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Haleigh's Hope Act: Medical Marijuana and the Georgia Employer

By R. Read Gignilliat & Brent D. Wasser, Elarbee, Thompson, Sapp & Wilson, LLP

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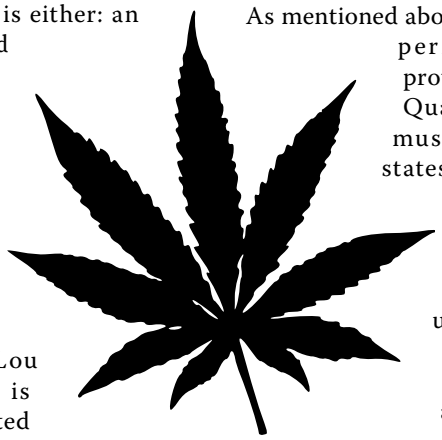
On April 16, 2015, Georgia House Bill 1, known Haleigh's Hope Act (the "Act"), was signed into law and took immediate effect. With the passage of the Act, the State of Georgia joined a growing number of states to legalize – to varying degrees – the possession and use of medical marijuana. This article answers questions and addresses issues about the Act generally and how it will affect Georgia employers.

What is the purpose of Haleigh's Hope Act?

The Act's principal purpose is to protect qualified persons from arrest and criminal prosecution for the possession of medical marijuana in the form of cannabis oil. It does not, however, permit the cultivation or sale of medical marijuana, nor does it address how medical marijuana should be purchased or transported. Because the Act only protects the use of cannabis oil, the inhalation of marijuana by combustion (smoking) and vaporization remains illegal in the State of Georgia.

Who/what is covered by the Act?

The Act applies to any person who has been a Georgia resident for more than one year and who is either: an adult with one or more of eight specified medical conditions, the legal guardian of such an adult, or the parent or legal guardian of a minor child with one or more of the specified conditions.



The eight specified medical conditions include cancer (when diagnosis is end stage or when the cancer treatment produces related wasting 110 illness, recalcitrant nausea and/or vomiting); amyotrophic lateral sclerosis (ALS or Lou Gehrig's disease), when such diagnoses is severe or end stage; seizure disorders related to epilepsy or trauma-related head injuries; multiple sclerosis (MS), when such diagnosis is severe or end stage; Crohn's disease; mitochondrial disease; Parkinson's disease, when such diagnosis is severe or end stage; and sickle cell disease, when such diagnosis is severe or end stage.

The Act requires that use of medical marijuana by a qualified person be physician approved. This, in turn, requires that a bona fide doctor-patient relationship exist; that the physician actually be treating the patient for the specified condition; and that the physician have an active MD or DO license in good standing with the Georgia Composite Medical Board. The physician does not need be a specialist in the treatment of the patient's condition, nor does the physician need to have a DEA license.

Importantly, physician approval does not result in issuance of a prescription for medical marijuana to the qualified person. Rather, it results in the submission of an application for a registry card from the State of Georgia. This is an individualized card to document that the card holder is protected from arrest and prosecution by Georgia law enforcement authorities. The Act does not authorize physicians to issue prescriptions for medical marijuana.

What is not covered by the Act?

As mentioned above, the Act – in its current form – does not permit the cultivation of marijuana or provide a means of acquisition of marijuana. Qualified patients and caregivers therefore must obtain the medicinal cannabis oil in states where cultivation is legal. This creates a complicated challenge, however, because transporting marijuana across state lines is illegal under federal law and possession of marijuana is illegal under the laws of each of Georgia's border states. The Act makes no effort to address these legal challenges. Nor does the Act address the conflict it creates with federal

law, which still classifies marijuana as a Schedule 1 illegal drug (meaning, among other things, that it has no legitimate medicinal purpose).

Drug-free workplace laws.

Studies of employers who conduct employee drug screening reveal that as much as nearly 20% of workers test positive for marijuana. Unfortunately, studies have also shown that marijuana use by employees can lead to a number of negative consequences, including higher absenteeism and tardiness rates; higher turnover; lower productivity associated with reduced motivation and impaired ability to perform complex tasks; and a higher likelihood of accidents (which in turn can expose employers to workers' compensation claims and third party negligent hiring/retention claims, among other forms of liability).

