Breakout Sessions – Series 2

DON’T GET LOST IN THE WEEDS

THE LATEST ON MARIJUANA AND THE WORKPLACE


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Ten states and Washington, DC, have now legalized marijuana for recreational use for adults over 21, and 33 states have legalized medical marijuana. With the legalization of marijuana use in a number of states, the risk of employees showing up to work impaired just went up.

The greater availability and proliferation of marijuana use has employers concerned. Studies have shown that marijuana use can be tied to decreased motor functions and impaired decision making that creates workplace hazards. A medical study published 2012 in Clinical Chemistry journal found “cannabis smoking increases lane weaving and impaired cognitive functions,” and that certain THC concentration levels “are associated with substantial driving impairment, particularly in occasional smokers.” A University of Colorado study — released in 2014, the year recreational sales of the drug were launched in Colorado — found the proportion of drivers involved in fatal crashes who tested positive for marijuana use had risen to 10 percent in 2011, up from 5.9 percent in 2009. The combination of marijuana and alcohol use has also increased the risk of fatalities. According to the Colorado Department of Transportation, in 2016, nearly 36 percent of all Colorado drivers involved in fatal crashes who tested positive for marijuana use also had consumed alcohol.

A. Background on State and Federal Law

While legal in a number of states, there is still a strong conflict with federal law. At the federal level, marijuana is regulated by the Controlled Substances Act (21 U.S.C. § 811) (“CSA”). That law makes any use of marijuana illegal. Federal law characterizes marijuana as it does any other controlled substance, such as cocaine and heroin. The law places this drug on “Schedule I.” Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. (21 U.S.C. § 812(b)(1).)

The zeal regarding federal enforcement of the laws against marijuana has been generally dependent on the existing administration. In the past, the federal government decided not to enforce most of the act. In a policy updated on August 29, 2013, the U.S. Department of Justice announced that it is generally taking a hands-off approach, with the exception of a few areas, such as distribution to minors and organized crime. According to then-U.S. Attorney General Eric Holder, “It will not be a priority to use federal resources to prosecute patients with serious illnesses or their caregivers who are complying with state laws on medical marijuana, but we will not tolerate drug traffickers who hide behind claims of compliance with state law to mask activities that are clearly illegal.”

On December 16, 2014, Congress passed a law, known at the Hinchey-Rohrabacher medical marijuana amendment to a spending bill, prohibiting federal agents from raiding growers of medical marijuana in states where it is legal.

However, with the Trump Administration, then Attorney General Jeff Sessions issued a memorandum dated January 4, 2018, directing all U.S. Attorneys to enforce the laws enacted by Congress and to follow well-established principles when pursuing prosecutions related to marijuana activities. According to the Attorney General, the rule to follow the laws as written is also “a return of trust and local control to federal prosecutors who know where and how to deploy Justice Department resources most effectively to reduce violent crime, stem the tide of the drug crisis, and dismantle criminal gangs.”
B. Marijuana and Other Substances That Cause Impairment in the Workplace

An employer’s primary concern in hiring and employment is maintaining a safe and productive work environment. The use of drugs and alcohol, as well as the misuse of prescription drugs, can interfere with these legitimate concerns in obvious ways. So far, no laws have prohibited an employer from enforcing workplace rules prohibiting using, possessing, or being under the influence of alcohol and/or controlled substances, including marijuana while at work. Employers may choose to rely on federal law, even if the government has in the past chose not to enforce it, in enforcing its drug free workplace policies.

C. Illegal Drugs and Testing

Employers may test any employee for the use of illegal drugs, which includes drugs prohibited by the Controlled Substances Act. A test for illegal drugs is not considered a medical examination under the ADA or FEHA, and an employer therefore has the right to require an employee to submit to a drug test and obtain the results. However, because California’s constitution also guarantees an individual’s right privacy, employers should trend in this area carefully. For instance, employers are permitted to test employees in certain circumstances: 1) During pre-employment screening; 2) As part of a physical examination; 3) Under reasonable suspicion; 4) During post-accident testing; and 5) As part of random testing.

