

October 24, 2019

# Cannabis, Addiction, and the Workplace

# Agenda

- Overview – state of the law regarding cannabis
- How legalization of medical or adult use cannabis impacts employment
  - Anti-Discrimination
  - Drug Testing
  - Duty to Provide Reasonable Accommodation
- Addiction – Scope of Issue, Legal Framework and Ramifications

The slide features a teal background with a white geometric shape on the left side that resembles a folded corner or a stylized arrow pointing towards the center. A thin orange horizontal line runs across the bottom of the teal section. The text "Overview – Cannabis Laws" is centered in white.

# Overview – Cannabis Laws

# Cannabis – Federal Law

- Cannabis is a controlled substance, like heroin or cocaine.
- Schedule 1 drug, meaning viewed as highly addictive with no medical value.
- 2013 DOJ memo stated that prosecution of state legal medical marijuana cases is not a priority, but rescinded under current Administration.

# Cannabis – State Law

- Mixed bag:
  - In some states (e.g. TX, VA), cannabis remains illegal.
  - Some states (e.g. NY, NJ, IL, MD, DE, PA), have legalized cannabis for medical purposes only.
  - Some states (e.g. ME and CA), have legalized both medical and recreational cannabis.

# State Cannabis Laws

- All of the states that have legalized cannabis permit employers to prohibit employees from possessing or using in the workplace.
- Most permit employers to prohibit employees from coming to work under the influence.
- *But* see PA law: Employers may not discipline employees for being under the influence unless the employee's conduct falls below the standard of care normally accepted for that position.

# The Difficult Questions

- Off Duty Use:
  - May employers with drug testing policies still test for cannabis in states where use is legal?
  - May employers have a zero tolerance policy, and refuse to hire individuals who use cannabis, even completely outside of work?
- How does an employer determine whether an employee is under the influence?

# Sources of Restrictions on Ability to Take Action Based on Off Duty Use

- (1) State cannabis statutes expressly prohibiting discrimination or requiring accommodation of off duty use.
- (2) State laws prohibiting discrimination against employees who engage in lawful activities outside of work.
- (3) General anti-discrimination statutes requiring employers to provide reasonable accommodations to qualified employees with disabilities.



# Cannabis Statutes Prohibiting Discrimination

- Many state medical cannabis statutes expressly prohibit discrimination against individuals simply because they use medical marijuana (*e.g.* IL, DE, ME, PA)
  - DE statute expressly provides no action may be taken on positive drug test, absent evidence of use or impairment at work.
  - These laws typically permit adverse action if necessary to comply with a federal contract, to qualify for federal funding, or if required under federal law.

# Cannabis Statutes Affirmatively Requiring Accommodation

- In New York, certified patients are deemed to have a disability under the New York State Human Rights Law.
- Thus, New York employers with 4 or more employees are not only prohibited from terminating / disciplining an individual who is a user, but must provide reasonable accommodations.

# Cannabis Statutes That are Silent

- *E.g.*, Maryland, New Jersey and California
- California's medical marijuana statute does not contain a non-discrimination provision.
  - In 2008, CA Supreme Court held employers could take action against an employee based on off-duty use that did not impact performance.
  - Recent legislative activity suggests CA will join states with anti-discrimination provisions.

## Americans with Disabilities Act (ADA)

- Employers covered by the ADA (more than 15 employees) must provide reasonable accommodation to qualified individuals with disabilities unless doing so would constitute undue hardship.
- Accommodations may include exceptions from generally applicable policies.
- Will excepting an employee from a policy prohibiting off-duty use ever be a reasonable accommodation under the ADA?

## ADA cont.

- Qualified individuals with a disability include individuals who have:
  - Successfully completed drug rehabilitation
  - Are participating in rehabilitation and are no longer using
  - Are erroneously regarded as using
- The ADA does not protect current users of illegal drugs.
- Because cannabis is an illegal drug under federal law, current users are not protected under the ADA (even if their use is lawful under state law).

# State Laws Requiring Reasonable Accommodation

- Most states have laws which, like the ADA, require employers to provide reasonable accommodation to employees with disabilities, and have expansive definitions of disability.
- Is tolerance of off-duty use required as a reasonable accommodation under state law?

**ANSWER: It depends on the state, and is an open question in most jurisdictions.**

## ***Ross, 2008 CA decision***

- Employee who used cannabis for chronic back pain was terminated when he failed a drug test.
- Employee contended employer was required to accommodate his off-duty use.
- Court found that, notwithstanding that medical cannabis was legal under CA law, employer was not required to accommodate even off duty use of a drug that is illegal under federal law.



## *Coats*, 2015 CO decision

- Employee, quadriplegic, used medical cannabis in accordance with state law, outside the workplace after work.
- Job – customer service representative for Dish Network.
- Terminated after random drug test.
- Court found that CO's "lawful activities" statute did not prohibit his termination, because cannabis is unlawful under federal law.

