Clearing the Haze: Marijuana and CBD Coming to a Workplace Near You

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Outline

I. Overview: Opioid Crisis and Opioid Deaths
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Opioid Crisis and Marijuana

The Opioid Crisis: Is Marijuana A Better Option?

"States that have implemented medical marijuana laws have a 25 percent lower annual rate of opioid overdose deaths than states without medical marijuana laws."

Source: Marcus A Bachhuber, MD. *Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999-2010*, JAMA Internal Med. 2014, 174 (10): 1668-1673

Cannabis Use Has Nearly Doubled

- A recent study states that the number of persons reporting past year cannabis use nearly doubled between 2001-2013.
- 1 in 10 adults reported using cannabis in 2013.*
- SHRM reported in May, 2017, based on the annual Quest Diagnostic Drug Testing index, that failed workplace drug tests reached a 12 year high.**
- Positivity rates continue to increase as shown by the 2018 Quest Diagnostic Drug Testing index.
- Marijuana positivity increased four percent in the general U.S. workforce (2.5% in 2016 versus 2.6% in 2017) and nearly eight percent in the safety-sensitive workforce (0.78% versus 0.84%).***
- Massachusetts saw a 14% increased positivity rate for marijuana in the general workforce and 11% in the safety-sensitive workforce following implementation of the recreational marijuana law.

*See O'Neil, Maya et al., *Benefits and Harms of Plant-Based Cannabis for Posttraumatic Stress Disorder*, Annals of Internal Medicine (15 August 2017).

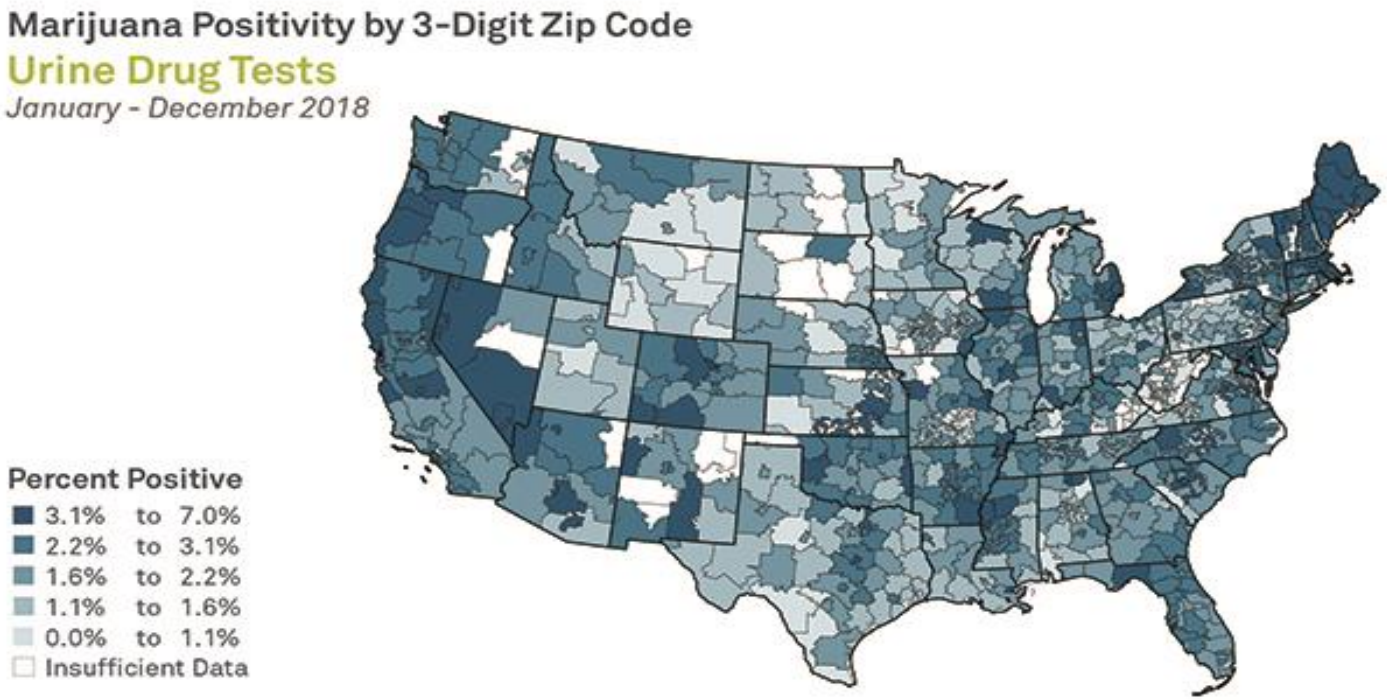
** Nagle-Piazza, Lisa. Failed Workplace Drug Tests Reach 12-year High. www.SHRM.org (May 24, 2017)

*** 2018 Quest Diagnostic Drug Testing Index https://www.questdiagnostics.com/home/physicians/health-trends/drug-testing

Quest Diagnostics 2019 Study: Positivity Rates Continue to Increase

- Positivity rates in the combined U.S. workforce increased nearly five percent in urine drug tests (4.2% in 2017 versus 4.4% in 2018), climbing to the highest level since 2004 (4.5%) and are now more than 25 percent higher than the thirty-year low of 3.5 percent recorded between 2010 and 2012.
- In the general U.S. workforce, marijuana positivity increased nearly eight percent in urine testing (2.6% in 2017 versus 2.8% in 2018) and almost 17 percent since 2014 (2.4%).
- For the federally mandated, safety-sensitive workforce, which utilizes only urine testing, marijuana positivity grew nearly five percent between 2017 (0.84%) and 2018 (0.88%) and nearly 24 percent since 2014 (0.71%).
- In the general U.S. workforce, the positivity rate for opiates in urine drug testing declined across all opiate categories. Among the general workforce screening for opiates (mostly codeine and morphine), positivity declined nearly 21 percent between 2017 and 2018 (0.39% versus 0.31%), the largest drop in three years and nearly 37 percent decrease since the peak in 2015 (0.49%).

Quest Diagnostics Marijuana Testing Positivity Map



"No One Has Died from A Marijuana Overdose"?

