



MOODY
INSURANCE AGENCY

Marijuana in the Workplace

What does it mean to you?

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A big thank you to,
The American Association of
Occupational Health Nurses
The American College of Occupational
and Environmental Medicine
The Department of Labor (OSHA)
Colorado Department of Health

Introduction

- Marijuana is the most frequently used illicit drug of abuse in the United States and worldwide.
- The U.S. government classifies marijuana as a Scheduled I drug and workers covered by federal drug testing programs are uniformly prohibited from using marijuana at any time. (This includes any mandated program)

Are they?

- Currently, (was 23 in 2016) 29 states have active medical marijuana laws.
- Of those states, Alaska, Colorado, Oregon, Washington, the District of Columbia, and beginning 2017, California, Maine, Massachusetts, and Nevada have recreational use laws in effect as well.
 - More states are expected to follow each year.
 - Medical Marijuana is legal nationally in Canada.

- Colorado's medical marijuana law began in January of 2000.
 - Less than 10,000 before October 2009
 - (Obamas statement)
 - By December 2010 over 100,000
- Today, there are more medical marijuana shops in the city of Denver than there are Starbucks!

Legal Implications of Marijuana Legislation



Legal Implications

- There are many new changes in the law and how employers can structure their Drug and Alcohol programs.
- A big change is employers can no longer have a blanket policy that requires employees to automatically be required to submit to Drug and Alcohol testing if involved in a work related accident.

Americans with Disabilities Act

- The OSHA Act of 1970 contains a general duty clause that requires employers under it's jurisdiction to, among other things, maintain conditions or adopt practices reasonably necessary and appropriate to protect workers on the job.
- This could be a problem area.

Americans with Disabilities Act

- As long as marijuana is illegal under federal law, employers who fire or refuse to hire employees for using marijuana are NOT in violation of the ADA or any other federal antidiscrimination statute, although there are restrictions on drug testing.
- Another problem for employers.

Drug and Alcohol Testing Regulations

- Most employers are NOT necessarily required to drug test and many state and local governments have statutes that limit or prohibit workplace testing unless required by state or federal regulations due to the nature of the job.
- U.S. DOT Regulations state that marijuana remains unacceptable for safety-sensitive positions.

Drug and Alcohol Testing Regulations

- This includes pilots, bus and truck drivers, locomotive engineers, subway operators, aircraft maintenance, transit fire-armed security personnel, and ship captains and others.
- SAMHSA (Substance Abuse and Mental Health Services Administration) are the standardized procedures for federal agencies.
- OSHA's new Anti-retaliation Standard! NO BLANKET DRUG AND ALCOHOL TESTING PROGRAMS!!!!

Drug Free Work Act

- DFWA was enacted in 1988 to promote safety and accountability and requires all federal grantees to agree that they will provide drug-free workplaces as a condition of receiving a federal contract of more than \$100,000 or a federal grant of any value.
- Compliance under this Act offers employers more stable position. Or does it?

NOTICE
**THIS IS A
DRUG-FREE
WORKPLACE**

Drug Free Work Act

- What is ironic about the DFWA is it does not specifically require drug testing, but it does require that employers,
- (1) Publish and distribute a policy statement
- (2) Specify actions that will be taken against employees who violate the policy,
- (3) And provide education in the workplace about the dangers of drug use and available counseling and employee assistance programs.

Federal Law Enforcement

- Simply stated, you cannot transport marijuana across state-lines through any mode of transportation.
- Law Enforcement overall have serious concerns with cartels and other escalating criminal activity since recreational legalization.
- The wait and see attitude the feds have adopted may make it harder on everyone as the catch 22 continues!

State Laws



- Colorado presently allows employers to prohibit the use of marijuana at work. Nevertheless, another state law, the lawful off-duty conduct statute, prohibits employers in this at-will employment state from firing employees for engaging in lawful conduct while off-duty and off premises during nonworking hours.
- Major problem! (This is in litigation)

State Laws



- Conflicting legal decisions have risen with regard to employees who have been fired for testing positive for marijuana, and as early of 2015, this issue is under review by the Colorado Supreme Court. (Still in litigation)
- Specific drug and alcohol programs that cover in detail, the expectations and procedures that employees must follow can help protect companies with potential future litigation.

Medical Issues

- We currently do not know the extent of potential long term use.
- Polls indicate a rise in use and real data is not available or limited.
- 2017: Latest study shows use up in adults over 50 and lower in younger users and teens.

Metabolism and Impairment

- Edibles effect a person differently than if smoked and are much easier to conceal.
- Effects can vary depending on the individual and the duration can last up to 6 hours or more.
- Edibles and derivatives are the most difficult to detect and contain the highest concentrations of THC
- (Up to 90% or more!)

Metabolism and Impairment

- Include suspected impairment as basis for testing
- Still okay to random test without impairment
- Importance to safety of others
- Consistent application of policy remains critical

Assessing Suspected Marijuana Impairment

- Studies are just now beginning to emerge for driving impairment and many other areas on the effects of marijuana impairment.
- New studies are currently being developed and funding has been made available so stay tuned!

Detecting Marijuana Impairment

- When a worker is suspected of being impaired by marijuana use, expected signs and symptoms of impairment must be clearly defined in advance and become part of supervisor training.
- Testing for impairment for marijuana will require a blood test as Urine test only supports past use.
- Use State Certified Testing facilities.



Detecting Marijuana Impairment

- Nevertheless, a urine drug test showing past use is NOT sufficient evidence of impairment. Although this use is still prohibited under federally regulated employment programs, this prohibition might not be reasonable or enforceable in nonfederal regulated employer drug testing programs in states with legalized recreational use.

Detecting Marijuana Impairment

- Employers choosing to prohibit the use of marijuana during off-work time in states where it is legal should consult with counsel regarding this policy.
- Best practices suggest that employers include an evaluation (Fit for Duty testing) of the impaired employee at an occupational medicine clinic or emergency department for a full evaluation.

Accommodating Marijuana Use in the Workplace: Legal Considerations

- A decision to accommodate the use of marijuana in whole, or in part, will offer some significant challenges for employers.
- Coats vs Dish Network was over three years ago and based on medical marijuana laws at the time. In 2013 recreational marijuana use passed in Colorado and new challenges have emerged.

Development and Management of Drug Testing Policies

- Have clear written policies regarding usage and testing.
- Inform employees of the process and how and where the testing will be conducted.
- Explain disciplinary action and alternative measures I.E. EAP Program.
- The foundation of a drug-free workplace program is a chemical impairment policy.

Development and Management of Drug Testing Policies

- Some state and federal regulations require programs in specific industries that mandate employer drug testing before and during employment.
- State regulations usually control the drug-testing protocols.
- The test currently being used by the state to support impairment is being challenged.

Major Concerns

- Depending on the Colorado Supreme Courts decision, it is currently possible that some employers may have to allow for lawful off-duty use of marijuana. (Pending)
- Urine Test is for past use detection and NOT for impairment.
- A blood test is the only current method to determine impairment. (Swabs are currently being field tested)
- Bulletproof your Drug & Alcohol Programs!

Summary

- The Joint Task Force recommends that marijuana use be closely monitored for all employees in safety-sensitive positions, whether or not covered by federal drug-testing regulations.
- Best practice would support employers prohibiting marijuana use at work.
- Nevertheless, in all cases, a clear policy to guide decisions on when marijuana use is allowed and how to evaluate for impairment must be widely distributed and carefully explained to all workers.

Questions

