CHALLENGES FOR EMPLOYERS: LEGALIZED MARIJUANA, IMPAIRMENT CONCERNS AND WORKPLACE SAFETY

Workers’ Compensation Seminar | May 7, 2015

With Paula Barran
Barran Liebman LLP
Course Objectives

- Describe the impact of recreational or medical marijuana on the employee.
- Discuss specific workplace safety issues related to marijuana use.
- Explain the legal issues with the changing regulatory environment.
- Explain the key steps to managing workplace issues related to the use of marijuana.
Changing Norms

Americans' Views on Legalizing Marijuana
Do you think the use of marijuana should be made legal, or not?

GALLUP

Available at: http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx
Physical & Mental Impact of Marijuana on the Employee
Marijuana's Effects on the Brain

When marijuana is smoked, its active ingredient, THC, travels throughout the body, including the brain, to produce its many effects. THC attaches to sites called cannabinoid receptors on nerve cells in the brain, affecting the way those cells work. Cannabinoid receptors are abundant in parts of the brain that regulate movement, coordination, learning and memory, higher cognitive functions such as judgment, and pleasure.
2 Primary Components of Marijuana

Delta 9-THC
The major psychoactive component in cannabis.
Contributes to the user getting “high”.

CBD
A non-psychoactive component in cannabis that has advantages for use in medication.
Does not contribute to the user getting “stoned”. Anti-inflammatory, Anti-pain, anti-anxiety properties.
Impact on User’s Behavior

- Euphoria
- Relaxed, drowsy, sedated
- Disorientated, mood changes, inability to focus
- Altered time and distance perception
- Appetite is stimulated
- Dry mouth, green or brown coating on tongue
Duration of Impact on User

- Effects reach peak within 10-30 minutes after use.
- Effects generally continue for 2-3 hours.
- Typical user feels “normal” within 3-6 hours after use.
- Impairment may continue long after feeling “normal.”
Marijuana as Medicine

The active components have therapeutic possibilities for:

- Pain relief
- Nausea control
- Appetite stimulation
- Ocular pressure decrease


Three Kinds of Medical Marijuana

- **FDA Approved**
  - Synthetic Cannabinoids
  - Marinol®
  - Cesamet®
  - Doctors can prescribe.

- **In FDA Studies**
  - Purified Cannabinoids
  - Sativex®
  - Epidiolex®
  - Other purified cannabinoids
  - Doctors can administer to patients in studies.

- **Not FDA Approved; No FDA Studies**
  - “Marijuana medicines” states legalize
  - Doctors cannot prescribe.

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**How can states make medical marijuana available to patients without putting them at risk?**

1. Set up a statewide IND with FDA for doctors to use marijuana components, called cannabinoids, in research studies.
2. Provide pure cannabinoids extracted from research-grade marijuana that meet FDA standards to protect patients’ health.
3. Commercial brands that ignore FDA regulations can endanger patients’ health.
   (FDA is the U.S. Food and Drug Administration)

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National Families in Action • PO Box 133136 • Atlanta, Georgia • 404.248.9676 • www.nationalfamilies.org
### Conditions Cited When Requesting Medical Marijuana

<table>
<thead>
<tr>
<th>DISORDER THAT REQUIRES TREATMENT</th>
<th>% CITING AS REASON FOR MJ USE</th>
</tr>
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<tbody>
<tr>
<td>Chronic Pain</td>
<td>58.2%</td>
</tr>
<tr>
<td>Mental Health Disorders</td>
<td>22.9%</td>
</tr>
<tr>
<td>Sleep Disorders</td>
<td>21.3%</td>
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<tr>
<td>Neurological Disorders</td>
<td>16.6%</td>
</tr>
<tr>
<td>HIV</td>
<td>1.6%</td>
</tr>
<tr>
<td>Cancer</td>
<td>1.5%</td>
</tr>
<tr>
<td>Glaucoma</td>
<td>1.3%</td>
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</table>

Source: Reinarman et al., 2011
Marijuana Medications
Cannabinoid-based Medications

- **Marinol** (Dronabinol) – a synthetic compound, FDA approved for chemo related nausea

- **Cesamet** (Nabilone) – a synthetic compound, FDA specific approval for chemo related nausea that is unresponsive to other agents

- **Sativex** - a new chemically pure mixture of plant derived THC. A mouth spray approved in Canada and parts of Europe for relief of cancer associated pain and spasticity.


