Testimony

Public Hearing on S.B. 749 – Medical Marijuana and Workplace Safety

Before the:
Pennsylvania Senate Health and Human Services Committee

Presented by:

Denise E. Elliott, Esquire
Member, McNees Wallace & Nurick LLC
Labor and Employment Group

September 21, 2021

100 Pine Street
Harrisburg, PA 17101
717-581-3713
delliott@mcneeslaw.com

Chairwoman Brooks, Chairman Haywood and members of the Senate Health and Human Services Committee, my name is Denise Elliott. I am an attorney with McNees Wallace & Nurick LLC. My practice is devoted to representing employers in a variety of employment law situations, with a primary focus on workplace safety and issues arising under the Family and Medical Leave Act, Americans with Disabilities Act and various anti-discrimination statutes. I am a frequent speaker and writer on these topics, and, since the passage of Act 16, I have closely followed legal developments around medical marijuana and the workplace. For the past couple of years, I've also served on a working group of employment attorneys from PA Chamber member law firms looking at Act 16 and developing concepts to improve the law.

I represent employers from a cross section of industries – health and long-term care, construction (including commercial and heavy and highway), transportation, logistics, manufacturing, warehousing and distribution, auto sales, foundries, alternative energy and others. I spend my time counseling them on policies and procedures to keep their employees and their workplaces safe; working through issues related to employee injuries and disability accommodations and ensuring consistency and equal treatment. And when there is a dispute between the employee and employer, I represent my employer clients at the administrative and agency levels and in state and federal courts.

Prior to the passage of Act 16 – each and every one of my employer clients maintained zero tolerance drug and alcohol policies. A positive test for any federally prohibited drug, including marijuana, equaled discipline – usually termination. Over the last couple of years, this has changed.

The employers I work with are no longer looking to maintain across-the-board zero tolerance policies that would prohibit employees from using marijuana legally obtained for medicinal use. They appreciate that employees and their doctors are in the best position to determine if medical marijuana would have a palliative or therapeutic effect; my clients further recognize that medical marijuana use has improved the quality of life for some of their employees – especially those with chronic pain conditions, severe anxiety, PTSD and the like. However, many of my clients are in highly safety-sensitive industries, and they are tasked with a daily balancing act – accommodating an employee who chooses to use medical marijuana, while at the same time keeping their workplaces, their employees and the public safe. And, importantly, they want to avoid unnecessary disputes and litigation.

In performing this balancing act, employers are looking for clarity around what they can and cannot do under the law, and what they must and must not do. Right now, there is simply too much gray area, which benefits neither the employers nor the employees who wish to – and often need to – use medical marijuana. As the medical marijuana program in Pennsylvania continues to expand, the proposed changes in SB 749 are aimed at providing necessary clarity for both employees and employers, eliminating unnecessary conflict and dispute, and keeping workplaces as safe as possible.

I commend the careful consideration that was given to Act 16 and the provisions included therein, which were intended to promote workplace safety and provide guidance for employers. For example, Section 2103(b)(2)&(3), which allows for a prohibition on the use of medical marijuana in the workplace, permits discipline if an employee is under the influence of medical marijuana while at work and addresses the paradigm created for employers who are regulated by federal law but operate in a state that has legalized a substance that remains federally prohibited.

The amendments in SB 749 aim to take these efforts the needed step further, while continuing to protect patient rights. Notably, SB 749 does not impact the anti-discrimination language included in Act 16.

Let me speak to some of the clarity that SB 749 would provide:

Section 510 of Act 16 contains what employment lawyers have been calling the "safety sensitive exception" – although that phrase is not presently included in the Act. Currently, section 510 allows employers to prohibit the performance of certain jobs while under the influence of medical marijuana. However, only section 510(1) defines what is meant by under the influence. For the remainder of section 510 – the term is not defined. Why is this a problem? Two reasons – first, we don't yet have a breathalyzer type test to determine if someone is under the influence of marijuana. Second, drug testing facilities tend to follow federal regulations and federal guidance in the handling and reporting of drug test results, including for marijuana that is being used legally. This means an employer is told only whether the employee tested positive for marijuana levels over the testing cut-off level. Except in very rare circumstances, for example, where the levels are abnormally high, the drug testing facility makes no reference to actual testing levels or what such levels may or may not indicate. This leaves employers with the following questions:

- Can they proactively prohibit medical marijuana users from performing safety sensitive positions based on a reasonable belief (1) that they could be under the influence while performing the job or (2) that performing the job while actively using medical marijuana would pose an unreasonable safety risk to the employee and their co-workers?
- Alternatively, can they ask medical marijuana users to provide certification from a healthcare provider that they will not be under the influence while at work; and, in the absence of such certification, can they prohibit the employee from performing the safety-sensitive position?
- Is the positive drug test enough to demonstrate that the employee will be or are under the influence while at work? Or, are employers supposed to take a leap of faith, allow an employee to come to work, start working and hope that employee is not impaired?

