“Early Bird” Session

CAN YOU STILL HAVE A DRUG-FREE WORKPLACE?

PRACTICAL SOLUTIONS FOR TODAY’S CHALLENGES

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Drug use, both legal and illegal, has a long history in the United States. In part in response to a perception that drug use in America had reached alarming levels, in 1986, the Reagan Administration began recommending drug testing programs for employers as part of the War on Drugs program. In 1988, Drug Free Workplace regulations required that any company with a contract over $25,000 with the Federal government provide a Drug-Free Workplace.

Private employers also saw the value of drug testing and instituted Drug-Free Workplace programs. Additionally, numerous states enacted legislation that rewards employers who institute drug testing for employees by awarding discounts on workers' compensation premiums if they comply with state drug testing regulations. The impact of all these factors combined has been impressive. Today, approximately 90% of Fortune 1000 companies and 62% of all employers in the United States have mandatory drug-testing programs of some sort.

At the same time, a crisis of opioid drug abuse, much of it perfectly legal, and a relaxation of public attitudes towards marijuana use, both medicinal and recreational, have made navigating the world of drug testing much more difficult for employers. What follows is a discussion of current challenges faced by employers attempting to regulate prescription drug misuse and abuse in the workplace, and a survey of the varied, and often conflicting, landscape of state medical and recreational drug statutes, and their impact on employers in those states.

A. Prescription Drugs and the Workplace

Overview of ADA Analysis and EEOC Guidance

The use of prescription drugs by employees, and how it relates to the Americans with Disabilities Act (ADA), is often the subject of complicated entanglements in the workplace. Though the use of prescription drugs alone is not a disability, prescription drugs are often used to treat injuries, illnesses, and conditions that could qualify as a disability. For example, an individual may take a prescription narcotic painkiller to treat chronic back pain, which, under many circumstances, would qualify as a disability. Prescription drug addiction (like alcohol addiction) likely constitutes a disability. Regardless of whether an individual is or is not legally disabled, that individual may be “regarded as” being disabled based on his or her prescription drug use.

The ADA’s prohibition against discrimination generally includes “medical examinations and inquiries.” See 42 U.S.C. § 12112(d)(1). A disability-related inquiry includes any inquiry that will reveal whether an employee has a disability or the nature or severity of the disability. Prescription and over-the-counter drug inquiries are specifically addressed in the EEOC’s Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (published 7/27/2000). The EEOC Guidance states the following constitute disability-related inquiries: (1) asking an employee whether he or she is currently taking any prescription drugs or medications; (2) asking an employee whether he or she has taken any prescription drugs or medications in the past; and (3) monitoring an employee’s usage of prescription drugs or medications. Courts have agreed that broadly asking about employees’ prescription drug regimens constitutes a disability-related inquiry. See Bates v. Dura Auto. Sys. (“Obviously, asking an employee whether he is taking prescription drugs or medication, or questions seek[ing] information about illnesses, mental conditions, or other impairments [an employee] has or had in the past[,] trigger the ADA’s . . . protections.”) (quoting Lee v. City of Columbus.)
Such disability-related inquiries are permissible, however, if the employer can show the inquiries are both job-related and consistent with business necessity. The EEOC Guidance expands on how this two-prong standard is defined:

5. When may a disability-related inquiry or medical examination of an employee be “job-related and consistent with business necessity”?

Generally, a disability-related inquiry or medical examination of an employee may be “job-related and consistent with business necessity” when an employer “has a reasonable belief, based on objective evidence, that: (1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.” Disability-related inquiries and medical examinations that follow up on a request for reasonable accommodation when the disability or need for accommodation is not known or obvious also may be job-related and consistent with business necessity. In addition, periodic medical examinations and other monitoring under specific circumstances may be job-related and consistent with business necessity.

Sometimes this standard may be met when an employer knows about a particular employee’s medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition. An employer also may be given reliable information by a credible third party that an employee has a medical condition, or the employer may observe symptoms indicating that an employee may have a medical condition that will impair his/her ability to perform essential job functions or will pose a direct threat. In these situations, it may be job-related and consistent with business necessity for an employer to make disability-related inquiries or require a medical examination.

In the portion of the EEOC Guidance addressing what is job-related and consistent with business necessity, the EEOC poses and answers the following question specific to inquiring about prescription drug usage:

8. May an employer ask all employees what prescription medications they are taking?

Generally, no. Asking all employees about their use of prescription medications is not job-related and consistent with business necessity. In limited circumstances, however, certain employers may be able to demonstrate that it is job-related and consistent with business necessity to require employees in positions affecting public safety to report when they are taking medication that may affect their ability to perform essential functions. Under these limited circumstances, an employer must be able to demonstrate that an employee’s inability or impaired ability to perform essential functions will result in a direct threat. For example, a police department could require armed officers to report when they are taking medications that may affect their ability to use a firearm or to perform other essential functions of their job. Similarly, an airline could require its pilots to report when they are taking any medications that may impair their ability to fly. A fire department, however, could not require fire department employees who perform only administrative duties to report their use of medications because it is unlikely that it could show that these employees would pose a direct threat as
a result of their inability or impaired ability to perform their essential job functions.
(Emphasis original.)

Breaking down the Guidance, the EEOC has a three-part test to determine when an employer can require its employees to disclose prescription medications. To require disclosure of a prescription medicine, each of the three elements must be established by the employer: (1) the employer must be one that affects public safety; (2) the employee must be in a position affecting public safety; and (3) the nature of the medication required to be reported must be one that affects the employee’s ability to perform their essential functions, resulting in a direct threat.

**EEOC Enforcement Activity and Case Law**

The EEOC has been active in enforcing employee rights in regard to prescription drugs in the workplace. For instance, in October of 2012, the EEOC settled a case against a medical center in Wilmington, North Carolina for $146,000 as a result of the agency’s allegation that the medical center violated the ADA by prohibiting employees from working if they were taking legally prescribed narcotic medications. As part of its settlement, the medical center was required to provide annual training to managers and supervisors concerning the ADA and provide periodic reports to the EEOC.

