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Establishing and Enforcing Drug Policies in the Age of "Legalized" Marijuana - It's High Time to Ensure Your Policies Are Up To Date

I. The Status of Marijuana's Legality Varies from State to State

Since the 1930s, federal law has declared the use, sale or distribution of marijuana illegal. Current federal drug laws are contained in the Controlled Substances Act (CSA). Under the CSA, cannabis is classified as a Schedule I substance, determined to have a high potential for abuse and no accepted medical use – thereby prohibiting even medical use of the drug. At the state level, however, policies regarding the medical and recreational use of cannabis vary greatly, and in many states conflict significantly with federal law.

The fifty States have various classifications when it comes to marijuana. Some states have legalized the use of recreational marijuana. New Jersey also voted to legalize recreational marijuana for adults 21 and older, opening a market that could near an estimated \$1 billion given New Jersey's proximity to New York City and Philadelphia. Although it might be some time before New Jersey residents can purchase Marijuana legally. South Dakota voted to legalize recreational and medical marijuana, marking the first time a state has voted in favor of both at the same time. State lawmakers have until April 2022 to enact legislation around cannabis, including regulations and dispensaries.

Some states have allowed medical marijuana. The states include Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Washington and West Virginia. An additional seven states allow CBD products for medicinal use. The states include Georgia, Indiana, Iowa, Kentucky, Texas, Virginia, and Wisconsin.

Medical marijuana uses the marijuana plant or chemicals in it to treat diseases or conditions. It's basically the same product as recreational marijuana, but it's taken for medical purposes.

The marijuana plant contains more than 100 different chemicals called cannabinoids. Each one has a different effect on the body. Delta-9-tetrahydrocannabinol (THC) and cannabidiol (CBD) are the main chemicals used in medicine. THC also produces the "high" people feel when they smoke marijuana or eat foods containing it. Medical marijuana is used to treat a number of different conditions, including: Alzheimer's disease; Appetite loss; Cancer; Crohn's disease; Eating disorders such as anorexia; Epilepsy; Glaucoma; Mental health conditions like schizophrenia and posttraumatic stress disorder (PTSD); Multiple sclerosis; Muscle spasms; Nausea and pain.

The greatest amount of evidence for the therapeutic effects of cannabis relate to its ability to reduce chronic pain, nausea and vomiting due to chemotherapy, and spasticity [tight or stiff muscles] from MS.

The use of marijuana has been decriminalized in the following states: Alaska, Arizona, California, Colorado, Connecticut (less than ½ ounce), Delaware (less than 1 ounce), Hawaii (less than 3 grams), Illinois, Maine, Maryland (less than 10 grams), Massachusetts, Michigan, Minnesota (less than 42.5 grams), Mississippi (less than 30 grams), Missouri (first-time offenders less than 10 grams), Montana, Nebraska, Nevada, New Hampshire (first two offenses less than ¾ ounce), New Mexico (less than ½ ounce), New York (less than 2 ounces), North Carolina (less than 0.5 oz), North Dakota, Ohio (under 100 grams), Oregon, Rhode Island (less than 1 ounce), Vermont, Virginia (less than one ounce), Washington, and Washington D.C.

While it is fully illegal to have marijuana in the following states: Alabama, Idaho, Kansas, South Carolina, Tennessee, and Wyoming. These states with their own specific degrees of punishment would have total ban on marijuana.

In Texas during the 2019 legislative session, the state expanded its low-THC medical marijuana program with the passage of HB 3703. The law added the following qualifying conditions: multiple sclerosis, ALS, terminal cancer, autism, spasticity, epilepsy, and incurable neurodegenerative diseases.

II. Considerations for Marijuana Use Policies in States Recognizing Various Degrees of Legality

1. Zero Tolerance Policies

A zero tolerance policy is a strict enforcement of regulations and bans against the possession of items deemed undesirable including all drugs.

2. Contractual Requirements Related to Working on Federal Property

Federal government contractors and recipients of federal grants are obligated to comply with the federal Drug Free Workplace Act, which requires employers to make a good faith effort to maintain a drug-free workplace and prohibits employees from using controlled substances in the workplace.

3. Federally Mandated Prohibitions on Marijuana Use that May Apply to the Work.

Even in states where employers may be required to accommodate medical marijuana use, employers in industries subject to federal regulation can likely demonstrate that accommodating medical marijuana use would be an undue hardship. Transportation employers are subject to U.S. Department of Transportation (“DOT”) regulations which prohibit any safety-sensitive employee subject to drug testing under DOT regulations from using marijuana.

