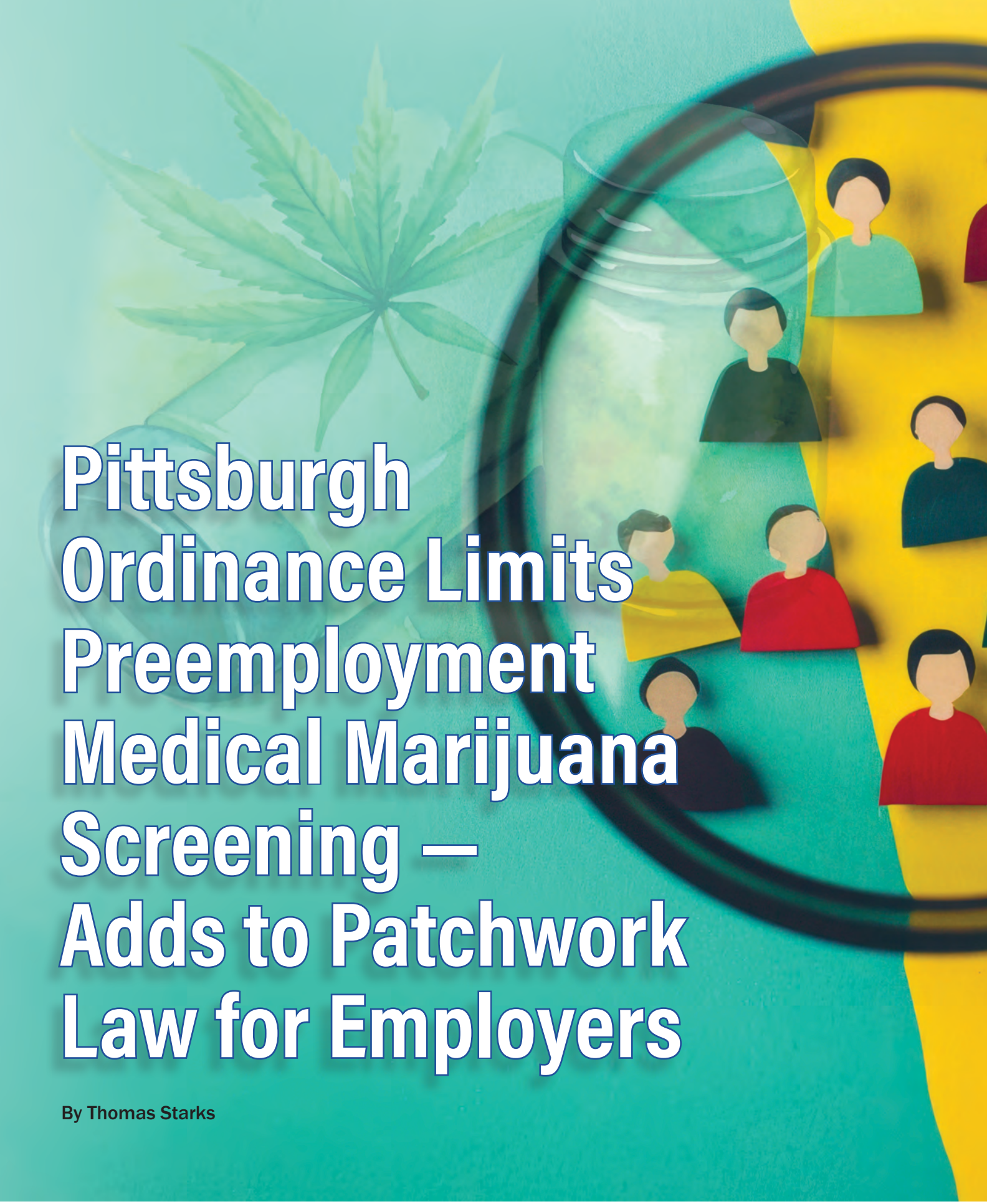

Pittsburgh Ordinance Limits Preemployment Medical Marijuana Screening — Adds to Patchwork Law for Employers

By Thomas Starks

In 2024, Pittsburgh enacted a new ordinance addressing medical marijuana. The ordinance puts medical marijuana users in a protected class for employment purposes, right alongside the protected classes of gender, race and religion. This new ordinance prevents employers from discriminating against medical marijuana use in the employment process, including prehire drug screenings. The ordinance does not protect marijuana users who do not have a medical card.

The changing landscape of marijuana legislation in the United States has prompted significant legislation regarding employment rights for medical marijuana patients. Despite the growing acceptance of medical marijuana, employers often face challenges in navigating hiring and creating uniform employment practices, with the employee's rights protected under differing federal, state and local laws. The protections afforded to medical marijuana patients under employment law have significantly expanded, so it is important that employers take note of this new framework and the exceptions within the framework.