While not applicable to statutory self or group insurance funds, Georgia is one of several states that provide workers' compensation insurance discounts to employers who maintain certified drug-free workplaces. Under the Georgia Drug-Free Workplace Act, the State Board of Workers' Compensation may certify employers as drug-free workplaces. The Georgia Drug-Free Workplace Act does not require employers to conduct employee drug testing.

In addition to Georgia's Drug-Free Workplace Act, there is also a federal Drug-Free Workplace law which applies to organizations that receive a federal contracts or federal grants valued at $100,000 or more. Such organizations must comply with certain requirements in order to qualify for drug-free workplace status. Like the Georgia Drug-Free Workplace Act, the federal Act does not require covered organizations to conduct employee drug testing.

U.S. Department of Transportation ("DOT") regulations also prohibit marijuana use; however, unlike the aforementioned drug-free workplace laws, the DOT regulations require regular drug testing for safety-sensitive employees, including pilots, truck drivers, subway operators, transit fire-armed security personnel, pipeline emergency response personnel, school bus drivers, train engineers, aircraft maintenance personnel, and ship captains, among others.

Haleigh's Hope Act does not protect covered individuals from discrimination.

Unlike other medical marijuana laws enacted by some states, Georgia's Act does not protect patients or caregivers from employment discrimination, and nothing in the Act requires an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in any form. In other words, the Act explicitly states that it imposes no restrictions on the right of Georgia employers to prohibit its employees' on-duty and off-duty use, possession, purchase, etc. of marijuana. This is a reflection of public policy, as Georgia continues to adhere strictly to the concept of "at will" employment and is only rarely willing to enact laws regulating the employment relationship. Thus, unlike many states, Georgia law does not prohibit discrimination against employees based on their off-duty use of lawful products or participation in lawful activities (e.g., smoking cigarettes or other forms of tobacco use).

Medical marijuana use is not protected under the ADA but employers should still proceed with caution.

The Americans with Disabilities Act (ADA) does not protect current users of illegal drugs; therefore, employers may apply drug and alcohol policies to employees who use medical marijuana. Likewise, under the current state of the law, tolerating the use of medical marijuana is not among the "reasonable accommodations" that an employer may have to provide under ADA. That said, because the underlying medical condition is almost certainly a disability within the meaning of the ADA, employers continue to have other accommodation obligations to users of medical marijuana. Among other things, this means that interactive dialog is still required.

Even though medical marijuana use is not (currently) protected under the ADA, employers should be sure to enforce drug and alcohol policies in a consistent manner to avoid a pretext argument based on the underlying medical condition(s). On the other hand, employers who do not drug test and do not have policies in place expressly prohibiting off-duty/off-site marijuana use should not adopt policies that only prohibit off-duty/off-site medical marijuana use, as doing so might give rise to a claim of disability discrimination under the ADA on the basis of disparate treatment.

Employers with zero tolerance policies.

Employers who wish to maintain zero tolerance policies regarding marijuana use are advised to amend their drug and alcohol policies to specifically address medical marijuana. In light of Haleigh's Hope Act, substance abuse policies that prohibit "illegal drug use," without more, may not be as broad as they once were. As a result, employers should consider revisiting their definition of "illegal drug" to specifically include marijuana derivatives otherwise authorized by Georgia law. Further, substance abuse policies that make exceptions for the proper use of "medication" may be broader than they once were. Employers with zero tolerance policies are therefore advised to revisit exceptions to policies for drugs taken pursuant to/under a physician's orders, instructions, advice or direction or otherwise taken in consultation with a physician. At a minimum, consideration should be given to incorporating a disclaimer into the existing policy such as the following: "In accordance with O.C.G.A. § 16-12-91(f), [EMPLOYER] does not permit or accommodate the on- or off-duty use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in any form, including but not limited to, 'medical marijuana.'"

Employers who wish to permit medical marijuana.

Any employer who wishes to permit medical marijuana use should amend its drug and alcohol policies accordingly and educate itself on the new law. Nevertheless, employers who permit medical marijuana use are advised to prohibit use, possession, sale, and purchase in the workplace. Employers who permit medical marijuana use should also remember

that federal DOT mandatory drug-testing regulations still apply, if applicable to the particular employee.

