

Weed and Work

Beware of Employment-Related Provisions in Delaware Marijuana Legislation BY TIM HOLLY

AS OF MARCH 18, 2021, the issue of legalizing non-medical marijuana use is back in play in Delaware. The bill includes provisions specifically addressing “places of employment;” and it features provisions amounting to social engineering regarding unions and sex and color-based hiring.

It is disconcerting to many employers that this bill at least arguably implies that any employer policy or practice pertaining to marijuana, that is not specifically permitted, is prohibited. For example, the bill oddly states that it does not require an employer to permit use of marijuana at work. This arguably implies an intent to prohibit an employer’s prohibition of use outside of work.

Similarly, the bill oddly states that it is not meant to affect the ability of employers to discipline employees who are under the influence at work. This also arguably implies that employers are meant to be affected in their ability to discipline employees who are found under the influence of marijuana outside of work.

Delaware has still not gone so far as to restrict an employer’s right to hire, discipline, and fire employees for non-work activity, with some exceptions such as medical marijuana use outside of work. For example, a Delaware business could choose to prohibit tobacco use even outside of work or to discipline and even terminate employment for public intoxication from alcohol. Some employers – regardless of any legal constraints – may choose not to meddle in the private lives of their workers in such a way, perhaps out of concern that otherwise good workers may choose not to work for them. Other employers may have different values and choose differently. The point is that businesses, like people, value having autonomy to define for themselves – even if disfavored by others – what “personality” and “reputation” they will have, molded by the choices they make.

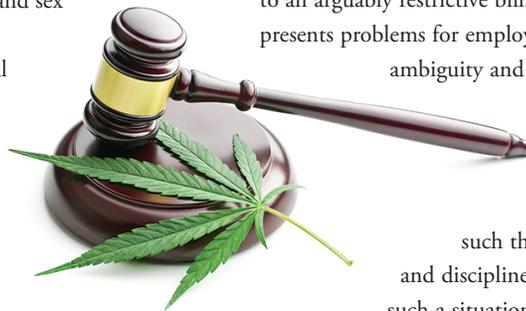
The fact that this bill at least implies that it means to meddle in (and restrict) employer choices as it pertains to how to handle a currently-illegal substance – giving it even more protective treatment than other things including tobacco and alcohol use – strikes many employers as bizarre. Beyond the narrow issue of marijuana, this bill builds concern about the appetite of Delaware law makers to erode the freedom of Delaware businesses to choose for themselves what standards will define them – including through further erosion of the employment at-will doctrine.

Another problem with this bill pertains to the definition of “work.” The definition is a positive change from a prior version of the bill in that “at

work” has been defined essentially to mean “while doing work” – rather than “at the employer’s place of work.” With a trend towards working remotely, especially during the pandemic, this is a needed improvement to an arguably restrictive bill. However, managing remote workers already presents problems for employers, and a law like this bill would create ambiguity and new conundrums for employers. For example, would an employee who works from home or travels for work, who possesses marijuana in the same space where they perform work, possess marijuana “at work” such that an employer would be allowed to prohibit and discipline for that? Could an employer face liability in such a situation?

The bill presents a further practical challenge for employers in that, while it declares that it does not “intend to affect the ability of employers” to discipline employees who are under the influence of marijuana at work, it defines “under the influence” to mean “because of marijuana use, the individual is less able than the individual would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in exercising the responsibilities of their job.” That definition arguably requires employers to measure all employees before any marijuana use so that they will be in a position to establish the “less able” part of the required analysis. For many legitimate reasons, it is predictable that employers will not develop and perform base rate testing. Even for those who do, there is likely to be a challenge in showing the “because of” part of the test is met – e.g., perhaps fatigue, a strong wind, or any number of excuses other than marijuana could be blamed for diminished ability. To be sure, if this bill becomes law, there will be greater risk for an employer who disciplines an employee even when the employee indisputably arrives to work having recently used marijuana.

In terms of social engineering, this bill also contains a provision showing a preference for unions. And what if you discovered that the bill seeks to compel a private business to demonstrate a plan that, rather than requiring truly equal employment opportunity for all and forbidding discrimination against any who are of a protected class under the law, focuses on the hiring specifically of men and people who are not “of color?” Some might argue that would present legal problems and, perhaps more importantly, present an example of unacceptable institutionalized, systemic sexism and racism. Many would find that to be socially irresponsible. Does this bill do that? Further discussion can be found online at www.dsc.com/legislativejournal.



Simply put, this bill creates risk and hassle for Delaware businesses and forces them to shoulder more than their fair share of burden from what would be a massive social change during already very trying times. If this bill becomes law, it is predictable that clever attorneys who help their clients grapple with marijuana issues in the employment context will argue about statutory construction concepts (e.g., “expressio unius est exclusio alterius”) and the implied covenant of good faith and fair dealing, among other things. While clever attorneys are more than happy to accept payment from businesses to create arguments that deal with the issues this bill would create, is more of that what Delaware businesses need?

Even if Delaware lawmakers find it wise, prudent, and consistent with their view of the will of their constituents and good State governance to legalize non-medical marijuana use, they should rethink the employment-related pieces of this bill and not seek to impose on private businesses either unions or sex-based or color-based hiring practices. ■



Timothy M. Holly is a partner at Connolly Gallagher LLP.

ByrdGomes

Government Relations & Public Strategy

Robert L. Byrd, Partner

(302) 530-4531 • Robert.Byrd@byrdgomes.com

Rebecca Byrd, Esq., Partner

(302) 690-4992 • Rebecca.Byrd@byrdgomes.com

Kimberly Gomes, Partner

(302) 530-9093 • Kim.Gomes@byrdgomes.com

Carrie Cole, Operations

(302) 757-8300 • Carrie.Cole@byrdgomes.com

(302) 757-8300 phone
(302) 322-6000 fax
www.byrdgomes.com

2 Penns Way
Suite 305
New Castle, DE 19720



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mboyer@connollygallagher.com



Lisa R. Hatfield

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Arbitration Association trained mediator.

302-757-7317

lhatfield@connollygallagher.com



CONNOLLY
GALLAGHER LLP

Wilmington Office

1201 North Market Street
20th Floor
Wilmington, DE 19801
T 302-757-7300

Newark Office

267 East Main Street
Newark, DE 19711
T 302-757-7300

www.connollygallagher.com