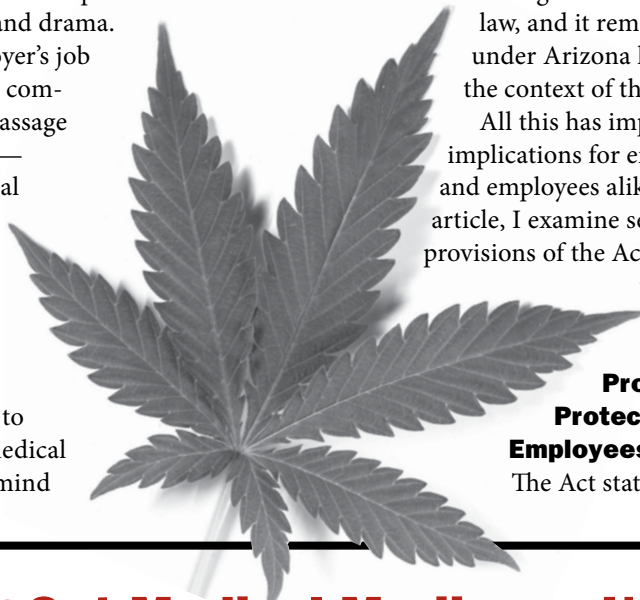


New Medical Marijuana Law Raises Questions, Creates Potential Pitfalls for Arizona Employers

Arizona employers are already overwhelmed by copious workplace issues, challenges and drama. Recently, an employer's job became even more complicated with the passage of Proposition 203—the Arizona Medical Marijuana Act (the "Act").

The Act makes it legal in Arizona for individuals to qualify to receive and use marijuana to treat a variety of medical ailments. Keep in mind



that the use and distribution of marijuana is illegal under federal law, and it remains illegal under Arizona law outside the context of this new law.

All this has important implications for employers and employees alike. In this article, I examine several key provisions of the Act impacting the workplace.

Provisions Protecting Employees

The Act states: "Unless a

failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either: 1) the person's status as a cardholder. 2) A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment."

This provision in the new law prevents employers from firing an employee who is

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Weeding Out Medical Marijuana Use On Arizona Real Estate

The recent passage of the Arizona Medical Marijuana Act means that medical marijuana dispensaries—a budding industry which will ultimately total about 126 under the law's guidelines—will soon sprout on the landscape, along with an as-yet-undetermined number of sites for the legal cultivation of the marijuana plant.

Just because medical marijuana use and distribution has been approved under state law, however, does not modify the long-standing and continuing illegality under independent federal law. Although opponents and proponents alike may welcome Arizona's new medical marijuana law as warmly as they would welcome a roach in



their kitchens, the stark conflict between state and federal law creates a host of foggy issues—including in the real estate field.

Real Estate Rules Restricting Reefer

Reverence for being able to deal freely with property is high among homeowners. Yet Arizona is a state where many people live in planned residential communities and conduct business within controlled commercial centers. Those areas are governed and limited, often in minute detail, by recorded agreements, contracts, easements, covenants, conditions and restric-

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PERSONAL NOTES

Timothy W. Barton served as a faculty member at the Colorado Bar Association's National Continuing Legal Education Conference in Vail.

Peter Collins, Jr. was re-appointed to the State Bar's Civil Rules and Procedures Committee and to the Board of Directors for the State Bar College of Trial Advocacy. He also was named in the 2011 *Best Lawyers in America*.

Robert D. Haws, Jennifer N. MacLennan and **Karl H. Widell** participated on an attorney panel discussing "Hot Topics in Special Education" for the Special Education Administrators of Arizona (SEAA).

John L. Hay, Christina M. Noyes and **Chas W. Wirken** hosted our firm's 2011 Franchise Seminar. **Barbara U. Rodriguez-Pashkowski** was a guest speaker on environmental issues for franchisors.

