# EFFECT OF UTAH MEDICAL CANNABIS ACT ON PRIVATE EMPLOYERS

By Jascha Clark

A number of our clients have asked us what effect, if any, Utah's new marijuana law will have on their drug-testing policies, and relatedly, whether they must accommodate use of medical marijuana by their employees. As discussed below, the answer is currently unclear; however, it appears unlikely that the new law will have a significant legal effect on private employers.

As a reminder, in November, Utah voters passed Proposition 2, legalizing medical marijuana. Weeks later, the Utah Legislature passed a compromise bill, the Utah Medical Cannabis Act (the "Act"), which revised and superseded Proposition 2. The Act was signed into law on December 3, 2018.
Initial versions of the Act prohibited discrimination in employment based solely on an individual's status as a medical cannabis cardholder. Specifically, the proposed provision stated:

An employer may not refuse to hire, suspend, terminate, take an adverse employment action against, or otherwise penalize an individual solely for the individual's status as a medical cannabis cardholder, unless failing to do so would cause the employer to lose a monetary or licensing-related benefit under federal law.

*See Draft Utah Medical Cannabis Act (2019FL-4444/020), dated October 4, 2018, at lines 1442-45.*

Importantly, the version of the Act that was signed into law only prohibits discrimination with regard to government employment. Utah Code Ann. § 26-61a-111. It states that the state or any political subdivision must treat "an employee's [legal] use of medical cannabis . . . in the same way the state or

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political subdivision treats employee use of opioids and opiates" except where doing so "would jeopardize federal funding for the employee's position." Utah Code Ann. § 26-61a-111(2)(a), (b).

Some states outside of Utah that recently adopted marijuana laws have provided employers with much more certainty by including specific carve-outs for employer drug testing and discipline. For example, both Vermont and Michigan passed ballot initiatives legalizing the recreational use of marijuana by persons 21 years of age or older. Michigan's new law specifically states that employers need not "permit or accommodate [use of medical marijuana] in the workplace or on the employer's property," and may discipline employees for violating "workplace drug policy or for working while under the influence" of marijuana. Mich. Comp. Laws Ann. § 333.27954(3). Vermont's law similarly provides that employers are not required to "accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace" and may discharge "an employee for violating a policy that restricts or prohibits the use of marijuana by employees." Vt. Stat. Ann. tit. 18, § 4230.

Unfortunately, Utah's new law is silent with respect to private employers and drug testing. This raises some concern because individuals eligible for a medical cannabis card are also likely protected by the Americans with Disabilities Act and the Utah Antidiscrimination Act. See Utah Code Ann. § 26-61a-104(2)(a)-(p) (listing qualifying conditions for medical cannabis card). Although there are open questions regarding how the Act will be interpreted and applied, it appears unlikely that Utah courts will, as a result of the Act, require private employers to change their drug testing policies and/or accommodate the use of medical cannabis.

To begin with, the Utah Legislature's consideration and rejection of a provision prohibiting discrimination by private employers against medical cannabis cardholders gives Utah companies an argument that the Act should not affect their current drug-testing policies. Further, unless expressly provided for by statute, most courts have concluded that the decriminalization of medical marijuana does not shield employees from adverse employment actions. Compare, e.g., Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC, 171 Wash. 2d 736, 752 (2011) (recognizing that statutory silence supports the conclusion that private employers are not required to accommodate off-site medical marijuana use) with Whitmire v. Wal-Mart Stores Inc., No. CV-17-08108-PCT-JAT, 2019 WL 479842, at *8 (D. Ariz. Feb. 7, 2019) (recognizing the "drastic dissimilarity" between medical marijuana statutes that do not apply to private employment and Arizona's statute, which prohibits employers from terminating medical marijuana users unless they used, possessed, or were impaired by marijuana on-site and during work hours). Because Utah's statute is silent as to accommodation of medical marijuana use, such accommodation does not appear to be required.

That being said, employers interested in taking a more conservative approach should, at the very least, engage in an interactive process with the applicant or employee to evaluate other options, such as different medications, before making employment decisions. See Barbuto v. Advantage Sales & Mktg., LLC, 477 Mass. 456, 466 (2017) (stating that even if the accommodation of the use of medical marijuana were facially unreasonable, Massachusetts employers are still obligated to participate in the interactive process to explore whether there was an alternative, equally effective, medication the employee could use that was not prohibited by the employer's drug policy).

If you have a fact-specific inquiry, including regarding your drug testing policy or a requested accommodation, you should consult legal counsel. ◀

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