

Morgan Lewis

Navigating Guns-At-Work Laws and
Civil Protections for Medical Marijuana Users:
A Case-by-Case Guide for Employers

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The Issue

- More than 15 states have passed laws specifically recognizing the right of employees to possess a firearm on their employer's premises.
- Even though the possession, sale, and use of marijuana is illegal under federal law, many states now permit individuals to use marijuana for medicinal purposes. Furthermore, two states have decriminalized the recreational use of marijuana.
- What can employers do to minimize workplace-related risks that these laws might lead to?

State Law, Not Federal Law, Controls

- Federal law does not directly regulate the conduct and obligations of employers in these areas.
- Therefore, employer policies restricting employees' access to guns while on the employer's premises and penalizing employees for using medical marijuana must be designed with respect to state law – a landscape that is constantly changing, often in divergent directions.

Supreme Court Case Law – Not Dispositive

- McDonald v. City of Chicago (2010): the Second Amendment applies to the states.
- District of Columbia v. Heller (2008): possessing a handgun for self defense is a fundamental right.
- Gonzales v. Raich (2005): Congress may criminalize the private growing of medical marijuana.
- Gonzales v. Oregon (2006): *legal* drugs may be prescribed to assist the suicide of the terminally ill.



What about OSHA?

- The “general duty clause” of the Occupational Safety & Health Act requires employers to provide their employees with a place of employment that "is free from recognizable hazards that are causing or likely to cause death or serious harm to employees."
- As described by the Department of Labor:
 - The general duty clause imposes “a legal obligation to provide a workplace free of conditions or activities that either the employer or industry recognizes as hazardous and that cause, or are likely to cause, death or serious physical harm to employees when there is a feasible method to abate the hazard.”

What about OSHA?

- Courts have held that OSHA neither expressly nor impliedly preempts state law. Instead, it sets forth a regime of “cooperative federalism.”
- OSHA contains two savings clauses, making it less likely that a court would hold that federal law intends to “occupy the field” of workplace safety and thus would preempt state laws relating to guns-at-work or marijuana.
- In sum, it is unlikely that OSHA would be dispositive of these issues.

Overview: Guns-At-Work Laws

- Generally, employers may regulate employees' possession of firearms in the workplace.
- However, many states have enacted “parking lot restrictions,” which require private employers to allow employees to keep firearms in their locked personal vehicles if:
 - The firearm is out of sight.
 - The vehicle is not owned or leased by the employer.
 - The employee possesses the requisite state license or permit.

Overview: Guns-At-Work Laws

- Guns-at-work laws vary as to whether the employer:
 - May conduct searches of employees' vehicles.
 - May ask employees whether they store a firearm in their locked vehicle on the employer's premises.
 - Is required to conspicuously post whether it bans employees from bringing guns into the workplace vicinity.
- Employees may pursue a common law wrongful termination claim if fired in contravention of the parking lot laws.
- States with parking lot restrictions may give employers immunity from suit for gun-related incidents on their premises.

Overview: Medical Marijuana Laws

- Many states (approximately 20) now permit individuals to obtain licenses from the state to purchase and use marijuana for medicinal purposes.
- This is permitted even though the possession, use, and sale of marijuana is generally a crime in all but two states (Washington and Colorado).
- Marijuana is a Schedule 1 controlled substance under the federal Controlled Substances Act, and its possession, use, and sale remains illegal under federal law.



Overview: Medical Marijuana Laws

- Civil Protections for registered medical marijuana users:
 - Employers cannot take adverse actions against an employee on the basis that the employee is a licensed user of medical marijuana, **even if** the employee fails a lawfully-administered drug test.
 - However, employees are not protected if they come to work under the influence.
- Only a minority of states provide civil protections:
 - AZ, CT, DE, IL, ME, RI.
 - In the rest: use medical marijuana at your own risk.

Overview: Medical Marijuana Laws

- Off-Duty Conduct Laws
 - At least 29 jurisdictions have passed “off-duty conduct laws,” which prevent employers from taking adverse actions against employees for lawful off-duty behavior.
- Generally, the laws fall into three categories:
 - Those that protect employees’ off-duty use of tobacco products;
 - Those that protect employees’ off-duty use of all lawful products (i.e., “consumption”-related products); and
 - Those that protect all lawful activity, including consumption, recreation, and political activities.

Overview: Medical Marijuana Laws

- Drug testing under established legal rules is generally acceptable, as long as it is not done in a discriminatory manner and civil protections (where applicable) are respected.
- Potential issues with:
 - The Fair Credit Reporting Act (employment offers).
 - Disability discrimination (federal and state law).
 - The Drug-Free Workplace Act (for federal contractors).

Case by Case: Guns-At-Work



Scenario 1: Does it make a difference where in the car the weapon is stored?