On September 26, 2014, the EEOC filed suit against a drilling company in Tulsa federal court charging that the company violated Francisco Salinas’ rights under the ADA by requiring him to disclose “medications that could cause impaired job performance.” Specifically, the EEOC claimed that the policy required Salinas, who was alleged to have a chronic and permanent back injury, to self-disclose that he was taking prescribed medication (in this case, Valium and Hydrocodone) to management and barred him from working while taking such medication. In its lawsuit, the EEOC sought a monetary award for Salinas and an order prohibiting such policies for being used on a continuing basis. One could presume that Salinas worked in oil and gas drilling operations that could injure or kill himself or others if handled improperly. The consent decree in the case requires Helmerich not to “conduct medical inquiries of [drilling employees] or impose requirements for self-disclosure of medication for [drilling employees] unless such inquiries are job-related and consistent with business necessity.” In another section the company agrees that its new policy “will provide that inquiries about substances or medications that might affect the safe performance of certain job duties will be made only when job-related and consistent with business necessity.” The consent decree does not go any further to define these terms of art, but does state in another section that: “In those instances whether the Defendant becomes aware of a prescription medication, through a fitness for duty exam, voluntary disclosure, inadvertent disclosure or a medical inquiry that is [job-related and consistent with business necessity], Defendant commits that it will conduct an individualized assessment as to the ability of the [drilling employee] to safely perform the essential functions of his or her job in conformance with the requirements of the ADA before making a determination regarding the [drilling employee’s] employment status.”

A seminal case exploring prescription drug testing and required disclosure of prescription drugs is *Bates v. Dura Automotive Systems, Inc.* In 2008, six former employees sued Dura Automotive Systems, Inc., a Michigan-based automotive parts company, claiming that Dura required those employees who tested positive for legally prescribed medications to disclose the medical conditions for which they were taking prescription medications, and made it a condition of employment that the employees cease taking their prescription medications. Specifically, Dura’s policy prohibited employees from “being impaired by or under the influence” of alcohol, illegal drugs, or legal drugs -including prescription medications and over-
the-counter drugs – to the extent that employees’ use of such drugs endangered others or affected their job performance. Dura reserved the right to enforce its policy via employee drug testing. Dura’s new policy provided that tests showing positive indication of drug/alcohol use will be confirmed” and that employees who tested positive could confidentially report to a medical review officer ("MRO") their use of prescription medications that may have affected their test results. Dura claims that it designed its new policy to comply with the Tennessee Drug Free Workplace Program.

None of the plaintiffs had ADA-covered disabilities, but all took prescribed medications for a variety of conditions. After these employees tested positive during Dura’s drug testing process, Dura directed the employees to disclose their medications to a third-party company hired to administer the drug tests. Only the machine-restricted drugs were reported to Dura, and Dura warned plaintiffs to discontinue using the offending medications. After retests came back positive, Dura terminated the plaintiffs’ employment. The jury found for all but one of the plaintiffs on their claims the company’s drug testing program violated the ADA as a medical exam and disability-related inquiry without business justification, and awarded damages of nearly one million dollars. Dura appealed.

In a 2-1 decision, the Court of Appeals for the Sixth Circuit on August 26, 2014 reversed the judgment and remanded for further proceedings. The Sixth Circuit majority found that the district court erred by holding as a matter of law that Dura’s testing program was a medical examination or disability-related inquiry under the ADA, which an employer must prove is job-related and consistent with business necessity. The court found that while the drug-testing protocol “pushes the boundaries of the EEOC’s medical-examination and disability-inquiry definitions,” a reasonable jury could find either way on the issues of whether the policy constituted a medical examination or disability-related inquiry.

The court specifically found that the goal of Dura’s program was not to force employees to disclose health conditions or potential disabilities but rather to determine if an individual’s drug use made it unsafe for the person to operate machinery. The court found that it was for a jury to resolve factual disputes about whether a company inquired into an employees’ health condition, or whether the information about legal drug use gleaned from the testing program inevitably disclosed to the company the nature of an employee’s impairment or disability.

The EEOC has more recently continued on this path with regard to prescription drugs in the workplace. For example, on September 14, 2016, the EEOC sued a casino in the United States District Court for the District of South Dakota alleging that the casino violated the ADA when it withdrew a candidate’s offer of employment when she failed a pre-employment drug test due to the presence of hydrocodone, which was lawfully prescribed to her for neck and back pain. The EEOC alleged, among other things, that the casino failed to allow the candidate to explain her prescription drug use or present evidence of her underlying impairment. It also took issue with the casino’s policy of requiring all employees to disclose all prescription and non-prescription drug use.

Additionally, in May 2017, the EEOC filed a lawsuit against a St. Paul-based design, printing and packaging company for violating the ADA. In that case, the company required an employee – who had been diagnosed with depression and had ceased taking his medication – to see a doctor and a psychologist, and to go back on his medication. The EEOC contended that although the employee complied with his employer’s unlawful directives, the employer violated the ADA by terminating his employment because of his disability. Similarly, in June 2017, the EEOC sued Kentucky Fried Chicken, alleging that the chain restaurant violated the
ADA by firing a manager after it discovered she was taking medications prescribed by her doctor for her bipolar disorder.

The EEOC also reached a $45,000 settlement with two Scottsdale, Arizona car dealerships of a lawsuit alleging the companies violated the ADA by rescinding a candidate’s job offer when her pre-employment drug test revealed the presence of a prescription drug. Although the employee explained that the drug was legally prescribed to treat a disability, the company still refused to hire her. The EEOC was particularly concerned with companies’ policy of refusing to hire any applicant who tested positive for certain prescription drugs. In addition to paying $45,000, the companies agreed to conduct additional ADA training and rescind the policy. In January 2018, the EEOC entered into a $70,000 settlement with a truck manufacturer based on allegations that the company rescinded a conditional job offer to an applicant for a laborer position at its Hagerstown, Maryland facility after the applicant disclosed that he was taking medically prescribed suboxone, which is used to treat opioid addiction. The applicant was a recovering addict who had been enrolled in supervised medication-assisted treatment programs since 2010. According to the EEOC, the company failed to conduct an individualized assessment to determine what effect, if any, the suboxone had on the applicant’s ability to perform the job in question. The EEOC emphasized that the ADA protects recovering addicts who are not currently using illegal drugs and prohibits discrimination on the basis of past drug addiction.