- Common argument made by supporters of medical marijuana use:
  - No one has died from a marijuana overdose.
- Is it true?
- How does cannabis use affect opioid use?
  - No good quality data for studies*
- Are there adverse health impacts?

*See Nugent, Shannon et al., *The Effects of Cannabis Among Adults with Chronic Pain and an Overview of General Harms*, Annals of Internal Medicine (15 August 2017).

AAA Study:

- Fatal road crashes doubled after Washington state legalized recreational marijuana.
  - "Prevalence of marijuana involvement in fatal crashes: Washington 2010-2014"" AAA Foundation for Public Safety (May 2016).

Reports of Children Ingesting Edible Marijuana

- In June 2017, two toddlers in Rhode Island were rushed to the hospital after ingesting a medical marijuana edible that was prescribed to a relative suffering from cancer.
- The two-year-old was taken to the ICU and “nearly died” according to the Department of Children, Youth and Families.
- The case was investigated as an accident

Adverse Mental Impact of Plant-Based Cannabis?

- Recent review of medical literature found “low- to moderate-strength evidence that cannabis use is associated with an increased risk for psychotic symptoms, psychosis, mania and -- in active users -- short term cognitive dysfunction” in patients with PTSD.*
- However, the body of research literature is limited.
- Small sample sizes, lack of adjustment for confounders, and paucity of studies with non-cannabis using control groups.

*See O’Neil, Maya et al., *Benefits and Harms of Plant-Based Cannabis for PTSD*, Ann. Internal Medicine, (15 Aug. 2017).

Another Recent Medical Review

- Another recent review of medical literature raised concerns about increased risk of adverse mental health effects on patients using medical marijuana for chronic pain.
- Although data was insufficient to characterize the magnitude of risk or in whom the risk is highest, the review stated that cannabis use has potentially serious mental health and adverse cognitive effects.
- Noted a “consistent association” between cannabis use and development of psychotic symptoms, as well as short term deleterious effects on cognition in active users.*

*Nugent, Shannon et al., *The Effects of Cannabis Among Adults with Chronic Pain and an Overview of General Harms*, Ann. Internal Med. (15 August 2017).

Potency of Marijuana Varies

- Potency depends on the amount of THC, which is the main compound responsible for marijuana's psychoactive effects.
- A study of marijuana seized by the U.S. Drug Enforcement Administration found the potency of marijuana has increased from 4% THC in 1995 to 12% in 2014.
- Another study shows THC potency increased to 17.1% in 2017.
- Increase of more than 300% from 1995 to 2017.
- High concentrations of THC can negatively effect body (Ex. Low concentration THC increases blood flow, while high concentration THC can produce massive vasoconstriction.

Source: NPR.org "Highly Potent Weed Has Swept the Market, Raising Concerns About Health Risks.

Increase in Emergency Room Visits

- Recent study of Emergency Room visits at University of Colorado Hospital from 2012 to 2016 found more than 3-fold increase in cannabis-associated ED visits over this period.
- 10.7% of ED visits were attributable to edible cannabis, (.32% of total cannabis sales in Colorado in kilograms of THC were for edible products)
- Rate of hospitalization after the ED visit was higher (32.9% vs. 18.9%) and the ED stay was longer (3 vs. 2 hours) for inhalable cannabis than for edible cannabis.
- See Volkow & Baler, "Emergency Department Visits From Edible Versus Inhalable Cannabis", Ann Intern Med. 2019;170(8):569-570

Illness By Route of Exposure

- Another study at University of Colorado Hospital compared adult emergency department (ED) visits related to edible and inhaled cannabis exposure from 2012 to 2016.
- There were 9973 visits with an ICD-9-CM or ICD-10-CM code for cannabis use.
- Of these, 2567 (25.7%) visits were at least partially attributable to cannabis, and 238 of those (9.3%) were related to edible cannabis.
- Visits attributable to inhaled cannabis were more likely to be for cannabinoid hyperemesis syndrome (18.0% vs. 8.4%).
- Visits attributable to edible cannabis were more likely to be due to acute psychiatric symptoms (18.0% vs. 10.9%), intoxication (48% vs. 28%), and cardiovascular symptoms (8.0% vs. 3.1%).
- See Monte et. al., "Acute Illness Associated With Cannabis Use, by Route of Exposure: An Observational Study", Ann Intern Med. 2019;170(8):531-537.

2018 Farm Bill

- 2018 Farm Bill legalized hemp (cannot contain more than 0.3 percent of THC)
- Section 12619 of the 2018 Farm Bill amends the Controlled Substances Act in two ways:
  1. It removes hemp from the definition of marijuana in section 102(16) of the Controlled Substances Act, 21 U.S.C. § 802(16).
  2. In listing THC as a Schedule I controlled substance in section 202(c) of the Controlled Substances Act, 21 U.S.C. § 812(c), it creates an exception for tetrahydrocannabinols in hemp.
- Hemp has been illegal in the U.S. since the 1937 Marihuana Tax Act and formally made illegal in 1970 under the Controlled Substances Act.
- 2014 Farm Bill allowed for hemp to be used for research purposes.
- 2018 Farm Bill allows broad hemp cultivation (not just for research studies).
- Allows the transfer of hemp-derived products across state lines for commercial or other purposes.
- Puts no restrictions on the sale, transport, or possession of hemp-derived products, so long as those items are produced in a manner consistent with the law.

States Must Have Plan to Regulate Hemp

- Section 10113 of the Farm Bill requires each state to devise a plan that must be submitted to the Secretary of USDA.
- Secretary of USDA must approve state's plan before it becomes effective.
- In states opting not to devise a hemp regulatory program, USDA will construct a regulatory program under which hemp cultivators in those states must apply for licenses and comply with a federally-run program.
- Highly regulated crop—can't grow without a license.

CBD under the 2018 Farm Bill

- CBD was not broadly legalized – only hemp derived products with less than .3% THC were legalized.
- Under Farm Bill, CBD is legal only if the hemp from which it is derived is produced in a manner consistent with the Farm Bill, associated federal regulations (e.g. FDA, DEA), associated state regulations, and by a licensed grower.
- States can't prohibit interstate commerce of hemp under Farm Bill.
- Section 297B of Farm Bill explicitly states that it does not preempt state law, meaning states can still prohibit CBD.
  - NO PREEMPTION.—Nothing in this subsection preempts or limits any law of a State or Indian tribe that—(i) regulates the production of hemp; and (ii) is more stringent than this subtitle.