- An employee leaves her pistol in the **unlocked center console** of her locked car, which is parked in your lot.
- Your state **has** a parking lot restriction.
- You terminate her for not storing the gun in an internal locked compartment.
- Does the employee have grounds to sue you for wrongful termination?



Scenario 1: Does it make a difference where in the car the weapon is stored?

- Yes. It most likely does not matter where in the car the gun is kept, as long as the car is locked and the gun is out of sight.
- Mitchell v. Univ. of Kentucky (Ky. 2012):
 - Anesthesia technician at UK Medical Center was terminated for keeping a pistol in the center console of his car vs. locked in the glove compartment.
 - Lower courts sustained the termination based on the KY statute permitting universities to prohibit weapons on the premises.
 - KY Supreme court reversed, holding that there is a “public policy” exempting personal vehicles from such restrictive gun laws.

Scenario 2: Can the employer require prior notification?

- You have a policy requiring employees who store guns in their locked vehicles on your premises to **inform you in advance** that they do so.
- Your state **has** a parking lot restriction.
- Your policy clearly states that no adverse action will befall the notifying employee for exercising this right; however, the policy states that employees who do not comply with the notification requirement may be terminated.
- You learn about an employee who is currently storing a rifle in the trunk of his locked car, but who did not notify you beforehand.
- Can you terminate him?

Scenario 2: Can the employer require prior notification?

- Depending on the jurisdiction, this policy may be enforceable.
- Mullins v. Marathon Petroleum Co. (E.D. Ky. 2014):
 - Plaintiff, a barge cleaner for an energy company, was fired for keeping a rifle in his car without telling the company per its notification policy. Kentucky is a parking lot state.
 - District court held that the termination was lawful because the notification requirement did not prohibit the employee from keeping the firearm in his car.
- But see Indiana's law: employers are prohibited from asking whether the applicant/employee owns a firearm.

Scenario 3: If the public parks in the lot, does the employer lose its right to regulate?

- Your premises is located on a busy commercial thoroughfare, and **members of the public** frequently park in your lot.
- While your state’s constitution provides that “[t]he right of a citizen to keep and bear arms in defense of his home, person, or property...shall never be prohibited,” it **does not have a parking lot restriction**.
- You implement a “no guns at work” policy. Later, you discover that one of your employees keeps a semi-automatic pistol locked in her trunk. You inform her that she will be terminated for violating your “no guns” policy.
- The employee argues that because the parking lot is available to the public, it is therefore a “public lot,” and your policy deprived her of her constitutional right to bear arms.
- Is she correct?

Scenario 3: If the public parks in the lot, does the employer lose its right to regulate?

- No, the employer does not lose its right to regulate firearms on its premises simply because the public uses its parking lot.
- Bastible v. Weyerhaeuser Co. (10th Cir. 2006):
 - Decided on facts that occurred prior to Oklahoma's adoption of a parking lot restriction.
 - Public access to an employer-owned lot does not diminish the employer's right to restrict the bringing of firearms on its property.
 - Moreover, because “the right to keep arms is not unfettered, establishing a wrongful discharge tort for exercising a statutorily sanctioned restriction on the right would be counterintuitive.”

Scenario 4: Can a terminated employee still receive unemployment compensation?



- You have a policy stating that armed security guards must always **store their guns “in a safe place.”**
- You learn that one of your guards, while using one of your vehicles, left his gun in the unlocked glove compartment of the locked car while he ran an errand within your large campus.
- Your state **has** a parking lot restriction.
- You terminate the guard for violating the policy, because in your view, the guard did not leave the gun in a “safe place.”
- Can the terminated guard collect unemployment benefits?

Scenario 4: Can a terminated employee still receive unemployment compensation?

- Yes, the guard may still collect unemployment compensation.
- Crespo v. Fla. Re-Emp. Asst. App. Comm'n (Fla. App. 2012):
 - Employer argued that the “safe place” contemplated in its policy was the guard’s gun locker; however, this was not defined in the policy.
 - Unemployment compensation was initially denied, based on a finding that the employee had committed misconduct within the meaning of the applicable statute, thus precluding benefits.
 - Appeals court reversed, based on the absence of an explicit policy requiring guards to always store their guns in their lockers or a rule prohibiting them from storing the gun in the glove compartment of a locked car.

Scenario 5: Can an employee grab her gun in a safety emergency?

- A fight breaks out in your facility between a customer and an employee. The **customer is armed** and brandishes his weapon.
- Another employee, who is parking her car at the time, sees the emergency. She **grabs her pistol, which she ordinarily keeps locked in her glove compartment**, rushes to the scene, and calms the rogue customer.
- Your state **has** a parking lot restriction.
- You terminate the employee for possessing a gun in the immediate workplace vicinity. In response, she files a wrongful termination suit, arguing that your enforcement of the policy infringed her right to self defense.
- Does she win?