In 2017, a Washington federal district court judge ordered an employer to pay a terminated employee $1.8 million in damages for its failure to accommodate her use of opioids that had been prescribed to treat her migraines. The court had concluded the plaintiff had a protected disability under the ADA and the Washington Law Against Discrimination (WLAD). In its determination of whether the employer failed to affirmatively adopt measures that were available to it and medically necessary to accommodate the plaintiff’s medical condition, the court noted the employer, “chose to address [the plaintiff’s] medication symptoms through a disciplinary process, rather than an interactive one aimed at finding a reasonable accommodation that would allow [her] to work and seek treatment for her disability.” In its findings, the court determined the employer’s actions “fell far short of the [employer]’s duty to affirmatively adopt reasonable accommodation.”

B. State and Federal Marijuana Law

As of November 2018, thirty-three (33) states and Washington D.C. have legalized marijuana for medical use. Further, recreational use of marijuana is legal in ten (10) states plus the District of Columbia: Alaska, California, Colorado, District of Columbia, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington.

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 a “Schedule I” Controlled substance, similar to cocaine and heroin. Schedule I drugs are categorized as such because of their high potential for abuse, the absence of any accepted medical use, and lack of accepted safety for use under medical supervision. (21 U.S.C. § 812(b)(1).)

In the past, the federal government decided not to enforce most of the Act. In a policy update on August 29, 2013, the U.S. Department of Justice (DOJ) announced that it was 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.”

But the tides have turned once again. On January 4, 2018, former Attorney General Jeff Sessions reversed the DOJ’s position under the Obama administration, in which the DOJ adopted a hands-off approach to enforcing federal marijuana laws in those states where marijuana was legal for medical and/or recreational use. In his one-page memorandum to U.S. Attorneys, Sessions reversed this approach, emphasizing the fact that marijuana has, and continues to be, unlawful under the federal Controlled Substances Act.

What does the Sessions memorandum mean for employers? The answer is: It depends.

Only a few states have addressed how federal marijuana law impacts workplaces in states where marijuana is legal. In 2010, the Oregon Supreme Court determined that employers are not required to accommodate medical marijuana use because it is illegal under federal law. The Colorado Supreme Court made a similar determination in 2015, when it held that an employer can discharge an employee who is a medical marijuana user for a positive drug test because marijuana remains illegal under federal law. And, in 2016, a federal court in New Mexico determined that employers in that state are not required to accommodate medical marijuana use because it is illegal under the federal Controlled Substances Act. Therefore, the Sessions memorandum is unlikely to have any impact on the current status of employment protections for medical marijuana users in Oregon, Colorado, and New Mexico.

On the other hand, in 2017, the Massachusetts Supreme Judicial Court determined that an employer cannot rely on the fact that marijuana is illegal under federal law to justify an adverse employment action against a medical marijuana user where such action would violate state disability discrimination laws. A federal court in Connecticut also determined that federal law, including the Controlled Substances Act, does not preempt the anti-discrimination provision contained in that state’s medical marijuana law. So, in these states, individuals who are registered medical marijuana users and test positive for marijuana have certain job protections, even though marijuana is illegal under federal law. Thus, unless the Sessions memorandum eliminates medical marijuana altogether, it may not have an impact in Massachusetts or Connecticut.

In other states, however, the answer is not so clear: The 2017 court decisions in Massachusetts and Connecticut indicated the momentum may have been moving toward providing medical marijuana users with at least some employment protections, but whether the Sessions memorandum will reverse this momentum remains to be seen.

C. Medical Marijuana and the Workplace – Is There a Right to Be Stoned at Work?

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 law has 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. Courts have issued various decisions thus far, demonstrating the contours of the lawful interaction between medical marijuana and the workplace.
• **Arizona**

In February 2019, an Arizona District Court held that the Arizona Medical Marijuana Act (“AMMA”), A.R.S. § 36-2813(B), creates a private cause of action for medical marijuana cardholders against their employers. In this case, a customer service supervisor injured her wrist while at work. After reporting her injury, the supervisor submitted to a post-accident drug screen. At the time of the drug screen, the supervisor disclosed that she was a medical marijuana cardholder under the AMMA and had used medical marijuana the night before. After the supervisor failed the drug screen, the employer terminated her employment because she had a detectable amount of illegal drugs in her body, which was a violation of company policy.

The Court granted summary judgment for the supervisor holding that the AMMA provides a private right of action for employees against employers. In addition, the Court held that the employer violated the AMMA by terminating the supervisor’s employment based solely on a positive drug test. In reaching this holding, the Court recognized that an employer has an affirmative defense under the AMMA if the employer can show that it had a good faith belief that the employee was impaired on the employer’s premises or during the hours of employment. In its defense, the employer argued that the high level of marijuana metabolites on the drug screen provided a good faith basis to believe the supervisor was impaired on the employer’s premises on the date of the drug test. The Court, however, believed the interpretation of the drug testing results was a scientific matter requiring expert testimony. The employer did not provide any expert testimony on whether the amount of marijuana metabolites on the drug screen were in a sufficient concentration to cause impairment. As a result, the Court held that the employer failed to establish a “good faith basis” to believe that the supervisor was impaired at work on the date of the drug screen, and granted summary judgment on the supervisor’s claim of discrimination under the AMMA.

• **California**

In California, employers may choose to rely on federal law, even if the government isn’t enforcing it. When medical marijuana became legal in California, the California Supreme Court dealt with the issue of whether employers could “discriminate” against employees who tested positive for marijuana. In *Ross v. RagingWire*, an employee was discharged after he tested positive for marijuana. The employee had a doctor’s note indicating he was allowed to use marijuana for back pain. The court held the employer was free to discharge the employee based on his marijuana use despite the legalization of medical marijuana. The court reasoned that although medical marijuana use was legal in California, it was still illegal under federal law. Thus, the employer did not violate the Fair Employment and Housing Act by discharging the employee.

Additionally, the medical marijuana law in California specifies that it does not require accommodation of medical marijuana at the workplace. California Health & Safety Code § 11362.7-11362.83 provides in part: “Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment...”