## ***Barbuto*, 2017 MA decision**

- Applicant used cannabis in small quantities, in the evening, 2-3 times / week.
- Job – entry level, promoting products in supermarket.
- Court said that, under MA law, medical cannabis was akin to any legally prescribed drug.
- Illegality under federal law immaterial, since employer bears no risk for off-duty use.

## *Callaghan*, 2017 RI decision

- Employer refused to hire applicant after she disclosed her status as a medical cardholder and failed a pre-employment drug test.
- Employer argued that non-discrimination provision in medical marijuana law applied only to discrimination based on *status*, not to failing a drug test.
- The court held that this was a meaningless distinction, and the employee had a cause of action for the employer's violation of the medical marijuana statute.

## *Noffsinger*, 2018 CT decision

- Applicant with PTSD has offer withdrawn after she failed a drug test.
- Court held the CT cannabis law was not preempted by the federal Controlled Substances Act.
- Court held that a jury could find the employer discriminated against the applicant on the basis of disability, by failing to consider an exception to its policy prohibiting even off-duty use.

## *Chance*, 2018 DE decision

- Employee involved in a work-related accident while operating a “shuttle wagon” on railroad tracks.
- Sent for a drug test, which indicated marijuana use.
- Terminated, notwithstanding possession of a card.
- Delaware statute expressly prohibits termination based on a positive test unless the individual used, possessed, or was impaired at work.
- Court found Delaware statute was not preempted by federal law, which doesn’t make it illegal to employment a marijuana user.

## *Eplee*, 2019 MI Decision

- Employee's conditional job offer rescinded after a positive pre-employment drug test.
- Michigan statute says qualifying patients may not be "denied any right or privilege including . . . disciplinary action by a business . . . for the medical use of marijuana. . ."
- Court said employee had no "right" to or property interest in the job, and therefore had no claim.

# Workers' Compensation

## \*Bourgoin v. Twin Rivers (Me. 2018)

- Holding WC carrier cannot be compelled to subsidize medical marijuana.
- Otherwise, carrier would be forced to aid and abet the individual's violation of federal law.

## Appeal of Andrew Panaggio (N.H., March 7, 2019)

- Holding WC carrier not banned from reimbursing for medical marijuana under state law.
- Remanding the case for further consideration of the effect of federal law that makes possession a federal crime.

Note several states have relied on the federal policy of noninterference to compel carriers to cover.

## Where Does This Leave Us?

Still unclear whether Law Court would hold employers are required to accommodate off duty medical marijuana use.

Risky not to do so, unless a federal contract or statute (DOT) is in play or unless employer can demonstrate legitimate safety concerns.

Assess timing of use, impact of use, and impact on employee's job/safety considerations.

Unless safety risk is apparent, may be advisable to seek an expert opinion about impact of off duty use on employee's ability to safely perform the job.



# State Laws Regarding Drug Testing

State laws around drug testing (generally) vary wildly:

- Which employers may test.
- Which employees they may test.
- The circumstances under which testing is allowed (random or only on reasonable suspicion) etc.
- Following slides are directed toward employers who are authorized to test under state law.

# Testing for Cannabis

- No test currently exists to test for impairment or impairment level.
- Testing will reveal only whether the employee has used in the past several weeks (i.e. can simply confirm off duty use).
- There is no reason to test for cannabis unless you can take some action based on the result.
- Knowing that someone is a user of medical cannabis is problematic information to have if you cannot make a decision based upon that information.

# Testing – Medical Cannabis

In states where discrimination against users is illegal (by statute or court decision) and no exception applies (e.g. conflict with federal law), employers should consider treating medical cannabis like any other prescribed drug and not receive positive test results if employee can produce a prescription to the tester.

# Drug Use and Employment

## Maine

- 360 overdose deaths in 2017
- “Top 10” state for highest rate of death
- 29.9 deaths per 100,000 persons

## New Hampshire

- 424 overdose deaths
- “Top 5” state for highest rate of death
- 34 deaths per 100,000 persons

# Drug Use and Employment

## Massachusetts

- 1913 overdose deaths
- “Top 10” state
- 28.2 deaths per person

## Rhode Island

- 277 overdose deaths
- Just outside the “Top 10”
- 26.9 deaths per 100,000

# Drug Use and Employment

## National Average

- 14.6 Deaths from Overdose

# The Legal Framework

## Drug Addiction is a Disability

- Cannot discriminate against an Employee or Applicant for past drug addiction.
- Cannot reject an Applicant for fear of a relapse.

## Current Drug Use is Not Protected

## Common Questions:

When can I test?

Should I test?

Is Leave a Reasonable Accommodation?

What if the Employee shows up for work impaired?

Is the answer different if the Employee can't come to work because relapsed?

Is use of medically prescribed opiates protected?



# Presenter

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