The newest marijuana law for employers to navigate is specific to Pittsburgh. The ordinance creates a protected class consisting of medical marijuana patients. In effect, employers cannot require preemployment testing for marijuana nor conduct testing during employment, unless an exception applies.

Legal Framework

Protections Against Discrimination

Under the newly enacted Pittsburgh ordinance, employers, employment agencies and labor organizations are prohibited from discriminating against any employee or prospective employee based on his or her lawful status as a medical marijuana patient. This prohibition includes policies that require preemployment drug testing for marijuana or ongoing testing during employment as a condition of employment.

Rationale for Protections

This legislation puts status as a medical marijuana patient for employment purposes in line with race, gender, national origin and disability. The rationale behind these protections stems from a recognition of the medical necessity of marijuana for certain individuals and the need to create an equitable work environment. The significance is that the law does not merely ban preemployment marijuana testing for medical patients; rather it creates a codified protected class for medical marijuana patients.

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Exceptions to Protections

Despite these protections, there are specific exceptions where discrimination based on medical marijuana status may be permissible:

1. Federal and State Transportation Regulations

Positions subject to drug testing under regulations established by the U.S. Department of Transportation or the Pennsylvania Department of Transportation are expressly excluded from the newly enacted employment protections related to medical marijuana. This exemption is grounded in the critical public safety concerns inherent to transportation-related roles where marijuana use may present substantial risks and reflects adherence to federal law, which continues to prohibit marijuana use.

2. Positions Requiring Firearm-Carrying

Employees in roles that necessitate the carrying of firearms are excluded from the antidiscrimination protections afforded to medical marijuana users. This exception is justified by the inherent risks associated with individuals potentially under the influence of marijuana in high-stakes settings, such as law enforcement or security operations. This is in line with Pennsylvania's Uniform Firearms Act, which prohibits individuals from buying a gun or possessing a gun when using medicinal marijuana, and one of the rationales behind this is that marijuana is still illegal under federal law.

3. Collective Bargaining Agreements

Furthermore, applicants subject to a valid collective bargaining agreement that expressly governs preemployment drug testing are not entitled to the protections against discrimination based on medical marijuana use. This exception preserves the ability of organizations employing unionized workers, such as those represented by the United Steelworkers, the American Federation of Teachers and AFL-CIO affiliates, to uphold the terms of their negotiated agreements, including policies related to marijuana use and preemployment screening.

Specific Restrictions Imposed on Medical Marijuana Patients

In addition to the exceptions outlined above, the Pittsburgh ordinance includes specific prohibitions for patients in line with the Pennsylvania Medical Marijuana Act:

1. Restrictions on Operation of Certain Equipment

Marijuana patients are prohibited from operating or exercising physical control over chemicals requiring a permit issued by state or federal authorities. Similarly, patients are barred from operating or controlling high-voltage electrical systems or any public utilities while under the influence of medical marijuana. This prohibition extends to instances where the patient's

blood contains active tetrahydrocannabinol (THC), the main psychoactive component of marijuana, exceeding a specified legal threshold.

2. Employment Duties in High-Risk Situations

Marijuana patients are prohibited from performing job duties at heights or in confined spaces or engaging in any tasks classified as life-threatening while under the influence of medical marijuana. Employers are vested with the discretion to determine what constitutes a life-threatening activity. However, this provision raises concerns, as it grants employers significant latitude in defining such activities, potentially subjecting their determinations to judicial scrutiny at a later date.

3. Public Health and Safety Concerns

Employers are permitted to prohibit medical marijuana patients from performing any duties that may pose a risk to public health or safety. Any such prohibitions, even if they result in financial harm to the employee, are not deemed to constitute adverse employment actions under the applicable legal framework. This could include an activity as basic as driving, because under Pennsylvania law, an individual can be cited for a DUI if he or she consumed medical marijuana earlier in the day, week or month. This is a critical restriction for employers to understand because significant liability could attach if an employee is allowed to operate a vehicle under the influence of medical marijuana.

Employer Rights and Responsibilities

Under the Pittsburgh ordinance, employers are authorized to impose disciplinary measures on employees under the influence of medical marijuana if their conduct fails to meet the requisite standard of care for their position. Moreover, employers are not obligated to permit the use of medical marijuana on workplace premises.

Furthermore, employers maintain the authority to conduct drug testing under defined circumstances, including for-cause testing and post-accident testing. For-cause drug testing may encompass testing for medical marijuana, provided supervisors have reasonable grounds to suspect that an employee is under the influence of a substance while on duty. The ordinance explicitly affirms employers' rights to conduct drug testing following workplace accidents.

Comparison of Pennsylvania's Local Laws

In Pennsylvania, there is no state law that prohibits testing for marijuana. However, the two largest cities, Pittsburgh and

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Philadelphia, both have their own prohibitions. In 2022, Philadelphia banned preemployment drug testing for marijuana, meaning even if the employee is a recreational user, preemployment marijuana testing is not allowed. The Philadelphia ordinance does not address marijuana testing with respect to current employees and allows an employer to discipline an employee under the influence of marijuana while working or possessing marijuana in the workplace. The Pittsburgh ordinance only protects medical marijuana users.