Scenario 5: Can an employee grab her gun in a safety emergency?

- No, the termination was lawful.
- Bruley v. Village Green Mgmt. Co. (M.D. Fl. 2008):
 - Leasing agent of an apartment complex, who also lived on the premises, responded to a resident's safety emergency with his shotgun and was terminated for doing so.
 - Court ruled that his termination did not violate public policy by infringing his right to bear arms in self defense. While the state's parking lot restriction allowed him to possess the gun in his car, he was not permitted to use the gun in the event of an emergency situation.

Scenario 6: Whatever You Do, Don't Do This

- You find out that Al, one of your employees, asked another employee, Barb, **to store his gun in her glove compartment** for the day while his car was being repaired off-site.
- You find out, and given your unease with employees who keep guns in their locked cars on your premises, you terminate Al for asking Barb to “do him a personal favor during work hours.”
- Your state **has** a parking lot restriction.
- Al sues you for wrongful termination, and you file a motion to dismiss the Complaint.
- Will your motion be granted?

Scenario 6: Whatever You Do, Don't Do This

- No. In arguing that the reason you gave for terminating him was merely pretextual – and that the real reason you fired him violated the state's parking lot restriction – AI has stated a plausible claim for wrongful termination.
- Holly v. UPS Supply Chain Solutions (E.D. Ky. 2014).



Will This Get Any Clearer? Don't Bank on It



- Bank manager kept a handgun in her purse, and was fired for violating the **Bank's ban on employees carrying weapons into the building.**
- She had the requisite concealed carry permit in a parking lot jurisdiction.
- She has since filed a wrongful termination suit.

Outcome? Stay tuned...

Ros v. Wells Fargo Bank (Fl. Cir. Ct. filed Feb. 2014)

Plaintiff's attorney, Noel Flasterstein, and his client, Ivette Ros.

Case by Case: Medical Marijuana



Scenario 1: Can I administer drug tests to registered medical marijuana users?

- All of the employees at your facility **use heavy machinery every day** as part of their regular job duties. You administer drug tests on a random basis to ensure workplace safety.
- After one such test, an employee tests positive for THC, the primary psychoactive ingredient in marijuana. Upon speaking with the employee, you learn that she has **a rare autoimmune disorder** and **is a registered medical marijuana user** as proscribed under state law.
- Can you terminate the employee for testing positive on the drug test, even though she did not come to work under the influence?

Scenario 1: Can I administer drug tests to registered medical marijuana users?

- If the state provides **no civil protections** to non-state employees, then yes, you may terminate the employee, subject to the ADA.
 - Ross v. RagingWire Telecomm. (Ca. 2008): Ca. Fair Employment & Housing Act did not require employer to accommodate registered marijuana user; thus, the employer could terminate the employee for failing a drug test, even though the employee was never suspected of being high at work. See also Curry v. MillerCoors (D. Colo. 2013).
 - Casias v. Wal-Mart, Inc. (6th Cir. 2012): private employer's termination of employee for positive result on random drug test was lawful, even though employee was a registered medical marijuana user, because Michigan's medical marijuana law does not regulate the conduct of private employers.

Scenario 1: Can I administer drug tests to registered medical marijuana users?

- **HOWEVER**, if the state does provide civil protections to the employees of private employers, then you most likely will not be able to terminate the employee under these circumstances.
- At this time, there are no published decisions involving this scenario.
- Factors that are likely to affect the outcome of such a lawsuit include:
 - The nature of the work the employee performs,
 - The onus placed on the employer in making the accommodation, and
 - Whether the employee was ever under the influence at work.

Scenario 2: Can I withdraw a conditional offer based on a drug test result?

- You are **interviewing candidates** for an open position. In your application, you advise candidates that they must submit to a drug test if they are extended a conditional offer of employment.
- You extend **a conditional offer** to Cecilia. She promptly consents to a drug test, which comes back positive for THC. You learn that she severely injured her back several years ago, and that **the only way she can fall asleep each night is by smoking a small amount of marijuana before bed.** She is a registered marijuana user in your state.
- Can you withdraw the conditional offer of employment?

Scenario 2: Can I withdraw a conditional offer based on a drug test result?

- If you are in a “no-civil protections jurisdiction,” you generally may withdraw the conditional offer, subject to the ADA and off-duty-conduct laws.
- Jane Roe v. Teletech Cust. Care (Wash. 2011):
 - Job candidate failed a post-offer drug test, employer withdrew the offer. Denied candidate brought a wrongful termination suit based on the withdrawn offer.
 - The termination was lawful, because Washington’s medical marijuana law does not require employers to accommodate offsite medical marijuana use.
 - Furthermore, the Washington law (like the Michigan law) does not apply to private employers.