California law does provide general protection for employees’ off duty lawful conduct. California Labor Code § 96(k) provides that the Labor Commissioner may pursue claims “for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer’s premises.” Labor Code § 98(a) prohibits, among other things, discharging an employee or in any manner discriminating,
retaliating, or taking any adverse action against any employee or applicant for employment because the employee or applicant engaged in the conduct described in section 96(k). However, given that marijuana use (either for medical reasons or for recreational purposes) remains illegal under federal law, the use of the substance is not lawful off duty conduct.

- **Colorado**

In June of 2015, the Colorado Supreme Court addressed workplace rights related to medical marijuana in *Coats v. Dish Network*. The court held that Colorado’s lawful off-duty conduct statute does not prohibit employers from discharging employees who choose to use marijuana for medical purposes off-duty and away from their employers’ places of business, even when there is no evidence that such use affected job performance or that an employee was otherwise impaired while at work. The court held that marijuana remains unlawful under federal law, and, as a result, an employee cannot rely on the lawful off-duty conduct statute as a basis for consumption in violation of an employer’s zero-tolerance drug policy. While the court’s decision is limited to Colorado’s constitutional amendment permitting the use of medical marijuana and does not address lawful recreational marijuana use, which Colorado voters approved in a referendum in 2012, the same analysis would seem to apply to recreational use, as such use would still be unlawful under federal law.

The employee in question tested positive for marijuana in violation of the company’s zero-tolerance drug policy. Mr. Coats used marijuana for medical purposes as lawfully allowed under Colorado state law. There was no evidence he was impaired or otherwise under the influence of marijuana while at work, or that he used marijuana at work. The employee sued, alleging that his discharge violated Colorado’s lawful off-duty conduct statute, C.R.S. § 24-34-402.5, which prohibits employers from discharging employees for “engaging in any lawful activity off the premises of the employer during nonworking hours,” subject to certain exceptions.

The Colorado Supreme Court held that the lawful off-duty conduct statute does not protect employees from termination for marijuana use in violation of an employer’s zero-tolerance drug policy. The court rejected Coats’ argument that the term “lawful activity” under C.R.S. § 24-34-402.5 refers only to state, and not federal law. The court considered the language of the statute, which provides, “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.” The court held that for an activity to be “lawful” in Colorado for purposes of the lawful off-duty conduct statute, it must be permitted by—and not contrary to—both state and federal law. As a result, the court rejected Coats’ argument that his discharge was unlawful.

The Colorado Supreme Court’s decision reaffirms an employer’s right to discharge an employee who tests positive for marijuana in violation of an express zero-tolerance drug policy, even when such use occurs outside the workplace, the employee has a license to use medical marijuana in Colorado, and there is no evidence the employee was impaired or otherwise under the influence of marijuana while at work. Colorado employers may still implement policies that prohibit the use of drugs that are illegal under federal law, and employees cannot rely on Colorado’s lawful off-duty conduct statute as a basis for arguing their discharge was wrongful.

Although in 2012 Colorado voters approved a constitutional amendment legalizing recreational marijuana use, the court’s decision applies only to medical marijuana. The constitutional amendment legalizing recreational marijuana use expressly states that nothing
contained in the amendment is intended to require an employer to permit or accommodate the use of marijuana in the workplace or to affect employers’ ability to implement and maintain policies restricting employees’ marijuana use. This means that there is no reason to believe the court’s decision would have differed if an employee had been discharged for using marijuana purely for recreational, as opposed to medical purposes.

- **Connecticut**

  In *Noffsinger v. SSC Niantic Operating Company, LLC*, a U.S. District Judge in August of 2017, found that there is no conflict between federal and Connecticut marijuana regulation and held that federal law does not preempt Connecticut law. Accordingly, a cause of action may be maintained under Connecticut’s medical marijuana law for firing or refusing to hire a user of medical marijuana, even where the individual has failed a drug test.

  As an initial matter, the court addressed the issue of whether an individual could even bring a private lawsuit for an employer’s violation of Connecticut medical marijuana law, the Palliative Use of Marijuana Act (PUMA). The law contains no express language that provides for a private right of action by an aggrieved applicant or employee. The court however found that the act impliedly provided for individuals to bring claims under the act based upon legislative testimony indicating that PUMA would provide protections for employees that would be enforceable in the courts.

  The court then held that federal law does not preempt Connecticut’s anti-discrimination employment provision. In regard to the CSA, which makes it a federal crime to use marijuana, the court found that the CSA does not regulate the employment relationship (by making it illegal to employ a marijuana user, for example), so the anti-discrimination provision of PUMA does not preempt or conflict with the CSA. The court also found that the ADA similarly did not preclude PUMA’s enforcement. The court’s key holdings regarding the implied private right of action, and non-preemption, are not binding on a Connecticut state court, but may be persuasive as the issue continues to percolate through the judicial system.

  After the *Noffsinger* decision, the parties filed cross-motions for summary judgment. On September 5, 2018, the district court granted partial summary judgment in the plaintiff’s favor and concluded that she had successfully asserted a PUMA discrimination claim. The court again rejected defendant’s arguments that federal/state law conflicts preempted enforcement of the Connecticut law. The court found that state law could co-exist with federal laws criminalizing marijuana use.

- **Maine**

  On November 8, 2016, Maine voters legalized recreational marijuana. While employers may take solace in the fact that the initiative expressly exempts them from having to tolerate marijuana use, possession, transport or employees being under the influence of marijuana in the workplace, employers need to be aware that the law also prohibits them from refusing to employ or otherwise penalizing persons 21 years of age or older solely because the person uses marijuana recreationally outside the employer’s property.

  Of the ten states to have joined the growing list of jurisdictions legalizing recreational use during the November 2016 elections along with Washington D.C., Maine is the only state to have a provision like this giving affirmative protection for recreational users. The provision raises serious questions, including how to address job applicants or current employees who
test positive for the presence of marijuana. In the event of a positive test, unless an employer has evidence that the applicant or employee was in possession, using or was under the influence of marijuana while in the workplace, the new law will prohibit the employer from taking any adverse action.

Employers will also need to be careful how they discipline and make other personnel-related decisions affecting employees who the employer knows use marijuana recreationally to avoid the appearance that the employer is being motivated by the employee’s marijuana use as opposed to legitimate business reasons under Maine law, such as performance. There is also a possibility that an employee could claim he or she has been unfairly targeted by his or her employer if the employer knows that the employee is a recreational marijuana user and the employer selects him or her for random testing on that basis.

