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HARSHING YOUR MELLOW?
A Look at the Cannabis Law in the School Setting

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Effective July 1, 2021, Connecticut became one of a growing number of states to legalize the recreational use of marijuana. Pursuant to "An Act Concerning Responsible and Equitable Regulation of Adult-Use Cannabis," June Special Session, Public Act No. 21-1 it is now legal in Connecticut for individuals age twenty-one or older to possess, use or otherwise consume marijuana or marijuana products, subject to certain restrictions and limitations, effective July 1, 2021. The law is extensive (303 pages), and the workplace provisions are effective as of July 1, 2022. In the following questions and answers, we will address the provisions that are of primary concern to local and regional boards of education.

QUESTION ONE:

> What's the deal with this new law? Do we have to put up with marijuana use in our schools?

ANSWER TO QUESTION ONE:

> Pursuant to the Act, all employers can prohibit the use of recreational marijuana in the workplace, and no employer can be required to allow an employee to perform his or her duties while under the influence of marijuana. *See* the Act, Section 98(a):
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> Sec. 98. (NEW) (Effective July 1, 2022) (a) No employer shall be required to make accommodations for an employee or be required to allow an employee to: (1) Perform his or her duties while under the influence of cannabis, or (2) possess, use or otherwise consume cannabis while performing such duties or on the premises of the employer, except possession of palliative cannabis by a qualifying patient under chapter 420f of the general statutes.

QUESTION TWO:

What about possession? Can an employee say that he has a right to pick up some weed to use later as long as he doesn't use it in the workplace?

ANSWER TO QUESTION TWO:

No. Prohibitions against the possession of cannabis in the workplace are also contained in Section 98(a) of the Act:

> (a) No employer shall be required to make accommodations for an employee or be required to allow an employee to: (1) Perform his or her duties while under the influence of cannabis, or (2) possess, use or otherwise consume cannabis while performing such duties or on the premises of the employer, except possession of palliative cannabis by a qualifying patient under chapter 420f of the general statutes.

Under the Act, all employers can prohibit the possession or use of recreational marijuana in the workplace, and no employer can be required to allow an employee to perform his or her duties while under the influence of marijuana. Please note, however, that employers are not able to prohibit possession of marijuana by qualifying patients under the Palliative Use of Marijuana Act (PUMA), Conn. Gen. Stat. § 21a-408 *et seq*.

QUESTION THREE:

Given that recreational use of marijuana is legal, what are the rights of school district employees to use recreational marijuana outside of the workplace?

ANSWER TO QUESTION THREE:

All employers, including boards of education, can also take disciplinary action against employees for possession, use, and consumption of recreational marijuana outside the workplace so long as the employer has a policy that is in writing and made available to employees. However, under the Act, boards of education are an "exempted employer," and as such they may enact such prohibitions without first publishing a written policy. Exempted employers, including boards of education, can refuse to hire or take disciplinary action for possession, use or consumption of marijuana inside or outside of the workplace, including before employment, or solely on the basis of a positive marijuana test, with or without a policy in place.

Even though a written policy is not strictly required for boards of education, it is advisable to put such a policy in place to give employees fair notice. When boards of

education do so, we wonder if unions will demand to bargain. Would the State Board of Labor Relations find the promulgation of such a policy to be a newly-prescribed course of disciplinary action requiring negotiation or simply a restatement of the obvious?

QUESTION FOUR:

Should boards of education categorically prohibit all use of marijuana by school employees outside of work except for qualifying patients protected under PUMA, as discussed below?

ANSWER TO QUESTION FOUR:

This is a policy decision for boards of education. What is your view?

QUESTION FIVE:

If boards of education can enact such prohibitions, can we test for marijuana? We make schools test for COVID-19 after all!