Pre-Employment Testing

As a condition of employment, employers can require all applicants to successfully pass a pre-employment drug test. The test usually takes place after a conditional offer of employment has been made and before the work has commenced. In certain circumstances, a pre-employment test has been deemed valid even if the applicant delays submitting the test until after work has commenced provided that the test was delayed through no fault of the employer. *Pilkington Barnes Hind v. Superior Court* (1998) 66 CA4th 28.

Testing During Employment

Once employment has begun, California courts have been more expansive in protecting the privacy rights of employees. This is because California courts have that noted job applicants have a lesser expectation of privacy than current employees. *Wilkinson v. Times Mirror Corp.* (1989) 215 CA3d 1034.

Physical Examination

Federal courts and some state courts have approved testing as part of annual or periodic physical examinations. This scenario is particularly true in union employment under the context of collective bargaining agreements. Notice to employees should be provided informing them that a drug test will be administered as part of the physical examination. If the employee refuses, disciplinary action may be taken.

Reasonable Suspicion

Reasonable suspicion testing is similar to, and sometimes referred to, as "probable-cause" or "for-cause" testing and is conducted when supervisors document observable signs and symptoms that lead them to suspect drug use or a drug-free workplace policy violation. It is extremely important to have clear, consistent definitions of what behavior justifies drug and alcohol testing and any suspicion should be corroborated by another supervisor or manager.
Since this type of testing is at the discretion of management, it requires careful, comprehensive supervisor training. In addition, it is advised that employees who are suspected of drug use or a policy violation not return to work while awaiting the results of reasonable suspicion testing.

Post-Accident Testing

Post-accident drug testing have been upheld by courts where an employer has reasonable suspicion that an employee involved in the accident was under the influence of drugs and/or alcohol or if the accident was serious. Testing following an accident can help determine whether drugs and/or alcohol were a factor. However, it is important to establish objective criteria that will trigger a post-accident test and how and by whom they will be determined and documented. Examples of criteria used by employers include: fatalities; injuries that require anyone to be removed from the scene for medical care; damage to vehicles or property above a specified monetary amount; and citations issued by the police. Although the results of a post-accident test determine drug use, a positive test result in and of itself cannot prove that drug use caused an accident. When post-accident testing is conducted, it is a good idea for employers not to allow employees involved in any accident to return to work prior to or following the testing. Employers also need to have guidelines to specify how soon following an accident testing must occur so results are relevant. Substances remain in a person's system for various amounts of time, and it is usually recommended that post-accident testing be done within 12 hours. Some employers expand the test trigger to incidents even if an accident or injury was averted and hence use term "post-incident."

Random Testing

Random testing is performed on an unannounced, unpredictable basis on employees whose identifying information (e.g., social security number or employee number) has been placed in a testing pool from which a scientifically arbitrary selection is made. This selection is usually computer generated to ensure that it is indeed random and that each person of the workforce population has an equal chance of being selected for testing, regardless of whether that person was recently tested or not. Because this type of testing has no advance notice, it serves as a deterrent.

While random testing may be the most effect program to detect and deter drug use, the legality of such testing in California is limited to just certain circumstances: 1) Employees in specific, narrowly defined job classifications; 2) Employees in professions that can be categorized as part of a pervasively regulated industry, where the employee has less expectations of privacy given the nature of employment; and 3) Employees in positions that are critical to public safety or the protection of life, property or national security.

OSHA Drug Testing

Fed-OSHA, has published standards relating to post-accident testing. The agency has taken the position that automatic post-accident testing may not be appropriate, because it may be perceived as punitive or retaliatory to the employee. According to the agency, this practice may discourage employees from reporting workplace injuries and illnesses. “Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting.” The agency states “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. For example, it would likely not be reasonable to drug-test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction. Such a policy is likely only to deter reporting without contributing to the employer’s understanding of why the injury occurred, or in any other way contributing to workplace safety.

