The Conundrum of New Medical Marijuana Laws

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Presented by:
Howard A. Mavity
Fisher Phillips LLP
Unidentified Members of an Unnamed Trade Association Testing for Impairement.
New Problems and Employment Challenges

• Changing views about Marijuana;
• Continued State legalization of Marijuana;
• First “bad” Court decisions in MA, RI, and CN;
• New Med Marijuana laws with “uncertain” effects.
• Tightening Labor Market.
• Increased Workplace Drug Use for last (6) years after almost 16 years of decline.
• Revolving drug tastes: Meth, Prescription Pain Meds, Marijuana increases and Cocaine and Heroin are back.
• 71% of Employers say that they have been affected by employee misuse of legally prescribed medications.
• Even lawful use affects performance and safety.
Nagging Questions.

• Should I still drug test?
• Can I refuse to hire an employee who uses medical marijuana?
• Do I have to accommodate an employee who uses medical marijuana?
• How do I know if the Medical Marijuana use is valid?
• What should I test for?
• Is Cocaine still a problem?
• How do I deal with Opiate issues?
Changing Views on Marijuana.

- October 2017 Gallup Poll – 64% favor legalization of Marijuana.
- As many as 1 in 5 have used Marijuana.
- WSJ: *Wall Street’s Marijuana Madness: ‘It’s Like the Internet in 1997’*
- Constellation Brands bought a stake in the Marijuana Industry.
- Less than 4% Unemployment.
- Companies such as AutoNation and some tech firms no longer test.
- Employers in the 9 States with legal Marijuana are more likely to quit testing. (2017 Mountain States Employer Association report).
- 33 states with Med Marijuana laws.
However, Drug Testing Continues.

• 57% of employers still drug test.
• Almost all Fortune 500 Companies engage in some drug testing.
• Businesses with Safety Sensitive positions or who do work with the Government in heavily regulated industries test … and have lower positive rates.
• Higher risk industries and industries with more injuries experience more Opiate positives.
• Many areas have worse drug problems/positive rates.
• Lower positive rates in DOT/FMCSA-regulated industries.
Effects on Employers.

• By 2016, Over 30 million people used an illicit drug in the previous 30 days - about 1 in 10 Americans.
• 23 million used marijuana in the previous 30 days.
• About 4.5 million people reported nonmedical use of prescription pain relievers.
Costs of Drug Using Employees.

According to one reputable recent analysis, Drug-using employees are:

- 2.2 times more likely to request early dismissal or time off,
- 2.5 times more likely to have absences of eight days or more,
- 3 times more likely to be late for work,
- 3.6 times more likely to be involved in a workplace accident, and
- 5 times more likely to file a workers’ compensation claim.
Since Colorado Marijuana legislation:

- Marijuana traffic-related deaths increased 151%.
- All Colorado traffic deaths increased 35%.
- Percentage of traffic deaths related to marijuana increased 11.43% to 21.3%.
- Marijuana use increased 45%.
- Colorado use by 12 and older is 85% higher than national average.
- Violent crime increased 18.6% and property crime increased 8.3%.
A primer on Pot.

500 metabolites are present in Marijuana but we focus on two:

- Delta 9–Tetrahydrocannabinol (THC) - impairs.
- (CBH) – modulates some psychotropic effects of THC, may have medical benefits, debated whether may impair users. At least one Cannabinol product FDA approved.

Resources:
- NHTSA Risky Driving | Drug-Impaired Driving
- Marijuana Impaired Driving – July 2017 Report to Congress. *
### Possible Medical Uses of CBD vs THC.

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Marijuana Impairment May be Invisible.

Most behavioral and physiological effects return to baseline levels within 3-5 hours after drug use, although some investigators have demonstrated residual effects in specific behaviors up to 24 hours, such as complex divided attention tasks.

• Psychomotor impairment can persist after the perceived high has dissipated.

• In long term users, even after periods of abstinence, selective attention (ability to filter out irrelevant information) ....

• Speed of information processing has been shown to be impaired with increasing frequency of use.

• Stronger doses may cause fluctuating emotions, flights of fragmentary thoughts with disturbed associations, a dulling of attention despite an illusion of heightened insight, image distortion, and psychosis.

