

ADDRESSING MEDICAL & RECREATIONAL MARIJUANA IN THE CONSTRUCTION INDUSTRY

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Poll

- How many have experienced employees with medical marijuana (MMJ) prescription/authorization?
- How many are from states with recreational marijuana?
- How many have had difficulty navigating marijuana laws with your workforce?

Items for Discussions

- MMJ and how to comply with state laws
- Employee protections under state MMJ laws
- Recreational marijuana
- Employee protections under state recreational marijuana laws
- How do we test now?
- Relevant court cases

The Federal Landscape

- **Federal Law**

- Controlled Substances Act (CSA) – Schedule I drug
 - DEA rescheduling in process to Schedule III?
- Farm Bill – legalized “hemp”
 - Low THC concentrations



The Federal Landscape

Drug Free Workplace Act of 1988

- Applies to Federal contractors and grantees
- Requires covered organizations to provide a “drug-free workplace” by:
 - Publishing a policy statement
 - Establishing an awareness program
 - Notifying employees of their obligations
 - Notifying the granting agency of any violations
 - Imposing penalties
- Standard – “good faith effort to maintain a drug-free workplace.”
- Penalties for lack of compliance – payments and/or grant may be suspended/terminated



Medical Marijuana

Medical Marijuana

- States/Territories that DO NOT Have MMJ Program
 - Idaho
 - Kansas
 - Nebraska
 - American Samoa
- All other states have MMJ Programs

How MMJ Works

Pennsylvania Example

- “Notwithstanding any provision of law to the contrary, use or possession of medical marijuana **as set forth in this act** is lawful in this Commonwealth.”
- Patients wishing to use medical marijuana must obtain a “certification” from a registered physician.
- The patient must suffer from one of the enumerated serious health conditions.
- Once certified, the patient obtains the medical marijuana from a licensed dispensary (pharmacist, CRNP, PA, MD or DO).



What Conditions Qualify?

- Cancer
- HIV/AIDS
- ALS
- Parkinson's Disease
- Multiple Sclerosis
- Spinal Cord Nerve Injuries
- Epilepsy
- Inflammatory Bowel Disease
- Opioid Use Disorders
- Dyskinetic and Spastic Movement Disorders
- Neurodegenerative Diseases
- Terminal Illness
- Anxiety
- Tourette's Syndrome



What Conditions Qualify?

- Neuropathies
- Huntington's Disease
- Crohn's Disease
- Neuropathies of the Central Nervous System
- Cancer Remission Therapy
- Post-Traumatic Stress Disorder
- Intractable Seizures
- Glaucoma
- Sickle Cell Anemia
- Chronic or Intractable Pain
- Autism



Protections for MMJ Users

In the Employment Context

- Anti-Discrimination Provision – *no employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against any employee regarding compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana.*
- Accommodation for use **at work** is **not** required – employers are not required to accommodate the use of medical marijuana on the property/premises.
- Disciplining is permitted – employers may discipline an employee for being *under the influence* of medical marijuana in the workplace.
 - *Note – under the influence is not (helpfully) defined in the Act*

Protections for MMJ Users

In the Employment Context

Safety Sensitive Exception – while “under the influence”

- May not perform work at heights or in confined spaces
- May not operate high-voltage electricity or public utility
- May not operate or be in control of chemicals that require a permit
- May be prohibited from performing tasks the employer deems life threatening to any employees of the employer
- May be prohibited from performing any duty that could result in a public health or safety risk

Federal Law Exception – employers do not have to “commit an act that would put the employer or any person acting on its behalf in violation of federal law.” (i.e., DOL regulated drivers)

Protections for MMJ Users

What are the questions????

1. Anti-discrimination clause – what does it mean and how is it enforced?
2. Are medical marijuana users protected by the ADA and/or the PHRA disability discrimination provisions?
3. Is allowing for use of medical marijuana by employers a reasonable accommodation?
 - Use at work?
 - Off the clock use?
 - Waiver of drug testing provisions?
 - Consideration of alternative accommodations?
4. How do we tell if someone is under the influence?
5. Do I have to change my drug testing policy?
6. How does recreational legalization affect my workplace?

Pre-Hire Practical Considerations

- Ask about status on applications or during interviews?
- Pre-hire testing?
- Post-offer disclosure required
- Certification of safety
- Consideration of position exemption (safety sensitive position)

Post-Hire Practical Considerations

- Policy Language
- Testing
- Reasonable Suspicion
- Discipline

Reasonable Suspicion Testing

- MMJ stays in the system for up to 30 days
- How do we know when it was consumed (i.e., how do we prove that they were under the influence at work)?
- How many have supervisors trained in reasonable suspicion detection?

