EMPLOYMENT PRACTICES LIABILITY CONSULTANT

MARIJUANA IN THE WORKPLACE

By Don Phin, Esq.

In recent years, numerous employers have asked me how they should handle use of marijuana in the workplace by their employees. I also contacted my friends at the Hotline team at ThinkHR. They've handled millions of employer questions. They told me the two most common questions they get are the following.

1. Our company does drug screenings, and an employee has provided a medical marijuana card. How do we handle that?
2. Our state allows recreational marijuana. What does this mean if we have a drug-free workplace policy?

The answers to these questions involve numerous factors, including but not limited to the following.

- The state they are in
- Why somebody is using it (medicinally or recreationally)
- How recently they used it
- The safety aspects of their job
- The company's policy on marijuana use

In this article, I will summarize the challenges faced by employers in managing employee marijuana use, explain the law addressing this subject, describe relevant marijuana testing devices, and analyze recent court cases. I'll finish with a few words of advice for the wise.

First, Some Facts about Marijuana Use

According to the Centers for Disease Control and Prevention (CDC), marijuana is the most commonly used illegal drug in the United States, with 37.6 million users.

In a 2017 report by the Substance Abuse and Mental Health Services Administration, "Key Substance Use and Mental Health Indicators in the United States: Results from the 2017 National Survey on Drug Use and Health," it was reported that, in 2017, about 1 in 5 young adults aged 18 to 25 (22.1 percent) were users of

marijuana. This means that 7.6 million young adults used marijuana in the past month. In 2017, 7.9 percent of adults aged 26 or older were users of marijuana, which represents about 16.8 million adults in this age group. In both groups, there was an overall increase in usage, compared to previous years.

The Risks of Marijuana Use

Marijuana use comes with real risks. According to the National Institutes of Health (NIH), studies suggest specific links between marijuana use and adverse consequences in the workplace, such as increased risk for injury or accidents. One study among postal workers found that employees who tested positive for marijuana on a pre-employment urine drug test had 55 percent more industrial accidents, 85 percent more injuries, and 75 percent greater absenteeism, compared with those who tested negative for marijuana use.

Also, according to the NIH, adverse consequences of marijuana use while intoxicated include the following.

- Impaired short-term memory
- Impaired attention, judgment, and other cognitive functions
- Impaired coordination and balance
- Increased heart rate
- Anxiety, paranoia

A map by Quest Diagnostics shows where positive marijuana results (based on urine tests) are produced by three-digit zip code. Overall, marijuana positivity (i.e., testing positive for marijuana) continued its 5-year upward trajectory in urine testing for both the general US workforce and the federally mandated, safety-sensitive workforce (i.e., where a particular job involves potential physical danger to both the employee and those in the employee's immediate vicinity). Marijuana positivity increased 4 percent in the general US workforce (2.5 percent in 2016 versus 2.6 percent in 2017) and nearly 8 percent in the safety-sensitive workforce (0.78 percent versus 0.84 percent).

What Employers Can Do

Here are seven key points to recognize and/or follow.

1. Current Marijuana Use/Intoxication Can Be Prohibited.

Even in states that have legalized marijuana, you don't have to tolerate current drug use or intoxication while at work. As we'll see, "current" drug use is subject to different definitions.

2. Zero Tolerance Policies Are Legal If Employees Are Subject to Department of Transportation (DOT) Requirements.

If an employer is subject to DOT testing requirements, the employer must have a zero-tolerance policy and perform random drug testing.

3. Employers Are Legally Required To Maintain a Safe Work Environment.

Employers have an obligation to maintain a safe work environment. Therefore, many states provide an exclusion from workers compensation benefits for workers injured while under the influence of alcohol or drugs, including marijuana. An example can be found in the revised statutes in Louisiana.

> EFFECTS OF DRUG AND ALCOHOL MISUSE ON WORKER'S COMPENSATION BENEFITS IN LOUISIANA
>
> SUBPART D. DEFENSES
>
> §1081. Defenses
>
> (1) No compensation shall be allowed for an injury caused:
>
> …
>
> (5) If there was, at the time of the accident, evidence of either on or off the job use of a

nonprescribed controlled substance as defined in 21 U.S.C. 812, Schedules I, II, III, IV, and V, it shall be presumed that the employee was intoxicated. [Marijuana is a Schedule I drug.]

(6) The foregoing provisions of this Section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question of whether the employee was under the influence of alcoholic beverages or any illegal or controlled substance.