Martin T. Jones presented at the 7th Annual Gatekeepers Regulatory Roundup and at the National Conference of the Environmental Information Association. For both, his program was entitled "It's Not Easy Being Green: Benefits and Difficulties with Alternative Energy Sources."

For the second year in a row, **James W. Kaucher** won his division in the Creedmoor Cup high-power rifle match in October. On March 31, Jim won the expert division in the Berger Southwest National mid-range high-power rifle championships. The following day, he placed second in the 800-point aggregate match.

Scott A. Malm spoke on title insurance issues at leadership meetings held by Old Republic Title Insurance Company and American Title Services Agency of Arizona.

Melanie G. McBride serves on the Board for the Arizona College of Trial Advocacy.

Craig A. McCarthy served as a featured speaker at the Property Loss Research Bureau's annual conference. His topic was arson and fraud defenses in large insurance property loss claims.

Christopher M. McNichol taught three classes on Real Property Leasing and Receiverships at the Arizona School of Real

Estate & Business. **Chris** and **Kent E. Cammack** spoke on Loan Enforcement issues at an Arizona Trustees Association event.

Barbara U. Rodriguez-Pashkowski spoke at the Southwest Regional Environmental Conference and was elected Chair of the Maricopa County Bar Association's Environmental and Natural Resources Law Section.

Richard A. Segal was appointed by the Arizona Supreme Court as a member of the Attorney Discipline Probable Cause Committee. Comprised of six attorneys and three public members, the committee is a key part of the revised attorney discipline system that became effective Jan. 1, 2011.

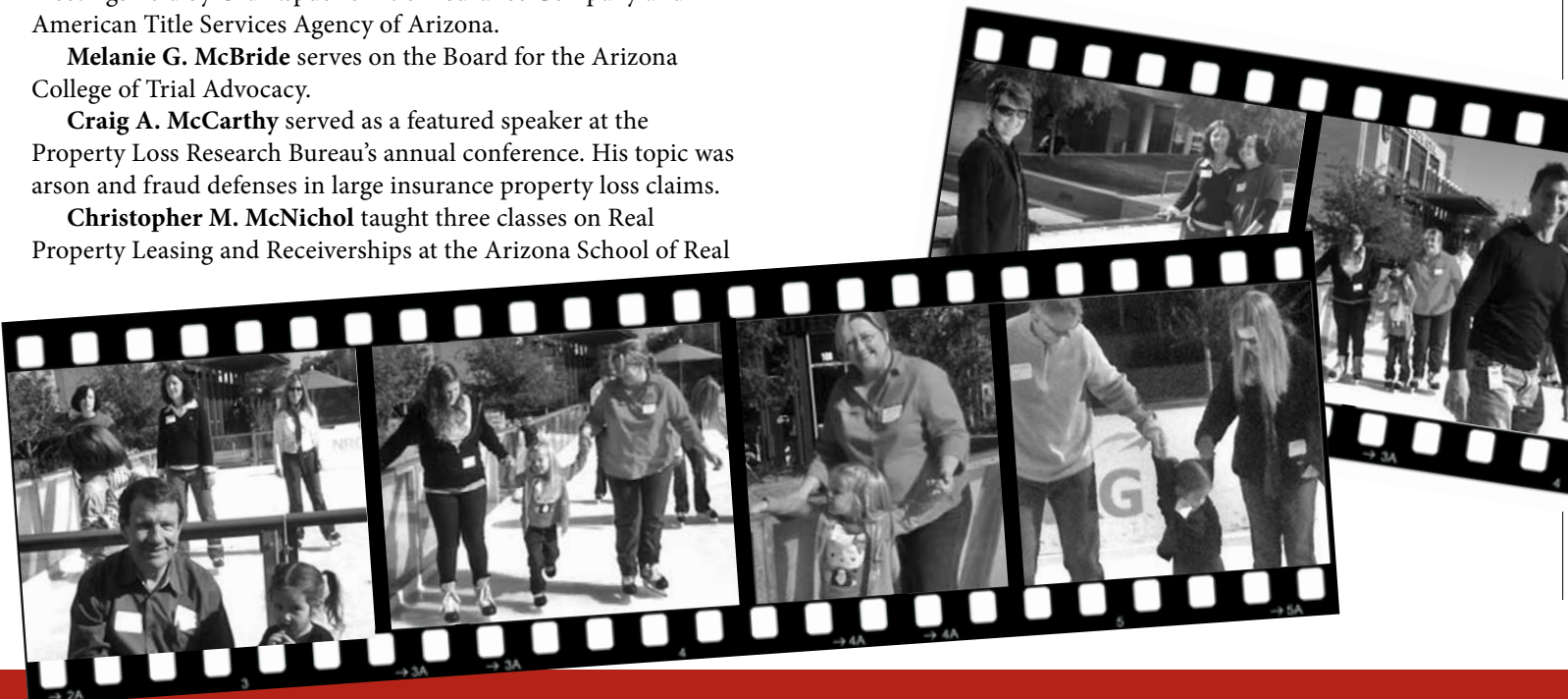
Trish Stuhan served as an attorney-coach for Arizona State University law students in preparation for the National Moot Court Competition hosted by the New York City Bar Association and the American College of Trial Lawyers.