ANSWER TO QUESTION FIVE:

Looking only at the Act, it would appear that school districts can simply test for evidence of marijuana use. Section 98(d)(2) provides:

> (2) Nothing in sections 97 to 101, inclusive, of this act, shall limit or prevent an employer from subjecting an employee or applicant to drug testing or a fitness for duty evaluation, or from taking adverse action, including, but not limited to, disciplining an employee, terminating the employment of an employee or rescinding a conditional job offer to a prospective employee pursuant to a policy established under subdivision (1) of subsection (b) of this section

But boards of education are governmental entities, and therefore they are subject to the restrictions set out in the Bill of Rights, including the Fourth Amendment, which prohibits unreasonable searches and seizures. In certain circumstances, suspicionless (or random) drug testing of public employees will be permitted. In two cases, the United States Supreme Court ruled that such testing was allowed. In one case a federal statute required that certain employees responsible for operating a train be tested (regardless of suspicion) following a train accident. *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989). In another case, the Court ruled that the United States Treasury Department could require random drug testing of agents who carried a firearm and were involved in the war on drugs. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). In both cases the Court held that there was

compelling justification for testing that outweighed any personal privacy interest of the employees.

The United States Supreme Court has not ruled on the question of suspicionless drug testing of teachers and other educational employees. For example, the board of education in New Orleans instituted a broad program of drug testing of teachers, aides and clerical workers any time they are injured on the job, without any particularized suspicion concerning drug use. The Fifth Circuit Court of Appeals ruled in 1998, that such testing violates the Fourth Amendment. *United Teachers of New Orleans v. Orleans Parish School Board*, 142 F.3d 853 (5th Cir. 1998). In the absence of particularized suspicion or any showing that the program was responsive to a particular problem of drug use among such employees, the court ruled, such testing was unreasonable.

By contrast, the Sixth Circuit Court of Appeals reached the opposite result in the same year as the *New Orleans* court. In *Knox County Education Association v. Knox County School Board*, 158 F.3d 361 (6th Cir. 1998), *cert. denied*, 120 S. Ct. 46 (1999), the court affirmed the district court decision permitting "reasonable suspicion" testing of all employees, but reversed its decision prohibiting suspicionless drug testing of all "safety-sensitive" employees, including teachers. The court held that teachers and administrators have a unique responsibility in the drug interdiction effort (similar to the Treasury employees in *Von Raab*) that justifies suspicionless testing. *See also Friedenberg v. School Board of Palm Beach County*, 2017 WL 2729668 (S.D. Fla. 2017) (substitute teachers properly subject to suspicionless drug testing).

QUESTION SIX:

One of the teachers in my building showed me his medical marijuana card and told me that he will be out in his car taking a "Mary Jane" break during his preparation period! Dude, for real?

ANSWER TO QUESTION SIX:

As stated above, boards of education and other employers may prohibit employees from possessing and using marijuana in- and outside the workplace. However, a qualifying patient under the Palliative Use of Marijuana Act (PUMA) is protected, and employers may not refuse to hire, penalize, or discharge an employee based on his or her status as a qualifying patient under PUMA, and they must continue to make a reasonable accommodation for employees who use marijuana outside the workplace under the PUMA.

That said, the use of medical marijuana is not protected on school grounds under PUMA. Conn. Gen. Stat. § 21a-408a(b)(2)(c). PUMA also does not restrict an employer's ability to prohibit the use of intoxicating substances, like marijuana, during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours. Conn. Gen. Stat. § 21a-

408p(b)(3). The Act does not change these provisions of PUMA. Accordingly, there is no requirement that employees with a medical marijuana card be permitted to take a "marijuana break" during the workday or otherwise on school grounds, even during a teacher's preparation period

QUESTION SEVEN:

Can districts ever terminate an employee for testing positive, even with a medical marijuana card?

ANSWER TO QUESTION SEVEN:

Notwithstanding the substantial protections it provides, PUMA does not close the door on an employer's ability to take adverse employment action against a qualifying patient-employee. The most likely such situation involves school bus drivers.