California Food and Drug FAQ

- California Department of Public Health FAQ clarifies:
  - "The use of industrial hemp as the source of CBD to be added to food products is prohibited. Until the FDA rules that industrial hemp-derived CBD oil and CBD products can be used as a food or California makes a determination that they are safe to use for human and animal consumption, CBD products are not an approved food, food ingredient, food additive, or dietary supplement."

CBD Confusion

- Hester Burkhalter, a 69 year old grandmother, was arrested at Disney World after security guards at the bag check entrance found CBD in her purse.
- She was using CBD to treat arthritis.
- CBD is legal in North Carolina, where she lived
- Still illegal under Florida law.

CBD at Disney World

- Orange County Sherriff Officer was called by Disney security.
- Officer asked whether product contained THC. Ms. Burkhalter refused to answer.
- Officer tested the bottle and result was presumptive positive for THC.
- Charges were later dropped.
- Ms. Burkhalter has hired an attorney.

CBD and Drug Testing

- An estimated 64 million people have tried CBD in the past 24 months, according to a January 2019 nationally representative survey by Consumer Reports of more than 4,000 adult Americans, using it for pain, insomnia, anxiety, and other health problems.
- CBD Oils may result in a positive Drug Test for marijuana; a 2017 study in JAMA found that 18 of 84 CBD products, all purchased online, had THC levels possibly high enough to cause intoxication or impairment.
- Many consumers are unaware there is even a possibility of THC in the CBD products they buy.
- "If you aren't regulated and you don't manufacture under strict standards for testing, we are seeing that there are people coming out with a lot more marijuana THC in it than what people thought," University of Illinois at Chicago toxicology expert Frank Paloucek told the ABC affiliate in Chicago.

Marijuana Prohibited for Horses?

- The United States Equestrian Federation, the National governing body of equestrian sports, announced that horses testing positive for CBD will be in violation of USEF drug rules.
- Owners and trainers of horses testing positive for CBD are subject to penalties.
- USEF states:
  - “CBD, both natural and synthetic forms, are likely to effect the performance of a horse due to its reported anxiolytic effects.”

MA Cannabis Control Commission

- Mission Statement:
  - The mission of the Cannabis Control Commission is to honor the will of the voters of Massachusetts by safely, equitably and effectively implementing and administering the laws enabling access to medical and adult use marijuana in the Commonwealth.
  - The Commission will foster the creation of a safely regulated industry that will create entrepreneurial and employment opportunities and incremental tax revenues in and to communities across the state and which will be a best practice model for other states.
  - The industry will be characterized by participation by small and larger participants and with full and robust participation by minorities, women and veterans.
  - We will develop policies and procedures to encourage and enable full participation in the marijuana industry by people from communities that have previously been disproportionately harmed by marijuana prohibition and enforcement and positively impact those communities.

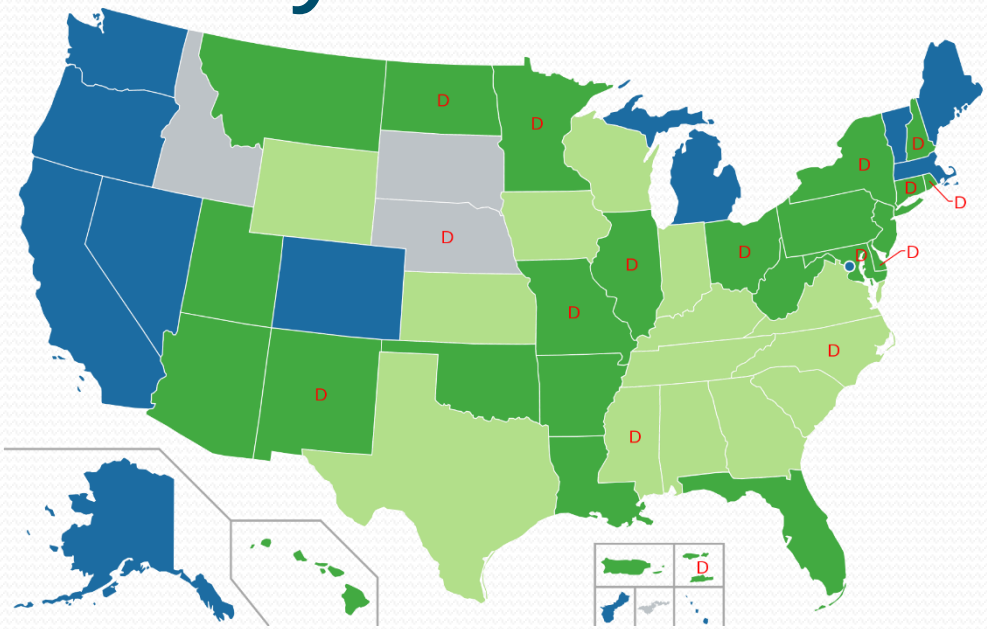
Cannabis Control Commission

- Enhance and ensure public health and safety by:
  - Issuing licenses to marijuana businesses;
  - Developing and enforcing effective regulations;
  - Developing and executing a program of continuing public education;
  - Conducting and contributing to research on marijuana related topics; and
  - Using surplus funds to help address issues in these areas.

Legal Status of Recreational and Medical Marijuana Use

ACEC/MA HR, Safety and Risk Management Forums
June 19, 2019

Thirty-Three States and DC



Medical & Recreational Marijuana

Alaska	Michigan
California	Nevada
Colorado	Oregon
D.C	Washington
Maine	Vermont
Massachusetts	

Medical Marijuana

Arizona	Montana	Utah
Arkansas	New Hampshire	West Virginia
Connecticut	New Jersey	
Delaware	New Mexico	
Florida	New York	
Hawaii	North Dakota	
Illinois	Ohio	
Louisiana	Oklahoma	
Maryland	Pennsylvania	
Minnesota	Rhode Island	
Missouri		

Limited Medical Marijuana*

Alabama	Mississippi	Wisconsin
Georgia	North Carolina	Wyoming
Indiana	South Carolina	
Iowa	Tennessee	
Kansas	Texas	
Kentucky	Virginia	

* Limited medical marijuana includes cannabis extracts that are high in cannabidiol and low in tetrahydrocannabinol.

