



Medical Marijuana and Opiate Usage in the Workplace: Industry Insights

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Staffing World 2018
 Wednesday, October 17, 2018
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Reefer Madness

FOREWORD:
The motion picture you
are about to witness
may startle you.
It would not have been



Agenda

- How did we get here?
 - Overview of U.S. Marijuana Laws Generally
- How have jurisdictions handled these issues?
 - Differing State Approaches
- What does State Law say?
- What to do now?



Use of Marijuana and Opioid Drugs Increasing

- Job applicants are testing positive for marijuana, cocaine, amphetamine and heroin at the highest rate in 12 years.
- 10 million workplace drug screens from across the country in 2017 found positive results from urine samples in 4.2 percent.

<https://www.theceonoblist.co/2017/05/17/drug-testing-marijuana-job-applicants-73991/>

<https://www.businessinsurance.com/article/2018/05/08/NEWS08/912321135/Positive-workplace-drug-tests-highest-in-decade-Expert-Opinion-Study>



Opioids in the Workplace

- Opioids, according to the Mayo Clinic, are the third most commonly prescribed medications.
- Side effects include impaired cognitive ability, dizziness and drowsiness.
- Tread carefully when taking action...
 - If prescribed, you need to consider Americans With Disabilities Act issues.



Opioids in the Workplace, cont'd.

- Distinguish between legal and illegal use
 - Illegal use = not a qualified individual with a disability...so not entitled to ADA protection
- Must distinguish in drug testing and refusal to hire if legal use
 - Refusing to hire because of legal use of opioids must be related to:
 - High likelihood that person will cause harm to himself or others (health and safety risk)
 - That risk can't be eliminated through a reasonable accommodation



Opioids in the Workplace, cont'd.

- In making the decision not to hire...
 - If not obvious – may need a medical opinion
 - Related to the essential functions of the job
- In making the decision to fire...
 - Be careful – don't want the termination to be based upon a "regarded as" disabled discrimination claim
 - Consider a "reasonable suspicion" drug test at the company's expense.
- Remember...the condition is not the issue, especially pre-employment, but detection of illegal drugs.



Opioids in the Workplace, cont'd.

- Before not hiring based upon the drug test results...
 - Inquire into whether it is prescribed drugs and give a chance to explain
 - Using a Medical Review Officer (MRO) at the testing facility is a good way to address
 - Avoids learning about the disability
 - Will only know if it is an illegal use or
 - If the use or impairment would prevent the applicant from performing the essential function of the job
- Remember – inquiry is always based upon the ability of the individual to perform the essential functions of the job.



Opioids in the Workplace, cont'd.

- Accommodation for opioids is different than the medical marijuana inquiry...and accommodation...
 - Maybe other laws implicated too, such as FMLA
 - Has different results in workers' compensation and unemployment



What are the Risks of Use?

- Inability to accurately gauge lengths of time and distance, as well as impairment of hearing and vision and short term memory
- Inability to cope with sudden changes in surrounding and/or emergency situations
- Loss of balance
- Visual and/or auditory hallucinations
- Decreased cognitive reasoning
- Decreased motor coordination
- Inability to concentrate or remain focused on a single thought or idea
- Increased drowsiness, fatigue and lethargy



Is Legalized Marijuana Legal? Not Under Federal Law

Scheduled Drugs Under Controlled Substances Act

Abuse Potential	High	Low to Moderate	Low to Moderate	Low to Moderate
CRITERIA	High	High	Medical use	Medical use
ABUSE	No medical use	No medical use	No medical use	No medical use
DEPENDENCE	High	Psychological or Physical Dependence	Psychological or Physical Dependence	Psychological or Physical Dependence
SCHEDULE	SCHEDULE I	SCHEDULE II	SCHEDULE III	SCHEDULE IV
EXAMPLES	Heroin, LSD, MARIJUANA, PCP	Quaaludes, Barbiturates, Cocaine, Amphetamines, Propoxyphene, Morphine, Fentanyl, Valium, Xanax, Propofol	Quaaludes, Codeine, Propoxyphene, Amphetamines, Methamphetamine, Propylhexedrine, Ephedrine, Pseudoephedrine, Lorazepam, Diazepam, Alprazolam, Clonidine, Propofol, Ketamine, Propylhexedrine, Ephedrine, Pseudoephedrine, Lorazepam, Diazepam, Alprazolam, Clonidine, Propofol, Ketamine	Quaaludes, Limited quantities of codeine and propoxyphene, Clonidine, Diphenhydramine, Gabapentin, Pregabalin, Lorazepam