Employers who permit medical marijuana should require current (unexpired) registry cards. Employers generally should not, however, request to review medical marijuana cards in advance (i.e., before an employee approaches the employer about the use of medical marijuana), as doing so might constitute an impermissible medical inquiry and might also reveal protected association. When an employer is aware that an individual is using medical marijuana, the employer should avoid assigning that individual safety-sensitive jobs and duties. The Act provides absolutely no protection from liability for an employer whose tolerance of an employee's medical marijuana use is alleged to have contributed to his/her involvement in an accident or injury.

Law Enforcement 2016 Calendar and Roll Call Training

The Public Agency Training Council (PATC) as a partner with The Georgia Municipal Association, Association County Commissioners of Georgia, and LGRMS, annually publishes a calendar with Law Enforcement High Risk Critical Tasks (HRCT), Ready to use Roll Call Training Lessons. These provide a quick but effective opportunity to discuss with your officers some of the key tasks that have the potential for high liability if improperly applied.

In most cases, these HRCT are formatted with an introduction, citing applicable Circuit or Supreme Court cases, a case study scenario, and then discussion questions. These are a great adjunct to your annual training plan. We have included the January Roll Call Training on Use of Force for you to use. You can receive a PDF copy of the calendar by emailing the LGRMS office; contact Shamilla Jordan (sjordan@gmanet.com) or Teresa Maddox (tmaddox@gmanet.com).

Monthly List of the Roll Call Training

January	Use of Force
February	Emergency Vehicle Operation/Pursuits
March	Arrest, Search and Seizure
April	Care, Custody, Restraint and Transportation of Prisoners
May	Officer-Involved Domestic Violence
June	Property and Evidence
July	Off-Duty Action
August	Sexual Harassment, Discrimination, and Misconduct
September	Selection, Hiring, Retention
October	Internal Affairs and Complaints
November	Special Operations
December	Persons of Diminished Capacity

January Roll Call Training

High Risk Critical Task / Use of Force

Any review on law enforcement's use of force must begin by outlining the Constitutional authority on use of force by law enforcement officers. The basic rule governing use of force is that all uses of force by a law enforcement officer against a free citizen must meet an objectively reasonable standard. In the case of *Graham v. Connor* the U.S. Supreme Court devised a formula for reviewing all uses of force to determine the objective reasonableness of a particular use of force. The most important aspect of *Graham* is the three factor test by which all uses of force are to be judged. First, how serious was the offense that the officer suspected was or had been committed. Second, did the suspect pose a physical threat to the officer or some other person present at the scene? Third, was the suspect actively resisting or attempting to evade arrest by flight?

Scenario: A uniformed officer is dispatched to a local market for a report of a shoplifter. On arrival the officer meets the store manager who points out a man who has stolen groceries. The officer approaches the suspect and informs him he is under arrest for larceny and instructs him to turn around for purposes of searching and handcuffing, prior to transporting him. The suspect does not comply but instead sits on the floor. The officer reaches down and takes hold of the suspect's arm and orders him to stand. The suspect now complies and submits to the officer's authority. The officer handcuffs the suspect and transports him.

Questions (referring to the three part test):

1. How serious was the offense the officer was investigating?

Answer: Shoplifting is a low level misdemeanor that is not associated with violence; therefore, it is not serious.

2. What type of resistance did the suspect offer when informed he was under arrest and instructed to turn around?

Answer: Because the suspect sat down and did not have a physical confrontation with the officer, this would be defined as passive resistance, posing no threat to the officer.

3. Is the task of handcuffing considered a use of force?

Answer: Yes, handcuffing is on the low end of the use of force continuum.

4. Once the handcuffs are applied, what precautions should the officer take to ensure the force is correctly applied?

Answer: The officer must check the tightness of the fit on the cuffs and double lock them to prevent the cuffs from tightening.

5. Is it necessary for an officer to report the use of handcuffs?

Answer: Yes, the officer must document the use of handcuffs in their police report. The officer should describe the actions taken and document that they checked cuffs for fit and double locked them.

Note: When a handcuffed prisoner complains of discomfort due to the tightness and fit of handcuffs the officer should respond to the complaint and make appropriate adjustments to prevent injury. Again, this must be documented in the officer's report.

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Local Government
Risk Management Services
3500 Parkway Lane • Suite 110
Norcross, Georgia 30092

A Service Organization of the Association County Commissioners of Georgia and the Georgia Municipal Association

This Month:

Medical Marijuana • Roll Call Training

GEORGIA MUNICIPAL ASSOCIATION

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Advancing Georgia's Counties.