Maine has set an April 20, 2019 deadline to develop rules required to begin adult-use cannabis sales.

- Massachusetts

On July 17, 2017, the Massachusetts Supreme Judicial Court issued a unanimous ruling in *Barbuto v. Advantage Sales and Marketing, LLC*, allowing medical marijuana users to assert claims for handicap discrimination under the Massachusetts Fair Employment Practices Act. However, in the same ruling, the court also held that the Massachusetts Act for the Humanitarian Medical Use of Marijuana (the Massachusetts Medical Marijuana Act) does not provide an implied, private right of action by employees against employers. The court also declined to recognize an action for violation of public policy within the context of adverse employment actions against medical marijuana users.

The decision, which represents the first medical marijuana case considered by the Massachusetts Supreme Judicial Court, has a potentially far-reaching effect—even outside of Massachusetts. Notably, the Supreme Judicial Court became the first appellate court in any jurisdiction to hold that medical marijuana users may assert state law handicap or disability discrimination claims—regardless of whether the state’s medical marijuana statute provides explicit employment protections. (Massachusetts’s medical marijuana statute does not provide such employment protections.)

The court held that an employer must engage in an “interactive process” with a medical marijuana user to determine if the medical marijuana user can continue to perform his or her job duties with a reasonable accommodation to the handicap. The court also insinuated that an employer should determine whether a medical marijuana user could treat his or her medical condition with an alternative medicine instead of medical marijuana. In reaching this conclusion, the court ignored case law from California, Montana and New Mexico (discussed herein), in which courts had declined to hold that employers must accommodate employees’ use of medical marijuana.

The court declined to recognize a private right of action under the Massachusetts Medical Marijuana Act itself for medical marijuana users who are subjected to adverse employment actions. However, this may be cold comfort to employers since the court noted that such a cause of action was unnecessary since those medical marijuana users could instead assert a claim for handicap discrimination under Massachusetts state law. Similarly, the court declined to recognize a claim for wrongful termination in violation of public policy for
medical marijuana users but, again, based this determination on the existence of an alternative handicap discrimination claim.

- **Montana**

  In *Johnson v. Columbia Falls Aluminum Co.*, the court noted that the Montana medical marijuana statute is “essentially a ‘decriminalization’ statute that protects qualifying patients . . . from criminal and civil penalties” and “does not provide an employee with an express or implied private right of action against an employer.” Specifically, while the plaintiff argued that his termination violated the Montana Human Rights Act and the ADA, the court found “the [Montana medical marijuana statute] clearly provides that an employer is not required to accommodate an employee’s use of medical marijuana. While [plaintiff] continues to assert his right to receive treatment in the form of medical marijuana, the issue here is whether [his employer] had to accommodate medical marijuana use under the [Montana Human Rights Act] or the ADA. We agree with the District Court in concluding that a failure to accommodate medical marijuana does not violate the MHRA or the ADA since an employer is not required to accommodate an employee’s use of medical marijuana.”

- **New Jersey**

  In *Wild v. Carriage Services*, the Appellate Division of the Superior Court of New Jersey reversed a trial court which had held the New Jersey Compassionate Use of Medical Marijuana Act (“NJCUMMA”) did not contain any employment-related protections for licensed users of medical marijuana under the Act. In doing so, the Appellate Division acknowledged the language of the NJCUMMA—which specifically provides that “[n]othing in this act shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace”. The Appellate Division found that the NJCUMMA did not create any new substantive rights for employees but it also did not eliminate any rights protected by other statutes. Since Plaintiff’s claim was brought under New Jersey’s Law Against Discrimination (“NJLAD”) which prohibits discrimination based on disabilities, the Appellate Division held the court should not have granted Defendants’ Motion to Dismiss, because Plaintiff’s Complaint met the minimum pleading standards for a disability claim under the NJLAD. The Appellate Division went on to suggest that the NJCUMMA’s “in the workplace” provision may not protect against a request for an accommodation of **off duty** medical marijuana use.

- **New Mexico**

  In *Garcia v. Tractor Supply Co.*, the court held that the New Mexico medical marijuana statute provides no wrongful termination cause of action for employees: “[M]edical marijuana is not an accommodation that must be provided for by the employer.” The court also specifically referred to marijuana’s status under federal law, “To affirmatively require [defendant] to accommodate [plaintiff’s] illegal drug use would mandate [defendant] to permit the very conduct the [Controlled Substances Act] proscribes.”

- **Oregon**

  In 2010, the Oregon Supreme Court decided in *Emerald Steel Fabricators, Inc. v. BOLI*, that Oregon’s disability law does not protect an applicant or employee who engages in the illegal use of drugs. This was so because marijuana remains illegal under the federal Controlled Substances Act, thus employers have no duty to engage in an interactive process or to accommodate an employee’s drug use in violation of their drug policy.
• Rhode Island

In a trial court decision issued on May 23, 2017, Callaghan v. Darlington Fabrics Corp., a Rhode Island Superior Court justice held that an employer could not deny employment to an applicant licensed under state law to possess and consume medical marijuana solely because the applicant would be unable to pass a mandatory pre-employment drug test. The decision, which granted the applicant summary judgment against the employer, recognizes—for the first time in Rhode Island—a private right of action for medical marijuana “cardholders” to seek damages for discrimination on account of their status as medical marijuana patients by schools, landlords, and employers. The court also found that there was no conflict between the state marijuana law and the Drug Free Workplace Act of 1988 because the state law expressly protected employers from having to accommodate drug use “in” the workplace. Accordingly, the court found there was no federal preemption.

• Washington

In Roe v. Teletech Customer Care Mgmt. LLC, the plaintiff alleged that a provision in the Washington medical marijuana statute stating medical marijuana users “shall not be penalized in any manner, or denied any right or privilege” protected employees from being “denied the right or privilege of employment due to authorized medical marijuana use.” In dismissing this argument, the court held that provision “[did] not confer any obligation on private employers.” The court further held that the statute was “unambiguous” and “did not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use.”