• After alcohol, marijuana is the most frequently detected psychoactive substance among driving populations.  
http://www.nhtsa.gov/PEOPLE/INJURY/research/job185drugs/cannabis.htm
Problems with Marijuana Testing.

- There is not yet an accepted test result that is alone legal and technical proof of Marijuana Impairment.
- Alcohol is blood soluble – THC is fat soluble and can be released into blood long after ingestion (See, eg. *Heustis* 2007 THC detected in blood after 30 days).
- The decline of alcohol is predictable – THC is not.
- Degree of Alcohol in blood is closely related, but not THC.
- Criminal Law – Limited ability to prove impairment based on Blood Alcohol Content (BAC).
State Marijuana Impairment BAC Laws.

• Illegal everywhere in America to drive under the influence of alcohol, marijuana, opioids, methamphetamines, or any potentially impairing drug—prescribed or over the counter.

• 15 States’ Zero Tolerance Laws prohibit the presence of any drugs.

• At least five states present the presence of any “prohibited drugs.”

• Several States have established a specific BAC result such as 5 nanograms of THC per millilitre of blood.
Implications for Employers.

If an employer must engage in an interactive process to determine if it can reasonably accommodate a Med Marijuana user … how does the employer determine undue hardship?

• Focus on Safety Sensitive positions?
• How to define?
• What about positions requiring engineering or complicated financial analysis?
Medicinal Marijuana Use

Perhaps 4 million medicinal marijuana users.

- Prescribed with increased frequency for ailments such as glaucoma, cancer, HIV, Hepatitis-C, MS, and Seizure disorders.
- Pain relief benefits are still debated.
- FDA has yet to approve it for medical use (THC is approved, however).
- Deemed a Schedule 1 controlled substance with high potential for abuse.
- AMA does not fully support medical use, but only further investigation.
- Most State Laws list the applicable conditions warranting use.
- May limit to cannabis oil and %.
Status of State Marijuana Laws:

- Legal Recreational Marijuana – 11 + the District of Columbia
- Legal Medicinal Marijuana – 33 states
- Legal CBD for Medical Use – 44 states
- 85 million Americans live in states allowing some form of marijuana use
- $7+ billion dollar industry, with $21.8 billion projected by 2020 – some speculate $100 million by then.
Applicable Laws.

- Americans with Disabilities Act (ADA)
- Family and Medical Leave Act (FMLA)
- State Drug Laws
- State Laws protecting Legal Off-duty Activities.
- Fed/State DOT/FMCSA regulations.
- OSHA Interpretations.
Applying the ADA Analysis.

- Drug and alcohol addictions are considered disabilities.
- A rehabilitated drug or alcohol addict is protected under the ADA.
- Leave of absence for rehabilitation may be considered reasonable accommodation (before violation of policy).
- A *current* user of illegal drugs is not protected under the ADA.
- A *current* user of alcohol is protected under the ADA, but may be disciplined for violating Company policy or work rule.
Drug & Alcohol Policies: The ADA

• The EEOC has stated that “current” means “recently enough” to justify the employer’s reasonable belief that drug use is an ongoing problem.

• Courts have indicated that “currently engaging” is not limited to “the day of” or even within a matter of days or even weeks before the employment act (i.e. workplace accident) took place.

• It is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in illegal drug use.
Drug & Alcohol Policies: The ADA

- The EEOC regulations explain that “individuals disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities.”
- Although courts generally do not consider alcoholism a “per se” disability – an alcoholic is a person with a disability when the condition “substantially limits” him or her in at least one “major life activity.”
- The ADA also protects individuals who do not currently drink alcohol but have a record of alcoholism.
Drug & Alcohol Policies: The ADA

- Employers may require an employee who is an alcoholic or engages in the illegal use of drugs to meet the same performance standards of performance and behavior as other employees;

- Employers do not have to tolerate poor job performance or unsatisfactory behavior such as absenteeism, tardiness, insubordination or on the job accidents related to an employee’s alcoholism or illegal use of drugs if similar performance or conduct would not be tolerated in other employees.

- The ADA specifically permits employers to prohibit the use of alcohol or drugs in the workplace and to discipline employees for such use.