III. Employer Best Practices for Dealing with Marijuana Use on the Job

It is important to note that no legal authority has yet required an employer to accommodate medical marijuana use during work hours or while at work. Indeed, the Delaware statute requiring medical marijuana accommodation expressly excludes marijuana use during work hours.

<https://delcode.delaware.gov/title16/c049a/index.shtml>

Only one state so far, Maine, protects off-duty recreational marijuana use.

In Maine and Nevada, where both medical and recreational pot are legal, lawmakers have taken it a step further; their regulations say employers can't make adverse decisions about most workers' employment based on their marijuana use outside of the workplace. And in New York City, new laws tackle the issue of a job candidate's marijuana use and prohibit most pre-employment tests for marijuana.

Many states are not as clear in addressing accommodations for current employees and job seekers. In 13 states, medical marijuana use is legal, but employers have no duty to allow its use. Seven states that have legalized medical marijuana are silent on the issue of employer accommodation.

That sends us to case law, where some decisions speak to the need for accommodation. Prior to 2014, court rulings more often fell on the side of the employer, but the legal landscape is evolving. Since then, courts have been more likely

to rule in favor of marijuana-using employees in states that expressly require employer accommodation.

Notable case law includes the Delaware Superior Court's 2018 decision in Chance v. Kraft Heinz Foods Co. C.A. No. K18C-01-056 NEP (Del. Super. Ct. Dec. 17, 2018) In this case, after a job site accident, Kraft Heinz fired an employee for failing a drug test even though he was a medical marijuana cardholder. The court held that the anti-discrimination provision of Delaware's medical marijuana law is not preempted by the federal Controlled Substances Act, allowing the worker to proceed with most of his claims.

This ruling could inform court decisions in other states going forward. It also should serve as a warning for employers that the argument that they can discriminate against marijuana users simply because the drug is illegal at the federal level may be a losing proposition.

In another case, Whitmire v. Wal-Mart Stores, Inc., 359 F. Supp. 3d 761 (D. Ariz. 2019) an employee who was a medical marijuana user in Arizona took a drug test triggered by an on-the-job injury and tested positive for pot. Though the screening took place two days after the injury, Walmart fired the employee, claiming that the test result indicated she was high when she was injured during her shift. She sued Walmart, arguing that her termination violated the Arizona Medical Marijuana Act, and won.

Like Delaware's law, Arizona's rules clearly prohibit discrimination against marijuana users. What's more, just because a test is positive for pot, that doesn't mean that the individual was impaired at the time of the test. People typically can test positive for the drug for up to a week after use.

These rulings should prompt employers to reconsider their zero-tolerance policies in states where marijuana accommodation is required and, instead, focus on preventing pot use or impairment while working.

V. Defending Employers Who's Employees Test Positive for Marijuana or Acknowledge its Use

A. Employer's Training Regarding Marijuana

There are courses employers can take about Marijuana and the Workplace. The courses sorts out fact from fiction and equips HR Managers, Safety Managers, Business Owners, and Substance Abuse Professionals with the information they need to avoid being blindsided.

B. Under the Influence v. In Blood Stream

As seen in the testing below there is a difference between showing up under the influence for marijuana and it showing up in the blood stream. Cannabis is detectable in the blood for approximately 12–24 hours, with heavy/frequent use detectable in the blood for up to 7 days. Your blood renewal system because they are invasive and difficult to administer, blood tests are used less frequently. They are typically used in investigations of accidents, injuries and DUIs.

VI. Testing

In order to implement a sound reasonable suspicion testing policy supervisors should be trained to recognize the signs and symptoms of drug and alcohol use and how to document their observations that cause suspicion of drug and/or alcohol use.

Random testing is the more problematic type of testing to implement and defend. The objections to random testing are based primarily on the issue of invasion of privacy. Some states place restrictions on random testing of employees for that reason.

Cannabis use is highly detectable and can be detected by urinalysis, hair analysis, as well as saliva tests for days or weeks. Unlike alcohol, for which impairment can be reasonably measured using a breathalyzer valid detection for cannabis is time-consuming, and tests cannot determine an approximate degree of impairment. The lack of suitable tests and agreed-upon intoxication levels is an issue in the legality of cannabis, especially regarding intoxicated driving.

Marijuana use can be detected up to 3–5 days after exposure for infrequent users; for heavy users: 1–15 days; for chronic users and/or users with high body fat: 1–30 days.