Impact on Drug-Free Workplace, Zero Tolerance Policies and Drug Testing

Is Use Protected Under MA Law?

- "Any [patient or caregiver] meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions…[and] shall not be subject to … civil penalty." (2012 Mass. Acts c. 369, Sec. 4)
  - Provision repealed by Section 47 of Chapter 55 of the Acts of 2017 which incorporated medical and recreational marijuana use under one law.
- (a) Notwithstanding any other general or special law to the contrary, except as otherwise provided in this chapter, a person 21 years of age or older shall not be arrested, prosecuted, penalized, sanctioned or disqualified under the laws of the commonwealth in any manner, or denied any right or privilege and shall not be subject to seizure or forfeiture of assets for: (1) possessing, using, purchasing, processing or manufacturing 1 ounce or less of marijuana, except that not more than 5 grams of marijuana may be in the form of marijuana concentrate … (2016 Mass. Acts c. 334, Sec. 7)
  - Current law.

Not Required to Accommodate Use in the Workplace

- "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." (2016 Mass. Acts c. 334, Sec. 2)
- But what about use outside the workplace?

Accommodate Possession?

- Brown v. Woods Mullen Shelter/Boston Public Health Commission, Suffolk Super. 16-805-C (Aug. 28, 2017)
- A homeless man was rejected from a shelter under a zero tolerance policy due to possession of medical marijuana.
- Citing *Barbuto*, the Superior Court held that the man could state a viable claim under the Massachusetts Civil Righs Act for interference with rights secured by the laws of the Commonwealth of Massachusetts.
- While “use” need not be permitted, “possession” cannot be prohibited under the Medical Marijuana Law.

MA Legislature Bills to Protect Marijuana Users

- S.1119: An Act relative to employment protections for medical marijuana patients
- "Notwithstanding any general or special law to the contrary, nothing in this chapter shall be construed to allow a person to discharge or cause to be discharged or to otherwise discipline or in any manner discriminate against any employee or candidate for employment for the reason that said employee or candidate for employment is a user of medical marijuana outside of the workplace."
- Referred to Committee on Cannabis Policy 04/04/19

Bill to Protect Recreational Marijuana Users

- H.3537: An Act relative to employment discrimination protections for legal cannabis
- Would amend M.G.L. c. 151B (MA Law Against Discrimination) to make the following an illegal practice:
  - For an employer by himself or his agent, because of the presence of tetrahydrocannabinol or marijuana metabolite in the blood, urine or other body sample provided by the individual, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment, unless based upon probable cause to believe that the person is impaired at work by reason of cannabis consumption and has caused or is at imminent risk to cause harm to a fellow employee, customer or the public due to such impairment.
- Bill would also amend Section 1B of Chapter 214 of the General Laws (MA Right to Privacy Law):
  - Such actionable interference shall include without limitation, an employer's refusal to hire or discharge of an existing employee, because of the presence of tetrahydrocannabinol or marijuana metabolite in the blood, urine or other body sample provided by the individual, unless based upon objectively demonstrable probable cause to believe that the person is impaired at work by reason of cannabis consumption and has caused or is at imminent risk to cause harm to a fellow employee, customer or the public due to such impairment.
- Referred to the Committee on Cannabis Policy on 01/22/19

An Act to Eliminate Workplace Drug Testing for Marijuana

- H.3751: An Act to eliminate workplace drug testing for marijuana
- Would amend M.G.L. c. 151B:
  - "no employer or agent of an employer may directly or indirectly solicit or require an employee or prospective employee to submit to testing for the presence of marijuana in his or her system as a condition of employment"
  - Includes exception for federal contractors and DOT safety sensitive testing
  - Referred to Committee on Cannabis Policy 05/13/19
- The Law in NYC: New York City recently passed a law that, starting May 10, 2020, will bar many employers from testing prospective employees for marijuana.

Current Law and Drug Testing

- Employers may drug test, penalize or terminate employees with positive marijuana tests (except medical marijuana patients) if the testing complies with the employee's right to privacy under M.G.L. c. 214, Sec 1B See Webster v. Motorola, 418 Mass. 425 (1994).
- But see the provision in 2016 Mass. Acts c. 334, Sec. 7 protecting all marijuana users from being "penalized, sanctioned or disqualified under the laws of the Commonwealth in any manner, or denied any right or privilege."
- It is permissible to test all applicants, but should you?
- After employed, testing should be limited to safety sensitive positions or upon reasonable suspicion (unless federally mandated testing).
- Follow regulatory testing requirements (e.g. Federal DOT)

Testing of Medical Marijuana Users

- Medical marijuana users have greater protection under Massachusetts law after the SJC decided Barbuto v. Advantage Sales & Mktg., LLC, 477 Mass. 456 (2017).
- The Court in Barbuto analyzed the provision in the original medical marijuana law:
  - "Any [patient or caregiver] meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions…[and] shall not be subject to … civil penalty." (2012 Mass. Acts c. 369, Sec. 4)"
- Under 2016 Mass. Acts c. 334, Sec. 7, this protection extends to all users of marijuana.
- In Barbuto, the court found that "A handicapped employee in Massachusetts has a statutory "right or privilege" to reasonable accommodation under M.G.L. c.151B, § 4.
- No MA court has examined what this provision means for recreational marijuana users.

Barbuto Accommodation

- Under Barbuto, a medical marijuana user cannot be terminated for a positive result unless the employer can show that the proposed accommodation imposes an undue burden on the employer.
- Employer must engage in a meaningful interactive dialogue to determine if there is a reasonable accommodation that would allow the employee to perform the job.
- Employer must have proof that the proposed accommodation would impose an undue burden before the employee can be terminated.

Testing from Practical Perspective

- Recreational use of marijuana in MA is increasing with retail shops opening.
- Legislation is already pending to protect recreational users from termination.
- Consider eliminating marijuana testing for non safety sensitive positions.
- Treat marijuana like alcohol – Discipline for impairment, job performance.
- Tailor drug testing policies accordingly.

