

**MICHIGAN CHAMBER OF COMMERCE
OFFICIAL POLICY
RELATING TO
MAINTAINING THE RIGHT TO DRUG-FREE WORKPLACE POLICIES
AND MEDICAL MARIJUANA USERS
APPROVED BY
BOARD OF DIRECTORS
APRIL 30, 2014**

The Michigan Chamber of Commerce supports the right of employers to enforce drug-free workplace policies for all employees, including medical marijuana users, without fear of being sued for wrongful termination or having to pay unemployment benefits.

Unless the Michigan Legislature or court acts to strengthen employer protections, the Michigan Chamber reaffirms its opposition to state and local efforts to decriminalize marijuana, as it would further jeopardize workplace safety and create human resources dilemmas for employers.

Background

Sixty-three percent of Michigan voters approved Proposal 08-01, Michigan's Medical Marijuana Act (MMMA),¹ in November of 2008. Under the law, a person with a qualifying debilitating medical condition, who has obtained a valid MMMA card, is exempt from criminal laws of the state for engaging in the medical use of marijuana to mitigate the symptoms or effects of their condition.

Although Michigan and 13 other states authorize the use of medical marijuana, marijuana remains a Schedule I controlled federal substance and is an illegal substance, even if used for medical purposes. However, the Department of Justice has publicly opted not to preempt state laws and has tightened federal marijuana prosecution standards, directing federal prosecutors to focus on eight enforcement priorities, including preventing marijuana distribution to minors, preventing drugged driving, stopping drug trafficking by gangs and cartels and forbidding the cultivation of marijuana on public lands.

The key purpose of the 2008 Proposal was to decriminalize medical marijuana use under state law, not to affect the employer-employee relationship. The MMMA recognizes the difficulty employers would face in accommodating an employee's use of medical marijuana, not only because it would jeopardize workplace safety but also because it would create conflicts with state and federal regulations mandating drug-free workplaces. For example:

- The federal Occupational Safety and Health law requires employers to provide a safe workplace.
- A US Department of Transportation regulation prohibits the use of marijuana (for medicinal purposes or not) by safety-sensitive transportation employees, including pilots, school bus drivers, truck drivers, train engineers and pipeline emergency response personnel.

¹ Michigan's statute was passed with the spelling of "marihuana" so that it would conform with the spelling used in Michigan's Public Health Code. The more common spelling is marijuana, which will be used throughout this Board Policy.

- The federal Drug-Free Workplace Act of 1998 requires federal contractors and grantees to agree that they will provide drug-free workplaces as a precondition of receiving a contract or grant from a federal agency.

The MMMA specifically does not require employers to give special treatment to medical marijuana users. The plain language of the law specifies that “[n]othing in this act shall be construed to require...[a]n employer to accommodate the ingestion of [marijuana] in any workplace or any employee working while under the influence of [marijuana].”

The Courts in other states and in Michigan have held that employers are not required to accommodate an employee’s use of medical marijuana. A federal appellate court, in *Casias v Wal-Mart Store, Inc*, rejected the argument of an employee that the MMMA on its face protects employees against discipline and upheld Walmart’s application of its drug-free workplace policy.

The Courts are now considering several cases that would decide whether an employee with MMMA card who is terminated for violation of a drug-free workplace policy is entitled to unemployment benefits.

The Michigan Employment Security Act, or “MES Act,” is clear and unambiguous on the question of drugs in the workplace: A failed drug test means disqualification from unemployment benefits (MCL 421.29). However, several pending court cases challenge this standard in the context of medical marijuana, creating issues for employers who fund 100 percent of the cost of this program through state and federal unemployment taxes.

At the heart of several pending court cases is the conundrum faced by employers who rely on objective drug tests in order to maintain a safe, drug-free workplace but could be penalized if employees are not disqualified from unemployment benefits when they are discharged after failing a drug test because they are medical marijuana users.

The Michigan Chamber Litigation Center filed a legal brief with the Michigan Court of Appeals challenging a decision by the Kent County Circuit Court (*Braska v. State of Michigan*), which awarded unemployment insurance (UI) benefits to an employee - a medical marijuana user - when he failed his employer's drug test and was subsequently fired. The Court ruled that the plaintiff was not disqualified from unemployment benefits because he was an authorized medical marijuana user under the MMMA. The State is appealing this decision to the Michigan Court of Appeals, arguing that the Circuit Court effectively extended the protections of the MMMA beyond what voters intended and altered unemployment law in Michigan.

If the lower court decision stands and finds that the MMMA preempts Michigan workplace laws the MES Act, it would put Michigan employers in a no-win situation: either accommodate medical marijuana users and jeopardize workplace safety or discharge those employees and pay their unemployment benefits and, subsequently, pay higher unemployment taxes.

The courts have the opportunity to follow the lead of other states on this issue by recognizing that the MMMA is not inconsistent with the MES Act. Rather, the statutes should be read in concert, meaning the laws do not prohibit employees from using medical marijuana but also do not prohibit employers from enforcing zero-tolerance drug policies or give special consideration for the award of unemployment benefits.

If the courts fail to find a balance between employer and employee rights under the MMMA and MES Acts, amendments to both Acts should be pursued, clarifying that employers do not have a duty to accommodate workers who use medical marijuana and employees cannot be awarded unemployment benefits if discharged for failing a drug test in violation of a workplace policy. While the change to the MES Act would require a simple majority, the change to the MMMA is critical to clarifying the intent of the law and would require approval by three-fourths of the members elected to and serving in each house of the Michigan Legislature.

Without clarification from the courts or Legislature on these key unemployment and workplace issues, the Michigan Chamber remains opposed to state and local efforts to decriminalize marijuana. Regardless of whether the law authorizes the use of medical marijuana or decriminalizes marijuana altogether, employers need to maintain the right to conduct pre-employment, post-accident, reasonable suspicion and random drug-screen testing. Further, the law must specify that any employee who fails a drug test can be considered to be in violation of a company's zero tolerance drug policy and can be terminated without fear of being charged unemployment benefits.