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Briefly

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"Navigating the specific requirements and exemptions under state and federal law for each workplace situation is crucial to avoid potential liability ..."

IMPACT OF STATE LEGALIZATION OF MARIJUANA ON EMPLOYER SUBSTANCE ABUSE POLICIES

There is a growing trend among states to decriminalize marijuana use. Currently, 17 states and the District of Columbia have legalized the recreational use of marijuana. Also, 36 states and D.C. now permit medical marijuana use.

Unfortunately, each state's law is different, which creates a potential compliance nightmare for employers with multi-state facilities. Such employers should work closely with their employment lawyers to clarify each state's laws and their interaction with federal legislation. Navigating the specific requirements and exemptions under state and federal law for each workplace situation is crucial to avoid potential liability, as demonstrated in the Eccleston case discussed below.

A recent decision from the Federal District Court in Connecticut demonstrates some of the risks associated with discharge of an employee who tests positive for medically approved use of marijuana. The plaintiff, Eccleston, was employed with the City of Waterbury as a firefighter. During his employment, he obtained a Connecticut Registration Certificate for medical marijuana for treatment of PTSD. Eccleston then tested positive for marijuana as part of an employer sponsored random drug test. Despite being a registered user of medical marijuana, Eccleston's employment was terminated by the City based on "use of marijuana such that it has endangered the health and wellbeing of others."

Eccleston filed suit in Federal Court alleging ADA discriminatory discharge, ADA failure to provide reasonable accommodations, ADA retaliation, as well as violations of the Connecticut Fair Employment Practices Act and the Connecticut Palliative Use of Marijuana Act. The City filed a motion to dismiss, asserting that Eccleston was not a qualified individual under the ADA because of his use of medical marijuana.

In ruling on the motion to dismiss, the District Court examined the ADA, noting that it provides that "a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." Further, the ADA defines illegal drug use by reference to the Controlled Substances Act, which classifies marijuana as a Schedule I illegal substance. The Court noted that the ADA "makes no exception for illegal drug use caused by an underlying disability, and instead explicitly provides that an employer may drug test employees and terminate employment on the basis of illegal drug use without violating the ADA."

In addition, although "*the ADA provides a clear exception for drug use under the supervision of a physician, federal law still explicitly prohibits the use, possession and distribution of marijuana, even for medical purposes.*" While many states have moved toward the legalization and regulation of marijuana for medical purposes, the Court recognized that many federal courts in other jurisdictions have "concluded that the ADA provides no protection against discrimination on the basis of medical marijuana use, even where that use is state-authorized and physician-supervised." The Court stated that "because medical marijuana does not fit within the supervised-use exception and remains illegal under federal law, an individual who uses medical marijuana cannot state a *prima facie* case under the ADA for discrimination on the basis of medical marijuana use." The Court held "that the ADA does not protect medical marijuana users who claim to face discrimination *on the basis* of their marijuana use." However, the Court decision clarified that medical marijuana users are still protected from discrimination based on their underlying disability.

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Eccleston's claim for ADA discrimination based on his underlying disability was likewise dismissed by the Court, as he could not demonstrate that his employer had knowledge of his diagnosis of PTSD. The Court noted that knowledge of the medical marijuana registration certificate is not the same of as knowledge of the underlying medical diagnosis, as the certificate which Eccleston presented to his employer did not reference his diagnosis of PTSD or even list the conditions establishing eligibility for such a registration card.

The Court also dismissed Eccleston's failure to accommodate claim, noting that multiple courts dealing with this issue have concluded "using marijuana is not a reasonable accommodation." The Court "held that the ADA cannot be read to affirmatively require an employer to accommodate the use of a substance deemed illegal under federal law."

Eccleston's claim for ADA retaliation was also dismissed, as Eccleston never informed his employer that he had PTSD and never sought accommodations for that disability. Therefore, he failed to establish that he engaged in protected activity for purposes of the ADA.

Eccleston's federal law claims were dismissed with prejudice and the District Court declined to exercise jurisdiction over the state law claims. Therefore, Eccleston can refile his state law claims in state court.

Most of the states that have legalized either the medical or recreational use of marijuana have not restricted the ability of employers to refuse to hire an applicant or terminate an employee who tests positive for marijuana. For example, Virginia's new law which goes into effect on July 1, 2021, decriminalizes possession of small amounts of marijuana for recreational use. However, nothing in Virginia's law prevents an employer from enforcing substance abuse policies and it does not prevent employers from requiring that employees not use or be impaired by marijuana at work.