- Employers may maintain a drug free workplace standard.
Drug & Alcohol Policies: Family and Medical Leave Act (FMLA)

- The FMLA provides twelve weeks of leave and reinstatement for employee with a “serious medical condition.”
- In most cases, drug addiction will be considered a “serious medical condition.”
- Substance Abuse Rehabilitation may count as FMLA leave.

✔ What about FMLA for medical Marijuana?
Status of Federal Law and it’s Effect on State Laws.

Still a Schedule I Drug under the Federal Controlled Substances Act, which means according to the Feds:

1. High potential for abuse;
2. No currently accepted medical use in treatment in the US; and
3. Lack of accepted safety for use of it.

Most Courts have held Fed Criminal Law trumped State Law.
Gonzales v. Raich, 541 U.S. 1 (2005)

- Congress may ban use of cannabis even where approved by states for medicinal use
  - Controlled Substances Act trumped California law (Prop. 215) pursuant to Commerce clause
  - Banning marijuana growth for medical use is a permissible way of limiting its access for other uses
  - As a result, employers in most states may safely refuse to accept medical marijuana as a reasonable explanation for a positive test result.

Colorado Supreme Court (6/15/15)

“We therefore agree with the Court of Appeals” … “that the commonly accepted meaning of the term ‘lawful’ is ‘that which is permitted by law’ or, conversely, that which is ‘not contrary to, or forbidden by law.’”

Rejected argument that the General Assembly, in drafting CLODA, intended the term “lawful” to mean “lawful under Colorado state law.”

“In sum, because Coats’s marijuana use was unlawful under federal law, it does not fall within [CLODA’s] protection for ‘lawful’ activities.”

Having decided the case under Federal law, the court declined to address the second issued – whether Medical Use Amendment makes use lawful.
Georgia Medical Marijuana Law.

General Law

- Lawful for any person to possess up to 20 fluid ounces of low-THC oil ("medical marijuana") if such substance is in a pharmaceutical container labeled by the manufacturer, indicating the percentage of tetrahydrocannabinol therein and:
  - the person has a registration card issued by the Georgia Department of Public Health or
  - the person has a registration card issued by another state’s Department of Health.

Employer-Exemption Provision

- Employers are not required to permit or accommodate the use, consumption, possession, transfer, display, transportation, or sale of marijuana in any form.
- Employers may maintain a written zero tolerance policy prohibiting the on-duty or off-duty use of marijuana.
- Employers may maintain a written zero tolerance policy prohibiting any employee from having a detectable amount of marijuana in their system while at work.
Marijuana State Laws: In Conclusion ….

- Marijuana is still federally an unlawful drug
- Employers can still enforce drug policies and drug test employees;
- So far, most courts have not treated marijuana the same as traditional prescription drugs; and,
- So far, employers do not need to accommodate marijuana use.
Of Course, it’s Becoming a Bit More Complicated.

- Many medical marijuana state laws expressly allow employers to “discriminate” against medical marijuana users, including California.
- However, a few states, especially with newly drafted laws, have anti-discrimination policies which may be interpreted to protect using employees.
- Massachusetts, Connecticut, and Rhode Island.
Developing Potential Issues in Other States.

Examples:

• **New York** – has incorporated medical marijuana users into other laws prohibiting discrimination based on disability. N.Y. Pub. Health Law § 3369.

• **Rhode Island** - “No employer may refuse to employ or penalize, a person *solely for being a cardholder*” R.I. GEN. LAWS § 21-28.6-4(C)

  • Current Case: Graduate student represented by the ACLU suing company for not being hired for paid internship after disclosing medical marijuana use in job interview.
Barbuto v. Advantage Sales and Marketing, LLC (Mass Supreme Judicial Court 8/2017)

• Court concluded that, as with the use of any properly prescribed medication, the use of lawfully prescribed marijuana must be accommodated - Chief Justice Gants:
  “an exception to an employer’s drug policy to permit its use is a facially reasonable accommodation.”

• Court left open the possibility that accommodating an employee’s use of medical marijuana could pose an undue burden to employers, holding that the use of marijuana could impair performance or cause a safety issue, which would impose an undue burden on employers.

• Essentially the analysis employers have been using for years with respect to employee use of other controlled substances.

