The Impact of Legal Marijuana Use on the Workplace: Should Employers Hire Marijuana Users? [1]

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I do not smoke or ingest marijuana—really. Not only would it be illegal to do so in Idaho, where I reside, but I like wine. Personally, apart from legality, I do not view adult-use cannabis as any different from my wine drinking. I appreciate that many, many, many disagree with me. No matter your position on this issue, the reality is that Idaho is completely surrounded by states that have legalized cannabis in one form or another.

Moreover, many Idaho employers have facilities or locations in states where marijuana use is legal or have employees who might use marijuana legally when traveling or on vacation. As such, it is incumbent upon employers to review, assess and perhaps modify their drug policies to comport with changes in marijuana legality. The purpose of this article is to provide: 1) some basic terminology and definitions; 2) a brief overview of the history of marijuana in the United States; 3) an analysis of applicable statutes and case law; and 4) best practices employers might utilize to manage employees who might ingest marijuana.

Basic terminology and definitions[2]

- Cannabis – a genus of the flowering plant in the Cannabaceae family long used for hempfiber, hemp oils, for medicinal purposes and as a recreational drug; its principal psychoactive constituent is tetrahydrocannabinol (THC)
- Marijuana (or Marihuana) – another commonly used (but some consider derogatory) name for cannabis; also known as a Schedule 1 drug under the federal Controlled Substances Act[3]
- Hemp – a variety of the cannabis plant typically grown for industrial use
- Tetrahydrocannabinol (THC) – marijuana's principal psycho-active ingredient, its mind-altering essence; also known as a Schedule 1 drug under the federal Controlled Substances Act[4]
- Cannabidiol (CBD) – marijuana's non-psycho-active ingredient with potential medical uses

Brief historical overview of Marijuana's [il]legality in the United States

Before the mid-nineteenth century, hemp was widely used for rope and fabric. In fact, George Washington and Thomas Jefferson, along with many others, grew hemp as a primary crop.[5] By 1850, marijuana had made its way into western medicine through inclusion in the United States Pharmacopeia, an official public standards-setting authority for all prescription and over-the counter medicines.[6]

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In the early 1910s, the Harrison Narcotics Act of 1914 regulated the possession and sale of opiate and its derivatives by imposing registration and taxing measures.[7] However, by the 1930s, prohibition-era momentum to pass uniform criminal anti-narcotic laws ultimately led to promulgation of the Uniform State Narcotic Act.[8] Marijuana, without any scientific evidence or study of its traits, was swept up in this momentum.[9] By 1937, every state had enacted some form of legislation regard-

ing marijuana, and 35 had enacted the Uniform Act.[10] (Some argue that *Reefer Madness*, a 1936 melodrama that highlighted the purported evils of marijuana, contributed to marijuana's inclusion in the sweeping anti-narcotic laws of the 1930s.)[11] In 1937, Congress passed the Marihuana Tax Act, which was the marijuana analog to the Harrison Narcotic Act.[12] Despite the national campaign against the "evil weed," the medical community disagreed: the American Medical Association actually opposed the Marihuana Tax Act, arguing that the Act's prohibitive tax would prevent any research into cannabis's potentially "important uses in medicine and psychology."[13]

By 1970, the criminalization of marijuana use in the United States culminated in the passage of the Controlled Substances Act, Title II of the Comprehensive Drug Abuse Prevention and Control Act (CSA).[14] In considering passage of the CSA, Congress had asked the Department of Health and Welfare to advise on which of the five schedules of the CSA marijuana should be placed.[15] The response stated that, due to a "considerable void in our knowledge of the plant and effects of the active drug contained in it, our recommendation is that marihuana be retained within schedule I at least until the completion of certain studies now underway to resolve the issue."[16]

In 1972, the President Richard Nixon appointed the Shafer Commission, which had been formally known as the National Commission on Marihuana and Drug Abuse. The Shafer Commission published the conclusions from the studies referenced by the Department of Health and Welfare and recommended that marijuana be removed from the scheduling system and that "casual distribution of small amounts of marihuana for no remuneration, or insignificant remuneration, no longer be an offense."[17] President Nixon rejected that recommendation.[18]

Although efforts have been undertaken to decriminalize marijuana at the federal level,[19] marijuana remains a Schedule I drug under the CSA. Recently, the White House Press Secretary and U.S. Attorney General have indicated the new Trump administration may pursue a more aggressive approach than the prior administration regarding states that have passed recreational marijuana use laws.[20]

Notwithstanding the federal position, many states have taken a different view of marijuana. Since 1996 and California's passage of the Compassionate Use Act, 29 states and the District of Columbia have passed laws that legalize in some fashion the medical and/or recreational use of marijuana, excluding CBD.