Other states, like California, specifically require the employer to prove that the injured worker was intoxicated at the time of injury to deny benefits and must demonstrate that the intoxication was a cause of the injury. This a much greater burden of proof on the employer, especially when it comes to marijuana use.

At one time, employers would automatically test employees postaccident to see if there were any drugs or alcohol in their systems. While such postaccident testing is still permissible under federal law, it may be limited under certain state laws or by certain court decisions.

In October 2018, the Occupational Safety and Health Administration (OSHA) reversed course on testing protocols. In a memorandum for regional administrators and state designees, OSHA stated, "The purpose of this memorandum is to clarify the Department's position that 29 C.F.R. § 1904.35(b)(1)(iv) does not prohibit workplace safety incentive programs or post-incident drug testing." It reversed a 2016 memorandum generated under the Obama administration that stated that there should be a "reasonable possibility" that drugs or alcohol could have caused or contributed to the accident to warrant testing. Also, "most instances of workplace drug testing" are allowed under the injury reporting rule, with drug testing under the following conditions being permissible.

- Random drug testing
- Drug testing unrelated to the reporting of a work-related injury or illness
- Drug testing under a state workers compensation law
- Drug testing under other federal law, such as a US DOT rule
- Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer uses 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.

Employers should make sure they state in their postincident testing policy that the company "reserves the right to test all employees whose conduct may have contributed" to a safety incident.

In states where random drug testing is prohibited as a privacy violation, managers can be trained to identify situations in which there is "reasonable suspicion" of marijuana use, including bloodshot or dilated eyes; slurred speech; rapid rate of speech; physical difficulties including stumbling, shaking, sweating, etc.; marijuana smell; as well as behavioral and psychological signs such as unexplained breaks, aberrant behavior, and poor work performance. Many states also have regulations enumerating the types of tests that may be conducted, chain of custody requirements for samples, secondary testing requirements, notification requirements, and disciplinary procedures.

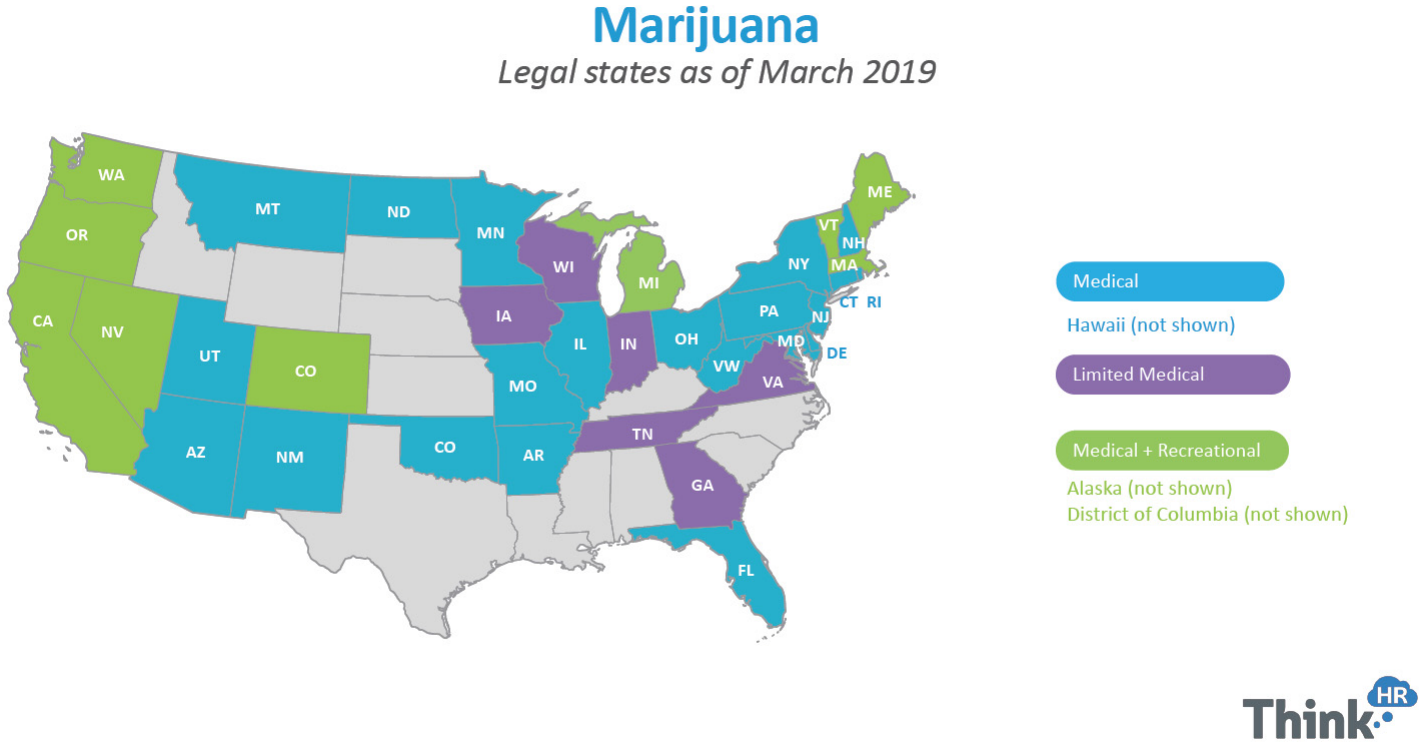
Not So Fast. In a recent case, *Whitmore v. Walmart*, No. CV-17-08108-PCT-JAT (D. Ariz. Feb. 7, 2019), Walmart had an Alcohol and Drug Abuse Policy, which required employees to submit to a drug or alcohol test if they suffered a workplace injury "that requires medical treatment from an outside health care provider." The plaintiff had a work injury, went to a clinic, and tested positive for the medical marijuana she consumed the night before. Shortly afterward, she was fired for the positive result.

