



2020 CLM Focus November Conference  
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Virtual

**Working in the Weeds: Cannabis Related Claims and Issues for Employers in the Retail, Hospitality, and Restaurant Industries**

**I. Current State of Cannabis Legalization**

**Federal Level**

The status of cannabis legalization has remained largely the same on the federal level since the passing of the Controlled Substances Act of 1970. Cannabis remains a schedule 1 drug same as cocaine, heroine, LSD under the controlled substances act. Schedule I drugs are “drugs with no currently accepted medical use and high potential for abuse.” The applicability of these two characteristics to marijuana and THC specifically is now under question. There are numerous consequences for cannabis businesses stemming from cannabis remaining on Schedule I. Most financial institutions, such as banks, credit card companies, will not work with the cannabis industry, fearing federal prosecution. As a further consequence of this, cannabis businesses often operate using large amounts of cash. This obviously creates substantial potential risk of robberies and accompanying injuries on premises due to potential robberies or theft, there is further risk of floods or fires on premises as dried plants and a lot of cash are both highly flammable. An additional consequence is that Cannabis companies cannot be list on US stock exchanges. So example, MedMen, a major cannabis retailer, which is based in Century City, CA but trade on the Canadian Securities Exchange as Cannabis is legalized nationwide in Canada. But the public attitude toward recreational and medical marijuana is changing dramatically. The Hemp Farming Act of 2018, which became law in December 2018, removed hemp (defined as cannabis with less than 0.3% THC) from Schedule I controlled substances and making it an ordinary agricultural commodity. There are potential further changes on the horizon.

**State Level**

More than half of U.S. states have legalized some form of medical or recreational marijuana, and the demand for cannabis is increasing dramatically. Regulations vary broadly between states that have legalized cannabis. California, one of the forerunners in the legalization movement can be used as an example. Prop 64 effectively legalized recreational Cannabis in California. Approved by voters in November 2016. Adults over the age of 21 can smoke or ingest marijuana recreationally, with certain limitations, including: (1) limitations on public; (2) limitation on driving under the influence; (3) open container laws. The regulatory

structure is complex and many state agencies are involved in regulating various stages of production and distribution.

### **Challenges for the Insurance Industry**

The division between state and federal status makes it difficult for businesses to receive inclusive, affordable coverage and often leaves policyholders with restrictive plans. Cannabis-related businesses (CRBs) face many risks and obstacles. Finding and securing adequate insurance coverage for CRBs can be challenging. Additionally, because of federal laws surrounding cannabis, insurers and brokers do not formally advertise their services to CRBs. When CRBs do find and obtain coverage, most would need to pay their premiums in cash, which presents another unique obstacle most other businesses do not face.

## **II. Marijuana in the Workplace**

While employers under all current state and federal laws may continue to operate a drug free work place, challenges arise still arise when dealing with a product that may be legalized recreationally at the state level but remains illegal federally. Additional complications arise from cannabis use by guests in the context of the hotel, retail, and hospitality industries.

### **Americans With Disabilities Act (ADA)**

The Americans with Disabilities Act (ADA) requires employers to make reasonable accommodations for qualified workers with disabilities. The act does not protect illegal drug use, though it does afford some protections for recovering addicts. Marijuana is an illegal drug under federal law, with no exceptions for medicinal use, so its use is not protected under the ADA. Federal courts have ruled that the ADA does not require a medical marijuana accommodation. In 2012, the 9th U.S. Circuit Court of Appeals held in *James v. City of Costa Mesa* that although the plaintiffs were "gravely ill," and California legalized medical marijuana use, the ADA did not protect the plaintiffs' use of the drug. The court said that the plain language of the ADA only protects drug treatments prescribed by health care professionals when those drugs are not explicitly banned by the federal Controlled Substances Act, like marijuana is. However, at he story may be different for non-employee guests at hotels and retail establishments where the premises does allow marijuana use in certain rooms or locations. Accommodations may be necessary to allow access to these facilities.

