

Employer Policies and Medical Cannabis in a Changing Legislative Environment

Avoiding ADA Liability, Applying Workers' Comp Laws, Amending Drug Policies

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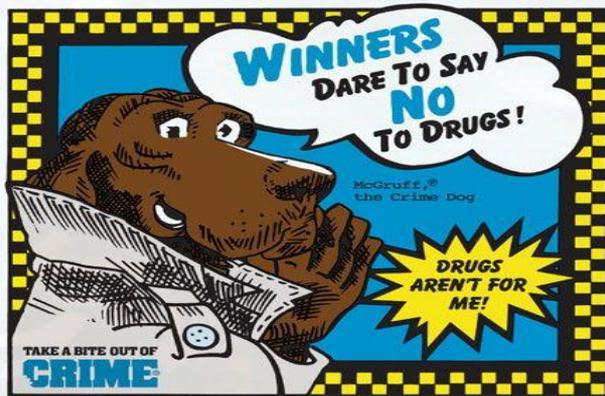
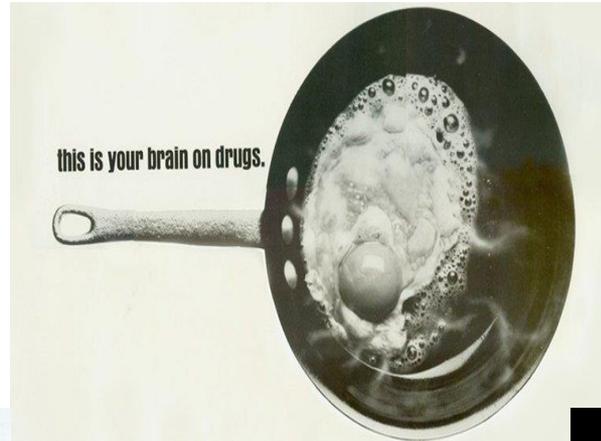
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Then...



Now...



Growing Acceptance by Workforce

- **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%
 - Silent ('28-'45) – 35%
- **Estimate of 35-55 million currently use (2x/mo)**
 - Compare to: 59 million cigarette smokers



Source: Pew Research, January 5, 2018 and Gallup Research

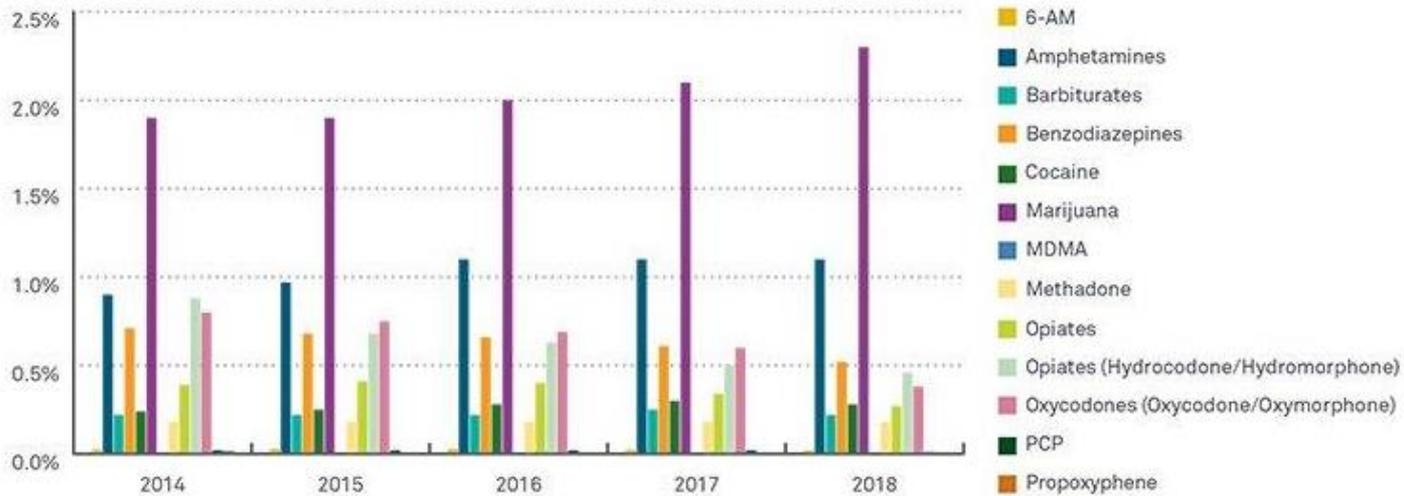
Marijuana is a Nationwide Concern

- Change in attitudes over last 20 years
- Lack of scientific consensus
-BUT over 70% of Americans live in states permitting at least some marijuana use
- More states close to full legalization

