



## Medical marijuana bill would give employers much to hash out

By: Abbie Bennett ◉ March 19, 2019

Some migraine sufferers have turned to medical marijuana as a way to treat headaches, but a medical marijuana bill that's currently working its way through the South Carolina legislature could potentially cause headaches of its own for employers in the state, some labor law attorneys are warning.

The Compassionate Care Act, H.3660, would allow qualified patients to purchase and use small amounts of marijuana for medical purposes. As currently written, the bill would also prohibit employers, including law firms, from firing, refusing to hire, or otherwise discriminating against an employee or candidate solely on the basis of their status as a legally authorized marijuana user.

As of Jan. 1, 33 states and the District of Columbia have removed state-level criminal penalties for the authorized medical use of marijuana. But South Carolina's proposed bill could be among the most employee-friendly of the bills passed so far, said Ben Dudek, a management-side attorney in the Columbia office of Fisher Phillips, a national labor and employment law firm.

Under the bill, employers will not be able to terminate or discipline medical marijuana cardholders who test positive for the substance on a pre-hire or random drug test unless the employer can prove they were using or under the influence in the workplace.

But that could prove difficult, Dudek said, because traces of marijuana can show up in drug tests long after its effects have worn off. Drug testing science has not yet caught up to medical use of the drug, complicating matters for employers when it comes to employee screenings, and potentially making it very difficult to prove that an employee was under the influence during work using drug screening results alone.

"Employers should be very concerned about the bill in its current form. It is very employee-friendly compared with other nearby states like Florida," Dudek said.

### Deep in the weeds

Under the bill, cardholders must be afforded the same rights under state and local law as they would be afforded if prescribed pharmaceutical medications when it comes to "any interaction with a person's employer," including drug testing by employers or required by government agencies and officials.

It wouldn't require employers to make any accommodation for the use of medical cannabis at the workplace, allow the ingestion of cannabis in any workplace, or allow employees to work while under the influence, nor would it limit an employer's ability to discipline an employee for being under the influence at the workplace or during work. And no employer could be penalized or denied any benefit under state law for employing a cardholder.

But Dudek said that the bill, if passed, could still open up employers to much risk of litigation.

"Employers will run into trouble when it comes to reasonable suspicion and post-accident/injury drug testing because the standard drug tests will not be able to show recent use like an alcohol breathalyzer test could do," Dudek said.

He noted that a federal court in Connecticut recently found that an employer had unlawfully discriminated against one of its employees when it rescinded a job offer from a medical marijuana patient who tested positive for THC, the active ingredient in marijuana, on a pre-hire drug screen.

Ashley Falls, an employee-side employment law attorney with Falls Legal in Charleston, said that if an employee who is a cardholder were to use marijuana during his or her personal time to treat a medical issue, a drug screening

by an employer could not be used to discriminate against the employee, and if that employee was fired or otherwise discriminated against, they could take legal action.

"An employee solely using medical marijuana with a valid medical prescription outside of work hours who is not under the influence at work could bring a claim of wrongful termination under state law if she is terminated for a positive marijuana urine screen, or for maintaining a valid medical marijuana identification card and prescription," Falls said.

### Don't bogart that job

Some aspects of the bill's effects are as yet unclear. It remains to be seen how the bill would interact with other states' laws when multi-state companies draft drug testing policies across states with varying degrees of tolerance toward marijuana, or how it will interact with federal laws.

While there is no explicit private right of cause of action in the bill in its current form, Dudek said that courts would not likely find it difficult to find an implied right.

"Other states such as Florida and Ohio have strong employer protections when it comes to allowing employers to continue to enforce their drug-free workplace programs and zero-tolerance drug testing policies, notwithstanding medical-marijuana prescriptions," Dudek said. "States like Florida also go as far as not allowing employees to sue employers at all when employers refuse to hire, discipline, or terminate employees based on medical marijuana."

But Andrew Arnold of Horton Law Firm in Greenville said that the bill as written provides protections and benefits for employees, including protection from being fired or not hired because of discriminatory practices on the part of the employer.

"Cannabis will become like any other medicine in South Carolina for those legally authorized to consume it," Arnold said.

The bill is currently in committee in both chambers of the legislature. In the previous legislative session, a comprehensive medical marijuana bill was favorably reported out of committee in both chambers but was not taken up for debate by either chamber.

The current version would allow qualified patients or registered caregivers to possess no more than 2 ounces of cannabis, and would be among the most restrictive medical marijuana laws in the country in terms of the threshold for obtaining cardholder status, requiring approval from a doctor (or two doctors, for those ages 18-23) who has performed an in-person exam and verified a person's "qualifying debilitating condition," such as epilepsy, PTSD, cancer or others listed in the bill and prohibiting smoking the substance.

Sen. Tom Davis, a Republican representing part of Beaufort County, is the primary sponsor of the current version of the bill and previously headed up efforts to help pass "Julian's Law" in 2014, which legalized low THC/high CPD oil for certain epileptic conditions. Davis did not respond to requests for comment for this story.

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