



Marijuana in the Workplace: A Growing Issue

By Tamara Cagney, Christopher E. Knoepke, and David W. Mitchell

In the United States there has been a growing movement to relax state laws prohibiting the possession and use of marijuana. These controversial reforms are beginning to impact employee assistance professionals.

In 1996, California became the first state to legalize the use of marijuana for medicinal purposes. As of 2014, 20 states plus the District of Columbia have enacted similar laws. Additionally, several states (Colorado and Washington) recently decriminalized recreational use of marijuana. Interestingly, marijuana may be legal in Colorado and Washington, but employees can still be fired for using it.

EA professionals in these states are now learning how to assist businesses and individuals in a challenging intersection of federal and state laws, local practices, and company policies.

Background

California's Proposition 215 allowed a wide variety of conditions to be treated by medical marijuana: "Cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." Physicians there have recommended mari-

juana for hundreds of conditions, including complaints such as insomnia, PMS, post-traumatic stress, depression, and ironically even substance abuse.

Most states that have passed medical marijuana since that time have learned from California and limited the number of conditions covered and limited personal cultivation as well. More states are expected to join the medical marijuana movement with Florida being the first Southern state to discuss such legislation.

Medical Marijuana Issues in the Workplace

Conflicting medical marijuana laws require employers to balance two competing interests: their right and duty to establish and maintain a safe and productive workforce, and their obligation to accommodate, when reasonable, employees with disabilities. These laws raise questions about the implementation of drug-testing policies in the workplace, the scope of an employer's duty to accommodate its employees under state and federal laws, and compliance with federal statutes such as the Drug-Free Workplace Act.

As more people begin to use marijuana for medical reasons

there has been an increase of employees seeking protection in the workplace.

Because medical marijuana remains illegal under federal law, its use is not protected by the Americans with Disabilities Act (ADA), even in states that have legalized medicinal marijuana (*James v. City of Costa Mesa*, 2012; *Casias*, 2012; *Emerald Steel Fabricators v. BLI*, 2010). However, the underlying condition may still be a covered disability. Employers need to determine whether a reasonable accommodation may be required to accommodate a protected disability.

EA professionals are in a unique position to assist companies with handling these challenging cases in a way that simultaneously reduces risk to the employer by supporting a company's drug-free workplace policy, while helping employees who may have run afoul of company policy.

State Laws Vary

Many state laws, including those in Colorado, Hawaii, and New Mexico are silent on their effect upon the workplace. Laws in other states, such as Washington, Montana, Oregon, California, and Massachusetts,

make it clear that employers may prohibit use or possession of marijuana in the workplace, but otherwise are silent on an employer's rights and obligations toward medical marijuana users.

Laws in still other states, including Arizona, Connecticut, Delaware, Maine, Michigan, and Rhode Island, include provisions explicitly addressing the laws' impact on the workplace.

Courts that have examined the impact of such laws on the workplace have typically not found restrictions or obligations beyond those expressly set forth in the statute (*Casias v. Wal-Mart*, 2012; *Roe v. Teletech*, 2011; *Johnson v. Columbia Falls Alum.*, 2009; *Ross v. RagingWire Telecomms*, 2008). Future court cases will continue to sort out the multitude of employment law issues that lie ahead.

Employer Policies

There is no doubt that employers benefit from a drug-free workplace, since these policies and procedures help to ensure a safe and productive work environment. Moreover, businesses with federal contracts or that operate under the Department of Transportation must comply with drug testing regulations that prohibit employees from using marijuana. In every state that permits medicinal or recreational marijuana, employers may lawfully prohibit employees from using marijuana during work hours or on work premises.

Employers in Washington and Colorado have additional challenges when writing workplace policies since marijuana has been

legalized for recreational and non-medicinal use by adults. In Colorado, the amendment legalizing recreational marijuana maintains that, "*nothing in this section is intended to require an employer to permit or to accommodate the use . . . of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.*"

As a result, companies in Colorado are able to enact virtually any type of policy they feel is in their best interest with respect to marijuana use by employees. This includes zero-tolerance policies for employees who fail any test pursuant to their Drug-Free Workplace

Policy. These employees may be subject to disciplinary action or remediation, including mandatory referral to the company's EAP, suspension, or termination.