C.G.S. § 21a-408p(b)(3) states that "[n]othing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours." Additionally, C.G.S. § 21a-408p(c) further provides that "[n]othing in [C.G.S. § 21a-408p] shall be construed to permit the palliative use of marijuana in violation of subsection (b) of section 21a-408a." C.G.S. § 21a-408a(b)(1) provides as follows:

> The provisions of subsection (a) of this section do not apply to:
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> (1) Any palliative use of marijuana *that endangers the health or well-being of a person other than the qualifying patient or the primary caregiver*; or
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> (2) *The ingestion of marijuana (A) in a motor bus or a school bus or in any other moving vehicle, (B) in the workplace, (C) on any school grounds or any public or private school*, dormitory, college or university property, unless such college or university is participating in a research program and such use is pursuant to the terms of the research program, (D) in any public place, or (E) in the presence of a person under the age of eighteen, unless such person is a qualifying patient or research program subject. For the purposes of this subdivision, (i) "presence" means within the direct line of sight of the palliative use of marijuana or exposure to second-hand marijuana smoke, or both; (ii) "public place" means any area that is used or held out for use by the public whether owned or operated by public or private interests; (iii) "vehicle" means a vehicle, as defined in section 14-1; (iv) "motor bus" means a motor bus, as defined in section 14-

1; and (v) "school bus" means a school bus, as defined in section 14-1. (Emphasis added.)

Finally, PUMA expressly permits an employer to take action required by Federal law or to obtain Federal funds. *See* C.G.S. § 21a-408p(b) (noting that, "[u]nless required by [F]ederal law or required to obtain [F]ederal funding," individuals enjoy certain protections under PUMA); *see also Smith v. Jensen Fabricating Engineers, Inc.*, No. HHD-CV18-6086419, 2019 WL 1569048, at *3 (Conn. Super. Ct. Mar. 4, 2019) ("Moreover, an employer may refuse to hire or terminate an employee who is a qualifying patient under PUMA if required by Federal law or as required to obtain Federal funding.")

Driving a school bus is an activity for which a positive marijuana test precludes one from employment, whether or not a person has a medical marijuana card. Various Federal laws and regulations impact the employment relationship between employers and their employees who operate commercial motor vehicles designed to transport passengers. For example, Federal law mandates that the Secretary of the USDOT promulgate regulations that address testing "operators of commercial motor vehicles for the use of a controlled substance in violation of law or a United States Government regulation . . . ." 49 U.S.C. § 31306(b). Generally speaking, these USDOT drug testing regulations apply to individuals and employers of individuals who operate commercial motor vehicles in commerce and are subject to commercial driver's license ("CDL") requirements. See 49 C.F.R. § 382.103(a)(1).

It is also significant that USDOT regulations continue to define marijuana as a "controlled substance." *See* 49 C.F.R. §§ 40.85 and 382.107. And it remains illegal to possess marijuana under Federal law, as it is a "Schedule 1" controlled substance that "has no currently accepted medical use in treatment in the United States." 21 U.S.C. § 812(b)(1)(B); *see also* 21 C.F.R. §§ 1308.11(d)(23) and (58).

According to USDOT regulations, once an individual employed to operate a commercial motor vehicle tests positive for a controlled substance, that individual's employer must prevent that employee from performing "safety-sensitive functions," which under federal law includes driving a school bus In particular, the following USDOT regulations apply to such circumstances:

- 49 C.F.R. § 40.23(a) provides in relevant part as follows: "As an employer who receives a verified positive drug test result, you must immediately remove the employee involved from performing safety-sensitive functions."

- 49 C.F.R. § 40.151(e) provides as follows: "[The licensed physician responsible for receiving and reviewing laboratory results generated by an employer's drug testing program] must not verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such

recommendations, such as the "medical marijuana" laws that some states have adopted)." As indicated by the USDOT, 49 C.F.R. § 40.151(e) does not authorize "medical marijuana" under State law to be a valid medical explanation for a transportation employee's positive drug test result. See Jim L. Swart, Director, Office of the Secretary of Transportation, *DOT "Metical Marijuana" Notice* (October, 22, 2009), https://www.transportation.gov/odapc/medical-marijuana-notice (last visited April 29, 2019).