Scenario 2a: Post-Script on Accommodation

- Whether accommodating a medical marijuana user is reasonable most likely still depends on traditional factors:
 - The reasonableness of the accommodation.
 - Undue hardship.
 - The individual’s qualifications for the position.
- See Washburn v. Colum. Forest. Prods. (Or. App. 2005):
 - An employer’s “concern about employees coming to work under the influence of marijuana might provide, under some circumstances, justification for not accommodating” a medical marijuana user.

Scenario 3: Can a terminated employee still receive unemployment compensation?

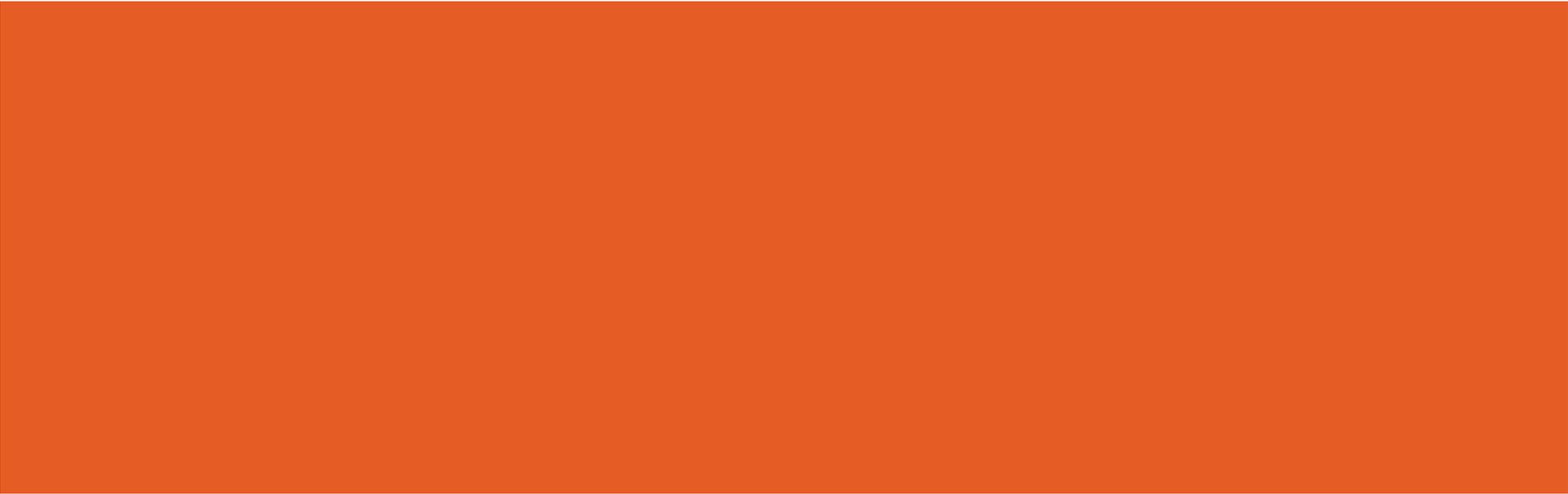
- You terminated an employee who tested positive for THC on a random drug test. The employee used marijuana to treat the pain from his “severe headaches,” and had the requisite physician’s certificate.
- You are in a jurisdiction that permits medical marijuana but does not extend civil protections to medical marijuana users.
- The terminated employee files for unemployment compensation. Is he entitled to it?

Scenario 3: Can a terminated employee still receive unemployment compensation?

- No. The employee may be denied unemployment compensation for testing positive on a drug test, even though he is a licensed medical marijuana user.
- Beinor v. Indus. Claim App. Office (Colo. App. 2011):
 - Because the employee’s positive result on the drug test violated the employer’s zero-tolerance policy, the employee was not entitled to unemployment benefits under Colorado law.
 - Under Colorado’s unemployment compensation rules, using medical marijuana under the state’s medical marijuana amendment is not the same as “having a prescription” for a controlled substance.

Risk Minimization Strategies

- Know your local laws.
- Phrase policies with conditional language (“consistent with state and local laws”) to maximize flexibility and ensure compliance with applicable laws:
 - If you have employees in a parking lot state, vehicle searches or pre-notification policies may or may not be enforceable.
 - If you have employees in states that permit medicinal use of marijuana and extend civil protections to such users, registered users who test positive on drug tests may not be terminated; however, they may be terminated if they come to work under the influence.
- Provide notice to employees:
 - That you prohibit guns in the workplace.
 - Of any post-offer drug test.



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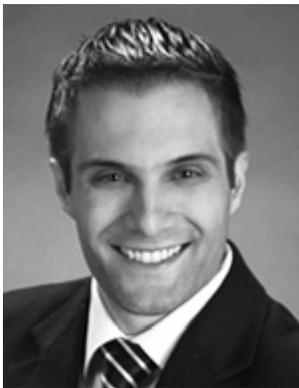


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