D. Effectiveness of Testing for Marijuana

While testing for marijuana use in the workplace may be permissible, a reliable testing method raises questions regarding its effectiveness in detecting marijuana use at work. For instance, a urine drug test can detect marijuana as soon as 2 to 5 hours after use. However, the length of time marijuana is detected in urine depends on the amount used, its potency, frequency of use and the user's weight and body fat. The more frequent the use, the longer it will stay in your system even after you “quit” using the drug. For an infrequent user, marijuana could stay in your system up to two weeks for someone who only smoked marijuana one time it may be out of your system in less than a week.

There are other methods to test for sobriety by qualified individuals, none of which is 100% accurate. For example, Police officers use three standardized tests: 1) Horizontal gaze nystagmus test; 2) Walk and turn test; and the one legged stand. The horizontal gaze nystagmus test is usually administered by an officer moving an object, or their own finger, from side to side in front of a person’s face. The reason they do this is to try and detect an involuntary jerking of the eye associated with high levels of intoxication. A person’s eye will reportedly jerk naturally after being strained beyond a 45 degree angle, but if the eye begins to jerk at or before moving 45 degrees, police officers can reference this reaction as evidence that a driver is under the influence.

The walk and turn test splits a suspected Marijuana DUI offender’s attention between physical and mental tasks. Also referred to as the “walk the line test”, the officer provides instructions to the suspected offender and watches to see if any of the following occur:

- Loss of balance
- Wrong number of steps
- Inability to stay on the line
- Breaks in walking
- Beginning before instructed

NHTSA estimates that this test is effective 68% of the time.

Another divided attention test, during the “one leg stand” an officer will instruct the suspect to raise his or her foot, hold still, count, and look down. An officer may arrest the suspect if any of the following behaviors are observed:

- Swaying
- Hopping
Putting foot down

NHTSA estimates that this test is effective 65% of the time

E. Accommodating Drug Use

Current illegal drug use is not a protected disability under the federal Americans with Disabilities Act and current users are not protected from discrimination. The definition of “current” is critical because the ADA only excludes someone from protection when that person is a “current” user of illegal drugs. 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 on the ADA provides the following guidance:

• If an individual tests positive on a drug test, he or she will be considered a current drug user, so long as 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.

Courts have not yet defined the scope of the “currently engaging” exception to the ADA, nor the safe harbor for those who are no longer engaging in the illegal use of drugs. See, 42 U.S.C. § 12114(a)-(b). One Circuit Court of Appeal has indicated that the “safe harbor” provision applies only to employees who have refrained from using drugs for a significant period of time,1 while other 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 a number of weeks or even months. For example, in Zenor v. El Paso Healthcare Systems, Ltd.,2 the court held that the employee, a pharmacist, was a “current” user because he had used cocaine five weeks prior to his notification that he was going to be discharged. In Salley v. Circuit City Stores, Inc.,3 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.”4

In Shafer v. Preston Memorial Hospital Corp.,5 the court considered the ADA claim of a nurse who was stealing medication to which she had become addicted. While the hospital investigated the matter, the nurse was put in drug rehabilitation. The day after she finished her inpatient drug rehabilitation, she was notified that she had been terminated for “gross misconduct involving the diversion of controlled substances.”6 In concluding that the plaintiff was still a “current” illegal drug user, the court noted that “the ordinary or natural meaning of the phrase ‘currently using drugs’ does not require that a drug user have a heroin syringe in his arm or a marijuana bong to his mouth at the exact moment contemplated.”7 Rather, according to the court, someone is a “current” user if he or she illegally used drugs “in a periodic fashion during

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1 Brown v. Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001)
2 Zenor v. El Paso Healthcare Systems, Ltd., 176 F.3d 847, 867 (5th Cir. 1999)
3 Salley v. Circuit City Stores, Inc., 160 F.3d 977 (3rd Cir. 1998)
4 Id., at 980.
5 Shafer v. Preston Memorial Hospital Corp., 107 F.3d. 274 (4th Cir. 1997)
6 Id., at 275.
7 Id., at 278.
the weeks and months prior to discharge.”