# Medical Marijuana vs. THC Medications

<table>
<thead>
<tr>
<th>Advantages of Medical Marijuana</th>
<th>Advantages of THC Medications</th>
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</thead>
<tbody>
<tr>
<td>Chemicals that moderate THCs psychoactive effects</td>
<td>FDA approved</td>
</tr>
<tr>
<td>Less expensive</td>
<td>Standardized medical formulation</td>
</tr>
<tr>
<td>More immediate relief</td>
<td>Purity</td>
</tr>
<tr>
<td>Instant feedback allows for moderation, possibly less consumption</td>
<td>Not smoked</td>
</tr>
<tr>
<td>Less erratic absorption than THC medications</td>
<td>Standardized dosing</td>
</tr>
</tbody>
</table>
Dispelling Urban Myths Shared by Employers and Employees

1. Users know when they are impaired, so they can be safe.

2. Testing positive means an employee is impaired.

3. Being around users who are smoking will result in an employee testing positive.

4. Medical marijuana is a gateway drug for youth.

5. Testing is unconstitutional.
1. Users Know When They Are Impaired So They Can Be Safe

- A Stanford pilot study tested carryover effects of use.

- 7/9 of the participants were impaired after 24 hours but only one reported being aware of the drug’s effects.
2. Testing Positive Means An Employee Is Impaired

- Actually, all it means is that the employee ingested marijuana.
- Employer policies need to address what the violation is – and it may be insufficient to talk only about impairment.
3. Being Around Users Who are Smoking Will Result in an Employee Testing Positive

- Only if there is so much secondary smoke around that the employee might as well have been smoking.
  - Cut-off levels are sufficiently high that minor contact with secondary smoke will not result in a positive test.
4. Medical Marijuana is a Gateway Drug for Youth

- Maybe.

- Studies show increased usage among youth generally (1 out of 15 high school students report smoking pot most days). However, teenagers don't smoke any more pot in states where marijuana is legal than in ones where it's not.
U.S. vs Colorado Past-Month Marijuana Use, 2013

- Ages 12+:
  - Total U.S.: 7.4%
  - Colorado: 12.7%
  - 72% Greater
- Ages 12-17:
  - Total U.S.: 7.15%
  - Colorado: 11.16%
- Ages 18-25:
  - Total U.S.: 18.91%
  - Colorado: 29.05%
- Ages 26+:
  - Total U.S.: 5.45%
  - Colorado: 10.13%
5. Testing is Unconstitutional

- Not really, and not for private employers except in a few states.
Legal Issues: Key Federal Laws
The act has a “general duty clause” requiring employers to provide a safe work environment.

Employers who allow impaired employees to work in safety sensitive positions where others may be harmed may be in violation of this requirement.
Department of Transportation

- DOT has multiple operating agencies
  - FMCSA, FAA, FTA, PHMSA & FRA
  - Federal regulation of transportation has detailed requirements for drug and alcohol control and testing programs

- (Even in states where it is legal under state law)
The illegal use of drugs is not protected:

- A person who is “currently engaging in the illegal use of drugs” is not a “qualified individual with a disability” if the employer takes action on the basis of such use.
- Illegal drug use, under the ADA, means the use of drugs where possession or distribution is made unlawful under the Controlled Substances Act (federal law).

Individuals can regain protection by participating in a supervised rehabilitation program and ceasing illegal use.

29 CFR 1630.3.
Drug Free Workplace Act

- Applies to employers who receive certain federal funds.
- Requires a zero tolerance drug policy.
Some states require substance abuse policies as a condition of awarding public works projects.
As Attitudes Change

- Workers compensation and other insurance programs may authorize reimbursement of medical marijuana cost.
- State laws may be interpreted to prohibit employers from disciplining employees for off-duty marijuana use unless they can prove actual impairment.
- Unemployment compensation may be available to employees terminated under employer policies.
- Congress may eventually take up the issue of where marijuana is on the Controlled Substances Act schedules.
Obtaining Medical Marijuana
Workplace Safety Issues Related to Marijuana Use
Marijuana’s Impact on Workplace Safety

Users are:

- 3.6 times more likely to be involved in a workplace incident
- 5 times more likely to file a workers’ comp claim
- 2.2 times more likely to request early dismissal or time off
- 2.5 times more likely to be absent eight days or more
- 3 times more likely to be late for work

Source: American Society of Safety Engineers (ASSE)
Concerns For Employers & Co-workers

- Safety
- Performance
- Health & Wellness
- Delayed recovery
- Return to work
Driver Impairment Update

Number of Drivers Testing Positive for Marijuana Only Involved in Fatal Crashes

Source: The legalization of marijuana in Colorado, Preliminary report, pg 18
Rocky Mountain High Intensity Drug Trafficking Area (RMHIDTA), August 2013
Safety Sensitive Jobs

- Questions to help identify safety sensitive jobs
  - Is the primary function related to public safety or national security?
  - Would a slip-up result in an immediate injury as contrasted with one that may happen over time?
  - Does the position require the employee to work with a dangerous population? (gang environment, prisons)?
Performance and Behaviors

Consider these indicators of workplace drug problems:

- Change in job performance.
- Inconsistent work quality.
- Poor concentration and lack of focus.
- Lowered productivity or erratic work patterns.
- Increased absenteeism or on the job “presenteeism.”
- Unexplained disappearances from the job site.
- Carelessness, mistakes or errors in judgment.
- Needless risk taking.
- Disregard for safety for self and others which can translate to on-the-job and off-the-job accidents.

Source: National Council on Alcoholism and Drug Dependence Inc. (NCADD)
What would you say?

- He wonders if marijuana might help his back.
Drug Testing
Types of testing

- Urine
- Blood
- Hair
Testing Urine for Marijuana

- Positive Test: (50 ng/ml is the standard for most states and federal programs)
  - Marijuana used within 4 hours to 3 days
  - A heavy user may test positive up to several weeks after use

- Should not be used to establish impairment
  - Urine tests do not detect THC, the psychoactive component in marijuana, and cannot measure impairment
  - Test may show evidence of use long after the effects have dissipated
Testing Blood for Marijuana

- A blood test is a better detector of recent use than urine tests, since it measures the active presence of THC in the system.

- THC is only detectable within 3-4 hours after use.
Detection window for cannabinoids in urine is variable

<table>
<thead>
<tr>
<th></th>
<th>Urine</th>
<th>Blood</th>
<th>Hair</th>
<th>Saliva</th>
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</thead>
<tbody>
<tr>
<td><strong>Marijuana</strong></td>
<td>Unusual to extend more than 3-4 days@50ng/ml</td>
<td>3-4 hrs</td>
<td>Approx. 90 days</td>
<td>Not validated</td>
</tr>
<tr>
<td>- Single Use</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Marijuana</strong></td>
<td>Unlikely positive more than 21 days @50 ng/ml</td>
<td>Unlikely positive more than 10 days</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Chronic Use</td>
<td></td>
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Testing Hair & Saliva

- **Hair testing**: It takes approximately 5-10 days from the time of drug use for the hair containing drug to grow above the scalp where it can be collected. 1.5 inches of hair from the root end is utilized for the test.

- **Saliva testing**: the technology for reliably testing saliva is still unavailable, and there are no national standards for testing saliva, as there are with blood and urine.
MRO

- Review legislation
- Federal and state laws
- Chain of custody check, verifies the results
- Safeguard the drug testing process
- Evaluate test results
- Connect with the toxicologist, medical professional, employer, and employee (on positive results)
- Maintain records and privacy
The Medical Review Officer (MRO)

- Medical Review Officer Certification Council [www.mrocc.org](http://www.mrocc.org)
- American Association of Medical Review Officer [www.aamro.com](http://www.aamro.com)
Other Considerations

- If you have a Medical Review Officer (MRO), use the MRO to oversee the drug screen program and review any positive results.
- Quality of testing: use of certified labs for confirmatory testing.
- Review the basic measures that promote a quality program.

