Complimentary Employer Education Series Webinar

Marijuana in the Workplace:
Navigating Potential Potholes

Thank you for joining us! Our program will begin at 10:00AM
Marijuana Policy

“I mean, a man can always get a job. But a man can only be the first person to buy recreational cannabis in Spokane once.”

- Mike Boyer
Marijuana Use

Keeping in mind that all of your answers in this survey are confidential, have you, yourself, ever happened to try marijuana?

% Yes

Based on 972 national adults in Form A

Question wording for 1969-1985 trends: Have you, yourself, ever happened to try marijuana?

GALLUP®
Medical Uses

- Chronic Pain
- Muscle spasms caused by multiple sclerosis
- Nausea from cancer chemotherapy
- Poor appetite and weight loss caused by chronic illness, such as HIV, or nerve pain
- Seizure disorders
- Crohn's disease
- Tourette’s syndrome
Federal Law

- Controlled Substances Act
- Gonzales v. Raich (2005)
- Cole Memorandum
President Trump had three things to say about marijuana policy during his campaign:

1. He was “in favor of medical marijuana 100 percent;”
2. He was skeptical of legalizing it more broadly; and
3. Marijuana policy should basically be left to the states.
Public Support for Marijuana Grows...

A 2/23/17 Quinnipiac poll found U.S. voters favored legalization 59% to 36%, with only Republicans and older voters opposed.

An impressive 71%, including majorities of Republicans and older voters, think the federal government should not interfere in states that have legalized marijuana. Gallup and other polls report similar findings, including strong majority support for legalizing among Republican millennials.
“Good people don't smoke marijuana … [It is] not the kind of thing that ought to be legalized.”

“You can't have the President of the United States of America talking about marijuana like it is no different than taking a drink … It is different … It is already causing a disturbance in the states that have made it legal.”
Federal Law

Picture yourself on a train in a state
with plastic ponies with looking fees dice,
suddenly someone is there in the turntable,
the girl with kaleidoscope eyes...

LUCY IN THE SKY WITH DIAMONDS
29 states and DC have legalized medical marijuana for medical purposes.
8 states have legalized recreational marijuana
Recreational Marijuana

- Only possession and use by adults over age 21
- Possession of up to 1 ounce outside home and 10 ounces in home.
- No marijuana use in public places
- No “open containers” in motor vehicles
- Retail license from newly-formed Cannabis Control Commission required to sell marijuana
A user must obtain “written certification” from a physician that in his/her “professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for the qualifying patient.” M.G.L. c. 369, s. 1(N).
Medical Marijuana

ID cards carried at all times in possession of marijuana

ID cards issued every three years

Annual renewal requirement, including physician certification
Recreational Law:

This chapter shall not require an employer to permit or accommodate conduct otherwise allowed by this chapter in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees.

Medical Law:

[Nothing in this law requires any accommodation of any on-site medical use of marijuana in any place of employment.]”
Courts have declined to read employment protections into state medical marijuana laws.

Accommodation

Americans with Disabilities Act explicitly excludes employees “currently engaging in the illegal use of drugs” from its coverage.
A reading of the [Medical Marijuana] Act and its implementing regulations supports a finding that it does not require an employer to accommodate an employee’s use of marijuana to treat a medical condition. The Act does not contain an anti-discrimination provision. To the contrary, it explicitly provides that “[n]othing in this law requires an accommodation of any on-site medical use of marijuana in any place of employment.” While the Act does not reference the “off-site” use of marijuana, it provides that “[n]othing in this law requires the violation of federal law or purports to give immunity under federal law.” The use of marijuana for medical purposes remains illegal under federal law.
Coats v. Dish Network, LLC

“It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours.” Colo. Rev. Stat. § 24-34-402.5
"We still must determine … whether medical marijuana use that is licensed by the State of Colorado but prohibited under federal law is ‘lawful’ for purposes of section 24–34–402.5. Coats contends that the General Assembly intended the term “lawful” here to mean ‘lawful under Colorado state law,’ which, he asserts, recognizes medical marijuana use as ‘lawful.’ We do not read the term ‘lawful’ to be so restrictive. Nothing in the language of the statute limits the term “lawful” to state law. Instead, the term is used in its general, unrestricted sense, indicating that a ‘lawful’ activity is that which complies with applicable ‘law,’ including state and federal law."
Rhode Island and Connecticut both prohibit employers from penalizing an employee “solely” on the basis of his/her “status” as a medical user.

Rhode Island, but not Connecticut, explicitly permits an employer to enforce a “drug testing, zero-tolerance, or drug free workplace” policy against a medical user.

New York’s law deems medical users automatically “disabled” within the meaning of its disability discrimination law.