However, a few state laws which legalize marijuana use provide employment protections for applicants and employees. For example, the latest state to decriminalize marijuana use is New York, whose new law was signed by Governor Cuomo on March 31, 2021. This law follows a recently enacted New York City law banning employers from testing for marijuana or THC as a condition of employment. New York state's law not only legalizes recreational marijuana use by adults, but it also specifies that it is illegal for employers to discharge, refuse to hire or otherwise discriminate against employees based on off-duty and off-premises marijuana use. However, New York state's law allows employers to legally take employment action when an employee is "impaired," and "manifests specific articulable symptoms," while working that decrease work performance or interfere with an employer's legal obligation to provide a safe and healthy workplace.

A majority of states at this time do not require employers to make accommodations for employees who legally use marijuana for medicinal purposes. However, a few, including Massachusetts and New York, provide legal protections to medical marijuana users and require employers to engage in an interactive process to see if a reasonable accommodation can be provided under the circumstances. New York and New Jersey both prohibit employers from taking adverse actions against employees who engage in lawful recreational use as well as medicinal use of cannabis.

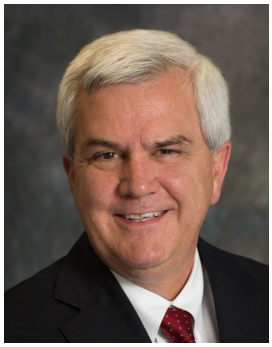
The Biden administration has also pledged to legalize marijuana as part of his social justice initiatives. Vice-President Harris supports the Marijuana Opportunity Reinvestment and Expungement (MORE) Act, which passed the House of Representatives on December 4, 2020; however, this legislation did not advance in the Senate. If federal legislation is passed which de-schedules and decriminalizes marijuana, employers will have new obligations under the ADA, as the rationale applied in the *Eccleston* decision referenced above may no longer apply. However, given the number of other pressing issues for Congress to consider, it is not anticipated that this will occur during 2021.

Yet substance abuse continues to be a societal problem. Employee substance abuse costs employers billions of dollars each year in lost revenue due to employee turnover, absenteeism, lack of productivity, accidents, injuries, and workplace fatalities. Moreover, employee substance abuse presents unique challenges and risks to employers, all of which justify adoption and implementation of substance abuse policies and procedures in the workplace. Employers have a legal obligation to maintain a safe workplace. Those who are federal contractors also have an obligation to comply with the Drug Free Workplace Act. Various legal, health and safety concerns certainly recommend in favor of strong substance abuse policies in the workplace.

What is an employer to do? Can employers continue to have substance abuse policies which prohibit illegal drug use, including marijuana? The answer is yes, but … caution should be exercised. Employers need to be informed as to how each state's laws impact the workplace. Attention should also be given to court decisions interpreting the various marijuana statutes. Employers with multi-state operations must evaluate their workplace policies to ensure state-by-state compliance. Consideration of a marijuana policy may be appropriate, so that the employer's position on marijuana use is fully explained to employees. In many states, employers may consider addressing marijuana the same as alcohol use - allow for off-duty use but prohibit on-duty use and impairment.

In conclusion, employers should carefully consider the legal risks presented under both state and federal laws before taking employment action against an employee or applicant who claims a legal right to use an illegal drug.

THE PRO ACT – A HORRIBLE PROPOSAL FOR EMPLOYERS



Howard B. Jackson

"[Arbitrators] who have no interest in the employer or its success would impose terms of employment, including wages and benefits, on the employer for a two-year period."

The Protecting the Right to Organize Act ("PRO Act"), which has passed the House and is now before the Senate, contains a great many changes that favor unions and restrict or punish employers. This article discusses some of the provisions of the proposed law in the following areas: elections, bargaining, enforcement, and other takeaways.

Elections. The PRO Act would expand the number of persons eligible to vote in elections in two ways. Note first that persons who are "employees" may vote, but "employees" does not include supervisors or independent contractors.

1. Provisions in the PRO Act would narrow the definition of supervisor, thus making more persons "employees" who may vote. Adoption of the more narrow definition of supervisor would also impact the employer's campaign abilities as supervisor are frequently important in delivering the desired message to employees who will vote.
2. The PRO Act would also substantially narrow the definition of independent contractor. It proposes use of the ABC test. That test provides, in short, that one is not an independent contractor unless all three of the following are met: (1) the worker is free from the control and direction of the hiring entity in connection with performing the work; (2) the worker performs work that is outside the usual course of the hiring entity's business; and (3) the worker is customarily engaged in an in an independently established trade, occupation or business of the same nature as the work performed. This definition clearly excludes "gig" workers from qualifying as independent contractors, along with a host of others.

The PRO Act also provides that in the course of an organizing campaign, employers may not "require or coerce" employees to attend employer meetings. This would be a huge change. For decades, one method that employers have used in communicating with employees during an organizing campaign is via meetings. In context of such meetings the employer explained its views and positions and commonly provided education about the union involved, the industry in which the employer was engaged and other relevant subjects. If the PRO Act becomes law the employer's ability to meet with its own employees would be infringed upon substantially in context of organizing campaigns.