Timothy J. Watson participated in the Special Olympics "Over The Edge" event, where he rappelled down the One Lexington building in downtown Phoenix to raise money for the organization's athletes.

Michael Woodlock and **Mary Ellen Shannon** participated in "United We Run Tucson," a 5K run/walk to benefit the families of the victims of the tragic Tucson shooting. **Peter Collins Jr.** and his wife **Debbie** made a generous donation to the fund. To make a donation, visit www.pimacountybar.org.

Gust Rosenfeld Employees Enjoy Holiday Ice Skating Party

Congratulations to all Gust Rosenfeld employees and family members who survived our skating event that was held on the First Annual Cityscape Holiday Outdoor Ice Rink on January 8, 2011. Hot cocoa, cookies, brownies, hot cider and cold drinks were enjoyed by all. The children were a delight and it was a fun and challenging event for everyone who attended.



Tax Implications of New Estate Tax Reforms

In the waning days of 2010, significant reforms to the federal estate tax laws were enacted along with the temporary extension of the “Bush tax cuts.”

Like the income tax provisions, the new estate tax changes expire at the end of 2012, requiring another review of tax policy by Congress and the President.

Here are several key elements of the new law:

- There is a retroactive restoration of the estate tax in 2010 and an extension of the tax for 2011 and 2012 with a \$5 million exemption equivalent and 35 percent top tax rate;
- Personal representatives for 2010 decedents may opt-out of the estate tax, choosing the existing carry-over basis



regime instead;

- The gift tax and generation-skipping transfer tax also have \$5 million exemptions and a 35 percent top tax rate in 2011 and 2012; and
- Spouses may inherit unused estate tax exemptions.

In cases involving trusts in which a formula is used to allocate assets between the marital trust and the decedent's (or family) trust, the formula will allocate assets up to \$5 million to the decedent's trust. This should continue to work well, except in rare cases.

For more information, please contact your estate planning attorney.

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Weed

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tions, commonly referred to as “CC&Rs.”

Leafing through commonly used CC&Rs reveals that they almost always prohibit illegal actions in so-called common areas on the property. These constraints also trip up activities and uses which could be considered a “nuisance,” either as defined in the CC&Rs or under higher principles of general tort and property law.

Going to Pot: Commercial and Common Areas

Smoking marijuana outside one's home in the common areas of a planned community, even if otherwise in compliance with

state law, would still violate the CC&Rs because the use remains proscribed by federal law, or arguably constitutes a nuisance.

This obviously creates an enforcement conundrum for a homeowner's association, whose job is to enforce the community's CC&Rs. These same concerns hold true were a shopper to use marijuana legally (under state law) while strolling around the local retail center.

Leases and Zoning Laws Add Smoke

Leases of residential or commercial property often have similar provisions that will butt into medical marijuana use under state law.