Ms. Whitmore claimed that her termination violated Arizona's medical marijuana laws. The relevant statutory language states, "a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment." The court emphasized that unlike most medical marijuana laws, "the [Arizona Medical Marijuana Act] goes one step beyond simply decriminalizing medical marijuana for qualifying patients by prohibiting employers from terminating such users unless the qualifying patient used, ingested, possessed, was impaired by or was under the influence of marijuana at work, or unless the employer's failure to discriminate against that qualifying patient would cause them to 'lose a monetary or licensing related benefit under federal law or regulations.'"

The court then said, "the Court will not preclude Defendant from arguing [at trial] that Plaintiff was fired because the level of marijuana metabolites present in her drug screen led Defendant to believe she was impaired at work…. At issue in this case is whether Plaintiff's positive drug screen is alone sufficient to support Defendant's 'good faith belief' that Plaintiff was impaired by marijuana at work on May 24, 2016 in the absence of any other evidence of impairment or any expert testimony establishing that the level of metabolites present in Plaintiff's drug screen demonstrates that marijuana was present in her system in a sufficient concentration to cause impairment." In finding that the company was unable to prove that the employee was impaired on the job (strictly by a positive drug screen), the court hinted that impairment should be established by other means, such as observed conduct. Nevertheless, employers may have greater leeway with safety-sensitive positions.

4. Medical and Recreational Use Is Illegal under Federal Law.

Recognize that both medical and recreational use remains illegal under federal law. However, this is not the case at the state level. As



of March 2019, 23 states have either legalized or decriminalized some aspects of use (medicinal or recreational). Below is a map from ThinkHR identifying the current status of these laws.

The National Conference of State Legislatures says 10 states and the District of Columbia now have legalized small amounts of marijuana for adult recreational use. Colorado and Washington approved adult-use recreational marijuana measures in 2012. Alaska, Oregon, and the District of Columbia followed suit in fall of 2014. In 2015, Ohio voters defeated a ballot measure that addressed commercial production and sale of recreational marijuana. On November 8, 2016, voters in four states—California, Maine, Massachusetts, and Nevada—approved adult-use recreational marijuana, while voters in Arizona disapproved. In 2018, Michigan voters approved "Proposal 1" by a margin of 56 percent to 44 percent to legalize, regulate, and tax marijuana in the state. In 2018, Vermont became the first state to legalize marijuana for adult use through the legislative process (rather than a ballot initiative). Vermont's law went into effect July 1, 2018.

According to NORML (National Organization for the Reform of Marijuana Laws), laws in Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania, and Rhode Island prohibit employers from discriminating against workers based on their status as a medical marijuana patient. The laws in Arizona, Delaware, and Minnesota specify that a positive drug test alone does not indicate impairment. All states allow exemptions for employers that are required to follow federal drug-testing mandates (e.g., the DOT requirements discussed earlier in this article). Only Maine protects recreational use.