Impairment…Difficult to Determine

Difficult to Determine Impairment

- Primary tool for detecting marijuana use is blood, urine, or hair test.
- Not like alcohol or other drug testing, however, because difficult to determine relationship between test result and impairment finding at time of testing.
- Alcohol testing can accurately measure impairment because eliminated from body quickly and impairment has been scientifically proven at blood level of .8 percent.
- Marijuana metabolites remain in blood for weeks, while psychoactive effects last two hours or less.

What Does Testing Show?

- Testing for marijuana would only indicate use in the past month, or more, and provides no reliable basis for concluding the individual was impaired at the time of testing.
- For employers, testing employees for marijuana will not prove impairment at work, improve work performance or show a worker's risk of harm to himself or others.
- Employers should consider other contemporaneous evidence of employee behavior to corroborate impairment.

The Future of Marijuana Testing

- DriveAble has developed a Cognitive Assessment Tool (DCAT) that relies on neuropsychological testing to assess reaction time, field of vision, and executive function using a computer application operated by the testee.
- DCAT is promoted to determine impairment at the time of testing.
- Testing only determines impairment, not the cause of the impairment (ex. Lack of sleep, alcohol, prescription meds., etc.)
- See https://driveable.com/index.php/products/dcat

Marijuana Breathalyzer?

- Hound Labs, a California startup, has developed the world's first marijuana breathalyzer.
- Completed second successful clinical trial in February 2019.
- Hound Labs claims the trial shows THC can be detected in the breath for two to three hours after inhaling.
- Breathalyzer would show recent marijuana use.
- There is no set impairment level for marijuana use, however, as there is for alcohol.
- Some states have adopted a concentration level for per se liability for impaired driving without concluding such a level irrefutably establishes impairment.

  https://www.ghsa.org/statelaws/issues/drug%20impaired%20driving

Workers Compensation

Reported Workers Comp. Decisions

- A handful of states have issued decisions addressing medical marijuana in the Workers Comp. context:
  - California: Two reported, WCAB not uphold reimbursement
  - Connecticut: Petrini, 6021 CRB-7-15-7; 2016 WL 6659149
  - Iowa: McKinney, 2002 WL 32125774
  - Maine: Seven reported cases; Mixed results fact specific
  - Massachusetts: St. Pierre v. T.E. Greenwood Construction, Board No. 014647-12 (April 11, 2018); Wright v. Pioneer Valley, Board No. 04387-15 (February 14, 2019)
  - New Jersey: Watson and 84 Lumber (unpublished)
  - New Hampshire: Nutting v. Benchmark Elect (not reasonably necessary), Appeal of Andrew Panaggio
  - New Mexico (now statutory reimbursement): three reported cases
  - Vermont: Hall v. Safelite Group, Inc. – not reimbursable

Connecticut*: Petrini*

- *Petrini v. Marcus Dairy, Inc.*, 6021 CRB-7-15-7 (May 12, 2016)
- Compensation Review Board found medical marijuana to be “reasonable and necessary” medical treatment, and therefore compensable
- The Review Board noted that while the legislation specifically excluded health insurance coverage for the palliative use of marijuana, the statute was silent with respect to workers’ compensation insurance.

Maine

- *Bourgoin v. Twin Rivers Paper Co*., WCB No. 89-01-36-55 (3/16/15): ALJ found marijuana was compensable. In December 2015, oral argument before Workers' Compensation Board Appellate Division.
- On August 23, 2016: Appellate Division upheld ALJ. "Medical marijuana was reasonable, proper and necessary medical treatment in this case." *Bourgoin v. Twin Rivers Paper Co*., WCB App. Div. 15-0022, Decision No. 16-26.

Bourgoin v. Twin Rivers Paper Co.

- The Bourgoin case was appealed to the Maine Supreme Court, which issued a decision on June 14, 2018.
- The Maine Supreme Court reversed the appellate court's decision.
- The Court found the Workers Compensation Board order was preempted because it forced Twin Rivers to violate federal law.
- Because the employer would be aiding and abetting Bourgoin's possession, the federal Controlled Substances Act preempts the MMUMA.

Bourgoin: Conflict with Federal Law

- "Compliance with both [the WCB order and federal law] is an impossibility. Were Twin Rivers to comply with the hearing officer's order and knowingly reimburse Bourgoin for the cost of the medical marijuana . . . , Twin Rivers would necessarily engage in conduct made criminal by the CSA because Twin Rivers would be aiding and abetting Bourgoin—in his purchase, possession, and use of marijuana—by acting with *knowledge* that it was subsidizing Bourgoin's purchase of marijuana. . . . Conversely, if Twin Rivers complied with the CSA by not reimbursing Bourgoin for the costs of medical marijuana, Twin Rivers would necessarily violate the [WCB order]."

New Hampshire

- Appeal of Andrew Panaggio, No. 2017-0469 (NH Supreme Court, 03/07/19)
- RSA 126-X:3, III states that "[n]othing in this chapter shall be construed to require . . . [a]ny health insurance provider, health care plan, or medical assistance program to be liable for any claim for reimbursement for the therapeutic use of cannabis."
- "Although the statute does not create a right to reimbursement for the cost of medical marijuana nor require any of the listed entities to participate in the therapeutic cannabis program, neither does it bar any of those entities from providing reimbursement."

Panaggio

- "Importantly, the statute provides that "[a] qualifying patient shall not be. . . denied any right or privilege for the therapeutic use of cannabis in accordance with this chapter." RSA 126-X:2, I (2015)."
- "To read RSA 126-X:2, III as barring reimbursement of an employee with a workplace injury for his reasonable and necessary medical care is to ignore this plain statutory language."
- "Pursuant to the Workers' Compensation Law, an employer's insurance carrier "shall furnish or cause to be furnished to an injured employee reasonable medical . . . care . . . for such period as the nature of the injury may require." RSA 281-A:23, I.
- "Thus, the effect of denying reimbursement of Panaggio under these circumstances is to deny him his right to medical care deemed reasonable under the Workers' Compensation Law."

