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Labor and Employment Alert: Bi-Partisan Medical Marijuana Legislation Introduced in Ohio

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It's been said that politics makes strange bedfellows as illustrated by the efforts at "legalizing" marijuana use in Ohio (marijuana use and possession remain illegal under federal law). Last year, Ohioans overwhelmingly rejected efforts to enshrine the right to medicinal and recreational marijuana in the Ohio Constitution. This year, the Ohio House of Representatives created a bipartisan medical marijuana task force to examine the issue. At the same time, two ballot proposals are seeking to amend the Ohio Constitution to permit the use of marijuana for medical purposes. Finally, in April, Republican Representatives Stephen Huffman and Kirk Schuring and Democratic Representative Dan Ramos introduced House Bill 523.

House Bill 523 would establish a Medical Marijuana Control Commission to regulate the state's medical marijuana policies, which would include licensing cultivators, retail dispensaries, independent laboratories, and physicians. The bill would not permit home-growing of marijuana. The bill includes several important protections for employers.

First, the legislation does not require an employer to accommodate an employee's use of medical marijuana.

Second, an employer is not prohibited from refusing to hire, discharging, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's use of medical marijuana.

Third, the bill does not affect the authority of the Administrator of Workers' Compensation to grant rebates or discounts on premium rates to employers that participate in a drug-free workplace program.

Fourth, a person who is discharged from employment because of his or her use of medical marijuana would be considered to have been discharged for just cause, which disqualifies the individual from collecting unemployment.

And fifth, the bill maintains the rebuttable presumption that an employee is ineligible for workers' compensation if he or she was under the influence of marijuana and this was the proximate cause of the injury, regardless of whether the marijuana use was recommended by a physician.

These protections, however, are not perfect. For example, while the bill does not require an employer to "accommodate" an employee's "use," the language is silent on whether an employer must accommodate an employee's "possession" of medical marijuana in the workplace. Moreover, the term "accommodate" has a specific legal meaning under the Americans with Disabilities and the Ohio's Civil Rights Act – an employer is generally required to provide a reasonable accommodation to qualified individuals with disabilities to allow them to perform the essential functions of their jobs. However, not all medical conditions for which an employee is using medical marijuana may rise to the level of a disability requiring "accommodation." And while the legislation does not prohibit an employer from taking adverse action against an employee who uses medical marijuana, not all workplace discipline rises to the level of an adverse action. Can an employer "discipline" an employee for medical marijuana use short of termination or other adverse action?

Moreover, the bill leaves several key questions about the use of medical marijuana in the workplace unanswered. Can an employer still enforce a drug testing, zero-tolerance, or a drug free workplace policy? Must a governmental medical assistance program, employer, or insurer reimburse a person for costs associated with medical marijuana? Can a property owner such as a business, nonprofit organization, college, or political subdivision prohibit the use or possession of medical marijuana on its property by an individual?

House Bill 523 may move quickly through the legislative process in order to show the voters that amending the Constitution is unnecessary. Enacting a statute enables the General Assembly to respond by further legislation or administrative rules to evolving federal law and the science surrounding marijuana use. Contact your Vorys lawyer if you have questions about House Bill 523, the legislative process, or how medical marijuana may impact your business.