While current illegal drug use is not a protected disability, employers in some states must reasonably accommodate any employee who volunteers to enter an alcohol or drug rehabilitation program, if the reasonable accommodation does not impose an undue hardship on the employer. An employer is limited in refusing to hire, or discharging an employee who, because of their current use of drugs is unable to perform his or her duties, or cannot perform duties without endangering their health or safety or the health and safety of others. Reasonable accommodation includes time off with or without pay and adjusting working hours. You need not provide time off with pay. An employee who is absent for alcohol or drug rehabilitation can use sick leave pay to which he/she is entitled. Moreover, an employer must take reasonable measures to safeguard the employee’s privacy about the fact that he/she entered alcohol or drug rehabilitation.

An employer need not continually accommodate an employee who relapses. In Gosvener v. Coastal Corp., (1996) 51 CA4 805, a California Court of Appeal refused an employee’s claim that he was wrongfully terminated when he failed to comply with the terms of a drug treatment plan to which he had agreed. After the employee divulged a drug and alcohol problem, the employer paid for treatment at a private clinic, temporarily assigned the employee to a less stressful position at full pay and entered into a rehabilitation and treatment agreement with the employee. The employer terminated the employee when he allowed unsafe work to be performed, appeared at work under the influence of alcohol and/or drugs, missed work on several occasions and failed to attend required therapy sessions.

F. Next Steps

Increased legalization of marijuana and the continued opioid abuse epidemic, will ensure that these issues will not go away anytime soon. Employers need to assess the effect that this will have on the workplace.

Update Policies. Employers should review and update policies in light of the new legal landscape. Employers may want to clarify policies to expressly forbid the use or possession of marijuana at the workplace.

Educate. Employers will need to educate supervisors and employees regarding company policy relating to medical marijuana and prescription drugs.

Drug Testing. Employers may also want to revisit their drug testing policies. Companies may consider the propriety of pre-hire screening, random drug testing, reasonable suspicion testing, and post-accident testing. Drug testing laws vary in states. Employers should maintain a uniformly implemented pre-hire drug testing program. Random drug testing may be subject to greater scrutiny by the courts though some industry sectors, such as transportation, and certain government contractors, employers are obligated to test workers. Random testing of employees working in safety-sensitive positions is also commonly accepted.

Safety. Inevitably, when more workers experiment with recreational drug use, or take prescription drugs that effect motor skills, workplace accidents will increase. Renewed efforts to ensure workplace safety may become paramount, particularly in industrial settings. Worker efficiency, health, and well-being will be of no less concern. Although many employers routinely drug test employees after a workplace accident, this practice is under increasing scrutiny.

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8 Id.
Recently, the federal work safety agency, OSHA, has published standards relating to post-accident testing. The agency has taken the position that automatic post-accident testing may not be appropriate, because it may be perceived as punitive or retaliatory to the employee. According to the agency, this practice may discourage employees from reporting workplace injuries and illnesses. “Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting.” The agency states “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. For example, it would likely not be reasonable to drug-test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction. Such a policy is likely only to deter reporting without contributing to the employer’s understanding of why the injury occurred, or in any other way contributing to workplace safety.” Consider the work being performed and the safety sensitive nature of the work. Evaluate the scope of the employee’s duties and consider applying the same standards you would apply to that work for alcohol and other impairment type medications.

**EAP.** Many employers have instituted Employee Assistance Programs (EAPs) to help employees cope with a variety of problems, including prescription drug abuse. It may be time to consider whether additional resources may be needed to address an increase in drug abuse.

