

A Budding Issue-Marijuana Legalization

Issues to Consider-Employment and Safety Policies

January 19, 2016

The High Cost of Substance Abuse for Employers

Facts about drug-using employees

- Over 3 times more likely to be involved in workplace accidents.¹
- 5 times as likely to file workers' compensation claims.¹
- 3 times more likely to use medical benefits than other employees.²
- 80% of drug-abusers steal from their workplace to support drug use.³
- Substance abuse is the 3rd leading cause of workplace violence.⁴
- Absenteeism, more likely to skip one or more days in the past month (13% vs. 5%).⁵

Marijuana is the most commonly used and abused illegal drug used by employees, followed by cocaine and prescription drug abuse.⁶

1. National Institute on Drug Abuse, 1987
2. Bureau of National Affairs, 1980
3. Security Journal, Drug Crimes in the Workplace, 1994
4. Society of Human Resource Management, EAP Digest , 1994
5. Substance Abuse and Mental Health Services Administration, 1994
6. National Council on Alcoholism and Drug Dependence, Inc. 2015

Shifting Sands of the Legal Landscape

State Status

- 23 states and the District of Columbia have approved comprehensive public medical marijuana programs
- 17 states allow use of low THC, high cannabidiol products for limited medical situations
- 4 States and DC have approved recreational use



The medical conditions that are approved for marijuana use varies but majority of states permit for the following:

- HIV-AIDS
- Epilepsy
- Glaucoma
- Cachexia
- Wasting Syndrome
- Severe Nausea
- Severe or chronic pain
- Muscle Spasms

Physicians may not legally prescribe Schedule I drugs. However, doctors can recommend marijuana to patients. (*Conant v. McCaffrey, US District Court, CA 2000*)

Understanding the Terminology

General definitions:

- **Marijuana Legalization**– Laws or policies which make the possession and use of marijuana legal under state law.
- **Marijuana Decriminalization**– Laws or policies adopted in a number of state and local jurisdictions which reduce the penalties for possession and use of small amounts of marijuana from criminal sanctions to fines or civil penalties.
- **Medical Marijuana**– State laws which allow an individual to defend him or herself against criminal charges of marijuana possession if the defendant can prove a medical need for marijuana under state law.

Medical Marijuana Legalization in US

State	Medical Marijuana Patients	State	Medical Marijuana Patients
Alaska	1,857 (2.5)	Michigan	146,811 (14.8)
Arizona	55,440 (8.4)	Minnesota	Not Open
California	572,762 (14.9)	Montana	8,470 (8.3)
Colorado	111,804 (21.2)	Nevada	6,500 (2.3)
Connecticut	2,326 (0.6)	New Hampshire	Not Open
D.C.	1,181 (1.8)	New Jersey	1,670 (0.2)
Delaware	133 (0.1)	New Mexico	11,547 (5.5)
Hawaii	13,833 (9.9)	New York	Not Open
Illinois	2,000 (0.2)	Oregon	69,429 (17.7)
Maine	17,274 (13.2)	Rhode Island	9,298 (8.8)
Maryland	Not Open	Vermont	1,290 (2.1)
Massachusetts	Not Open	Washington	103,444 (14.8)

Source: ProCon.org 10/27/14
 () Number of Patients per 1000 residents

Recreational Legalization in US

Approved
Alaska
Colorado
D.C.
Oregon
Washington

On the Docket in 2016
California
Connecticut
Maine
Massachusetts
Michigan
Nevada
Ohio
Rhode Island
Vermont

Ohio voted against legalizing marijuana for recreational and medical use in November.



Marijuana is Still Illegal Under Federal Law-or Is it?

The U.S. Department of Justice issued a memorandum to US Attorneys in August 2013 updating its guidance on marijuana enforcement.

- Stated marijuana remains illegal federally
- Expects states to create “strong, state-based enforcement efforts...and will defer the right to challenge their legalization at this time.”

“We’ve got bigger fish to fry,” responded President Obama to a question concerning prosecution of marijuana users posed by Barbara Walters on ABC’s “Good Morning America” on December 14, 2012

Conflicting Laws-Caught between a Stone(r) and a Hard Place

Federal Status

- Bottom Line-marijuana remains classified as a Schedule I narcotic under the Federal Controlled Substance Act
 - Marijuana cultivation, distribution, possession and use are still criminal acts under federal law.
 - Marijuana is in the same category as Cocaine, Heroin, LSD and Ecstasy
- Schedule I definition
 - The drug or other substance has a potential for abuse
 - The drug or other substance has not currently accepted medical use in treatment in the United States
 - There is a lack of accepted safety for use of the drug or other substance under medical supervision

Schedule I drugs are the most dangerous drugs of all drug schedules with potentially severe psychological or physical dependence.

Issues to Consider When Making Decisions or Setting Policies

- Zero Tolerance Drug Policies
- Workplace Safety
- Accommodating Employees Under ADA
- Employment Screening

Zero Tolerance Drug Policies

Prohibiting Illegal Substance Use at Work and/or Reporting to Work with it in their system.

