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Medical Marijuana Use: What's at Stake for Massachusetts Colleges and Universities

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State of the Law: Massachusetts

- Chapter 369 of Massachusetts General Laws:
  - Must possess “registration card” from DPH
  - “Certification” (not prescription) from MD with “bona fide” relationship furnished to DPH
  - “Debilitating medical condition” required
  - Registration card renewed annually
  - Public consumption still not permitted

State of the Law: Massachusetts (cont)

> Key Limitations

1. Health care providers - not required to reimburse
2. Health care professionals – not required to authorize use of medical marijuana
3. *Employers, schools, and public places not required to allow on-site medical use of marijuana*
4. *No person or entity is required to violate Federal law, nor is any person immune from federal protection*

State of the Law: Federal (Controlled Substances Act)

- Despite fact that 23 states (plus D.C.) have enacted laws – marijuana recreational or medical use, still a violation of federal law
- Controlled Substances Act of 1970 criminalizes growing and use of marijuana – limited exception only for FDA-approved research – still classified as "Schedule I" controlled substance

State of the Law: Federal (Controlled Substances Act) (cont)

- Gonzales v. Raich (2005) – U.S. Supreme Court – CSA trumps state medical marijuana laws – federal law enforcement can prosecute users/growers despite state law "legalizing use" – California medical marijuana law preempted
- Attempts to reclassify marijuana unavailing – Americans for Safe Access v. DEA, (D.C. Circuit 2013) – DEA classification of marijuana as Schedule I controlled substance not arbitrary and capricious

Drug Free Schools and Communities Act of 1994

- Amended HEA of 1965
- Requires institutions of higher education (IHEs) receiving federal financial aid to adopt/implement programs to prevent use of illicit drugs and abuse of alcohol by students/employees
- 34 C.F.R. Part 86 ("Part 86") implements DFSCA providing:
  1. Certification: IHE must certify to DOE that they have alcohol and other drug (AOD) prevention programs

Drug Free Schools and Communities Act of 1994 (cont)

2. Annual Notification: IHEs must annually notify all students/employees of the following:
   - Standards of conduct
   - Possible legal penalties/ramifications if convicted
   - Statements of health risks associated with AOD abuse
   - Description of AOD prevention programs
   - Disciplinary sanctions imposed by IHE
3. Biennial Review: IHEs must review/report every 2 years so as to determine program effectiveness and monitor enforcement

Drug Free Schools and Communities Act of 1994 (cont)

- Secretary of DOE to annually review a "representative sample of IHE drug prevention programs"
- If IHE violates its certification, Secretary of Education may terminate all forms of financial assistance, and may require repayment of such assistance (20 U.S.C. § 1101i; also Part 86.301)
  - Federal grants/contracts to/with IHE at risk
  - Title IV financial aid at risk

Drug Free Workplace Act of 1988

- IHE receiving federal contracts in excess of $100,000, or any federal grant, must establish policy prohibiting manufacture, use and distribution of controlled substances in workplace

"Guidance" Re: Federal Law Enforcement:

- Mixed messages from Executive Branch
- 10/2009 Memorandum from David W. Ogden (Deputy A.G.) to selected U.S. attorneys:

> The Department of Justice is committed to the enforcement of the Controlled Substances Act in all states. Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. One timely example underscores the importance of our efforts to prosecute significant marijuana traffickers: marijuana distribution in the U.S. remains the single largest source of revenue for the Mexican cartels.

"Guidance" Re: Federal Law Enforcement: (cont)

The Department is also committed to making efficient and rational use of its limited investigative and prosecutorial resources. In general, United States Attorneys are vested with "plenary authority with regard to federal criminal matters" within their districts… This authority should, of course, be exercised consistent with Department priorities and guidance….

As a general matter, pursuit of these priorities should not focus resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.

"Guidance" Re: Federal Law Enforcement: (cont)

> But see 6/2011 Memorandum from James M. Cole (Deputy AG) to selected U.S. attorneys:

> [Given] an increase in the scope of commercial cultivation, sale, distribution and use of marijuana for purported medical purposes, … large-scale, privately operated industrial marijuana cultivation centers [will be the subject of federal enforcement action and prosecution] **even where those activities purport to comply with state law**.

"Guidance" Re: Federal Law Enforcement: (cont)

- And 8/2013 Guidance (James M. Cole) RE: "Marijuana Enforcement:"
  - Calls upon states that treat marijuana as "legal" to "implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health and other law enforcement interests"
  - Makes clear, even where such systems in place, Justice Department will continue to pursue federal enforcement of the CSA

Colleges/Universities Responses to Date:

- Bottom line – unless/until amendment to federal law exempting at least medical marijuana as a controlled substance – what choice do colleges and universities really have?
- Informal "guidance" not enough to justify change in college/university AOD policies
- Argument: what is real risk that an IHE would actually be stripped of eligibility to receive federal funding?

Colleges/Universities Responses to Date: (cont)

- Even states where the most liberal marijuana laws have been enacted [CA, WA, AZ], colleges and universities have held the line
- Most that has been done has been to seek to accommodate by relaxing rules providing for mandatory freshman on campus housing and/or dining for those certified to use medical marijuana
- UMass undergrad:

  "A lot more students need federal funding than medical marijuana at this point."

Colleges/Universities Responses to Date: (cont)

- Key for institutions: clearly spell out policy on medical marijuana – must be firm
- Approach most extreme cases on a case-by-case basis, permitting some minimal accommodation without outright modification of drug and alcohol prohibition/prevention policies?
- Each institution must assess – right now balance tips heavily in favor of strict, across-the-board prohibition and enforcement

Medical Marijuana Law and Employers

- Pre-Employment Drug Testing
- Drug Testing for Current Employees
- ADA Accommodation Obligations

Medical Marijuana Law and Employers

Pre-Employment Drug Testing

- Conditional Offer Contingent on Drug Screening Test
- Applicant Has Medical Marijuana Card
- Law is Shield not Sword
- No Private Cause of Action

Medical Marijuana Law and Employers

Drug Testing for Current Employees

- Federal Law Concerns
  - Controlled Substance Act – Schedule I Drug
  - Drug Free Workplace Act
- No Recognized Claim for Wrongful Termination

Medical Marijuana Law and Employers

ADA Accommodation Obligations

- Requires “reasonable accommodation”
- To “qualified individuals with a disability”
- If needed to perform “essential functions of job”

Medical Marijuana Law and Employers

ADA Accommodation Obligations

- Employee has “debilitating medical condition”
- Medical marijuana use certified by physician
- Employee has registration card
- Employee requests accommodation to use marijuana in workplace or during workday

Medical Marijuana Law and Employers

ADA Accommodation Obligations

- Employer not obliged to made accommodation
- MA Law – does "not require any accommodation of the medical use of marijuana in any workplace…"
- Federal Law – ADA does not require accommodation for the "illegal use of drugs"
- ADA defines "illegal use of drugs" by reference to federal law

Medical Marijuana Law and Employers

Considerations for Employers

- Review Drug Policies to make explicit reference to medical marijuana
- Analysis may differ based on specific state law
- Law is evolving

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