Federal and State Laws

- Federal Laws**
 - Controlled Substances Act
 - Americans with Disabilities Act
 - Federal Drug Free Workplace Act
 - DOT Trucking Regulations
 - Rohrabacker-Blumenauer Amendments
 - Attorney General Sessions
 - Sen. Schumer "4/20 Bill"
- State Laws**
 - State medical marijuana statutes
 - State anti-discrimination and disability statutes
 - Workers' Compensation and Unemployment Compensation laws
 - 30 States and the District of Columbia allow medical marijuana
 - 9 of the 29 states also allow recreational marijuana



States Allowing Medical Marijuana



States Allowing Recreational Marijuana



Smoke it if you got it . . .

- Nine states with laws that permit recreational marijuana use
 - Alaska
 - California
 - Colorado
 - Massachusetts
 - Maine
 - Nevada
 - Oregon
 - Vermont
 - Washington



Compliance with Federal Law

- Most states have provisions similar to:
 - “Nothing in this act shall require an employer to commit any act that would put the employer or any person acting on its behalf in violation of Federal law.”
- Federal Contracts

Federal Drug Free Workplace Act

The federal Drug Free Workplace Act imposes stricter rules on federal contractors (contracts over \$100,000) and any business that receives federal grants.

Failure to comply can lead to cessation of payments, termination of the contract or grant, and suspension or loss of contractor or grantee status.

Businesses Subject to the DFWA Must Make a Good Faith Effort to Comply With These Requirements

- All employees working pursuant to the contract or grant must be informed in writing that “the unlawful manufacture, distribution dispensation, possession, or use of a controlled substance,” including marijuana, is prohibited in the workplace.
- Notify employees that they must abide by the drug-free workplace statement as a condition of employment.
- Establishing a drug awareness program.

Businesses Subject to the DFWA Must Make a Good Faith Effort to Comply With These Requirements (continued)

- Timely alerting the contracting or granting federal agency after the contractor or grantee becomes aware that a covered employee has been convicted under a criminal drug statute.
- Penalizing, or requiring participation in a drug abuse assistance of rehabilitation program, any employee convicted of a reportable drug offense.
- No specific requirement to drug test or fire employees who test positive.

Non-Federal Contractors

- Are not subject to these same requirements
- But can use them as a framework for developing their own policies
- Construction companies with both federal and private contracts will often find it cleaner to use the same approach for both

Hiring/Pre-Hire Drug Testing

- Enact Drug-Free Workplace Policy
- Zero-tolerance policies
 - Pro – easier to apply
 - Cons – limit employer flexibility





Hiring/Pre-Hire Drug Testing (continued)

- In most jurisdictions, you can refuse to hire someone who tests positive.
 - Some jurisdictions regulate testing – e.g. in DC, can't test before making a conditional offer of employment; in Maine, the state must approve your testing policy.
 - Understand the limits of testing – no definitive way to know if someone was under the influence at a particular time.
 - Especially in tight job markets, some employers have concluded that testing for marijuana disqualifies quality candidates.
 - Others argue that, despite limitations, testing is the best way to weed out workers who pose a safety risk.
 - Need not allow medical use of marijuana at work.
 - Need not permit employees to be under the influence at work.