Many businesses in these states have not updated their policies to clarify their expectations about employees who use legalized and medical marijuana. Businesses in other states that have employees who live in or travel to Washington or Colorado, should also review and revise policies to reduce risk and litigation. If a company's drug and alcohol policy only discusses "illegal drugs" without making an affirmative

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Breakthrough Approval for Medical Marijuana Research

To date, only 6% of research projects have investigated the potential *benefits* of medical marijuana, rather than its detriments. It is impressive that there are even *that many* projects, since scientists who study marijuana’s potential medicinal properties have to wade through an enormous amount of federal red tape, and they’re not always successful. As a result, research into medical marijuana has historically been trapped in a bureaucratic catch 22 and has definitely not kept pace with state approval of medical marijuana.

The federal government’s position on marijuana, according to a 2011 document featured prominently on the U.S. Drug Enforcement Administration’s home page, says that: *“The clear weight of the currently available evidence supports [Schedule I] classification, including evidence that smoked marijuana has a high potential for abuse, has no accepted medicinal value in treatment in the United States, and evidence that there is a general lack of accepted safety for its use even under medical supervision... Specifically, smoked marijuana has not withstood the rigors of science – it is not medicine, and it is not safe.”*

Twenty states (plus the District of Columbia) allow cannabis use for certain medical conditions. Despite that fact, many scientists are reluctant to research the potential medical benefits of marijuana. The Controlled Substances Act of 1970 placed marijuana in the most restrictive use category, Schedule I, deeming it a drug with no medicinal value and high potential for abuse. To perform clinical research with marijuana, you need a DEA license, and you need to get your study approved by the Food and Drug Administration (FDA). When it comes to actually obtaining research-grade marijuana, though, you have to go through the National Institute on Drug

Abuse, a process that has proved problematic for some researchers determined to study the potential medical benefits of pot.

Landmark Shift in Policy

But now a researcher at the University of Arizona is a step closer to studying how medical marijuana affects veterans with post-traumatic stress disorder. Although there is a “mountain of anecdotal evidence” that marijuana helps with PTSD, there has been no controlled trial to test how marijuana suppresses the symptoms, including flashbacks, insomnia and anxiety, said Suzanne Sisley, the study’s lead researcher.

Her study titled, “Placebo-Controlled, Triple-Blind, Randomized Crossover Pilot Study of the Safety and Efficacy of Five Different Potencies of Smoked or Vaporized Marijuana in 50 Veterans with Chronic, Treatment-Resistant Posttraumatic Stress Disorder (PTSD)” will examine whether smoking or vaporizing marijuana can help reduce PTSD symptoms in 70 veterans with PTSD. Participants can be men or women aged 18 or older with a diagnosis of PTSD that has not improved after they have tried either medication or psychotherapy.

Sisley’s study could pave the way to the development of a prescription drug based on the entire marijuana plant. Her proposal has wound its way through the federal government for three years. In 2011, she received approval by the FDA. In March 2014 the study cleared a major hurdle when the Public Health Service, part of the U.S. Department of Health & Human Services, gave its approval, which is a historic shift in federal policy. ❖

– Tamara Cagney

statement regarding marijuana, employees may unintentionally violate zero-tolerance policies, and courts may not agree that the company has a right to pursue action if their policy is unclear. EAPs in these states are in a unique position to provide feedback to these companies.

What is Next?

Testing drivers for recent marijuana use has not been as simple as testing for alcohol. Preliminary research on the detection of THC in the breath of marijuana smokers may change that. According to the National Institute on Drug Abuse, a new breath test they have developed can detect in most cases whether a person used marijuana within the previous 30-150 minutes, depending on the frequency of use. This kind of testing could become a valuable tool for workplace or roadside marijuana testing (Himes, 2013).

Employee Assistance Professionals' Role

EA professionals understand that long-term marijuana use can lead to a diagnosable substance use disorder. It is estimated that 9% of marijuana users will become dependent. That number shoots up to about 1 in 6 in those who start using in their teens and rises to 25-50% among daily users (Anthony, et al, 1994).