Apart from constraints affecting behavior, a legal marijuana dispensary itself will need to qualify under applicable real estate zoning laws. Many Arizona municipalities are rolling out amendments to zoning regulations that will clip the geographic locations for marijuana clinics. Analogies to other regulated industries are not that far out; from a zoning perspective, some equate the use with adult entertainment.

When the smoke clears, the use of medical marijuana on non-private property may be a pipe dream. Anyone partaking in this new medical marijuana regime should consult legal counsel before inhaling.

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Marijuana

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a registered qualifying patient receiving and using marijuana for medical purposes.

An employer can take disciplinary action if the employee is caught doing the drug at the worksite and/or is determined to be under the influence during work hours. The Act further states that a registered qualifying patient cannot be considered “under the influence of marijuana *solely* (my emphasis) because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.”

The litigation spawned by the phrase “in insufficient concentration to cause impairment” will be legion. It is unclear who will have the burden of proving use, possession or impairment, but given the law’s provisions, it will likely fall to the employer.



Provision Offering Some Protection for Employers

The new law says: “No school, landlord or employer may be penalized or denied any benefit under state law for enrolling, leasing to or employing a registered qualifying patient or a registered designated caregiver.”

What this provision purports to do is provide some comfort to employers who are concerned about their employees, now or in the future, qualifying as a patient who can legally receive and use medical marijuana and/or qualifying as a caregiver who can supply medical marijuana to qualifying patients.

This provision is limited to “state law” and offers no protection under federal law. Given that the state law and federal law are at clear odds with each other, employers should be cautious in their handling of this issue.

More Issues Involving Federal v. State Law

Arizona’s new law also raises questions and potential consequences for Arizona-based employers whose businesses rely on or benefit from federal contracts, federal grants and/or federal licensing. There is a real risk that the federal government could pull these associated benefits from the employer for violating federal law regarding marijuana use.

However, in October 2009, the Justice Department issued a memorandum suggesting that federal prosecutions related to

medical marijuana use and distribution may be limited; this may sound like good news, but employers should proceed with caution because any possible prosecution or workplace drug-related review is subject to the federal government’s discretion.

For More Information

If, as an employer, you take nothing from this article except that the Arizona Medical Marijuana Act means great complexity for you, I have succeeded in my mission.

At the very least, you would be wise to examine the new law and review your employment practices and documents for any issues raised for your workplace by this new law.

If you have questions and/or need sage advice on this issue, contact Rob Haws, our firm’s resident employment law guru, at rhaws@gustlaw.com or 602.257.7976.

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ET·Y·MOL·O·GY COR·NER MARIJUANA

“I tried marijuana once. I did not inhale.”

WILLIAM J. CLINTON

Etymologically, there is little to say about the word “marijuana.” It comes from Mexican Spanish “marihuana” of undefined origin. More interesting are the numerous alternative terms used for the controversial plant: mary jane, weed, pot, juju, reefer, joint, grass, hemp. If you can think of others, you know too much—and probably have a room at home with blacked out windows and very bright lights.

Will Social Media Spark a Litigation Firestorm for Employers?

Examining Some of the Business Hazards of Using Facebook, Twitter

Social networking sites, such as Facebook and MySpace, started as online forums for individuals to connect on a social level. Today, however, these kinds of sites are valuable tools used by businesses to market products and services, attract and retain clients, and establish credibility in the marketplace. But, as with anything, there are potential pitfalls associated with using social media that you should be aware of and avoid if possible.

Every piece of data posted online is likely saved, searchable and retrievable. Everything you say can potentially be held against you. In the context of litigation, this means it might be discoverable and actionable even years down the road. Thus, a good rule of thumb is: *Don't say anything online that you wouldn't say if your grandmother was sitting next to you.* This simple advice may be the most valuable part of this article.

Businesses Liable for Employee Behavior

The beauty of social networking is that information can be disseminated quickly to wide audiences. If it's positive information – that's great. If it's negative, potentially defamatory or confidential information, that's not so great – and it could spark a lawsuit.