- 49 C.F.R. § 382.213(a) provides as follows: "No driver shall report for duty or remain on duty requiring the performance of safety sensitive functions when the driver uses any drug or substance identified in 21 C.F.R. 1308.11 Schedule I."

- 49 C.F.R. § 382.215 provides in relevant part as follows: "No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive . . . for controlled substances. No employer having knowledge that a driver has tested positive . . . for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions."

- 49 C.F.R. § 391.41(a)(1)(i) provides in relevant part as follows: "A person subject to this part must not operate a commercial motor vehicle unless he or she is medically certified as physically qualified to do so . . . ." Notably, "[a] person is physically qualified to drive a commercial motor vehicle if that person . . . Does not use any drug or substance identified in 21 C.F.R. 1308.11 Schedule 1, an amphetamine, a narcotic, or other habit-forming drug." 49 C.F.R. § 391.41(b)(12)(i).

Additionally, if a commercial motor vehicle operator tests positive for a controlled substance, he/she may not perform safety-sensitive functions until he/she completes the "return-to-duty process" outlined by USDOT regulations. In particular, that process prevents an employee who tested positive for marijuana from performing safety-sensitive functions "until and unless [such employee] complete[s] the [substance abuse professional] evaluation, referral, and education/treatment process." 49 C.F.R. § 40.285(a); *see also* 49 C.F.R. §§ 40.23 and 382.217.

QUESTION EIGHT:

Is there a difference between smoking and vaping?

ANSWER TO QUESTION EIGHT:

No. Effective October 1, 2021, Section 86 of the Act amends Conn. Gen. Stat. § 19a-342 to define "smoke" or "smoking" as "the burning of a lighted cigarette, cigar, pipe or any other similar device, ***whether containing, wholly or in part, tobacco, cannabis, or hemp.***" (Emphasis added). The new law continues to prohibit smoking on school grounds and in school buildings, clarifying that such prohibition extends to any area of

such building. Section 87 of the Act amends Conn. Gen. Stat. § 19a-342a and extends the prohibition against using an electronic nicotine delivery system or vapor product on school grounds or in a school to also prohibit use of an "electronic cannabis delivery system" in such locations. The new law maintains the obligation to post signs stating that use of electronic nicotine delivery systems, and now electronic cannabis delivery systems, or vapor products must be posted in a conspicuous place, but clarifies that signs need not be posted in every room of the building.

QUESTION NINE:

Do these new laws affect students?

ANSWER TO QUESTION NINE:

In general, no. The Act specifically refers to "Adult-Use Cannabis." However, Section 19 of the Act amends Conn. Gen. Stat. § 10-221(d), which requires local and regional boards of education to develop, adopt and implement policies and procedures for (1) dealing with the use, sale or possession of alcohol or controlled drugs by public school students on school property, including coordination with and referral to appropriate agencies, and (2) cooperating with law enforcement officials. The Act provides that, as of January 1, 2022, no such policies and procedures shall result in a student facing greater discipline for the use, sale or possession of cannabis than a student would face for the use, sale or possession of alcohol.

QUESTION TEN:

Should the employer treat employee posts on social media showing marijuana use outside the workplace in the same manner as it treats such posts that show alcohol use?

ANSWER TO QUESTION TEN:

We recommend that you do not treat social media posts showing marijuana use any more severely than you would treat social media posts showing alcohol use. As mentioned above, Section 19 of the Act provides that boards of education may not impose greater discipline on *students* for the use, sale, or possession of marijuana than for the use, sale, or possession of alcohol. While this section of the Act applies only to students, it nevertheless provides a helpful framework for all school District operations, and social media posts specifically. School officials may invite a challenge under the First Amendment if they take action on the basis of posts showing marijuana use (unless the district enacts a categorical prohibition), because it may be hard to show that such posts are disruptive of the operation of the district.

We hope that this information is helpful and did not harsh your mellow. Good luck with the new law!