5. There Is Potential for "Impairment Testing."

Unlike with alcohol, it remains difficult to establish whether somebody is intoxicated or under the influence of marijuana. As a result, some businesses are considering implementing what is known as "impairment testing" (more on testing later in this article).

6. No Americans with Disabilities Act (ADA) Accommodation Is Required for Illegal Drug Use.

The federal ADA does not require employers to accommodate illegal drug use.

According to guidance published by the Commission on Civil Rights, the following is an overview of the current legal obligations for employers and employees.

- An individual who is currently engaging in the illegal use of drugs is not an "individual with a disability" when the employer acts (e.g., terminates or disciplines) on the basis of such use.
- An employer may not discriminate against a person with a history of drug addiction but who is not currently using drugs and who has been rehabilitated.
- An employer may prohibit the illegal use of drugs and the use of alcohol at the workplace.
- It does not violate the ADA for an employer to give tests for the illegal use of drugs.
- An employer may discharge or deny employment to persons who currently engage in the illegal use of drugs.
- Employees who use drugs or alcohol may have to meet the same standards of performance and conduct set for other employees.

The EEOC has defined "current" to mean that the illegal drug use occurred "recently enough" to justify the employer's reasonable belief that drug use is an ongoing problem. The EEOC *Technical Assistance Manual for Title I of the Americans with Disabilities Act (ADA)* provides the following guidance.

- If an individual tests positive on a drug test, he or she will be considered a current drug user, provided the test is accurate.
- Current drug use is the illegal use of drugs that has occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem.
- "Current" is not limited to the day of use or recent weeks or days but is determined on a case-by-case basis.

Two Circuit Courts of Appeals have held that a person can still be considered a current user even if he or she has not used drugs for several weeks or even months. For example, in *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847 (5th Cir. 1999), the court held that the employee, a pharmacist, was a "current" user because he had used cocaine 5 weeks prior to his notification that he would be discharged. In *Salley v. Circuit City Stores, Inc.*, 160 F.3d 977 (3d Cir. 1998), the court noted that it knew of "no case in which a three-week period of abstinence has been considered long enough to take an employee out of the status of 'current' user."

However, as we'll soon see, one court has ruled that the state disability laws allow for reasonable accommodation of medical marijuana use.

7. Always Have a Clear Drug Use/Testing Policy.

No matter what state you are in, you should have a very clear policy outlining when you can test, how you might test, and potential disciplinary results. You should also make sure that the policies are applied uniformly and with only rare, legitimate exceptions. The Society for Human Resource Management has a sample drug policy available for viewing.

Is There an Accurate Test for Current Impairment?

Marijuana can stay in somebody's system for 30 days or more, and by that definition, if tested and detected, they would be considered "intoxicated." This is still all you need to prove impairment at the federal level and in most states. However, it is hard for any test to determine if somebody is currently impaired. Current testing methods using urine, hair, blood, saliva, or sweat samples can show the presence of marijuana in the system, but unlike an alcohol test, it is hard to detect current impairment.

According to the CDC,

> Although we know marijuana negatively affects a number of skills needed for safe driving, and some studies have shown an association between marijuana use and car crashes, it is unclear whether marijuana use actually increases the risk of car crashes. This is because:
>
> - An accurate roadside test for drug levels in the body doesn't exist.
> - Marijuana can remain in a user's system for days or weeks after last use (depending on how much a person uses and how often they use marijuana).
> - Drivers are not always tested for drug use, especially if they already have an illegal blood alcohol concentration level, which, by itself, is enough evidence for making a driving-while-impaired charge.
> - When tested for substance use following a crash, drivers can have both drugs and alcohol, or even multiple drugs in their system, thus making it hard to know which substance contributed more to the crash.

Seizing the opportunity, companies are jumping on the tetrahydrocannabinol (THC) testing bandwagon. An example is Cannibix Technologies. According to their website,

> Cannabix is working to develop drug-testing devices that will detect Tetrahydrocannabinol (THC—the psychoactive component of marijuana that causes intoxication) using breath samples.... In particular, Cannabix

is focused on developing breath testing devices for THC detection that would target recent use of THC, (within a 2 or 3 hour time period at time of testing) in contrast to saliva or urine testing for THC which can be invasive and take a considerable amount of time for laboratory analysis. The devices will also be useful for other practical applications such as testing employees in the workplace where intoxication by THC can be hazardous.