Business owners can be held liable for what their employees say and do online. Students at Canterbury's University of Kent created a Facebook group named "For Those Who Hate the Little Fat Library Man" to harass a librarian they disliked. In the United States, if a company's employees were to use corporate IT resources for a similar purpose, the company might be liable for defamation if litigation ensued. At the very least, the cost of discovery to determine if the posting was actionable could be very high.

A company can also be held responsible for employee claims about the

company's products and services. Let's say that an employee for a mattress manufacturer Tweets that the company's signature memory foam mattress can heal or prevent lower back problems, even though the company has and would never make such a claim. This seemingly innocent comment by an employee could result in a potential product liability case against the company.

Leaking Information, Secrets is a Real Risk

There are also disclosure and confidentiality issues to keep in mind. If you're an employer, you should closely monitor what is posted online about your business and maybe even your clients' and competitors' businesses. Sharing confidential company information, even inadvertently by you or your employees, can cause great damage—not just because of the legal ramifications but because it can harm your reputation. Blog posts and Tweets have led to disclosure of trade secrets, insider trading, wrongful termination and harassment suits.

A few years ago, it came to light that 10 workers at the Ministry of Defence in the United Kingdom were disciplined for leaking sensitive information and secrets on Twitter and Facebook. This is alarming when you consider that these workers could have been employed in any area within the organization, including the military.

Online Badmouthing May Be Protected Speech

News outlets have reported on employees who have been fired or reprimanded for posting derogatory comments about company owners and other supervising executives. A recent

settlement involving a worker fired for complaining about her boss on Facebook suggests that an employee's Facebook posts represent speech protected by the First Amendment, especially if the posts are done from a personal computer on the employee's own time.

Dawnmarie Souza sued her employer after she used "psychiatric patient" and other offensive terms to describe her boss on Facebook. As a result, the company cited its policy prohibiting employees from saying anything at all about the company on social media sites.

The National Labor Relations Board stepped in to aid Souza's lawsuit, which reached an undisclosed settlement on Feb. 7, 2011. As a result of the settlement, Souza's former employer lifted its Internet policy that banned employees from participating in "online badmouthing" about work-related topics.

The lesson for employers is two-fold: 1) check your social media policies and make sure they only restrict allowable offenses, like disclosing confidential information; and 2) modify your policies if they are overly broad.

Conclusion

Social media is a business tool that's here to stay. If used responsibly, social media offer a host of advantages for companies. If used haphazardly and without a full understanding of the risks, these sites could lead to the inside of a courtroom.

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Wendy is a litigator focusing on construction, breach of contract and commercial law.



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NEW FACES

Susan P. Segal



Susan specializes in Public Law. She has represented the State of Arizona, the Arizona Department of Education and the Arizona Board of Education in complex litigation pertaining to the finance of public education. She has also served as legal counsel to a large public school district in northwest Phoenix and has represented numerous state and local public bodies and agencies on a variety of issues.

Before joining Gust Rosenfeld, Ms. Segal was the Division Chief in the Public Advocacy Section of the Arizona Attorney General's office. She supervised the Consumer Protection and Advocacy Section (Consumer Litigation, Antitrust, and Tobacco Enforcement Units) and the Environmental Enforcement Section and conducted a variety of outreach programs in consumer education.

Calvin J. Platten, Jr.



Calvin primarily practices in the areas of commercial, construction, insurance, and real estate litigation. He is licensed to practice in federal and state courts and often represents clients in alternative dispute resolution proceedings. He also handles Arizona Registrar of Contractors, Arizona Department of Real Estate, and Arizona Association of Realtors' hearings.

Calvin represents insurance carriers and self-insured businesses of varying sizes in commercial matters. He has a broad legal background ranging from commercial litigation to extensive experience in commercial and real estate transactions. He has published several articles in the *Arizona Journal of Real Estate and Business* on real estate and litigation topics.

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