The nationwide social experiment legalizing marijuana will have far reaching effects in the workplace. Employers should evaluate options and take steps to ensure worker safety, productivity, and health.
Don’t Get Lost in the Weeds: The Latest on Marijuana and the Workplace

Presenters
Vince M. Verde (Orange County), Kevin D. Reese (San Francisco), and Mike Lynn, MD (Hound Labs)

Moderator
Austin E. Smith (Denver)

Presentation Overview
- Federal and State Marijuana Laws
- Anti-Discrimination Provisions
- Marijuana Types
- The Rise of Reasonable Suspicion
- ADA/FMLA/Leave Law Concerns
- Quiz
- Practice Pointers
Marijuana is a Nationwide Concern

- Over 70% of Americans live in states permitting at least some marijuana use
- Only 4 states left: Kansas, Nebraska, South Dakota, and Idaho
- 9 more states close to full legalization
Applicable Federal Laws

- Controlled Substances Act
- Americans with Disabilities Act
- Occupational Safety & Health Act
- Drug-Free Workplace Act
  - Federal contractors and recipients of federal grants must prohibit the use of marijuana as a condition of participation.
- DOT guidelines prohibit the use of medical marijuana for transportation workers in safety-sensitive jobs (i.e., pilots, bus and truck drivers, subway operators, ship captains, and transit security).

Anti-Discrimination Laws

- Most MMLs/court decisions provide that employers are not required to accommodate intoxication, use, or possession in the workplace
- AR, AZ, CT, DE, IL, ME, MN, NV, NY, OK, PA, RI
  - “[A]n employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon . . . a patient’s positive drug test for cannabis . . . unless the patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment.” Minn. Stat. Ann. § 152.32(3)(c).
ADA/FMLA/Leave Law Considerations

- No duty to accommodate illegal drug use
- Recovering addict provisions
- May have a duty to engage in the interactive process if there is reason to believe the employee is disabled
- May have to consider whether FMLA or other leave is appropriate for underlying medical condition

Dealing With Pre-Employment Drug Tests

- Health care worker applies for a position and Employer provides an offer of employment conditional upon passing drug test. Employee shows up to take the drug test and provides the Employer and MRO with the following information prior to taking the test (3 scenarios):
  1) I have a medical marijuana card. What do you do?
  2) I have prescription for synthetic marijuana – Marinol. What do you do?
  3) I have both a medical marijuana card and I have a prescription for synthetic marijuana. What do you do?
Marijuana Types

- Joints
- Bongs
- Edibles
- Beverages
- CBD products
- Hemp-based products

Hemp vs. Marijuana – What’s the Difference?

- Applicant receives a pre-employment offer subject to successful passing of drug test. Candidate provides Employer and MRO with notice of taking the cannabidiol drug Epidiolex. The employee also mentions prior to taking the test that she occasionally uses CBD derived from hemp and wants to know whether either will cause her to fail the drug test.
- What do you tell her?
Testing/Detection Issues

- Pre-Employment
- Random
- Post-Accident
- Reasonable Suspicion

Hypothetical #1

Michael Palsgraf works for a bank as a teller. He is pushing a cart into the vault when he accidentally hits a co-worker causing injury. Can the company send Michael out for drug testing?

It depends

Yes

No

It depends
Hypothetical #2

Jane Thompson is a forklift operator at a warehouse. While at work, a co-worker strikes her with a forklift causing her injury. She becomes injured and submits a workers' compensation claim. Can the company send her co-worker out for drug testing?

It depends

Yes

Hypothetical #3

Can you send Jane out for drug testing?

It depends

Yes

No
Workplace Safety

- **DFWA** (Drug-Free Workplace Act) applies to certain federal contract/grant recipients
  - Does not require drug testing in the workplace
  - Does not require employers to fire employees for positive drug test
  - Requires continuous good faith efforts to maintain a drug-free workplace
- Reasonable suspicion is paramount
- OSHA General Duty Clause

Practice Pointers

- Legalization ≠ accommodation
- Duty to provide safe workplace paramount
  - No state restricts employer prohibition on recreational use affecting work activities
  - Beware “lawful off-duty conduct” litigation
  - Drug testing policies must be uniformly enforced to avoid discrimination
Practice Pointers

- Establish and communicate clear drug policies
  - Employers may enforce drug testing policies to exclude employees who test positive for marijuana (note anti-discrimination states)
  - Beware ADA risks in drug tests positive for Rx drugs

Questions
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