Like many states, Rhode Island, Connecticut, and New York do prohibit on-premises use and/or impairment.
Many medical marijuana laws provide that carriers do not need to reimburse medical users. In states without a statutory prohibition, however, courts have ordered that medical marijuana be reimbursed.
Polling Question

Do you drug test your employees?
Drug Testing

According to a 2006 survey by the Society for Human Resource Management:

- 84% percent of private employers conduct pre-employment testing
- 39% conduct random testing
- 73% percent conduct for-cause testing

Quest Diagnostics reports that failed drug tests increased 20% in Colorado following its legalization of marijuana.
What are the pros and cons of drug testing employees?
# Drug Testing

## Types of Drug Testing

1. Pre-Employment
2. Reasonable Suspicion
3. Post-Accident
4. Random
   - Balancing test: does legitimate, business interest of employer outweigh employee’s interest in privacy?
   - Safety sensitive positions only

## Procedure

- Advanced notification
- Retesting to confirm
- EAP
- No termination for first-time positives
- Last change agreement
# Drug Testing

<table>
<thead>
<tr>
<th>Substance</th>
<th>Urine</th>
<th>Blood</th>
<th>Hair</th>
<th>Saliva</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marijuana - Single Use</td>
<td>1-7 + days</td>
<td>12-24 hours</td>
<td>Doubtful</td>
<td></td>
</tr>
<tr>
<td>Marijuana – Regular Use</td>
<td>7-100 days</td>
<td>2-7 days</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Amphetamines/ Methamphetamines</td>
<td>1-3 days</td>
<td>24 hours</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Barbiturates</td>
<td>3-8 days</td>
<td></td>
<td>Months</td>
<td></td>
</tr>
<tr>
<td>Benzodiazepines</td>
<td>2-14 days</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cocaine</td>
<td>1-3 days</td>
<td>1-3 days</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Heroin, Opiates</td>
<td>1-5 days</td>
<td>1-3 days</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Methadone</td>
<td>2-8 days</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PCP</td>
<td>3-8 days</td>
<td>1-3 days</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tricyclic Antidepressants</td>
<td>10 days</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Not validated. Estimated 0-24 hours
Reasonable Suspicion Checklist

Go through checklist, with at least one witness signing off as well

Signs of current impairment include:

- Bloodshot eyes
- Poor coordination
- Drowsiness
- Perception of time
- Odor, or cover-up
Federal Drug Testing Requirements

“Please note that marijuana remains a drug listed in Schedule I of the Controlled Substances Act. It remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation’s drug testing regulations to use marijuana.”

-DOT “Medical” Marijuana Notice, February 2013
Drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use.

- OSHA’s Commentary to Final Rule amending its Recording and Reporting Occupational Injuries and Illnesses Regulation (May 12, 2016)
Polling Question

Would you choose to accommodate a medical marijuana user?  
Yes or No?
The Company may in its discretion seek to accommodate legally recognized Massachusetts medical marijuana users when possible depending on the Employee’s position. Employees who obtain a registration card from the Massachusetts Department of Public Health must submit a letter to the Director of Human Resources attaching a copy of their card and requesting a reasonable accommodation. The Company will then enter into a discussion with the Employee and where applicable the Employee’s Health Care provider to determine if such accommodation is appropriate under the circumstances.
Medical Marijuana Policy

Factors to consider in assessing whether to offer accommodation:

- Frequency of use
- Work schedule
- Federal and state regulatory requirements
- Safety sensitive position
- Vulnerable population
- Transfer to another position
- Length of service
Problems

A medical assistant, Jack, leaves a backpack reeking of marijuana in his locker before his shift. Do you open his backpack? Yes or no?
You hear a rumor that Mary, a repair technician at the manufacturing plant where you work, has begun taking medical marijuana for her chronic pain. What is your next step?
Bill goes out to his car during breaks and comes back looking unsteady. You don’t smell alcohol or marijuana, but you are suspicious about the employee’s behavior. What should you do?
Problems

Security calls you after break and reports that they believe they just saw Joe in the back of the building smoking marijuana. After walking by him, you realize that you do not smell it on him. Do you confront him anyway? Yes or no?
Mike has just been injured on the job. While going to the drug testing room, he reports that he is on Suboxone and will likely test positive. Do you still test him? Yes or no?
Your company enforces its zero-tolerance drug policy through random drug tests. When an employee, Jill, is randomly selected for a test, she responds, “I don’t have to take the test,” and presents a medical marijuana card. Do you still test Jill? Yes or no?
Laura’s test is non-negative. It is the weekend and HR is not on-site. You arrange for her to go to CompreCare and you call the taxi. Later in the shift, the taxi service calls you and advises that Laura demanded to be taken home and they did not drive her to CompreCare. What happens now?
Problems

ABC Company hosts a holiday party, with an open bar, at a local restaurant. Several employees begin smoking marijuana outside on the veranda, causing another employee to complain. May you tell the employees to stop smoking?

Yes or no?
Next Steps

01. Educate employees about the law and Company’s position

02. Consider revising Company’s Substance Abuse Policy

03. Consider revising Company’s Drug Testing Protocol

04. Consider revising Company’s Reasonable Accommodations Policy
Questions?

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Please remember to take our brief survey when you exit.