Panaggio

- “Accordingly, because the board found that Panaggio’s use of medical marijuana is reasonable, medically necessary, and causally related to his work injury, we hold that the board erred when it determined that the insurance carrier is prohibited from reimbursing Panaggio for the cost of purchasing medical marijuana.”
- The Court noted that the CAB failed to analyze whether the insurance carrier’s compliance with an order to reimburse Panaggio for medical marijuana obtained in accordance with state law would violate any federal statute.
- “However, in concluding that the insurance carrier “is not able to provide medical marijuana,” the board simply stated that “possession of marijuana is still a federal crime” and that RSA 126-X:3, III “is clearly a provision to protect [the carrier] from being subject to criminal prosecution under federal law.” The board did not cite any legal authority for its conclusion, much less identify a federal statute that, under the circumstances of this case, would expose the insurance carrier to criminal prosecution; thus, we are left to speculate.”
- The Court remanded for a determination of the issue.

Vermont

- Hall v. Safelite Group, Inc., Opinion No. 06-18WC (01/02/18)
- Hall, a New Hampshire resident, worked at Safelite's Brattleboro, Vermont location as a windshield installer.
- On January 8, 2014 he injured his left elbow while removing a windshield from a glass rack.
- Defendant accepted the injury, initially diagnosed as a left elbow strain, as compensable and began paying workers'compensation benefits accordingly.
- Hall is diagnosed with Complex Regional Pain Syndrome (CRPS)

Hall v. Safelite

- Hall tried numerous treatment options including rest, anti-inflammatories, physical and occupational therapy, nerve blocks, non-narcotic and opioid medications, compounded topical ointments and scrambler therapy.
- Only relief was from marijuana.
- Hall's doctor issued the medical certification required under New Hampshire's Therapeutic Cannabis Program.
- Hall received NH certification card in October 2016.
- ALJ finds use of medical marijuana to be medically appropriate and necessary and therefore qualifies as "reasonable" treatment under §640(a).

Hall v. Safelite: Reimbursement Required?

- Vermont's medical marijuana statute states:
  - (b) This chapter shall not be construed to require that coverage or reimbursement for the use of marijuana for symptom relief be provided by:
  - (1) a health insurer as defined by section 9402 of this title, or any insurance company regulated under Title 8;
  - (2) Medicaid or any other public health care assistance program;
  - (3) an employer; or
  - (4) for purposes of workers' compensation, an employer as defined in 21 V.S.A. §601(3).
- 18 V.S.A. §4474c(b)

Hall v. Safelite: Employer Cannot be Compelled to Reimburse Medical Marijuana Expenses

- "I interpret the language of §4474c(b) to mean just what it says. The fact that medical marijuana can now be legally prescribed, distributed and used means that an insurer who wants to cover its costs on behalf of a registered patient can do so without violating Vermont law. However, given the uncertainties engendered by the drug's continued illegality under federal law, it cannot be compelled to do so."
- "It seems inevitable that state and federal policy regarding legalization will eventually coalesce. When that occurs, the uncertainty that now exists as to insurance coverage for medical marijuana will likely be resolved. Until then, and particularly given the shadow cast by the federal Justice Department's most recent enforcement guidance, the specific language of 18 V.S.A. §4474c(b)(4) permits only one result."
- "Notwithstanding that Claimant's use of the drug is medically appropriate, necessary and therefore reasonable under 21 V.S.A. §640(a), I cannot compel Defendant to reimburse him for his medical marijuana purchases."

Massachusetts

- St. Pierre v. T.E. Greenwood Construction, Board No. 014647-12 (April 11, 2018)
- Case was on appeal by Trust Fund to the Board of Industrial Accidents
- Workers' Compensation Trust Fund appealed a hearing decision ordering it to reimburse the employee, a Vermont resident, for the costs associated with medical marijuana, authorized and obtained in Vermont to treat the employee's chronic pain and post-traumatic stress disorder causally related to his May 2, 2002, Massachusetts industrial injury.
- DIA Reversed ALJ.

St. Pierre: MA MMA Applies to MA Residents Only

- The Trust Fund argued that the Medical Marijuana Act is specifically limited to patients, physicians and dispensaries located in Massachusetts.
- St. Pierre, his physician and dispensary were all located in Vermont.
- The DIA held that the Massachusetts Medical Marijuana Act and its statutorily prescribed regulations are specifically limited to "qualifying patients" who are Massachusetts residents with registration cards issued by the Massachusetts Department of Public Health, and to physicians and dispensaries located in Massachusetts.

Wright v. Pioneer Valley

- DIA holds that: “where an employee seeks an order from an Administrative Law Judge at the Department of Industrial Accidents to compel a workers’ compensation insurer to pay for the employee’s medical marijuana, a positive conflict exists between the federal and state laws, such that the CSA preempts the Massachusetts Act as applied in these circumstances.”
- Under theory of conflict/obstacle preemption, federal law takes precedence where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Obstacles to Comp. Coverage

- State law may expressly provide that "health insurers" do not have to reimburse for medical marijuana.
- No FDA approval.
- No large scale Human Trials to prove "efficacy."
- Currently, not included in any workers compensation treatment guidelines, such as the Official Disability Guidelines (ODG) and the American College of Occupational & Environmental Medicine (ACOEM) Practice Guidelines.

Other Issues for Coverage…

- Is it "reasonable and necessary"?
- Is it a "Prescription" or "Service"?
- What is the reimbursement rate?
- How to reimburse – if not thru a bank to dispensary because Schedule I.

State Law Eligibility/Cross Border

- Does the injured worker have a "debilitating condition" under the state's medical marijuana statute?
- Which state's law applies if the employee lives and works in different states?

Returning the Injured Worker to Employment?

- Until recently, terminated employees had not fared well in the courts when employer had a zero tolerance drug policy.
- Even in New Mexico….*Garcia v. Tractor Supply Company*, No. CV 15-00735 (D. N.M. 2016)(upheld employee termination for positive drug test; no duty of employer to accommodate).
- Federal ADA: Employer has no duty to accommodate.
- State law?
  - Most states have not required workplace accommodation for off duty use but. . . is this changing (at least in CT, MA and RI)?
  - Private right of action under state legalization law? Off Duty Conduct? Privacy laws? Drug testing law (Ct., ME., RI, VT, common law)?