The court also held that Washington’s medical marijuana statute implied no cause of action against an employer, stating that “implying a cause of action against a private entity is inconsistent with a statutory scheme intended to provide an affirmative defense to state criminal prosecution,” and noting the statute does not “provide a civil remedy against the employer.” Put simply, Washington’s medical marijuana statute did “not support such a broad public policy that would remove all impediments to all authorized medical marijuana use or forbid an employer from discharging an employee because she uses medical marijuana.”

D. Non-Discrimination State Statutes—Medical Users Have Workplace Rights

As of November 2018, Arkansas, Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Oklahoma, Pennsylvania, Rhode Island, and West Virginia offer certain employment protections for authorized medical marijuana card holders. In most of these states, merely possessing a medical marijuana card, or testing positive for marijuana use, is not alone a sufficient cause for adverse action against an employee. Generally, the employer must demonstrate that the employee used, possessed or was impaired by the drug at work.

Arkansas: Ark. Code Ann. § 20-6-91 provides that “An employer shall not discriminate against an individual in hiring, [or] termination, . . .based upon the individual’s past or present status as a Qualifying Patient or Designated Caregiver.” Arkansas’s 2017 amendment to their medical marijuana statute provides an express exception for “safety sensitive positions” (defined in the statute). If an employer has a good faith belief that a Qualifying Patient was engaged in current marijuana use, the employer can exclude that individual from “safety sensitive positions,” and terminate them for a positive drug test.
**Arizona:** The Arizona Medical Marijuana Act, passed in 2010, prevents Arizona employers from discharging or discriminating against cardholding applicants or employees solely because they (1) test positive for marijuana; or (2) possess a medical marijuana card unless doing so would cause an employer to lose a monetary or licensing benefit under federal law. Additional evidence of impairment, use, or possession at work would be required before taking adverse action. In response to the passage of the AMMA, the legislature amended Arizona’s drug testing statute to provide additional protections for employers. Although no penalty exists for noncompliance with the statute, if an employer chooses to voluntarily comply, the statute provides a “safe harbor” by shielding the employer from certain civil liability arising out of the testing procedure, including adverse employment actions. This includes protecting employers from litigation based on actions to exclude an employee from performing a “safety sensitive position,” based on a good faith belief that the employee is engaged in the current use of any drug (including medical marijuana) that could cause impairment, and to refuse to hire cardholding applicants for those positions. A safety sensitive position is any job designated by the employer as such, or any job that includes tasks or duties that the employer, in good faith, believes could affect the safety or health of the cardholding employee and/or others. (See Ariz. Rev. Stat. Ann. Title 36, Chapter 28.1, § 36-2802, § 36-2807, § 36-2813, § 36-2814 and Ariz. Rev. Stat. Ann. Title 23, § 23-493 et. seq.).

**Connecticut:** Connecticut’s 2012 medical marijuana law, “An Act Concerning the Palliative Use of Marijuana” (Public Act No. 12-55) also provides worker protections. Employers are prohibited from refusing to hire, discharging, penalizing or threatening an employee based solely on the employee’s status as a qualifying patient or primary caregiver. (See Conn. Gen. Stat. Ann. § 21a-408a, § 21a-408p (2012).)

**Delaware:** Delaware’s medical marijuana law provides that an 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 either of the following: the person’s status as a cardholder; or a registered qualifying patient’s positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment. (See Del. Code Ann. Title 16, Ch. 49A, § 4902A, § 4904A, § 4905A, § 4907A, § 4921A.)

**Illinois:** Under Illinois medical marijuana law, an employer may not penalize a person solely for his or her status as a registered qualifying patient or a registered designated caregiver. An employer may enforce a policy concerning drug testing, zero-tolerance or a drug free workplace provided the policy is applied in a nondiscriminatory manner. An employer may discipline a registered qualifying patient for violating a workplace drug policy. (See 410 Ill. Comp. Stat. Ann. 130/40, 130/30, 130/50.)

**Maine:** In Maine, an employer may not refuse to employ or otherwise penalize a person solely for that person’s status as a qualifying patient. A business owner may prohibit the smoking of marijuana for medical purposes on the premises of the business if the business owner prohibits all smoking on the premises and posts notice to that effect on the premises. As with similar laws in other states, an employer is not required to accommodate an employee’s ingestion of marijuana in its workplace. (See ME. Rev. Stat. Ann. tit. 22 § 2421, § 2423-E, § 2426.)

**Minnesota:** Under Minnesota’s medical marijuana law an 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 either of the following: (1) the
Nevada: In Nevada, the medical marijuana law provides that an employer is not required to modify the job or working conditions of a person who engages in the medical use of marijuana that are based upon the reasonable business purposes of the employer, but the employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card, provided that such reasonable accommodation would not: (1) pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or (2) prohibit the employee from fulfilling any and all of his or her job responsibilities. (See Nev. Rev. Stat. §§ 435A.010-.810, § 453A.800, § 453A.300.)

New York: In New York, certified patients shall not be subject to any penalty or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, solely for the certified medical use or manufacture of marijuana, or for any other action or conduct in accordance with the state medical marijuana law. (See N.Y. Pub. Health Law §§ 3360 to 3369-d (McKinney), § 3369; N.Y. Comp. Codes R. & Regs. tit. 10, § 1004, § 1004.18.)

Oklahoma: On June 26, 2018, the Oklahoma Medical Marijuana Act (OMMA) passed after receiving 57 percent of the popular vote in favor of the proposed law. The law went into effect on July 26, 2018. Section 6 of the OMMA, which is codified at Oklahoma Statutes Title 63, Section 425, affects employers. Under the OMMA, employers cannot discriminate in hiring, impose any term or condition of employment, or otherwise penalize an employee based on his or her status as a medical marijuana license holder or solely based on a positive test for marijuana or its components. Employers may lawfully take employment action against employees (including medical marijuana license holders) for the possession of and/or use of marijuana: (i) at the place of work; (ii) on or in work property, vehicles, or equipment; and/or (iii) during work hours (i.e., off the employers' property but “during the hours of employment”). In addition, if an employer would “imminently” lose a monetary or licensing-related benefit under federal law or regulations, then the employer does not have to comply with the OMMA.

Pennsylvania: In Pennsylvania, SB 3, the Medical Marijuana Act was signed in April of 2016. Pursuant to section 2103(b) of SB 3, '[n]o employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee’s compensation, terms, conditions, location or privileges solely on the basis of such employee’s status as an individual who is certified to use medical marijuana.” The law includes exceptions where the drug use would cause the employer to violate federal law, or where the employee’s job duties include performing certain types of dangerous activities.