A quick nod to the supremacy clause and federal preemption

So how, then, are states able to pass laws which legalize both medical and recreational marijuana use while the CSA criminalizes them? Too simply put, Congress's ability to compel states to enact laws consistent with the CSA is limited by the Tenth Amendment. And Congress did not intend that the CSA would displace all laws associated with its controlled substances, leaving federal preemption in many instances out of the picture.[21]

Applicable statute and case analysis

Pursuant to the Occupational Safety and Health Act of 1970 (OSHA), each employer subject to that statute is required to "furnish to

each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm."[22] While maintaining a safe workplace, employers must also be cognizant of various statutes, laws and rules that may protect or shield certain cannabis users in the workplace.

Several states have passed statutes that protect employees from adverse employment action based on their off-duty activities. Four states offer statutory protection for employees who engage in lawful activities.[23] Eight states protect the use of lawful products.[24] A total of 18 jurisdictions have enacted statutes that are limited to "tobacco only."[25] However, as of this writing, no court has held an employer liable under any state's lawful activities or use statutes for terminating an employee who has tested positive for a cannabis derivative, even if such cannabis use is proven to be for medicinal purposes.[26] In addressing this issue, courts either focus on the fact that such use remains illegal under federal law (therefore it cannot be lawful) or find that such statutes do not alter or diminish the at-will employment doctrine or otherwise guarantee employment.[27]

Moreover, 11 states include specific statutory job protections for marijuana medical users.[28] As of this writing, there are no published decisions in these states that address an employer's decision to terminate an employee for use of medical marijuana. However, in those states where there is no such job protections statute, courts have consistently held in favor of employers facing discrimination claims based upon medical marijuana use, particularly where the employer's policy is clear.[29]

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What is an employer to do?

With the varying and seemingly ever-fluid nature of marijuana laws, what should an employer do to ensure it complies with its obligations to maintain a safe workplace yet does not run afoul of applicable state marijuana laws?

There is no question that every employer should have a policy regarding drug use. There is likewise no question that every employer should have a zero tolerance policy regarding intoxication and impairment in the workplace. In its Recommended Practices for Safety and Health Programs, the OSH Administration also identifies "best-in-class" programs that involve a rigorous evaluation element that facilitates hazardous prevention and control.[30] In sum, every employer must promulgate and actively enforce policies that not only respond appropriately to workplace incidents and injuries but also impel continuous improvement of safety practices.[31]

If you are a federal contractor or federal grantee, a robust drug-free workplace policy is mandatory and specific requirements must be met.[32] While drug testing is not *per se* mandatory, "it is fair to say [the federal Drug-Free Workplace Act] encourage[s] it."[33] Best practices might suggest a zero-tolerance policy when an employee tests positive for any drug following an incident involving safety. To promulgate a policy that provides otherwise may place an employer's eligibility for federal funds at risk.[34]

While the Americans with Disabilities Act prohibits discrimination based on disability, it expressly permits an employer to prohibit the illegal use of drugs at the workplace and also permits an employer to hold an employee who engages in illegal drug use to the same standards as other employees, even if the unsatisfactory performance is related to drug use for treatment of a disability.[35] Even in those states which have legalized medical marijuana and/or "lawful activities" statutes, because marijuana remains illegal under federal law, courts will likely continue to consider both recreational and medical marijuana use "illegal" in the employment context.[36] However, for those employers in any of the 11 states with a job protection statute (AK, AZ, CT, DE, IL, ME, MN, NY, NV, PA and RI), best practice would be that such employers have a policy that provides certain accommodations for those legally using medical marijuana.

For Idaho employers who have employees that may vacation in jurisdictions that have legalized marijuana, implementation and enforcement of a policy that has zero-tolerance for impairment on the job and mandatory drug testing in the event of any incident involving safety would certainly be appropriate and acceptable. Should an employer prefer a slightly more nuanced approach that focuses on impairment rather than presence of marijuana, impairment testing is a good option and one that continues to evolve and grow.[37]

In sum, the issue of marijuana in the workplace is nuanced, primarily around the use of medical marijuana outside of the work place. However, even for those 11 states with a job protection statute, employers must implement a robust drug policy. For the remaining 39 states, employers may elect to promulgate a policy that insists upon zero tolerance. Unless and until the federal government legalizes cannabis use, an unlikely event under the current administration, in Idaho, zero-tolerance policies remain the most conservative, and likely, best practice.