THE TIDES ARE CHANGING IN THE STATE COURTS

Connecticut: Federal Court Holds PUMA not Preempted by Federal Law in August 2017

Noffsinger v. SCC Niantic Operating Co., 2017 WL 3401260 (D. Conn. Aug. 8, 2017)

- Federal court held that federal law does not preempt Connecticut law which prohibits employers from firing or refusing to hire someone who uses marijuana for medicinal purposes.
- 2012 Connecticut enacted Palliative Use of Marijuana Act (PUMA).
- PUMA includes a provision that explicitly prohibits discrimination against qualifying patients and primary caregivers by schools, landlords, and employers. Conn. Gen. Stat. § 21a-408p(b).

Noffsinger....

- Plaintiff is a recreational therapist.
- Recruited by Bride Brook, a nursing facility.
- Plaintiff was offered a position.
- Plaintiff accepted the position and was told to give her current employer notice.
- Plaintiff disclosed PTSD disability and use of prescription marijuana.
- Rescinded job offer after positive drug test (Marinol).

Noffsinger: Three Counts

- Violation of PUMA's anti-discrimination provision.
- Common law wrongful rescission of job offer in violation of public policy.
- Negligent infliction of emotional distress.

Noffsinger Court Held:

- Federal CSA does not preempt PUMA
- Federal ADA does not preempt PUMA
- PUMA does not authorize use of medical marijuana in the workplace
- The State is not precluded from prohibiting adverse action against employees who use illegal drugs outside the workplace (and whose drug use does not affect performance).
- Zero tolerance drug policy is not a “qualification standard” unless job-performance/behavior related.

Noffsinger : Court's Findings

- PUMA creates a private right of action.
- No right of action for wrongful rescission of job offer.
- Plaintiff can state a claim for negligent infliction of emotional distress related to rescission of job offer.

Noffsinger Court Grants Summary Judgment to Plaintiff

- On September 5, 2018, the District of Connecticut granted summary judgment to Noffsinger.
- PUMA's anti-discrimination provision includes an exception when "required by federal law or required to obtain federal funding"
- Bride Brook argued that the federal Drug-Free Workplace Act (DFWA) barred it from hiring Noffsinger, and thus fell within PUMA's anti-discrimination exception.
- The Court rejected such argument stating: "The DFWA does not require drug testing. . . . Nor does the DFWA prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical marijuana outside the workplace in accordance with a program approved by state law."

Noffsinger Summary Judgment

- Bride Brook argued that by hiring Noffsinger, it would violate the Federal False Claims Act because its employment of someone who uses medical marijuana in violation of federal law would amount to a defrauding of the federal government.
- The Court rejected such argument: “Because there is no federal law that bars defendant from hiring plaintiff on account of her medicinal use of marijuana outside work hours, it would not constitute fraud on the federal government for defendant to hire plaintiff.”

Noffsinger Summary Judgment

- Bride Brook also argued that it did not violate PUMA because it did not discriminate against Noffsinger based on her *status* as a medical marijuana user; rather, it had relied on the positive drug test result.
- The Court rejected such argument stating: “the language and purpose of the statute make clear that it protects employees from discrimination based on their use of medical marijuana pursuant to their qualifying status under PUMA. Under defendant’s restrictive interpretation of the statute, employers would be free to fire status-qualifying patients based on their actual use of medical marijuana—the very purpose for which a patient has sought and obtained a qualifying status.”
- “By negative implication, this language makes clear that PUMA protects a qualifying patient for the use of medical marijuana outside working hours and in the absence of any influence during working hours.”

Barbuto: Mass. Highest Court Weighs In On Reasonable Accommodation Analysis
July 2017

Barbuto v. Advantage Sales & Marketing, LLC, 477 Mass. 456 (2017)

- In August, 2016, Judge Robert Tochka granted the employer's motion to dismiss 5 of 6 counts in first Massachusetts case involving an employee's termination for off duty use of medical marijuana.
- Plaintiff alleged six counts:
  - Three counts for violation of the Massachusetts Anti-discrimination statute M.G.L. c. 151B, failing to provide reasonable accommodation;
  - Violation of the Medical Marijuana law under 105 C.M.R. 725 and Section 369 of the 2012 Acts;
  - Violation of public policy; and
  - Invasion of privacy.

Barbuto: A favorable plaintiff

- Christina Barbuto was recruited by Advantage Sales.
- Ms. Barbuto was offered the job, and later informed she would need to take a drug test.
- Ms. Barbuto disclosed to Advantage Sales that she would test positive for marijuana because she used marijuana off duty in small quantities, two to three times per week, to treat Crohn's Disease.
- The marijuana was "prescribed" by Ms. Barbuto's physician for Crohn's disease and her use was in compliance with Massachusetts law.

Barbuto Superior Ct. Decision

- The Suffolk Superior Court dismissed all counts, *except for* invasion of privacy re drug test under M.G.L. c. 214, §1B.
- The Plaintiff appealed to the Massachusetts Court of Appeals.
- The Plaintiff retained Vincente Sederberg, known as “the marijuana law firm”.
- Massachusetts Supreme Judicial Court took the case on direct appellate review, and requested amicus briefs on two issues.

SJC Asked for Amicus Questions

- Amicus Questions:
  - (1) whether termination of an employee's employment based on her lawful use of medical marijuana outside the workplace violates the MGL c. 151B or is otherwise wrongful; and
  - (2) whether the medical marijuana act and its regulations create a private right of action. (MCAD and Mass. NELA filing amicus)
- Oral Argument March 8, 2017; decision July 17, 2017

MCAD Position:

- In its Amicus Brief, the MCAD took the position that the employer MUST engage in an interactive dialogue re reasonable accommodation. *See also* NY and Nevada.
- Employer cannot simply terminate the employee for violation of the Zero Tolerance drug testing policy (exceptions).
- Need to consider underlying medical condition.
- Use the interactive process to determine if a reasonable accommodation may be made.
- Employer burden of proving "undue burden."
- Will need medical opinion re ability to safely perform job duties.
- On site use? Impairment?

SJC Holding in *Barbuto*:

- Plaintiff may seek a remedy through a claim of state law handicap discrimination for off-site medical marijuana use.
- No private right of action under state medical marijuana law.
- No wrongful termination claim for violation of public policy.