- To date, states that have legalized medical and/or recreational marijuana have sided with employers giving them the right to terminate employees for violation of zero-tolerance policy
- Be aware ,certain states such as Arizona, Delaware, Minnesota and Nevada expressly prohibit firing employees for positive marijuana test that results from off-duty use for medicinal purposes.
 - Az. Rev. Stat. 36-2813; Del. Code Title 16, § 4905A; 2013 Minnesota Senate File No. 2470
- Review state statutes for exemption under The Drug Free Workplace Act applicable to federal grantees .
 - DFWA requires that any State agency which receives Federal funding and any organization that receives Federal contract of at least \$100,000 must establish a drug-free workplace.
 - Az. Rev. Stat. [36-2813 (2011)] “unless 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” based on qualified patient’s testing positive for medical marijuana
- DFWA does not specifically regulate off-duty drug use nor does it require drug testing.

Zero Tolerance Drug Policies, cont'd

- Guidance on off-duty medical marijuana use from court decisions:
 - Coats v. Dish Network, Colorado (Employee that was a quadriplegic was terminated for testing positive for medical marijuana)-Upheld by Colorado Supreme Court
 - Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries (Temp. employee discharged after self reporting medical marijuana use). Upheld by Oregon Supreme Court
 - Beinor v. Industrial Claims Appeals Office (Employee denied unemployment for testing positive for marijuana in violation of employer's zero tolerance drug policy. Upheld by Colorado Supreme Court
- While it is uncertain how state courts will handle recreational marijuana, some pundits suggest there is no reason to believe the findings from above cases won't apply equally.

The act itself “may not be construed to amend or affect in any way any state or federal law pertaining to employment matters.”

Oregon Medical Marijuana Act Measure 91, Section (4)

Zero Tolerance Drug Policies, cont'd

Some things to consider in evaluating zero tolerance policies:

- Does the policy address use of illegal drugs in the workplace?
- Does the policy specifically state position on the use of medical and/or recreational marijuana?
- Have you defined what constitutes “use” (e.g., any positive marijuana drug screen test result)?
- Have you defined what (if any) constitutes accommodation of marijuana in the workplace?

Workplace Safety

Questions to consider if safety policy forbids employees to report to work impaired:

- What constitutes “impairment”?
 - There is no scientific method to determine marijuana intoxication level, unlike BAC for alcohol.
 - Field sobriety roadside tests used to detect if under the influence of alcohol don’t work as well for marijuana.
 - 88% of drivers failed when under influence of alcohol compared to 30% percent for marijuana
 - Reasonable suspicion in a workplace setting may be difficult for supervisors to detect through normal observation
 - If employee is acting erratically, or there are independent observations that an employee consumed marijuana, or actually smells like marijuana would likely give employer “reasonable suspicion” to drug test employee.
 - May be better to use the term “under the influence” rather than “impaired” in the policy.
- Who determines “impairment” or “under the influence” (e.g., physician, supervisor, employee)?
- Can you/have you defined all job descriptions to classify all positions as “safety sensitive”?

ADA and the Use of Marijuana to Treat a Disability

What accommodation is required:

- ADA specifically excludes from protection employees who use illegal drugs .
 - Courts have generally held that an employee's right to use medical marijuana does not impose an obligation on employers to accommodate.
 - Important to verify in each respective state if explicit anti-discrimination for medical marijuana provisions exist and if so, determine the scope of liability under state disability laws, if any.
 - Important to also ensure disability policies are enforced uniformly to avoid argument that employer applied policies selectively and discriminately to employees who have disabilities like cancer, HIV-AIDS, glaucoma, chronic pain or multiple sclerosis since these employees are more likely treated with medical marijuana.
- However, if an employee enters a substance abuse program, employers have to accommodate the employee's participation.

Pre-Employment Screening

- EEOC has issued instructive guidance regarding pre-employment disability related questions:
 - Generally advises against asking applicants about lawful drug use as such inquiries may elicit information about a disability.
 - Employers generally can ask about current illegal drug use because such is not protected under the ADA and marijuana remains illegal under federal law.
 - Employers generally may ask if applicant is currently using any substance that may impair their ability to safely perform their job duties.
- Employers must comply with applicable state laws, including anti-discrimination provisions related to medical marijuana.

Summary

Employers are responsible for employees as soon as they report to work. Any drug use that impacts an employee's ability to safely and effectively perform their job should be a genuine concern for the employer.

- The landscape of legalized marijuana use is relatively uncharted territory. Proceed with caution.
- Work closely with labor/employment law attorneys to conduct regular reviews of relevant policies in light of rapidly changing legislation.
- Employers need to be cognizant that the treatment is now different, and one-size-fits-all solutions are more difficult.
- Developing policies that are clear, consistent with applicable federal, state and local laws and regulations and supports the position the employer wants to take on the issue of illegal drugs in the workplace can help address issues surrounding state legalization of medical and recreational marijuana .

At a minimum, employers in all 50 states and the District of Columbia can regulate an employee's use of marijuana by:

- Prohibiting possession and use at work
- Prohibiting employees from reporting to work impaired or under the influence of marijuana

Disclaimer

The information contained in this presentation is intended to provide general guidance only and is in no way to be construed as legal direction. Consult a qualified attorney for legal advice on any matter pertaining to compliance with all applicable federal, state and local laws and regulations.