Drug Testing – Conditional Offer

Required before testing in:

- Maine - drug testing program must be approved by the Maine Department of Labor, Bureau of Labor Standards, with one exception if employer has any employees who are subject to a federally mandated drug-and-alcohol testing program working in Maine, that employer may expand the federal testing pool to cover all employees and forego a policy with the State (model policies are avail).
- Minnesota
- Oklahoma
- Puerto Rico
- Rhode Island
- Vermont
- DC
- Boulder, CO

Recommended in:

- California
- Massachusetts
- New Jersey
- West Virginia

Common Features of State Medical Marijuana Laws

- Immune from prosecution under criminal laws
 - Including laws proscribing possession. Patients are allowed to possess a minimal amount
- Require registration and a qualifying medical condition
 - It is very restrictive in certain jurisdictions as to what is a qualifying medical condition.
 - Other jurisdictions may have loose definitions
- Patient will be issued a medical marijuana user card

Employment Provisions

- Most states have provisions that prevent retaliation by an employer solely because an employee is a registered medical marijuana user
 - Most of these states also specifically note that an employer does not have to accommodate marijuana use in the workplace

Checklist for Deciding if Have to Accommodate

- Is employee located in a state with protection laws?
- Has employee presented medical marijuana card?
- Has employee tested positive?
- Has employee been impaired at work?
- Has employee brought marijuana to work?

What about the Americans With Disabilities Act?

- Under the ADA, current illegal drug users, which include drugs that are unlawful under the Controlled Substances Act, are not "individuals with disabilities."
- However, what about employees who do not use at work but might test positive due to length of time marijuana stays in system?
 - Employers may need to reasonably accommodate a person with a disability – and the use of medical marijuana – so long as it does not rise to the level of an undue hardship. It would be prudent for an employer to engage in the interactive process with an employee who is using medical marijuana.



Americans with Disabilities Act

- Prohibits covered employers from discriminating against qualified individuals on the basis of a disability.
- Requires employers to provide reasonable accommodations to employees with disabilities so that they can perform the essential functions of their job.
- ADA does not require employer to suffer an undue hardship as a result of the accommodations.

Cases

- Most cases have held that employers do not have to engage in interactive process with an employee to accommodate marijuana use:
 - *Ross v. RagingWire Telecommunications*, California
 - *Coats v. Dish Network*, Colorado
 - *Roe v. Teletech*, Washington
- Some cases are not so clear as to whether there is a duty to accommodate:
 - *Washburn v. Columbia Forest Products*, Oregon
 - Recent Rhode Island case, *Callaghan v. Darlington Fabrics*, suggests there may be a duty to accommodate

Medical Marijuana and the ADA

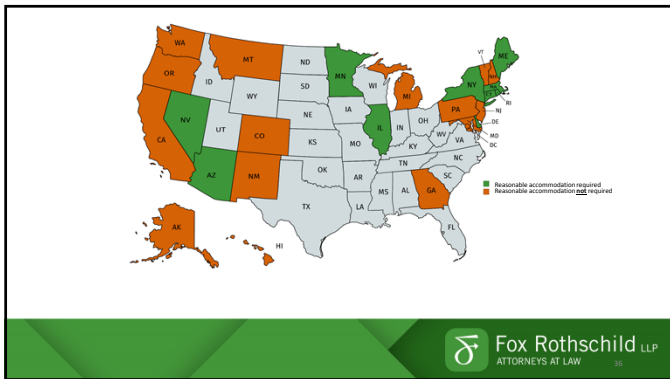
- Ninth Circuit (California)
 - Physician-Supervised medical marijuana use does not come within ADA exception for drug use “authorized by other provisions of Federal law.”
 - Court did not find that medical marijuana users are not protected by the ADA in any circumstance. Court held that ADA does not protect medical marijuana users who claim to face discrimination *on the basis of their marijuana use.*



Serious Medical Conditions

- Many states have a defined list of qualifying conditions
 - Most, if not all, will count as disabilities under state and federal law
 - In states where the law does not specifically state that employers need not make accommodations, may have to engage in the interactive process





States with Employment Provisions that State NO Accommodation of Use in Workplace Necessary

- Alaska
- California
- Colorado
- Connecticut
- Delaware
- Florida
- Hawaii
- Illinois
 - Be careful, as there is some limiting language on when you can consider an employee under the influence based on observation alone



States with Employment Provisions that State NO Accommodation of Use in Workplace Necessary

- Massachusetts
- Montana
- Nevada
- New Hampshire
 - Says that employees cannot be under the influence of cannabis at work
- New Jersey
- New York
 - Says can have policy prohibiting impairment at work
- North Dakota