Certainly not comprehensive, below are some factors to consider in drafting or reviewing a drug policy for an employer:

- An employer's industry may determine the scope, nature and extent of a drug policy
- Review and craft provisions that address state laws
- Specifically address when and how drug testing shall take place:
    - Must be state law compliant
    - As a condition of employment if necessary for the specific position
    - Reasonable suspicion/for cause testing
    - Following incident involving safety
- Variable "acceptable" levels dependent upon work duties/sectors of business (production and distribution facilities)
- Does the federal Drug Free Workplace Act of 1988 apply to you? If so, drug policy must comply
- Provision of counseling to address abuse and no action based thereon (if sought before testing)
- Training of managers/supervisors to recognize signs of drug use

Should an employer prefer a slightly more nuanced approach that focuses on impairment rather than presence of marijuana, impairment testing is a good option and one that continues to evolve and grow.[37]

- Obvious prohibitions – under the influence or possession at work
- Consequence of policy violations: disciplinary action, including, but not limited to, termination
- Written acknowledgement by employees

Endnotes

1. This article is generally based upon a presentation entitled *The Impact of Legal Marijuana Use on the Workplace: Should employers hire marijuana users?* by Jennifer Schrack Dempsey and Alyson Foster at the Federal Bar Association Annual Meeting and Convention in Salk Lake City Utah on September 11, 2015. Many thanks to Alyson, and Patrick Bageant, Jason Rudd, and Tony Emerson, who assisted with the final touches and edits on this article.

2. *See,* http://norml.org/aboutmarijuana/marijuana-a-primer

3. *See*, 21 U.S.C. §812(c), Schedule 1(c)(10).

4. See 21 U.S.C. §812(c), Schedule 1(c)(17)

5. *See,* ProCon.org. "Historical Timeline." ProCon.org. Last modified on January 30, 2017. Accessed February 24, 2017. http://medicalmarijuana.procon.org/view.timeline.php?timelineID=000026.

6. *Id.*

7. *Id.*

8. *See,* ProCon.org. "US National Commission on Marijhuana and Drug Abuse." ProCon.org. Last modified on May 20, 2008. Accessed February 24, 2017. http://medicalmarijuana.procon.org/view.source.php?sourceID=154.

9. *See,* Richard J. Bonnie & Charles H. Whitebead, II *The Forbidden Fruit and the Tree of Knowledge: an Inquiry into the Legal History of American Marijuana Prohibition* 56 Va. L. Rev. 6 (1970) http://www.druglibrary.org/schaffer/library/studies/vlr/vlr3.htm

10. *Id.*

11. *Reefer Madness* is part of the public domain and may be viewed online at The Public Domain Review, http://publicdomainreview.org/collections/reefer-madness-1938/.

12. *See,* Did You Know…Marijuana Was Once a Legal Cross-Border Import?, https://www.cbp.gov/about/history/did-you-know/marijuana (last visited March 7, 2017)

13. *See, Taxation of Marihuana, Hearing Before the H. Comm. On Ways and Means* (May 4, 1937) (statement of Dr. William C. Woodard, Am. Med. Assoc.), *available at* Schaffer Library of Drug Policy, http://www.druglibrary.org/Schaffer/hemp/taxact/woodward.htm (visited March 7, 2017); Letter from William C. Woodard, Am. Med. Assoc., to Hon. Pat Harrison, S. Finance Comm. (July 10, 1937) ("Since

the medicinal use of cannabis has not caused and is not causing addiction, the prevention of the use of the drug for medicinal purposes can accomplish no good end whatsoever. How far it may serve to deprive the public of the benefits of a drug that on further research may prove to be of substantial value, it is impossible to foresee."), *available at* http://www.marijuanalibrary.org/AMA_opposes_1937.html (visited March 7, 2017); *see generally The Federal Prohibition of Marihuana*, J. Soc. Hist. (Autumn 1970).

14. *See,* 21 U.S.C. §801, *et seq.*

15. *See Letter from Roger O. Egeberg, Asst. Sec. for Health & Scientific Affairs, to Congress, available at* DrugScience.org, *Marijuana's Dependence Liability – 1970*, https://www.drugscience.org/Petition/C7A.html (visited March 7, 2017)

16. *Id.*

17. *See,* The Report of the National Commission on Marihuana and Drug Abuse, Commissioned by President Richard Nixon, March 1972. http://www.druglibrary.org/schaffer/Library/studies/nc/ncmenu.htm.

18. *See,* A Brief History of the Drug War, http://www.drugpolicy.org/facts/new-solutions-drug-policy/brief-history-drug-war-0 (Feb. 25, 2017, 17:32 MST).

