LEGAL UPDATE

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Doctor-Supervised Marijuana Use Is Still Illegal

ADA DOES *NOT* PROTECT "MEDICAL MARIJUANA" USE

by

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In a ruling with positive implications for employers, the U.S. Court of Appeals for the Ninth Circuit ruled that "medical marijuana" use is not protected by the Americans with Disabilities Act ("ADA"). A divided panel of the Court held on May 21 that the ADA's exclusion of current illegal drug users from the definition of individuals with a disability applied to users of "medical marijuana."

The decision is rendered even more significant by the fact that it comes from the Ninth Circuit, which is based in San Francisco and is generally considered the most liberal Circuit Court by far.

Four allegedly disabled individuals claimed that the pain caused by their disabilities was not alleviated by conventional medical services and drugs. Their medical doctors instead recommended marijuana pursuant to California's Compassionate Use Act of 1996.

As you are aware, while the federal Controlled Substances Act continues to prohibit the possession and distribution of marijuana, the Compassionate Use Act suspends penalties under state law for Californians who – on the recommendation of a physician – possess or cultivate marijuana for medical use. In response to the law, numerous cooperatives sprang up across California to dispense marijuana.

Plaintiffs obtained marijuana from cooperatives located in the cities of Costa Mesa and Lake Forest, California. In 2005, Costa Mesa passed an ordinance which outlawed facilities which dispensed medical marijuana. Lake Forest brought suit to close the dispensaries as a public nuisance. Police in both cities raided the dispensaries. Plaintiffs brought suit under Title II of the ADA against the two California cities after those cities took steps to shut down facilities which dispensed medical marijuana.

Plaintiffs claimed that the closing of the marijuana dispensaries violated the ADA's prohibition on discrimination in the provision of public services and sought a preliminary injunction prohibiting the cities from closing the marijuana cooperatives. Arguably, the plaintiffs were attempting to use the ADA's prohibition on discrimination to "end-run" the federal prohibition on marijuana possession and use.

The cities argued that the ADA does *not* protect against discrimination based on current marijuana use. In fact, the ADA expressly exempts from protection current illegal drug use. The cities argued that the protections of the ADA do *not* extend to any drug use that is not authorized by federal law. Plaintiffs argued that since their use of medical marijuana was permitted under California law it did not fall under the ADA's exclusion of illegal drug use.

The Court concluded that in interpreting the ADA, Congress clearly intended for the courts to look to federal law, rather than state law, when determining if drug use is excluded from ADA protection as illegal. The Court concluded that supervision by a doctor under California law does not provide a basis for extending ADA protection to illegal drug use, including medical marijuana. The Court held that "the ADA does not protect medical marijuana users who claim to face discrimination on the basis of their marijuana use."

The text of the opinion is available at:
http://www.ca9.uscourts.gov/datastore/opinions/2012/05/21/10-55769.pdf.

What this means for employers

While this case does not involve employees, it is another example of the *federal* illegality of marijuana being upheld. Plaintiffs were unsuccessful in their efforts to leverage the ADA using state laws to "end-run" the continuing nationwide illegality of marijuana under federal law. This case should serve a reminder of the creativity shown in challenging this fact, but nonetheless reinforce the principle that employees who are disciplined and discharged because of their current use of illegal drugs cannot rely on the ADA to protect them. Also, employers who rely on the current illegal use of marijuana as the basis of an adverse employment action have a strong defense to a disability claim, even if they cannot control whether a disciplined employee chooses to litigate.

If you have any questions or comments regarding this Update or the Institute, please contact Mark de Bernardo, Matt Nieman, Andrew Cabana, or Katharine Murphy at (703) 391-7222 (Institute) or (703) 483-8300 (Jackson Lewis).

Regards all.

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