Drug testing results*

Positivity Rates by Drug Category

Urine Drug Tests – For Combined U.S. Workforce, as a Percentage of All Such Tests



*Quest Diagnostics

Federal and State Laws at Play

- Federal Controlled Substances Act (CSA)
 - Marijuana remains a Schedule I drug
- Federal Drug-Free Workplace Act (DFWA)
 - Governs federal contractors and grant recipients
- Federal and State Disability Laws
 - Americans with Disabilities Act (ADA) – No protections
 - State counterparts – Sometimes protections
- Federal and State Leave Laws
 - Family and Medical Leave Act (FMLA)
 - State counterparts – Sometimes protections
- Federal and State Health and Safety Laws
 - Occupational Safety and Health Act (OSHA)
 - State counterparts

Additional State Laws at Play

- State Recreational and Medical Marijuana Laws
 - Offer criminal protections and sometimes employment protections
- State Off-Duty Conduct Laws
 - Protect employees from adverse actions for engaging in lawful conduct outside of work
- State Unemployment Laws and Workers Compensation Laws
 - Affect eligibility for certain benefits

Federal Controlled Substances Act

- Drug Scheduling
 - Rating is based on acceptable medical use and potential for abuse/dependency
 - Drug Enforcement Agency regulates with input from the Food and Drug Administration
 - 5 categories or schedules
- What's a Schedule I drug?
 - Most severe of the 5 categories
 - No currently accepted medical use and a high potential for abuse
 - Examples: heroin, LSD, marijuana, ecstasy, mushrooms and peyote
 - Cocaine, meth and oxycodone are all Schedule II drugs because they are viewed as having some medical value

Disability Law Primer

- Federal Americans with Disabilities Act (ADA) and state anti-discrimination laws:
 - Prohibit disability discrimination
 - Require employers to
 - make **reasonable accommodations**
 - to **qualified employees/applicants**
 - so they can perform the **essential functions** of the job

Who is “Qualified”?

- “Qualified” means the employee:
 - Satisfies the requirements of the position
 - Possesses requisite education, credentials and experience
 - Can perform the essential functions of the job, with or without reasonable accommodation

Drug Use and “Qualified”

- Under the ADA, if you are currently engaging in the “illegal use” of drugs, then you cannot be “qualified”
- “Illegal use” does NOT include
 - Use of drugs “taken under supervision by a licensed health care professional or other uses authorized by the Controlled Substances Act or other provision of Federal law”
- Many state disability discrimination laws adopt this “illegal use” language

Basics of the Accommodations Process

If an employer is aware that an employee has or claims to have a disability, the employer is:

- Required to engage in an interactive dialogue with the employee to assess potential accommodations that is individualized, collaborative and ongoing; and
- Provide reasonable accommodations to assist the employee in performing the essential functions of his or her job unless the accommodation would impose an undue hardship on the company.

Family Medical Leave Act (FMLA) Primer

- An employee with a “serious health condition” is entitled to FMLA leave. 29 C.F.R. § 825.114.
- FMLA does not protect medical drug *use, possession, or impairment* in the workplace
- However, a condition requires an employee to take time off from work for medically prescribed drug use, that time off would be covered by FMLA.



Family Medical Leave Act (FMLA) continued

- An employer's drug free workplace policies may still allow drug testing or require a fitness for duty examination upon returning to work from related FMLA leave
- BUT this could be a liability – employee could claim that resulting termination was due to retaliation for using FMLA

Which law controls?

- Does the CSA preempt state laws? Sometimes.
 - CSA is silent on employment relationship
- Does the DFWA preempt state laws? So far, no.
 - Federal contractors
 - Federal DOT regulations
- Does the ADA preempt state laws? No.