### **State Disability Law and Accommodations**

Many states have laws that are similar to the ADA and require employers to provide reasonable accommodations for qualified workers with disabilities. However, while the ADA does not protect illegal drug use nor medical marijuana use, this is not always the case under state laws. Employers never have to accommodate on-the-job drug or alcohol use or intoxication, but some state disability laws may provide more protections for illegal drug users than the ADA. Other states consider medical marijuana use to be legal. Most state disability laws were written before medical marijuana use became pervasive and do not directly address the subject. In these instances, it has been left to courts to interpret how such laws apply to medical marijuana use. Most states have not required employers to accommodate marijuana use in the workplace,

even medical marijuana prescribed by a physician. Ambiguities remain, however. An example is Colorado's medical marijuana law. The medical marijuana law provides, "Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place." While this may be interpreted as limiting an employer's reach only to the workplace, the Colorado Supreme Court also issued a ruling on the issue expanding it.

### **III. Marijuana in the Workplace- Safety**

#### **Worker's Compensation**

The potential use of marijuana by employees, whether medical or recreational, present special challenges for worker's compensation. Each state has its own system for handling medical marijuana. A New Mexico appellate court issued a decision that required insurers to provide reimbursement for an injured worker using medical marijuana to treat their injury. This was a first of its kind decision and seems to be signaling a trend. In 2017, a New Jersey administrative law judge ruled that a carrier was responsible for reimbursement of medical marijuana for an injured worker who was using the marijuana to treat one of their covered injuries. And in Minnesota, an insurance carrier paid for an injured workers' use of medical marijuana to treat muscle spasms. In contrast, other states, like Arizona, take the opposite position. A carrier cannot be compelled to pay for medical marijuana, because it remains illegal on the federal level. Medical marijuana also remains absent from treatment guidelines. In the cases where it was found to be proper treatment for an injured worker, the physician only prescribed it after trying other forms of treatment unsuccessfully.

Even taking into account the various views on coverage for medical marijuana in workers' comp, one of the biggest conflicts comes in regards to workplace and employee safety. Many employers operate a drug free workplace, which means the use of marijuana, which is illegal on the federal level, could be considered a violation of that policy. Moreover, employers place restrictions on employees operating under the influence, which does include prescription medications, especially when the employee is operating machinery or driving a vehicle. Even if the marijuana is used as a medical treatment for a workplace injury, much like when they are prescribed opioids, they may be prevented from returning to work. Further, if they're allowed to return to work, it raises issues about whether medical marijuana would violate the drug free workplace rule.

#### **Occupational Safety and Health Administration Issues**

Drug use on the job is an obvious safety hazard; however, when testing employees for substance use following a workplace accident, employers must be careful not to run afoul of OSHA's antiretaliation rules. Because reporting a work-related injury or illness is a protected activity, and imposing negative consequences for protected activities is prohibited under the recordkeeping rules at 29 CFR 1904.35 and 29 CFR 1904.36 and by the whistleblower protection rules in Section 11(c) of the Occupational Safety and Health Act (OSH Act), OSHA has indicated that automatic drug testing of any employee who reports an injury could constitute illegal retaliation. OSHA believes that if employees know they will be drug tested following an on-the-job injury, regardless of whether or not drug use was a factor in the incident, employees will be

less likely to report injuries. And in situations where drug or alcohol use is unlikely to have caused or contributed to an incident, requiring employees to submit to a drug test could be considered retaliatory. However, OSHA does not ban postaccident drug testing altogether. Instead, it requires employers to have a valid safety-related reason for performing a postaccident drug test, such as contributing to a root cause analysis. If drug testing is used to investigate and determine the root cause of an incident, then all employees whose conduct could have contributed to the incident should be tested, not just the employee or employees who reported injuries. The agency also makes exceptions for employers that are required to conduct postaccident drug testing under another state or federal law, such as the Department of Transportation (DOT) rules for commercial drivers or a state workers' compensation statute.