By way of anecdote, here are some examples of how these questions can play out:

- We have a client engaged in heavy construction and steel erection. Some of their equipment operators arrive early to the job site. This means the employee could be alone on the job site and may have no interaction or point of contact with any manager or other employee before they start their shift operating heavy construction equipment that, if mishandled, could cause significant injury, death or property damage. Now, the employer has maintained a policy of prohibiting the use of medical marijuana by employees performing such work, under the rationale that accommodating medical marijuana use by such employees would create an unreasonable safety risk. This promotes workplace safety. But, does it put them at risk for a lawsuit? Under the current version of Act 16, the answer is not clear. Moreover, is an employer such as this even permitted to ask that employees performing such work disclose their medical marijuana use? Federal and state disability discrimination laws allow an employer to ask about prescription drug usage, where the inquiry is job related and consistent with business necessity. Indeed, the federal courts have held that "when an
  employee's use of prescription medication could impair the employee's ability to perform his job safely, such as when the employee's job involves the operation of heavy machinery, an

employer's inquiry into the employee's prescription drug use does not violate the ADA." *See Cooper v. City of Adamsville*, 2021 U.S. Dist. LEXIS 53799, at *31 (N.D. Ala. Mar. 22, 2021). This rationale should extend to an inquiry regarding medical marijuana use, but under the current language of Act 16, employers are left wondering if they can inquire about medical marijuana use without violating the Act. SB 749 would provide clarity for this employer and its employees. The proposed language in Section 2103(b)(6) would allow such an employer to inquire regarding an employee's certification status. The proposed language in Section 2103(b)(7) would allow such an employer to maintain their workplace safety policy. In both instances, SB 749 creates clarity around expectations and the dialogue permitted between employers and employees, reduces the need for litigation and promotes safety for everyone within and around the workplace.

- We have clients with employees who drive automobiles as part of their job. Understandably, these clients do not want to put a potentially-impaired employee behind the wheel. But again, do they have to simply take the employee's word that they will not be impaired or under the influence? Or, can they treat medical marijuana like any other legal drug that could cause impairment and seek certification that the employee's use will not impact the employee's ability to safely perform the job or threaten the safety of co-workers or the public. SB 749 would provide clarity for such employers and their employees. The proposed language at Section 2103(b)(8) makes it clear that an employer may inquire about the impact of medical marijuana on an employee's job performance. If the response to the inquiry is that there will be no impact, then as would be the case with prescription drugs, the employee should be permitted to perform the job. But where there would be an impact, the employer would be able to restrict the employee from driving, thus ensuring the safety of that employee, their co-workers and the public.

SB 749 also provides needed clarity around what will be considered a safety-sensitive position, by expanding the definition and providing examples. This is needed to provide certainty to both employees and employers. For example, under the current catch-all provisions in Section 510, employers do not have certainty that certain jobs are included in the safety-sensitive group of positions. They're understandably asking what about:

- A job that requires the use of power tools?
- Or a job that requires operation of machinery that requires lock-out/tag-out and if improperly used could result in the loss of limb or in severe injury?
- Or a fork-lift operator?
- What about jobs that involve working around combustible or flammable materials?
- Or providing patient or childcare?
- Or driving an automobile?

I would argue that each of these aforementioned jobs would qualify as safety-sensitive and would be included in the current catch-all provisions of Section 510. But when my clients have made such determinations, there has been pushback from their employees and unnecessary disputes and conflict as a result. Moreover, as we recently saw in the case of *Harrisburg Community College v. PHRC*, the court had to resolve the question of whether providing patient care is safety sensitive.

The expanded definitions included in SB 749 would provide clarity in this space.

SB 749 provides additional needed clarity by:

- Stating specifically that drug testing for medical marijuana users is permitted;
- Stating specifically that reasonable suspicion policies may be followed for medical marijuana users;
- Specifically including workers' compensation in the term "insurer or health plan;"
- Permitting employers to inquire about, and ask for, proof of certification from those who claim to be legally using medical marijuana;
- Maintaining anti-discrimination protections for employees, while providing needed safe harbor protections for employers who establish policies and procedures to promote and maintain workplace safety; and
- Establishing an administrative process for adjudicating complaints of discrimination, similar to the process for adjudicating complaints in violation of the Pennsylvania Human Relations Act, which will prevent unnecessary lawsuits from being filed in the already overburdened Courts of Common Pleas.

Let me reiterate, my employer clients are not looking for a reversal of legalization. They are not seeking a return to zero tolerance policies or broad prohibitions for marijuana use. They recognize that patients and their doctors are in the best position to determine whether medical marijuana will benefit such patients. What they are seeking is clarity around, and a framework for, interacting with those patients who become employees, so that employee rights are protected while maintaining the safety of the workplace and all who enter it. SB 749 will improve upon Act 16 to provide this clarity and framework. On behalf of my employer clients, I thank you for your attention to these issues and for holding this hearing and would encourage you to take up this legislation.

Thank you for the opportunity to testify. I would be happy to answer any questions.