States with Employment Provisions that State NO Accommodation of Use in Workplace Necessary

- Ohio
- Oregon
 - Emerald Steel Fabricators v. Bureau of Labor and Industries, 348 OR 159 (2010). Supreme Court rejected idea that had to engage in interactive process with employee who tested positive for marijuana and was registered for medical use
- Vermont
 - Big caveat: only says patient is not immune from "arrest or prosecution" for using marijuana at work
- Washington
- West Virginia



States with NO Provisions Regarding the Employment Relationship

- Michigan
 - Law just decriminalizes possession for medical use and prohibits prosecution against doctors prescribing marijuana
- New Mexico
 - Only employment provisions say employee can be criminally prosecuted or have a civil penalty for possession or use in the workplace



States with Anti-Discrimination/Retaliation Provisions for Employees

- Arizona
 - specifically says cannot penalize a patient for a positive drug test
- Arkansas
- Maine
- Pennsylvania
 - Does provide that employers can prohibit employees from being under the influence while working at heights or where there is a safety risk
 - Specifically says does not have to accommodate use at work
- Rhode Island
 - *Callaghan v. Darlington Fabrics* case survived motion to dismiss based on claim that she was fired for having glaucoma and not because she, as a registered patient, would fail the pre-employment drug test



State-Specific Anti-Discrimination/Retaliation

- Pennsylvania
 - Does provide that employers can prohibit employees from being under the influence while working at heights or where there is a safety risk.
 - Specifically says does not have to accommodate use at work.
- New York
 - Employers can have policy prohibiting impairment at work



Types of Reasonable Accommodations

- Leave of Absence beyond FMLA
- Job Reassignment
- Modified work schedules
- Based on an individualized assessment



Checklist for Deciding if Have to Accommodate

- Is employee located in a state with protection laws?
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- Has employee tested positive?
- Has employee been impaired at work?
- Has employee brought marijuana to work?



Documentation

- If you are engaging in the interactive process over marijuana use, you can still request medical information such as:
 - Doctor's note or prescription noting that use was prescribed
 - Information to help decide if an employee is disabled, i.e., symptoms and job duties the employee cannot perform
 - Medical marijuana registration card







Can an employer terminate employment for off the clock marijuana use?

- Some states say YES
- Some say NO.....

Can An Employer Terminate Off-The-Clock Marijuana Use? Some States Say Yes!

- *Coats v. Dish Network*, 350 P.3d 849 (Colo. 2015) – Coats was authorized to possess and use medicinal marijuana, but was discharged after failing a random drug test. Coats argued that his discharge violated Colorado’s “lawful activities statute,” which provides that it “shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee’s engaging in any lawful activity off the premises of the employer during nonworking hours.”
- Ruling – “[A]n activity such as medical marijuana use that is unlawful under federal law is not “lawful” activity under” Colorado’s lawful activity statute.



Can An Employer Terminate Off-The-Clock Marijuana Use? Some States Say Yes!

Swaw v. Safeway, Inc., Civil Action No. 2:15-cv-00939-MJP (W.D. Wash. Nov. 20, 2015) – Former employee alleged discrimination on the basis of disability under Washington’s Law Against Discrimination when he was terminated after failing a drug test. The employee was prescribed medicinal marijuana for his medical condition. Holding – Plaintiff failed to state a claim for relief because “Washington law does not require employers to accommodate the use of medical marijuana where they have a drug free work place, even if medical marijuana is being used off site to treat an employee’s disabilities, and the use of the marijuana for medical purposes remains unlawful under federal law.”



Can An Employer Terminate Off-The-Clock Marijuana Use? Some States Say No!

Noffsinger v. SSC Niantic Operating, No. 3:16-cv-01983 (D. Conn. Aug 8, 2017) – job offer withdrawn after candidate tested positive for marijuana. District Court held that federal law (including Controlled Substances Act and ADA) does not preempt enforcement of CT medical marijuana law, and denied defendant’s motion to dismiss plaintiff’s claims under the state medical marijuana statute.



Can An Employer Terminate Off-The-Clock Marijuana Use? Some States Say No!