### **General Liability and Product Liability Issues**

Like most commercial manufacturing or agricultural businesses, cannabis-related businesses experience exposure to third-party general liability and product liability as well as first-party property losses such as recall or theft. However, the potential for loss is greater when compared to other businesses of equal size due to higher risk. CRBs are also likely to face increased product liability exposure across diverse sectors of the industry as legalization becomes more widespread and there are more retailers with greater access. If consumers purchase a product that is contaminated or mislabeled, CRBs can be charged with violating state regulation, and because state regulations are burdensome, it can be very difficult for operators to be fully compliant. Businesses in this sector can help mitigate product liability risk and bring greater credibility to the industry by adhering to state regulations for product testing and labeling, creating effective product recall plans, and obtaining appropriate insurance. Underwriters are looking for secure sites that utilize locks, surveillance and security plans as well as product safety plans and controls such as recall protocols because such measures ensure that the business owner knows how to operate securely, adhere to regulation, and has business expertise.

### **Vicarious Liability**

In most jurisdictions, an employer can be vicariously liable for an employee's negligence but will not be liable for intentionally wrongful or criminal acts, such as assault, unless the employee's intentionally wrongful acts were either required by the employment or foreseeable. In general, even if an employee does act outside the scope of employment, an employer can be held liable in some jurisdictions if it subsequently ratifies the wrongful actions. The question that must be answered in *respondeat superior* cases is whether the employee's acts were in furtherance of the employer's interests. These issues come to the forefront in instances where accidents occur where employees were under the influence of marijuana. Particularly in the context of motor vehicle accidents.

## **IV. Issues Specific to Retail, Hospitality, and Restaurants (20 Minutes)**

One of the key industries effected by the spread of cannabis legalization both for medical and recreational purposes are retail, restaurants, and particularly hospitality. So what does that mean for the hospitality industry? How should companies be treating employees who obtain a medical use recommendation? What about employees who use cannabis recreationally? Finally, how should they deal with visitors and guests who either want to use cannabis on hotel

property or want recommendations where they can obtain cannabis. Our overarching recommendation is use caution when determining what policy(ies) you put in place.

### **Employee Cannabis Use**

The California Supreme Court opined in *Ross v. Raging Wire Telecommunications* (2008) that the disability discrimination provisions of California's Fair Employment and Housing Act (FEHA) do not require an employer to accommodate an employee who used medicinal marijuana. We recognize that more employees may use cannabis now that adult use has been legalized. With that in mind, employers can still maintain a drug-free workplace and prohibit employees from using/bringing marijuana to work. An employer can (and should) insist employees refrain from working under the influence. If an employee uses medical cannabis, an employer must decide what type of policy you want to have in place. Regardless of your decision, that policy must be uniformly applied. Even one instance of uneven application of the policy could result in legal action against companies for, amongst other things, discrimination, retaliation, and/or harassment

### **Guest Cannabis Use**

Marijuana users are no different from cigarette smokers and may smoke in designated "smoking areas" outside of the hotel. What about addressing guests who may be intoxicated as a result of cannabis use? Train your restaurant servers and bartenders (if you have them) in the same manner you train them to observe signs of alcohol intoxication. Hotels should update alcohol training programs to include signs of cannabis impairment and risks associated with the drug. Once again, we recommend hotels following our Best Practices: (1) Investigate guest complaints of marijuana use in the hotel; (2) Make any "non-smoking" policy clear; (3) Place marijuana users in "smoking rooms"; (4) Be cautious where marijuana user is a person with a physical disability; (5) Every hotel has the right to ask a guest who is smoking marijuana to stop, unless they have a legitimate prescription, from a licensed physician to be using medical marijuana; and (6) If the guest does not have legal paperwork, you can prevent them from doing so within the boundaries of the hotel's premises

### **Potential Claims and Scenarios**

Various scenarios exist of potential claims arising from marijuana use in the context of the hospitality, including: (1) employees using recreational marijuana; (2) employees using medical marijuana at work; (3) guest recreational use; and (4) guests medical marijuana use.