Rhode Island: Rhode Island’s medical marijuana law, The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act offers protection to medical marijuana users. Under the law, schools, employers, and landlords may not refuse to enroll, employ, or lease to, or otherwise penalize, a person solely for his or her status as a cardholder.” (G.L. § 21-28.6-4(c.).)
that employers may not discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee solely based on that employee’s status as a medical marijuana user. However, the WVMCA specifically states that nothing in the act requires an employer “to make any accommodation of the use of medical cannabis on the property or premises of any place of employment, and that the act shall not limit “an employer’s ability to discipline an employee for being under the influence of medical cannabis in the workplace or for working while under the influence of medical cannabis when the employee’s conduct falls below the standard of care normally accepted for that position.”

E. Next Steps

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

Update Policies. Employers should review and update policies in light of the new legal landscape. Policies should appropriately address prescription drug use and abuse. Policies should not, however, include blanket prohibitions and disclosure requirements related to the use of prescription medications. The policies should provide for individualized assessments for employees who may be impaired by the use of prescription drugs. Employers may want to clarify policies to expressly forbid the use or possession of marijuana in the workplace.

Educate. Employers will need to educate supervisors and employees regarding company policies relating to medical marijuana and prescription drugs. Employers should train supervisors and managers on how to assess employee impairment at work.

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 by state. Employers should maintain a uniformly implemented pre-hire drug testing program. Random drug testing may be subject to greater scrutiny by the courts though in 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 has come under increased scrutiny. In 2016, the federal work safety agency, OSHA, published standards relating to post-accident testing. The agency took 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. The agency stated “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.”
In October 2018, OSHA issued new guidance 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” (emphasis added). OSHA “believes that many employers who implement safety incentive programs and/or conduct post-incident drug testing do so to promote workplace safety and health.” Most significantly, OSHA states, “To the extent any other OSHA interpretive documents could be construed as inconsistent with the interpretive position articulated here, this memorandum supersedes them” (emphasis added). In other words, the previous guidance—which included examples of multiple programs that were not compliant—is presumably null and void. OSHA further states that most instances of workplace drug testing are permissible including random 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 U.S. Department of Transportation rule; or drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. OSHA added, “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.”

**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.
Can You Still Have a Drug-Free Workplace? Practical Solutions for Today’s Challenges

Presenters
Rayna H. Jones (Phoenix) and David L. Zwisler (Denver)

Moderator
Ben P. Glass (Charleston)

Times Are Changing

- 61% of Americans favor legalization
  - Nearly double from the year 2000 (31%)
  - Percentage in support just 12% in 1969

- Generational Shifts
  - Millennials (’81-’97) – 70%
  - Gen X (’65-’80) – 66%
  - Boomer (’46-’64) – 56%

- Estimate of 35-55 million currently use (2x/mo.)
  - Compare to: 59 million cigarette smokers

- In this low unemployment environment, many clients report difficulty hiring when screening for marijuana.
Unemployment Rates for States, Seasonally Adjusted

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BLS March 11, 2019

Drug testing results*

*Quest Diagnostics
Drug testing results*

Federal v. State Laws

- **Federal**
  - Marijuana classified as Schedule I Narcotic
  - Manufacture, sale, distribution, possession are illegal under federal law (Controlled Substances Act)
  - No DEA-certified doctor may prescribe marijuana
  - Under DOT regulations, marijuana use is prohibited for safety-sensitive positions
  - The Drug-Free Workplace Act (DFWA) applies to certain federal contract/grant recipients, and:
    - 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
Federal v. State Laws

- **State**
  - 33 states (plus D.C.) permit some form of medical marijuana
  - 10 states (plus D.C.) permit recreational marijuana
  - Over *64% of Americans* live in a state with medicinal marijuana
  - Estimated 3.5 billion dollars in sales in 2017 for medicinal marijuana

Medical Marijuana Statutes and Job Protections

- Thirteen states with medical marijuana laws containing express job protections/anti-discrimination provisions:

  1. Arkansas
  2. Arizona
  3. Connecticut
  4. Delaware
  5. Illinois
  6. Maine
  7. Minnesota
  8. Nevada
  9. New York
  10. Oklahoma
  11. Pennsylvania
  12. Rhode Island
  13. West Virginia

Most MMLs provide that employers are *not* required to accommodate intoxication, use, or possession in the workplace.
Recreational Marijuana Statutes

- Recreational marijuana is legal in 10 states plus D.C.
  - Alaska
  - California
  - Colorado
  - Washington, D.C.
  - Maine
  - Massachusetts
  - Michigan
  - Nevada
  - Oregon
  - Vermont
  - Washington
- Beware of “lawful off-duty conduct” litigation

Medical Marijuana Laws and Employer Substance Abuse Policies

- Most state medical marijuana laws: employers not required to accommodate use, consumption, possession, sale, etc. of marijuana in the workplace
- Employers in most states can prohibit marijuana use by employees, even off duty
- Employees cannot be impaired while working or on company property
- Exceptions: States with anti-discrimination provisions, Massachusetts
- What about safety-sensitive positions?
An Overview of the Opioid Crisis

- Epidemic and nation’s fastest growing drug problem
  - Crosses broad spectrum: age, sex, ethnicity, economic status
- A perfect storm
  - Misperception of risk
  - Wide availability, legally and otherwise
  - Broad use and very addictive substances
  - Policy and law enforcement focus elsewhere
- Expensive

National Epidemic

- Annually, over 16 million Americans, ages 12 and up, take some type of prescription medication
  - Adults: painkillers, anti-depressants
  - Youths: stimulants
- CDC: more people die every year from prescription painkillers than from heroin and cocaine combined
National Epidemic (cont’d)

- Abusers are urban, rural, across ethnic groups, economic classes, male and female
- Women particularly at risk – the rise of the single parent household
  - Women more likely than men to be prescribed pain medication and at higher doses
  - Women more likely to be given psychotherapeutic drugs (anti-depressants and anti-anxiety medications)
  - People who overdose likely to be taking combination
- Young adults (18-25) are biggest abusers
  - 1,700 died in 2014 (4 fold increase over 1999)
  - For each death, 119 emergency room visits/22 treatment admissions

Opioids – Why is This Happening?!