Source:
Key Aspects of Drug Testing Policies
Components of a Chemical Impairment Policy

- Employer’s policy statement
- Prohibited conduct and consequences for violations
- Basis for drug testing
- Drug testing procedures
Employer’s Policy Statement

- Commitment to a drug-free workplace
  - Improved safety
  - Increased productivity
  - Decreased absenteeism

- Confidential treatment of results

- Required for compliance with the Drug Free Workplace Act
Prohibited Conduct & Consequences

- **Identify the prohibited conduct:**
  - “Under the influence” while on the job
  - Possession of any “controlled substance”
  - Subverting the test
  - Refusing to test

- **Consequences:**
  - Decline offer of employment
  - Discipline/termination
  - Treatment
  - Last chance agreement
Definitions

- **“Under the influence”** - having any detectable level of alcohol or illegal drugs in an employee’s body, or any noticeable or perceptible impairment of the employee’s mental or physical faculties.

- **“Controlled substance”** - all controlled substances on the federal Controlled Substances Act, to include marijuana and designer drugs not approved for use by the U.S. Food and Drug Administration.
Marijuana Law in the States

- **Medical marijuana states**

- **Recreational marijuana states**
  - Alaska, Colorado, D.C., Oregon, Washington

- **Two kinds of state laws:**
  - **Medical use:** Defined conditions, possession limits, cultivation, sale, caregivers, registration
  - **Recreational use:** Possession limits, taxation, commercial cultivation and sale, regulation of places or consumption
Duty to Accommodate Medical Marijuana

- Depends on state law
  - No duty to accommodate, or to engage in an interactive process
    - Colorado, Oregon, Washington (by case law)
  - Statutory nondiscrimination requirement
    - Arizona, Connecticut, Delaware, Maine, Rhode Island
- Employer likely has obligation to accommodate the underlying condition if it is a disability
Basis for Drug Testing

- **Pre-employment**
  - Do not test prior to offer
  - Testing should be post-offer, pre-placement
  - Use a “conditional offer”
  - Keep medical records confidential
    - Need-to-know basis
    - Separate from personnel file

- **Random Testing**
  - Establish a protocol for randomly selecting employees
  - Notify employees of selection protocol
  - Don’t let supervisors abuse the policy
  - Selective enforcement will be evidence of pretext and retaliation
Basis for Drug Testing

Reasonable Suspicion
- Watch for signs of impairment
- Check with others about their observations
- Document observations immediately

After accident testing
- Do it immediately; do not let the employee continue working
Current Laws Relating to Marijuana and the Workplace
Federal Controlled Substance Act

- Marijuana is a Schedule 1 Drug federally and in most states
  - High potential for abuse
  - No currently accepted medical use in treatment in the US
  - A lack of accepted safe use of the drug under medical supervision
- Possession and use of marijuana is illegal under federal law..however..
- Federal government recently defunded drug prosecutions in medical marijuana
Constitutional Issues for Public Employers

- Public employers may not violate 4th Amendment
- Drug testing is defined as a “search”
- Warrantless searches must be justified
Key Steps to Managing Workplace Issues Related to the Use of Marijuana

- Determine how to update job descriptions
- Develop policy and administrative guidelines
- Educate employees and managers
Challenges Facing Employers

- Safety violations
  - OSHA general duty clause
  - Tort claims – negligent supervision
- Productivity standards and QA
- Recruitment
- Public Image
- Potential legal challenges to punishing off-duty conduct
Responding to the Challenges

Options for employers:

- Implement/maintain zero tolerance policy
- Maintain current policies
- Develop different sets of policies relative to job duties and safety concerns
- Modify policies to only prohibit being under the influence while at work or representing the employer
  - Document signs of impairment
  - Observations made by regular supervisor
Other Issues/Best Practices

- Companies may run afoul of the new law: drug-free workplace policies that refer to “illegal drugs.”

- Just because it’s legal now doesn’t mean employers can no longer require employees not to use it.

- Consider updating your policies to reflect that legalized marijuana is considered an illegal substance under your policies.

- Pre-employment, random, reasonable suspicion and post-accident testing are still permissible.
Summary

- To help avoid future problems:
  - Republish your drug testing policy
  - Be clear and transparent with employees
  - Spell out prohibited behaviors
  - Explain consequences for policy violations
  - Take measures based on employee conduct
  - Call an expert for the very latest in best practices and legislation before taking an adverse action for violation of substance abuse policies
Thank You!
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Special Thanks to Linda Meuleveld BA, RN, COHN-S, CCM, CPDM, FAAOHN, linda@medmanageconsulting.com

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