Urine Testing is an immunoassay based test on the principle of competitive binding. Drugs which may be present in the urine specimen compete against their respective drug conjugate for binding sites on their specific antibody. During testing, a urine specimen migrates upward by capillary action. A drug, if present in the urine specimen below its cut-off concentration, will not saturate the binding sites of its specific antibody. The antibody will then react with the drug-protein conjugate and a visible colored line will show up in the test line region of the specific drug strip.

False positives have been known to be triggered by consuming hemp-seed bars and other products, although the more detailed, more expensive gas chromatography-mass spectrometer (GCMS) test can tell the difference.

The Duquenois–Levine test is a simple chemical color reaction test initially developed in the 1930s by Pierre Duqu nois. It was adopted in the 1950s by the United Nations as the preferred test for cannabis.

Hair testing

Cannabis use is detectable with hair tests and is generally included in the standard hair test. Hair tests generally take the most recent 1.5 inches of growth and use those for testing. That provides a detection period of approximately 90 days.

Saliva testing

Cannabis is detectable by saliva testing. Just like blood testing, saliva testing detects the presence of parent drugs and not their inactive metabolites. This results in a shorter window of detection for cannabis by saliva testing. Delta 9 THC is the parent compound. If a saliva sample is tested in a lab, the detection level can be as low as 0.5 ng/mL (up to 72 hours after intake).] Per National Institute on Drug Abuse saliva drug testing provides a reasonable alternative to other drug testing methods.

Blood testing

Cannabis is detectable in the blood for approximately 12–24 hours, with heavy/frequent use detectable in the blood for up to 7 days. Your blood renewal system because they are invasive and difficult to administer, blood tests are used less frequently. They are typically used in investigations of accidents, injuries and DUIs.

VII. Considerations for Insurers with Employee Marijuana

Continue to enforce workplace policies preventing the use of alcohol, marijuana, and illegal drugs at work or during work hours. Ensure that these policies expressly identify marijuana as a prohibited substance, instead of referring to “illegal drugs” since that phrase may no longer encompass marijuana.

Determine whether any federal statute or regulation requires your organization to maintain a drug-free workplace or decline to employ any applicant testing positive for marijuana.

Notify prospective employees that any pre-employment drug screen may test for cannabis, and that testing positive for cannabis may disqualify the applicant from employment.

If a prospective or current employee notifies you of medical marijuana use, consult with counsel to determine whether a reasonable accommodation is required or feasible.

Underwriting and Policy Language

Cannabis-related businesses (CRBs) face many risks and obstacles. Some of the biggest risks involve theft, general liability and product liability. Companies functioning within state legality face severe banking restrictions due to federal regulations. CRBs may be forced to handle large sums of cash, subjecting them to a higher risk of theft. CRBs share the same general liability and other risks agricultural and manufacturing businesses face. This includes workplace accidents, damage to property and crop failure. CRBs are especially prone to fires from both wild and internal sources.

The popularity of cannabis-infused products, such as edibles, increases the risk of product liability and safety recalls. The psychoactive effects of cannabis raise the risk products may be deemed mislabeled, misrepresented or harmful. Standard general liability plans account for these claims in non-CRB businesses, but most insurers hesitate to provide such coverage for CRBs due to the legal uncertainties. Policy language specifically tailored to the cannabis industry is crucial in providing adequate coverage.

Individuals using cannabis also face insurance challenges ranging from legality issues to coverage deficiencies. Users may be faulted in workers' compensation claims or subject to employment-disqualifying drug screening. In addition, insurers offering medical treatment options may have policies preventing the use of cannabis in treating a patient's condition.

Auto insurance rates may be influenced by elevated risks associated with drivers under the influence. Complicating the situation is the lack of standardized methods for roadside detection of drug-impaired driving. Additionally, the variability of side effects and physiological reactions in each user increase the risk of misidentifying a driver's status at the time of the incident.

For insurance underwriting purposes, individuals consuming cannabis prescribed by a legally authorized physician and/or authority for a specific cause/disease/impairment and through legally authorized dispensaries should be considered medicinal cannabis users. Individuals buying it over-the-counter or with self-defined medical marijuana use for health and well-being should be considered recreational cannabis users. Risk factors such as the method of consumption, the reasons for use, and the type, frequency, and duration of cannabis consumption should be considered at the underwriting stage. RGA's findings indicate that the increasing strength of cannabis products and the ratio of THC to CBD are of considerable concern.

Also a concern is the number of occupations noted to have higher prevalence of marijuana use.