Reasonable Suspicion Testing

The New Jersey “WIRE” Program

- Under NJ’s marijuana legalization program, employers may not discipline employees for off-duty use of marijuana.
- NJ requires employers to have Workplace Impairment Recognition Experts (WIRE).
- Interim guidance – positive drug test alone is insufficient to support an adverse employment action.

Case Law

Whitmire v. Wal-Mart Stores, Inc. (Dist. AZ 2019)

- Post-injury test; due to the high levels of marijuana metabolites (more than 1000 ng/ml), employee must have been impaired (according to Wal-Mart).
- Claims for discrimination in violation of the AMMA and the Arizona Civil Rights Act (state law disability discrimination).
- Court found an implied private cause of action in the AMMA.
- AMMA provides: “patient shall not be considered to be under the influence solely because of the presence of metabolites that appear in insufficient concentration to cause impairment.”
- Court – proving impairment based on a drug test is a scientific matter; employer offered no evidence that it observed impairment or believed the employee was impaired.

For Federal Contractors

- How does the DFWA (Drug-Free Workplace Act) marry with all the MMJ statutes?
- Has anyone had to address this?
- We'll ask this again when we get to recreational marijuana

Case Law

Noffsinger v. SSC Niantic Operating Co. (U.S. Dist. Conn., Aug. 2017 & Sept. 2018)

- Under DFWA, “workplace” means the actual workplace.

Callaghan v. Darlington Fabrics (RI Superior Ct., May 2017)

- Medical marijuana act, by virtue of non-discrimination clause, contains an implied right of action for employee
- Cannot refuse to hire simply because the employee will not pass a pre-employment drug test

Case Law

Wild v. Carriage Funeral Holdings (Superior Ct. NJ 2019)

- Post motor vehicle accident (MVA) – clear plaintiff was not under the influence; no blood test required by hospital; employer required the test anyway.
- Upheld employee’s claim for disability discrimination under NJ law.

Chance v. Heinz (DE Super. 2018)

- Post-accident testing; employee terminated in accordance with company policy; no allegation that the company believed the employee was impaired at the time of the accident.
- Court upheld private right of action – “Controlled Substances Act does not make it illegal to employ someone who uses marijuana, nor does it purport to regulate employment matters.”

Case Law

Barbuto v. Advantage Sales and Marketing (Supreme Ct. MA, July 2017)

- Accommodation requested by employee – waiver of policy barring anyone from employment who tests positive for marijuana – is facially reasonable; medical marijuana user may assert state law discrimination claim.
- What might be unreasonable?
 - Use of medical marijuana poses an “unacceptably significant safety risk.”
 - Continued employment would violate “employer’s contractual or statutory obligation and thereby jeopardize its ability to perform its business.”

Lambdin v. Marriott Resorts Hospitality Corp. (Dist. Hawaii 2017)

- Employee was not certified to use medical marijuana/had never been certified.
- Employee’s claims dismissed.

Adult Use Recreational Marijuana

Poll

- How many live in states with recreational programs?
- How many of you have changed your drug and alcohol policies as a result?
- How many of you have changed your testing regimen?
- For those without recreational programs, how many have bills pending to create a recreational program?

Recreational Marijuana

• States That Have Adult Recreational Program

- Alaska
- Arizona
- California
- Colorado
- Connecticut
- Delaware
- D.C.
- Illinois
- Maine
- New York
- Ohio
- Oregon
- Rhode Island
- Vermont
- Virginia
- Washington

Protections of Recreational Marijuana

- Question applicants about marijuana use?
- Refusal to hire?
- Pre-employment testing?
- Discipline for off-duty use?

Protections of Recreational Marijuana

- All states with adult use marijuana permit employers to restrict use at work.
- Some states do not place restrictions on employers' ability to enact marijuana policies at all.
- Some states prohibit discrimination based on off-duty use of marijuana or presence of metabolites in test results.
- Some states contemplate contractual requirements and federal requirements.

Practical Considerations

- For states with recreational programs, who has changed how they consider marijuana use by employees?
- Who simply treats it like alcohol under your policies?
- Who has removed it from your pre-hire and/or random testing panel?
- What about DOT drivers?

Practical Considerations for Your Policies

- Be clear on use and possession at work or company property
- Consider any carve outs provided under your state law for contract requirements and/or safety requirements
- Training for reasonable suspicion to reduce negligence liability
- Definition of “under the influence” under the policy

Questions & Answers

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