Many of Pennsylvania's smaller cities have laws that decriminalize possession of a small quantity of marijuana, but do not address medical marijuana use in connection to employment actions. For example, Erie, Harrisburg, Lancaster and York all decriminalize possession of marijuana and instead have a nominal fine for possession.

Federal Law

In 2024, the U.S. Drug Enforcement Administration (DEA) proposed a rule to move marijuana from Schedule I of the Controlled Substances Act (CSA) to Schedule III. DEA Administrative Law Judge John Mulrooney ordered witness testimony in the matter of marijuana's federal classification to take place from January to March of 2025.

Under the CSA, Schedule I drugs have no accepted medical use and high potential for abuse, meaning that marijuana currently sits in the same category as heroin, LSD and ecstasy. This also means that researchers face strict restrictions, businesses that manufacture or sell medical marijuana are unable to access the banking system and are denied tax benefits and medical users are breaking federal law.

If marijuana is changed to a Schedule III drug, the DEA would be classifying

it as a substance with moderate to low abuse potential and accepted medical use. Marijuana would be put in the same category as ketamine, anabolic steroids and testosterone. This would also provide researchers with the ability to study and better understand the impacts and effects of marijuana on the human body and mind. Manufacturers and retailers would be provided with valuable federal tax credits and deductions for their entire operations, whereas because of the classification under Schedule I, Internal Revenue Code 280E prevents many of those tax credits and deductions. Marijuana would be subject to provisions of the Food, Drug and Cosmetic Act, thus requiring Food and Drug Administration (FDA) approval to be marketed. In lieu of approval, the FDA could classify marijuana as an investigational new drug, meaning marijuana would not be approved for general use, but would be approved for clinical trials to evaluate its safety and efficacy. Even if marijuana is changed to a Schedule III drug, it will still be difficult for states' medical marijuana facilities to come into compliance with

federal law. Instead, the change would make state-compliant marijuana facilities "less illegal" and subject to lesser penalties.

Federal law does not prohibit employers from doing drug screenings for Schedule I drugs. However, if an employer is taking an adverse employment action for an individual's use of a prescribed Schedule III drug, the employer could be subject to a disability discrimination lawsuit under the Americans with Disabilities Act (ADA). This is because the ADA prohibits employers from discriminating based on prescription drug use. In effect, classifying marijuana as a Schedule III drug would prevent employers from inquiring into medical marijuana prescription status unless there is a direct connection to the ability to perform one's job safely and would create an employer drug screening standard similar to that created under the Pittsburgh ordinance.

Differing States' Laws

There are 47 states that allow for the use of cannabis for medical purposes, and, among them, 38 have comprehensive programs for the sale of medical marijuana. The laws vary widely by state in terms of medical marijuana testing for employment purposes. Pennsylvania's surrounding states, New Jersey, New York, Ohio, West Virginia, Delaware and Maryland, have varying marijuana testing laws in relation to hiring.

- In New Jersey, a candidate's marijuana use outside of work cannot affect hiring decisions, but employers may act based on reasonable suspicion of impairment on the job. For example, employers are allowed to drug test employees, but the employees have an opportunity to provide a medical explanation for the presence of marijuana if they test positive.

- In New York, an employer may only test candidates for marijuana use if state or federal law requires it, including by way of losing federal funding. Essentially, New York recognizes that medical marijuana patients have a disability that entitles them to the reasonable accommodation of taking medical marijuana.

- Ohio does not restrict marijuana testing for job applicants. Ohio employers must comply with their own existing company policy but are free to fire or decline to hire an applicant based solely on medical marijuana use.

- West Virginia merely requires that drug testing be within the terms of a written policy that is available to applicants. Even though marijuana is recreationally legal, employers can still drug test for it.

- Delaware law protects medical marijuana users from disciplinary measures. But it does not extend to protecting employees impaired by marijuana while on the job.

- Maryland provides no preemployment drug testing laws, allowing employers to test for marijuana use for any reason and to take action against an employee or prospective employee.

Pennsylvania's neighboring states all have their own medical marijuana testing laws with their own intricacies. A legal drug test in one state may be unlawful in another.

Conclusion

The interplay between employment law and medical marijuana creates a nuanced legal framework that seeks to reconcile individual rights with employer obligations and public safety imperatives. While Pittsburgh's legal provisions are designed to safeguard medical marijuana patients from discriminatory employment practices, they concurrently acknowledge the necessity of exceptions to uphold workplace safety standards. As legal standards continue to evolve, ongoing dialogue and potential legislative revisions will be necessary to address the nuances of this issue and ensure fair treatment for all workers.

The new marijuana ordinance in Pittsburgh highlights the challenging regulatory environment employers face in maintaining compliance with differing federal, state and local marijuana laws. ⚖

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