Because marijuana impairs judgment, motor coordination and slows reaction time, a user has an increased chance of being involved in an accident. According to the National Highway Traffic Safety Administration, drugs other

than alcohol (e.g., marijuana and cocaine) are involved in roughly 18% of motor vehicle deaths. A recent survey found that nearly 7% of drivers, mostly under age 35, who were involved in accidents tested positive for THC; alcohol levels above the legal limit were found in 21% of such drivers (Richer et al, 2009).

Yet these statistics must be balanced by the medical issues that marijuana seems to treat diseases more efficiently than other alternatives (including prescription opioids), with fewer side effects and less risk of addiction and death. As more states move to legalize medical and recreational marijuana, employers will be challenged to balance the safety of many with the rights of employees. This is not a new challenge, and EA professionals should offer the experience and expertise gained in working with the effects of other impairment-causing substances to help employers design the best possible workplace policies and assist employees in understanding these policies. ♦

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Impairment: The Crux of the Issue for Employers

One could argue that the primary marijuana issue for employers, as has been the case for alcohol since the repeal of the 18th Amendment, involves suspected impairment resulting from marijuana use while at work. Employers in every state may lawfully prohibit employees from working while under the influence of *any* substance and may discipline employees who violate the law.

In some states, however, “under the influence” is more narrowly construed for marijuana use than for other controlled substances. For instance, employers in Arizona may need to establish impairment through behavioral symptoms in combination with drug test results to take lawful disciplinary action. In Illinois, employers must perform an investigation before disciplining a registered patient for being impaired at work.

Defining Impairment is Tricky

Whether correct or not, companies often model their policies for defining impairment based on laws that relate to driving. In Washington State, the passage of the “New Approach” to marijuana in 2012 introduced a new threshold limit for marijuana levels allowed while driving, much like the .08 limit did for alcohol. The threshold was established as 5.0 nanograms of delta-9 tetrahydrocannabinol per milliliter of a person’s blood. Prior to Sept. 28, 2013, law enforcement offices had the authority to obtain a blood test without a warrant if there was suspicion of recent marijuana use. However, since that time, in response to a U.S. Supreme Court case, a warrant is now required.

Under Colorado’s newest DUI laws, a motorist is also presumed to be under the influence of marijuana if the driver’s blood contains the same 5 ng/mL or more of active THC of blood while driving, mirroring the standard set in Washington. This differs from the treatment of a driver who has been accused of driving under the influence of alcohol, as 5 ng/mL is not considered a “per se” standard of impairment. This means that accused drivers in Colorado can claim that they were not impaired while driving.

Unlike urine testing, blood testing for marijuana checks for both parent drug and drug metabolites. Blood testing is more invasive and has other safety risks, which means employers are reluctant to use blood testing. Blood testing generally determines use within 1-24 hours. Occasional recreational users will test less than 5 ng within 1-3 hours after use while regular users may test positive for 1-2 days, lending credence to a claim of impairment associated with a positive test.

Urine tests for marijuana are based on detection of the metabolite of delta-9-THC but not the parent drug. Because metabolites are stored in fatty tissue and slowly excreted through urine they can be detected for days and weeks after stopping use. Again this leads to the criticism that positive urine tests and point-in-time impairment are not strongly correlated, especially among lighter marijuana users.

Where EAP comes in

From the EAP perspective, this is an area where advising companies on their policies may help reduce challenging situations in the future:

- If a company’s policy only discusses “impairment,” instead of the “presence of any federally illegal substance,” employees may challenge a positive test result – they had THC in their system, but whether they were impaired may be in question.
- If a company’s policy only addresses a THC level in urine testing, and an employee tests positive and they have a valid marijuana card, employees could argue again that they were not impaired as “the last time they used was yesterday,” and again, an EAP assessment after a positive test becomes extremely complex.
- Unless guidelines are extremely clear, if a company’s policy allows legal alcohol use at a company function but terminates for legal marijuana use, employee and employer are headed for extensive litigation. ❖

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