurer of commercial trucking before reaching a position as in-house subrogation counsel prior to entering the private practice of law. Andrew is a member of the Knoxville Bar Association.

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Medical Marijuana Act improperly authorized conduct that was prohibited by federal law, i.e., by authorizing the use of marijuana and requiring employers to accommodate that use. In rebuttal, Chance argued that Kraft's analysis was overbroad and that the anti-discrimination provisions of the state statute do not violate federal law.

The Court's Analysis

Federal law regulates the use and possession of drugs, including marijuana. These drugs are called "controlled substances." The law states that it is unlawful to manufacture, distribute, dispense, or possess controlled substances except as provided by the Controlled Substances Act. Under the Controlled Substances Act, marijuana is a *schedule 1 substance* and the act does not allow any exceptions, including for the medical use of marijuana.

In contrast, the court acknowledged that the Delaware statute provides "for the distribution, possession, and use of marijuana for medical purposes." The state act further prohibits employers from discriminating against employees in hiring, firing, or any other term or condition of employment who are card-carrying users of medical marijuana or card-carrying users of medical marijuana who test positive for marijuana use. But if the employee possesses or uses marijuana or is impaired while on the employer's premises or during the employees scheduled shift, employers may discipline employees.

The court acknowledged that upon a cursory review the Delaware act appears to be in direct conflict with federal law. But the court reasoned that such a view is overbroad, because the only part of the statute at issue in the Chance case was the anti-discrimination provision. And the court was not called upon to review the statute as a whole. The court reasoned that in its preemption analysis, it need only consider the extent to which the state law contradicts federal law and that the court should not invalidate the state statute any more than necessary to resolve the pending case. So, the court limited its review of the Delaware act solely to the provision regarding employment discrimination.

The court further explained that although federal law does not authorize the medical use of marijuana, it does not prohibit the employment of marijuana users, and the federal statute does not attempt to regulate employment matters. The court thus concluded that the anti-discrimination provisions of Delaware's Medical Marijuana Act are not in conflict with federal law and do not interfere with the goals of Congress. Therefore, the court denied Kraft's motion to dismiss Chance's discrimination claim. The case will proceed to discovery, allowing the parties to learn the facts and analyze the strengths and weaknesses of their positions, and ultimately to decide whether to file dispositive motions, settle the case, or proceed to trial.

Practical Tips

Notwithstanding the holding of the *Chance* case, employers should not immediately toss out their drug policies.

1. *Know the Law*

Thirty-three states plus the District of Columbia have passed laws permitting medical marijuana use and, in some jurisdictions, recreational use. The laws are not uniform and, in some instances, like the Delaware act, give rise to employer liability for discriminating against card-carrying marijuana users. And in states like Tennessee, marijuana use is not authorized. Thus, employers must be aware of the laws governing marijuana use in the jurisdictions in which they have employees. And they must ensure that their policies do not violate those laws.

2. *Consider Focusing Your Policies on Impairment*

Even though the majority of states have passed medical marijuana laws, none of the laws prohibit an employer's right to discipline an employee for being impaired while at work. Unlike alcohol, a positive drug test for marijuana does not necessarily mean that the employee was impaired at the time of the test. Evidence of marijuana use remains in the human body long after its effects have dissipated. So instead of having a policy that disciplines employees for a positive marijuana drug test, consider modifying your policy to discipline employees who are impaired while at work.

A drug test confirming marijuana use should only be one factor in determining whether an employee is impaired. Employers should rely on common short-term symptoms of marijuana use as evidence of impairment: "panic, anxiety, poor muscle and limb coordination, delayed reaction times and abilities, an initial liveliness, increased heart rate, distorted senses, [and] red eyes." https://americanaddictioncenters.org/marijuana-rehab/how-to-tell-if-someone-is-high. If an employee manifests common symptoms of marijuana use, then the employer may use a drug test to confirm the employee's impairment.

By being aware of the applicable medical marijuana laws and amending policies to focus on impairment, employers can avoid a new breed of discrimination claims.