19. *See, e.g.* Respect State Marijuana Laws Act of 2017, H.R. 975 §710 2017 Cong US HR 975 (Westlaw); Rohrabacher Farr Amendment, H.Amdt.332 to H.R. 2578 2015 Cong US HR 2578 (Westlaw) (set to expire on April 28, 2017; Memorandum for Selected United States Attorneys from David W. Ogden, Deputy Attorney General (Oct. 19, 2009) https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states; and, Memorandum for All United States Attorneys from James M. Cole, Deputy Attorney General (Feb. 14, 2014)

20. *See,* Paul Armentano, White House Press Secretary Hints Federal Marijuana Crackdown May Be Forthcoming, http://blog.norml.org/2017/02/23/white-house-press-secretary-hints-federal-marijuana-crackdown-may-be-forthcoming/ (last visited Mar. 7, 2017)

21. *See, generally,* Todd Garvey, Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Laws (Congressional Research Service, Nov. 9, 2012).

22. *See,* 29 U.S.C. §654(a)(1).

23. *See,* Colo. Rev. Stat. Ann §24-34-402.5; Cal. Lab. Code §96(k) and §98.6; N.Y. Lab. Code §201-d; and N.D. Cent. Code Ann. §14-02.4-03.

24. *See,* 820 Ill. Comp. Stat. Ann. 55/5; Minn. Stat. Ann. §181.938; Mo. Ann. Stat. §290-145(identifies only alcohol and tobacco); Mont. Code ann. §§39-2-313 and 314 (provides specific exception for medical marijuana use that impairs ability to perform job); Nev. Rev Stat. Ann. §613.333; N.C. Gen. Stat. Ann. §95-28.2; Tenn. Code Ann. §50-1-304; and Wis. Stat. Ann. §111.321.

25. *See,* CT, DC IN, KT, LA, ME, MS, NH, NJ, NM, OK, OR, RI, SC, SD, VA, WV, and WY. Because these statutes do not pertain to cannabis, cites to the statutes are not provided. They are noted in order to show how certain substances, even though indisputably determined harmful, are protected.

26. *See, e.g., Coats v. Dish Network, LLC* 350 P.3d 849, 852 (Colo June 15, 2015)

27. *Id., See, also., Parker v. Town of North Brookfield*, 861 N.E.2d 770, 775 (Mass. App.Ct 2007) and *Coles v. Harris Teeter, LLC*, No. 2016 WL 6684189, at *2 (D.D.C. Nov. 14, 2016).

28. *See,* Ark. Const. amend. 98, §3(f)(3); Ariz. Rev. Stat. Ann. §36-2813; Conn. Gen. Stat. Ann. §21a-408p; Del. Code Ann tit. 16 §4905A; 410 Ill. Comp. Stat. Ann. 130/40; Me. Rev. Stat. Ann. tit. 22 §2423-E; Minn. Stat. Ann §152.32(3); N.Y. Pub Health Law §3369; Nev. Rev. Stat. Ann. §453A.800(3); 35 Pa. Stat. Ann. §10231.2103; 21 and R.I. Gen. Laws Ann. §21-28.6-4.

29. *See, e.g., Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wash. 2d 736 (2011); *Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970, 976 (Colo. App. 2011); and *Emerald Steel Fabricators, Inc. v. BOLI*, 230 P.3d 518 (Or. 2010)

30. *See,* Recommended Practices for Safety and Health Programs, October 2016, OSHA, https://www.osha.gov/shpguidelines/docs/OSHA_SHP_Recommended_Practices.pdf.

31. *Id.*

32. *See,* 41 U.S.C.§ 8102 et seq.

33. *See, Santiago v. Greyhound Lines, Inc.* 956 F.Supp. 144, 152 (N.D.N.Y. 1997)

34. *See, Parker v. Atlanta Gas Light Co.* 818 F.Supp. 345, 347 (S.D. Ga 1993).

35. *See,* 42 U.S.C. §12114(c)(1)(4).

36. *See, e.g., Coates* 350 P.3d 849

38. *See, e.g.,* Jonathan Katz, Impairment Tests as a Drug-Screen Alternative: Impairment testing shows promise as a more effective measure to determine on-the-job alertness, http://www.industryweek.com/public-policy/impairment-tests-drug-screen-alternative; David Lauriski, The Advantages of Impairment Testing over Drug Testing to Improve Workplace Safety, http://www.predictivesafety.com/news/2017/2/6/the-advantages-of-impairment-testing-over-drug-testing-to-improve-workplace-safety; Impairment Testing—Does it Work?, http://workrights.us/?products=impairment-testing-does-it-work Accessed March 24, 2017.

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