In addition, union petitions for "micro-units" will commonly be accepted. The question of what is an "appropriate unit for bargaining" has long been a contested one. The definition of employees who will be in the unit determines which employees are allowed to vote. The National Labor Relations Board ("Board") for years used a variety of factors around the concept of determining which employees shared a community of interest. In the manufacturing setting, for example, this commonly resulted in a production and maintenance unit. Under the PRO Act a union could apply to represent a small sub-set of the workforce, such as only machine operators, for example. The practical impact is that this would make it easier for unions to get their foot in the door.

Bargaining. The PRO Act contains several requirements relative to bargaining for an initial collective bargaining agreement ("CBA"). These requirements apply only when an initial agreement is involved.

Bargaining must begin within ten (10) days after a written request, unless the parties agree to a different date. If a contract is not reached within ninety (90) days either party may request assistance from the Federal Mediation and Conciliation Service ("FMCS"). If no agreement is reached within thirty (30) days after the FMCS begins assisting, or a longer time agreed upon by the parties, FMCS will refer the matter to arbitration.

This is where the sea-change comes. From the beginning of the National Labor Relations Act until present the parties have always had to agree for a collective bargaining agreement to exist. This was sometimes difficult, with strikes, lock outs, or long bargaining times. But no agreement was imposed on the parties.

Under the PRO Act if the matter is referred to arbitration, then each side picks an arbitrator and the parties agree upon a third. The arbitration panel receives evidence from each side and considers matters such as the employer's financial status, the employees' cost of living, and industry wages and benefits. At the end of the day the arbitration panel sets wages and benefits for a two-year period. In other words, a set of third parties who have no interest in the employer or its success would impose terms of employment, including wages and benefits, on the employer for a two-year period.

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Enforcement. The changes in enforcement are too numerous and wide-ranging to include here. A brief description of some of the more significant changes is set out below.

If an employer is found to have discharged an employee because of the employee's union sympathies or activities, the employee may receive: backpay with no reduction for interim earnings; front pay; consequential damages; and liquidated damages equal to two times the damage award. In the past, such an employee would have received back pay reduced by interim earnings, and that would have been it.

Previously, all such matters were processed via the Board and heard by administrative law judges. Under the PRO Act for certain types of charges employees can bring an action on their own in federal court where they can require a jury trial. In this setting also the enhanced damages are available.

The PRO Act creates a new action for whistleblowers. In those claims also an employee has a path to bring a private action in federal court and to be heard via a jury trial. These claims also include enhanced remedies for employees whose claims are proven.

The PRO Act creates a greatly enhanced set of fines for employers, which are in addition to the multiple and far larger remedies that employees may recover. Failure to comply with a Board order results in a civil penalty up to $10,000.

And if you think the last one was tough, an employer found to have discharged an employee in violation of certain provisions of the National Labor Relations Act can be fined up to $50,000. If the employer has committed such violations in the last five (5) years that amount is doubled.

Other Takeaways. The PRO Act would make it easier to establish joint employment. There is an express provision to the effect that indirect and reserved control can be sufficient to establish joint employment status.

The PRO Act provides that employers may not replace economic strikers, which are currently and for many years have been distinguished from unfair labor practice strikers.

The PRO Act would preclude employers from requiring employees to sign an agreement preventing them from bringing a claim via joining a class action – unless agreed to in a CBA.

The PRO Act would permit "fair share" agreements whereby employees are required to pay the cost of union representation activities such as collective bargaining and grievance processing. This section of the proposed law would permit such agreements even in "right-to-work" states, resulting in a situation where employees could not be forced to join a union but could be forced to pay money to a union.

The proposed law would revise the "persuader rule" such that attorneys who provide legal advice to an employer in connection with opposing union organizing would have to register as persuaders. As a result, both the attorney and their client would be required to file reports of the attorney's activities and the cost of their services.

In summary, the PRO Act is designed to make organizing easier and opposing organizing harder, to deter employer management actions by enacting high rewards for employees found to have been mistreated and harsh punishments for employers found to have violated the labor law, and to in a variety of other ways favor employees and restrict employers. About the only good news is that there is still time to oppose this draconian action toward employers. Contact your federal representatives and tell them to VOTE NO!

SOLVING COVID-19 ISSUES FOR EMPLOYERS

With COVID-19 presenting unprecedented challenges and increased liability exposure for employers, our attorneys offer powerful and practical solutions by combining in-depth experience with leading-edge understanding of the new laws, employee issues, and unique questions affecting businesses and management in these difficult times.

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