Employee Protections for Medical Use?

- **Washington** – “Nothing in this chapter requires any accommodation of any medical marijuana use in any place of employment...” RCW 69.51A.060(4); *Roe v. TeleTech Customer Care Management*, 171 Wash2d 736, n. 10 (Wash. 2011) (not a reasonable accommodation to require an employer to violate federal law by using medical marijuana).
- **Connecticut** – Statute specifically protects employees and applicants from discrimination. *See Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326 (D. Conn. 2017) (rejecting preemption argument)
- **Michigan** – Statute does not prevent employers from enforcing their drug policies. *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012) (finding state statute does not regulate private employment).

Employee Protections for Medical Use?

- **Oregon** – *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010) (rejecting employee’s claim and holding federal law preempts state medical marijuana law)
- **Colorado** – *Coats v. Dish Network, LLC*, 350 P.3d 849, 851, 2015 CO 44 (Colo. 2015) (dismissing wrongful termination claim based on off-duty conduct law and positive drug test for medical marijuana)
- **Rhode Island** – Failure to hire discriminatory where medical marijuana card signaled disability. *Callaghan v. Darlington Fabrics Corp.*, 2017 R.I. Super. LEXIS 88 (Super. Ct. 2017) (rejecting preemption argument).
- **Pennsylvania** – Statute protects employees and applicants from adverse actions “solely” on the basis of registered user status, but an employer is not required to accommodate medical marijuana use on its premises, to violate federal law, or to permit intoxication on premises. 35 Pa. C.S.A. § 10231.2103

New Jersey's Rollercoaster – A Warning

- Compassionate Use Act (Oct. 1, 2010) – “Nothing in this act shall be construed to require ... an employer to accommodate the medical use of marijuana in any workplace.” N.J.S.A. 24:6I-14
- *Cotto v. Ardagh Glass Packing, Inc.*, No. 18-1037, 2018 U.S. Dist. LEXIS 135194 (D.N.J. Aug. 10, 2018) (dismissed a medical marijuana user's disability discrimination and failure to accommodate claims based on the statute's language)
- *Wild v. Carriage Funeral Holdings, Inc.*, 458 N.J. Super. 416 (App. Div. March 27, 2019) (reinstated a dismissed medical marijuana discrimination complaint based on the state's disability law)
- Compassionate Use Act (July 2, 2019) – Prohibits adverse employment action based *solely* on the employee's registered user status (similar to PA)
- *Wild v. Carriage Funeral Holdings, Inc.*, 238 N.J. 489 (March 10, 2020) (affirmed reinstatement of dismissed medical marijuana discrimination complaint)

Legal Recreational Marijuana

- Alaska
- California
- Colorado
- District of Columbia
- Maine
- Illinois
- Massachusetts
- Nevada (protects applicants who fail drug tests for marijuana)
- Oregon
- Washington
- Vermont

Drug Testing

- Types

- Pre-employment
- Random
- Reasonable Suspicion
- Following Workplace Injuries/Accidents



- Largely remains permissible even with legalization (Nevada and NYC are the exceptions for pre-employment only)
- *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012) (upholding employee's termination because of a positive drug test for medical marijuana post workplace accident)

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**



The Mechanics of Testing*

	<u>Lab-based urine</u>	<u>Instant Urine</u>	<u>Oral Fluid</u>	<u>Hair</u>
Process	Lab and facility collection.	On-site collection and facility.	On-site collection and facility.	On-site collection and facility.
Collection Time	15-20 minutes	15-25 minutes	3-10 minutes	5-10 minutes
Common benefits	Adulteration testing and variety of drug testing available	Fast results and reduced downtime. Some adulterant testing.	Observed collection. Reduce opportunity for tampering.	Observed collection. Reduced opportunity for tampering. Longest lookback period.