- Societal acceptance/quick fix society
  - Perception of safety
- Wide availability
  - Stimulant prescriptions up from 5M to 45M and painkiller prescriptions up from 75.5M to 209.5M
  - For teens, 70% get prescription drugs from friend or relative and target online sales
- Not on law enforcement/employer radar
- May of 2017, State of Ohio sued big five pharma companies
- February of 2018, State of Ohio sued four opioid distributors
- March of 2019, State of Oklahoma and Purdue Pharma (Oxycontin) reach $270 million out-of-court settlement
The Cost

- Workplace insurers spend an estimated $1.4 billion on narcotic painkillers annually
- Non-medical use of prescription medication costs health insurers up to $72.5 billion in direct health care costs
- Lost productivity?
  - Difficult to measure, but the number of employees testing positive for prescription painkillers has increased by more than 40% since 2005
  - $78.5 billion in economic costs directly associated with just opioids

The Cost (cont’d)

- Loss of life: Fatal doses of prescription drugs outnumber deaths from all other illicit drugs combined
  - More women die of overdoses from painkillers than from cervical cancer or homicide
Prescription Drug Use & ADA

- Prescription drug use is not a disability
- But, prescription drugs are often used to treat conditions that qualify as a disability
- Prescription drug addiction may constitute a disability

Disability-Related Inquiries and Medical Exams

- Generally, employers may not ask about employee’s use of prescription drugs
  - Impermissible at the pre-offer stage
- May be able to demonstrate job related and consistent with business necessity
  - Positions of public safety
- Direct threat
Reasonable Accommodation

- Under the ADA, employer may be required to engage in an interactive process with individuals taking prescription medications and, if necessary, provide reasonable accommodations
- Modified work schedule/leave of absence is the most typical accommodation for drug and alcohol abuse
  - Rehabilitation
  - Support group meetings

Best Practices for Workplace Drug Testing and Drug Policies
Understanding Drug Testing

- Blood, urine, saliva, hair, sweat (detection vs. impairment)
- Initial screening typically followed by confirmation testing
  - Medical Review Officer
- Interpreting the data
  - Interferences
  - Drug interaction
  - Timing of the test
  - Tolerance and accommodation
- Using the data for decision-making

Mechanics of Testing (cont.)*

<table>
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<tr>
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<th>Detection Window</th>
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<tbody>
<tr>
<td></td>
<td>URINE</td>
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<tr>
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<tr>
<td>Cocaine</td>
<td>24 - 72 hours</td>
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<td>Opiates</td>
<td>24 - 72 hours</td>
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<tr>
<td>PCP</td>
<td>1 - 5 days (occasional use) up to 30 days (habitual)</td>
</tr>
<tr>
<td>THC</td>
<td>1 - 3 days (infrequent use) up to 30 days (habitual)</td>
</tr>
</tbody>
</table>

*Quest Diagnostics
Mechanics of Testing (cont.)*

The MRO

- **Amphetamines** – Prescription (Adderall, Eldepryl) and OTC (some inhalers such as Vicks VapoInhaler); positives for MDMA (Molly, Ecstasy) or MDA (Sally).
- **Cocaine** – No prescription medications. May be used in topical application.
- **PCP** – No prescription and no OTC.
- **THC** – Schedule I. Will be reported as positive. Marinol exception.
- Dilutes/substituted specimens/adulterated specimens/invalid specimens.

*SAMHSA MRO Guidance Manual

Do I Have to Test?

- Department of Transportation (DOT)
- Department of Defense (DOD)
- Nuclear Regulatory Commission (NRC)
- Executive Order 12564
- Federal Contractors and Grantees
  - Drug-Free Workplace Act of 1988
    - No obligation to test
Should I Test?

- Safety Sensitive
- Workers’ Compensation Premiums
- Unemployment Premiums
- Impact on Productivity
- Impact on Ability to Hire/Retain
- Culture
- “Right Thing to Do”
- Employer of Preference

Applying What We Know

[Image of prohibition sign with text: Discrimination]

[Image of drug test results]

[Image of bellagio hotel]
Applying What We Know

- Individual applies for a job as a receptionist.
- Employer requires all applicants take a pre-employment drug test.
- Applicant informs recruiter that he has a medical marijuana card for his severe arthritis.
- Can employer test for marijuana?
- Can employer withdraw the offer?
- Does the answer change if individual is applying for a safety-sensitive position?

Applying What We Know

- Employer is a federal contractor.
- Employer performs primarily office support services.
- Employer’s primary federal contract is in Alaska.
- Employer’s primary federal contract is in Iowa.
- What if employer works on gas pipelines instead?
- Does it matter where they are located?
Applying What We Know

- Manufacturer makes steel girders.
- Employer observes employee with slurred speech, red eyes, and unsteadiness on his feet.
- Upon closer review, detects smell of alcohol.
- Tests and employee tests positive for alcohol.
- Does it matter in which state the facility is located?

Applying What We Know

- Manufacturer makes steel girders.
- Employer observes slurred speech, red eyes, and unsteadiness on his feet.
- Upon closer review, detects smell of marijuana.
- Tests and employee tests positive for marijuana.
- What if the employee says he uses medical marijuana for a disability and is a registered cardholder?
- Does it matter in which state the facility is located?
Applying What We Know

- Manufacturer makes concrete barriers.
- Employer has random testing policy.
- Employee is selected for random test and there are no observable signs of impairment.
- Employee tests positive for THC.
- Employer is located in California.
- Employer is located in Maine.
- Does it matter if employee has a medical marijuana card?
- What if only uses marijuana recreationally?

Applying What We Know

- Manufacturer builds airplane parts.
- Employee tests positive for opioids on random drug screen.
- Employee has a valid prescription for a pain medication.
- MRO notifies employer that test was negative with safety concerns.
- Prescription may cause drowsiness and decreased motor function.
- Can the employer remove the employee from the position?
Can You Still Have a Drug-Free Workplace?
Practical Solutions for Today’s Challenges

Presenters
Rayna H. Jones (Phoenix) and David L. Zwisler (Denver)

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