• Court also confirmed that the statute does not require employers to permit the use of medical marijuana in the workplace.
Noffsinger v. Niantic Operating Company (USDC Connecticut) (9/17)

- Held that Connecticut employees who have received approval from the state agency to use medical marijuana outside of work cannot be fired just because they test positive for marijuana during a drug screening.
- The court held that employees and job applicants can sue based on a termination or a rescinded job offer.
What are Overall Drug Use Trends?

Positive test rates fell from a whopping 13.6% in 1988 to 3.5% in 2012 – 20+ years of decline. In 2013, they began to rise again, led by a staggeringly fast rise in opiates positivity.

From Quest Diagnostic's May 8, 2018 release of its analysis of 10,000,000 2017 drug test results.

- Good News … Prescription opiate positivity rate drops, but cocaine rises by double digits in certain states
- Methamphetamine positivity skyrockets in Midwestern and Southern United States
- Marijuana positivity rises considerably in states that recently enacted recreational use statutes, finds national analysis by Quest Diagnostics.

May 8, 2018 Quest Diagnostics Annual Drug Testing Index.
Increased Methamphetamine and Cocaine Use.

Rate for Cocaine increased for the 5th consecutive year.

- Nebraska (91% increase between 2016 and 2017),
- Idaho (88% increase),
- Washington (31%),
- Nevada (25%),
- Maryland (22% increase), and
- Wisconsin (13%)

Between 2013 and 2017, methamphetamine positivity skyrocketed:

167% in the East North Central division of the Midwest (Illinois, Indiana, Michigan, Ohio, Wisconsin);
160% in the East South Central division of the South (Alabama, Kentucky, Mississippi, Tennessee);
150% in the Middle Atlantic division of the Northeast (New Jersey, New York, Pennsylvania); and
140% in Delaware, D.C., Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, WV.
More Americans die of overdoses than in car crashes and gun homicides combined.

In 2016, 64,000 people died due to drug abuse.

- 23% related to prescription pain relievers.
- 24% related to heroin.
- 31% related to non-methadone, synthetic opioids (e.g., fentanyl)

In 2016, over 11.8 million people used heroin or misused prescription opioid pain relievers.

- In 2015, 919,400 people 25 – 54 years old were not in labor force due to opioids.
- From 1999-2015, the decline in labor force participation cumulatively cost economy 12.1 billion work hours.
- During that period, the reduction in work hours slowed real annual economic growth rate by 0.2%, which translates to around $702.1 billion in real output.

*American Action Forum (AAF), “The Labor Force And Output Consequences Of The Opioid Crisis” (March 2018).*
Industries Most Affected by Opiate Abuse.

A Massachusetts Department of Public Health report broke down opioid-related overdose deaths by industry and occupation 2011 - 2015 and found: the

“rate of fatal opioid-related overdose was higher among workers employed in industries and occupations known to have high rates of work-related injuries and illnesses.”

- Construction and extraction: 150.6 deaths per 100,000 workers
- Material moving occupations: 59.1 deaths per 100,000 workers
- Installation, maintenance, and repair occupations: 54.0 deaths per 100,000 workers
- Transportation occupations: 42.6 deaths per 100,000 workers
- Production occupations: 42.1 deaths per 100,000 workers
Alcohol Abuse

• A hospital emergency room study showed that 35% of patients with an occupational injury were at-risk drinkers.
• Breathalyzer tests detected alcohol in 16% of emergency room patients who were injured at work.
• Large federal surveys show that 24% of workers admit to drinking in the workplace at least once in the past year.

Obama OSHA Attacks on Post-Accident Drug Testing

The actual OSHA Rule …

• What must I do to make sure that employees report work-related injuries and illnesses to me?

• (i) You must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness
Obama OSHA’s Interpretation Of The Rule

- Maintain incentive programs which reward employees for experiencing no recordable workplace injuries and illnesses;
- Maintain rules requiring disciplining employees who do not immediately report workplace injuries; and
- Automatically conduct post-accident drug testing of injured employees
- Also Emphasized in OCT 19 MEMO: Disproportionate discipline against injured employees.
Obama OSHA’S Initial Interpretation Of The Rule

• To strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use.

• Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing. In addition, drug testing that is designed in a way that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting.
Practical Problems With OSHA’S Interpretation: Impairment May Not Be Obvious

Remember this Landmark Study showing Carry-over Effects?

- Marijuana carry-over effects on aircraft pilot performance.
- Study found evidence for 24 and 48 -hour carry-over effects of a moderate social dose of marijuana on piloting tasks.
- While seven of the nine pilots showed some degree of impairment at 24 h after smoking, only one reported any awareness of the drug's effects.

More subtle impairment may last and not be readily obvious.
Exceptions to Obama OSHA’s Interpretation

• DOT mandated testing is exempt.
• OSHA’s interpretation exempts post injury testing conducted pursuant to State Workers Comp Drug Free Workplace Programs (DFWPs) or related insurer plans.
• Not all State DFWP Laws require automatic Post Accident Testing.
Brand New 10/11/18 OSHA Guidance on Post Accident Drug Testing

Signals that Trump OSHA interprets Regulation more conservatively but doesn’t completely backtrack ….

- OSHA provides that most instances of workplace drug testing are permissible. Examples of permissible drug-testing include:
  - Drug testing unrelated to the reporting of a work-related injury or illness.
  - Drug testing under a state workers’ compensation law.
  - Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees.
    - If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.
Many States’ Laws Regulate When an Employer May Test Employees and the Procedures.

Some Examples:

- California State Constitutional limitations.
- Connecticut limits random testing to certain positions.
- Minnesota limits testing as part of a routine physical, and limits random testing to certain positions and imposes limits discharge rights.
- Montana limits random testing to certain positions.
- Rhode island prohibits random testing.
- Massachusetts Privacy Act affects test occasions.
- Many States require specific test procedures, Notice to employees and opportunities to rebut.
Zero Tolerance Policies

• Don’t paint yourself into a corner.
  • Termination for every infraction, big or small, is not effective.
  • Leaves no room for employer’s discretion.

• Scenario: Your policy says everyone who fails a drug test will immediately be terminated.
  • All four members of one department tested positive today.
    • Can you operate without that department?
    • Can you terminate some, but not others?
Zero Tolerance Policies

• The department employees’ test results:
  • Two tested positive for marijuana.
  • One tested positive for Methadone.
  • One tested positive for heroin, and appeared high.
• If the policy had left room for discretion, you could:
  • Give the marijuana smokers a last chance agreement.
  • Suspend the Methadone user, pending proof of prescription.
  • Terminate the heroin (opioid) user.
What should you do if you think an employee is “under the influence”?

- Observe the employee carefully
- Have another supervisor or management representative observe the employee
- Document findings
  - Did you receive a report from someone?
  - What behaviors did you observe?
  - What other supervisor or manager observed the employee?
  - What behaviors did the other supervisor observe?
  - Is there consensus?
Reasonable Suspicion Testing

- More than mere suspicion but less than “probable cause”
- Balancing of employee’s reasonable expectation of privacy against the employer’s legitimate interest in imposing the test
- Public-sector employers, in contrast, typically must articulate a “compelling” interest to justify a “search” under the Fourth Amendment to the U.S. Constitution
What Constitutes “Reasonable Suspicion”

- Typically established when there is reliable information or evidence that an employee is at work with drugs or alcohol in his/her system.

- We recommend that more than one person in a confirm whatever facts or circumstances may become the reasonable suspicion basis for discipline.
Reasonable Suspicion – Conduct

- Extreme mood swings or changes, including inappropriate glee or excitement
- Slurred speech
- Unusual clumsiness
- Staggering/unsteady walk
- Sleeping on the job or lethargy
- Excessive sweating
- Smell of alcohol/marijuana
- Very large or small pupils

- Bloodshot/watery eyes
- Wearing sunglasses indoors without regard to weather or lighting
- Poor, careless, modified, or unacceptable work performance
- Erratic/unusual behavior on the job
- Irritability/unpredictable responses to ordinary requests and job circumstances
Confidentiality

- All information related to the substance abuse testing of an employee must remain confidential.
- Information should be divulged strictly on a “need to know” basis.
- Test results, medical reports and pertinent documentation should be kept in a confidential file consistent with requirements mandated by the ADA, FMLA and other laws.
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