*Quest Diagnostics

Mechanics of Testing (cont.)*

Federal Cut Off Levels

Amphetamines

500/250 ng/ml

Cocaine

150 / 100 ng / ml

Opiates

2000 / 2000 ng / ml

PCP

25 / 25 ng / ml

THC

50 / 15 ng / ml

Detection Window

URINE 24 - 72 hours

ORAL 24 - 36 hours

HAIR 1 - 3 months

URINE 24 - 72 hours

ORAL 24 - 36 hours

HAIR 1 - 3 months

URINE 24 - 72 hours

ORAL 24 - 36 hours

HAIR 1 - 3 months

URINE 1 - 5 days (occasional use) up to 30 days (habitual)

ORAL 24 - 26 hours

HAIR 1 - 3 months

URINE 1 - 3 days (infrequent use) up to 30 days (habitual)

ORAL (<24 hours)

HAIR (1 - 3 months)

*Quest Diagnostics

Mechanics of Testing (cont.)*

The MRO

- Amphetamines – Prescription (Adderal, Elderpryl) 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.
- Opioids – Prescription medicines. Poppy seeds. Heroin (6-AM) metabolites.
- 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

Drug Testing (cont'd)

- Testing can indicate ingestion within 4-6 hours, but there is no accepted test to assess or predict impairment
- Impairment affected by:
 - Strain & potency of Marijuana
 - Physical characteristics of the user
 - Environmental surroundings
 - Frequency of use
 - Method of consumption

Drug Testing (cont'd)

- THC can be detected in bloodstream days or weeks after ingestion
- Document signs of impairment
 - Helps establish causation
 - Arizona – requires “observable impairment” for adverse action
 - Arkansas – requires “good faith belief”

Workplace Injuries/Accidents

- Impacts eligibility for workers compensation benefits
- 3 state examples:
 - North Carolina
 - Maine
 - New Mexico



Scenario - Hiring

- Luke has autism. He is a registered user of medical marijuana.
- Luke applied for a sales associate position at a car dealership.
- Job requirements include in-person interactions with customers, accompanying customers on test drives, and maintaining awareness of the metrics used to sell and compare makes and models of cars.
- The dealership routinely conducts pre-employment drug screens using a urine test. The test protocol is disclosed to Luke.
- When he sees the drug test protocol, Luke says, “I will fail your test. I am a legal user of medical marijuana but I won’t use it at work.” And he provides his medical marijuana ID card.
- Now what?

Scenario – Performance Management

- Luke has been on the job for 6 months.
- When he interacts with customers, he doesn't have a command of basic facts about the cars, and customers regularly appear frustrated with his continued need to look up information.
- He has only made 1 sale thus far, and it required lots of hand holding from his manager, Han.
- When confronted about his performance, Luke claims that his off-duty medical marijuana use impacts his attention span and memory.
- Now what?

Scenario – Workplace Accident

- Luke was on a test drive with a customer that went wrong.
- The customer, Leia, claims that she turned left at Luke's instruction, resulting in her driving the wrong way down an ill-marked one-way street. Leia had to swerve to miss oncoming traffic and hit a parked car.
- No one was injured, but both the dealership's car and the parked car have minor damage.
- Can we drug test Luke? Should we?
- Can we fire Luke? Should we?

Scenario – Termination

- Luke's manager, Han, cut him a break after Leia's accident, but no good deed goes unpunished.
- Now a year into his employment, Luke's performance has remained lackluster and Han is finally ready to fire Luke.
- Han calls HR for guidance on the termination. This is the first time that HR has been advised that Luke is a medical marijuana user.
- What's next?
- Do we have to have an interactive dialogue?
- Can we terminate now?

Best practices for medical marijuana in the workplace

- Issue a written policy to employees that clearly articulates acceptable/minimum standards of workplace conduct and the employer's drug testing requirements
- Train supervisors on specifics of Company policy
- Educate employees
- Have a consistent plan and policy for how positive test results will be handled
- Keep drug test results completely separate from any employee personnel files

Best practices for medical marijuana in the workplace

- Do not deny opportunity to a candidate or employee with a medical marijuana card solely because of their status as a legal user of marijuana
- Follow ordinary procedures regarding requests for accommodation. Engage in an interactive process. Remain cognizant that the underlying medical condition is likely a per se disability under state disability laws or the ADA
- Follow ordinary procedures regarding requests for leave. Remain cognizant that the need for leave may qualify for FMLA

QUESTIONS?

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