- *Barbuto v. Advantage Sales and Marketing*, No. SJC-12226 (Mass. March 9, 2017) –plaintiff discharged after testing positive on a pre-employment drug test was a “handicapped person” under the state’s disability statute, and her use of medical marijuana recommended by her doctor was a “reasonable accommodation.”
- *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680 (R.I. Super. Ct. May 23, 2017) –federal law did not preempt Rhode Island’s medical marijuana statute and that the employer’s discharge of an employee for her medical marijuana use was a violation of both the state’s medical marijuana and civil rights statutes.



Can An Employer Terminate Off-The-Clock Marijuana Use? Some States Say Yes!

- Recent decision in NJ – Although the state has adopted the NJ Compassionate Use Medical Marijuana Act which shields qualified users from criminal prosecution – the court found the Act did not obligate employers to allow employees to use medical marijuana.
- Employee refused drug test post accident. Finding was based upon the failure of the employee to show that he could perform the “essential functions of the job” he was seeking to perform.
– *Daniel Cotto, Jr. v. Ardagh Glass Packing, Inc.*, No. CV 18-1037 (RBK/AMD), 2018 WL 3814278 (D.N.J. Aug. 10, 2018)



Avoiding Discrimination Claims

- Avoid selective enforcement where possible
- If draw distinctions, be sure there’s a legitimate business reason and document it



Essential Functions of the Assignment

- Even more critical so that you can determine if there is a safety risk. (You are already making this assessment in some fashion for OSHA and for the correct workers' compensation codes)

Safety Concerns

- Safety Sensitive Positions – Some Examples
 - Driving motorized vehicles – highway and off the road such as forklifts
 - DOT has its own regulations that will preempt state laws.
 - Working with machinery or chemicals where there is a risk of hazard
 - Working above the ground
- Health care sector jobs where patient protection is a concern.

Occupational Safety and Health Administration

- Neither prohibits nor requires post-accident drug testing
- Some states provide discounted workers' compensation premiums if you conduct post-accident testing
- OSHA requires employers to provide employees "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees"
- OSHA announced a rule in 2016 that said post-accident testing must measure impairment at the time of injury. Later clarified to say that only applies where such a test is available.

Workers' Compensation and Unemployment Benefits – Another “Toss-Up”

- Workers' Compensation Issues
 - Intoxication as a bar to receiving benefits – does that include medical marijuana?
 - Reimbursement for costs prescribed medical marijuana
 - Accident Research Fund (MI Company) founds workers' compensation claims were 4x more likely to be catastrophic and 9x more expense when long acting opioids were prescribed.
- Unemployment Compensation
 - Is an employee terminated for off-site marijuana use entitled to benefits?



Workers' Compensation

- Some states offer premium discounts for employers that implement drug free workplace.
- Causes issues because of state requirements
- Some state laws specifically permit the denial of benefits if cause by employee's use of drugs or alcohol
 - State standards vary



Workers' Compensation

- States have differing views of use of medical marijuana
- New Mexico has a reimbursement rule requiring employers to reimburse for medical marijuana
- Minnesota – health commissioner decision allowing “intractable pain” to be treated with medical marijuana opened the door to allow claimants to request coverage for cost of medical marijuana.
- New Jersey ordered reimbursement
- California and Connecticut have had decisions finding medical marijuana to be an allowable treatment and reimbursable.



Workers' Compensation

- Michigan, Arizona, and Montana have the opposite positions – so far saying that workers' compensation carriers can't be compelled to pay for medical marijuana because still illegal under Federal law.



Workers' Compensation

- Recent decision in Maine found that employers are not required to pay for an employee's medical marijuana under the state's workers' compensation statutes.
- The court held that the federal Controlled Substances Act preempts the state's medical marijuana law, at least for purposes of workers' compensation benefits.
- Bourgoin v. Twin Rivers Paper Co., No. WCB-16-433, 2018 WL 2976309 (Me. June 14, 2018)



Recent Case in New Jersey

- A New Jersey Division of Workers' Compensation judge ordered Freehold Township to pay for a municipal worker's medical marijuana following a workplace injury



Company Policy Considerations



- What to consider:
 - What is your existing human resources policy on a drug free workplace?
- Update drug policies to conform to state law
 - Add non-medical use of prescription drugs may be treated the same as illegal drug use.
 - Add employees' responsibility related to notification of impairment from prescription drug use.
 - Does this policy address use of medical marijuana by employees?
 - Do you drug test and why?
 - What is your existing policy for use of prescription medications?