A similar company is Hound Labs. It claims, "The Hound® breathalyzer is the only device to measure recent use in minutes and automatically store a second sample, providing better information about possible impairment" and that employers will benefit by being able to "[e]nforce changes to zero-tolerance policies that differentiate employees legally using marijuana off-hours from use of marijuana in the workplace."

Given the fact these tools are not yet available to employers, the best available option is what is known as impairment testing (such as simulated driving), which measures hand-eye motor skills. I doubt many employers will have the requisite equipment available to be able to use this type of testing to prove impairment in a timely fashion.

Some states have identified specific toxicity levels. For example, an FAQ from the Colorado DOT says the following.

> Q: Is there a legal limit for marijuana impairment while operating a vehicle?
>
> A: Colorado law specifies that drivers with five nanograms of active tetrahydrocannabinol (THC) in their whole blood can be prosecuted for driving under the influence (DUI). However, no matter the level of THC, law enforcement officers base arrests on observed impairment.

This five nanograms level has been used in several state statutes. However, according to Kevin McKernan, chief scientific officer at Medicinal Genomics, which does genetic testing of cannabis, "If you want to gauge intoxication, pull the driver out and have him drive a simulator on an iPad. That'll tell ya. The chemistry is too fraught with problems in terms of people's individual genetics and their tolerance levels."

The Governors Highway Safety Association says the following.

- Eighteen states have zero tolerance or non-zero per se (i.e., it is illegal to drive with amounts of specified drugs in the body that exceed set limits) laws for marijuana.
- Nine states have zero tolerance for THC or a metabolite.
- Three states have zero tolerance for THC but no restriction on metabolites.
- Seven states have specific per se limits for THC.
- One state (Colorado) has a reasonable inference law for THC.

The Governors Highway Safety Association also has a PDF list of state marijuana-related laws available.

Remember, under federal law, and in those states that have not legalized use, any level of intoxication is enough to warrant a nonhiring or dismissal decision.

Accommodating Medicinal Use under State Law

There have been a handful of cases tried under state law, and, up until recently, most have come down in the employer's favor. For example, in *Coats v. Dish Network*, 350 P.3d 849 (Colo. 2015), the claimant said he was wrongfully discharged due to his state-licensed use of medical marijuana at home during nonworking hours. In siding with the employer, the Colorado Supreme Court ruled, "The supreme court holds that under the plain language of section 24-34-402.5, 14 C.R.S. (2014), Colorado's 'lawful activities statute,' the term 'lawful' refers only to those activities that are lawful under both state and federal law. Therefore, employees who

engage in an activity such as medical marijuana use that is permitted by state law but unlawful under federal law are not protected by the statute. We therefore affirm the court of appeals' opinion."

However, in two cases, the employee claim was allowed to proceed. In *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326 (D. Conn. 2017), a Federal District Court in Connecticut ruled in the employee's favor where the claimant used medical marijuana to help manage her posttraumatic stress disorder. According to the court, the Federal Drug-Free Workplace Act does not "prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical marijuana outside the workplace under a program approved by state law. That defendant has chosen to utilize a zero-tolerance drug testing policy to maintain a drug-free work environment does not mean this policy was actually 'required by federal law or required to obtain federal funding.'"

In 2017, the Massachusetts Supreme Judicial Court held in *Barbuto v. Advantage Sales & Mktg., LLC*, 477 Mass. 456, 78 N.E.3d 37 (2017), that an employee fired after testing positive for marijuana could proceed with a "handicap discrimination" claim under the Massachusetts Fair Employment Practices Act.

Final Thoughts

Zero tolerance for marijuana use is no longer applicable in roughly half the states in the country. As a result, employers need to work with their employment law attorneys to make sure they are following relevant legislation, OSHA regulations, and court decisions applicable in their respective states. Businesses should review their policies annually to stay in step with this rapidly changing legal landscape. Given low employment levels, many employers are taking a practical approach and removing marijuana from the list of substances for which they test in prehire drug testing. This is especially true as respects positions that do not involve high safety or security factors. Employers should deal with marijuana use in a manner similarly to the way in which they handle alcohol use, adopting the attitude that "what you do at home is your business; just don't do it at work or let it affect your productivity at work."

In a well-written article in *The New Yorker*, Malcolm Gladwell points out that cannabis is not as bad as opioids, but neither is it coffee. Perhaps marijuana falls somewhere in between. He points out that we don't yet fully understand the benefits and/or risks of marijuana consumption, whether for medicinal or recreational use. The reality is that this is all one big experiment. Let's hope it all works out for the best!

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