Company Policy Considerations cont.

- Do you receive federal funding or seek federal contracts that could be impacted by permitting the use of medical marijuana by employees?
- Review job descriptions –
 - Add as an "essential job function" the "ability to work in a constant state of alertness and safe manner"
- Interactive process/Individualized assessment



Practical Applications

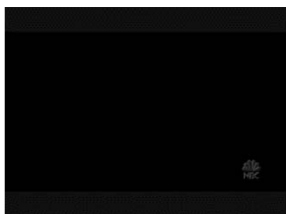
- Hiring and Firing
- Reasonable Accommodations
- Zero Tolerance Policies
- Drug Testing



Where do we go from here?

- Train Managers to identify typical signs of opioid (marijuana) related performance or behavior problems.
- Train Managers and staff that have contact with temporary employees on ADA obligations. Such as how to handle employee notification of medications that may impair job performance
 - CAUTION don't treat lawful use of drugs and medical marijuana as drug abuse
- Adopt reasonable suspicion drug testing in conformity with state laws and make sure that the test being used covers the most abused prescription drugs
- Use a medical review officer to review and analyze results of positive drug tests
- Adopt a EAP





Where do We Go From Here?

- Review and modify drug policies and nondiscrimination policies.
- Review job descriptions –
 - Add as an "essential job function" the "ability to work in a constant state of alertness and safe manner"
- Interactive process/Individualized assessment
- Handbook review including drug testing policies (keep in mind new OSHA regulations regarding post accident testing – pre-employment – post offer – random testing – and reasonable suspicion.



Addressing Employee Behavior/Reasonable Suspicion Testing

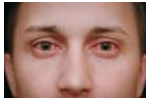
Work Performance Behaviors

- **Indicators:** Certain criteria (i.e., work performance, social interaction, personal health) can identify on-the-job/work-related behavioral characteristics that may indicate a chemical abuse problem.
- Apply these criteria to the employee whose performance is causing concern or who may be in violation of the drug-free workplace policy.
- These criteria are to be used as a general guide to help you identify the employee conduct indicating possible drug abuse.
- Be alert to deteriorating performance or changes in an employee's usual work patterns.



The Reasonable Suspicion Test

- The **reasonable suspicion test** must be based on a trained supervisor's specific, contemporaneous, articulable observations based on the employee's appearance, behavior, speech or body odors.
 - Red eyes
 - Smell like marijuana smoke
 - Increased appetite
 - Loss of focus/easily distracted
 - Missing time from work



Use of MRO

- Use a medical review officer to review and analyze results of positive drug tests
 - Provides confidentiality for applicant/employee
 - MRO can contact employee's doctor before advising employer if employee is eligible. MRO should discuss safety concerns with the employee's doctor. Employee's doctor can help with the safety assessment.
 - MRO can excuse lawful use – has the option to advise company if likely a significant safety risk



Good Procedures and Communication

- Employers can be held responsible for acts of employees under the influence.
- So – handling your policies and procedures correctly is critical.



Watch For

- Watch for a change in the classification from a Class I to a Class II drug federally
- Watch your state court decisions regarding
 - Disability accommodation, workers' compensation payment for medical marijuana and unemployment.
- New testing will help with recency and impairment determination
- Expansion of the state and possibly federal disability legislation to accommodate medical marijuana use.



Takeaways

- Know the state law(s)
- Review employment policies and revise your handbook
- Have essential functions of the job listed as part of job descriptions and job orders
- **Have a Plan**



FOX HAS A REGULARLY UPDATED ONLINE PUBLICATION:
Published by our Cannabis Law Group



<https://www.foxrothschild.com/publications/employment-compliance-in-the-age-of-legalized-marijuana>



Questions?



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