The “Interactive Dialogue”

- Must use interactive process to determine if equally effective medical alternatives exist which would not violate employer policy.

- If no equally effective alternative exists, the employer bears the burden of proving “undue hardship”.

Undue Hardship, Judicial Guidance

- Employer might prove that continued use would impair the employee's performance, or pose an "unacceptably significant" risk to the public, the employee, or others.

- Alternatively, the employer may prove use of medical marijuana would cause it to violate statutory or contractual obligations. (e.g., DOT drug testing rules)

Early Progeny of *Barbuto*

- Brown v. Woods Mullen Shelter/Boston Public Health Commission, Suffolk Super. 16-805-C (Aug. 28, 2017)
- A homeless man was rejected from a shelter under a zero tolerance policy due to possession of medical marijuana.
- Citing *Barbuto*, the Superior Court held that the man could state a viable claim under the Massachusetts Civil Righs Act for interference with rights secured by the laws of the Commonwealth of Massachusetts.
- While “use” need not be permitted, “possession” cannot be prohibited under the Medical Marijuana Law.

Commonwealth v. Richardson

- In a recent criminal case, the Supreme Judicial Court urged the state legislature to clarify the law regarding home cultivation of medical marijuana.
- Currently, MA medical marijuana law lets patients grow enough marijuana to yield a 60-day supply for the person's personal, medical use.
- Must show hardship to obtain authorization for home cultivation.
- When Richardson was arrested, there were no dispensaries open yet. At the time, every registered person was allowed home cultivation.
- A 60-day supply is defined as enough to provide 10 ounces of usable marijuana.
- Joshua Richardson is a medical marijuana patient who was arrested after the police found 22 marijuana plants growing in his basement.

Richardson: Vagueness of Home Cultivation Law

- Prosecutors alleged Richardson was growing more than the legal limit with an intent to distribute.
- Richardson argued the law is unconstitutionally vague.
- The Court declined to rule on the vagueness argument and made its decision on other grounds.
- The Court, however, cautioned the legislature that the statute is vague.
- The Court stated that of the 15 states that allow home cultivation, MA is the only state that defines “its limit solely in terms of supply per period.”
- All other states use a plant based limit.

Vagueness

- The Court noted that even the MA Recreational Marijuana law defines a plant based limit for home cultivation (individual limited to 6 plants, household limited to 12 plants).
- “The amount of usable marijuana yielded by a plant depends on a large number of variables, including the skill of the grower. The ten-ounce rule provides some additional flexibility for patients who may be inept growers, unable to yield much even from a large number of plants but, by the same token, it makes enforcement of the cultivation limit all the more difficult. Although the law may not be vague in many cases, such as when a defendant grows an acre of marijuana, without a plant based limit, start-up home cultivation operations like this one may pose a vagueness problem. Although we need not resolve this issue in the instant case, we emphasize that statutory and regulatory clarification would be most beneficial in this regard."

Rhode Island: *Callaghan v. Darlington Fabrics Corp*. May 2017

Callaghan v. Darlington Fabrics, Corp. (RI Super. Ct. 05/23/17)

- Plaintiff, a Master's Degree student, applied for an internship.
- Disclosed use of medical marijuana with an authorization card.
- Darlington refused to hire because would not be able to pass required pre-employment drug screen.
- Policy for testing did not provide that a positive test would be cause for withdrawal of a job offer.

Callaghan Complaint Alleged:

- Count I: Sought a declaration that refusal to hire violated Hawkins-Slater Medical Marijuana Act.
- Count II: Violation of Rhode Island Civil Rights Act, (the disability discrimination law).
- Count III: Violation of Hawkins-Slater Act due to discrimination.

Callaghan Holding:

- There is a private right of action under the state medical marijuana law.
- But employers do not have to tolerate an employee working under the influence and unable to perform job duties.
- Under marijuana law, not required to make accommodation as defined in the employment discrimination context.

Callaghan Holding...

- But also a right of action under the disability discrimination act.
- Summary judgment for Plaintiff granted on Counts I and III.
- Summary judgment motion of employer denied

Was Maine the Harbinger Decision for the Change? (2012)

The Maine *Savage* Decision

- The Maine Supreme Court upheld termination of Jody Savage after she applied to open a medical marijuana dispensary. Savage v. Maine Pretrial Services, Inc., 58 A.3d 1138 (2012).
- She filed suit alleging that her termination violated the Maine Medical Use of Marijuana Act.
- The court upheld dismissal of the complaint, finding that the state MMUMA did not provide a private right of action and that applying for a dispensary license was not "conduct authorized" under the Act.
- In dicta, the Court stated that the statute only provides a private right of action for qualifying patients and primary caregivers who have been discriminated against by an employer.
- Query: what is discrimination under the MMUMA?

Maine Medical Marijuana Law

- Prohibits smoking of marijuana on the premises IF the employer prohibits all smoking on the premises AND posts a notice.
- Not required to accommodate ingestion in the workplace or the employee working under the influence.

Good Workplace Policies

Good Workplace Policies

- Best practices for employers to adopt:
  - Don't ask; don't tell?
  - Zero Tolerance (possession, use, impairment; on or off duty conduct)?
  - Drug Testing (consider state laws):
    - Pre-employment
    - Reasonable Suspicion
    - Post Accident (OSHA?)
  - No Smoking/Vaping in the Workplace
  - Government Contractor Obligations/DFWP?
  - Reasonable accommodation considerations?

Anticipate the “Interactive Dialogue” Based on the New Trend

- Do any pre-employment drug test and get the result before the employee starts.
- Conditional Offers: Do not recommend quitting current employment until background tests (including any pre-employment drug screens) are completed.
- The interactive dialogue: required or the test case?
- What will positive marijuana test mean in relation to the position? (medical or recreational)

Slippery Slope … Impairment?

- Positive test? No current test for "impairment."
- Stays in the blood a long time for a positive test, even if not "impaired."
- What will the MRO test for?
- What will the MRO report as a positive result?
- Employer liability for negligent retention?

OSHA Rule on Post Accident Drug Testing

- The final rule published August 2016:
  - requires employers to inform employees of their right to report work- related injuries and illnesses free from retaliation;
  - clarifies the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and
  - incorporates the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses.
  - OSH Act prohibits OSHA from superseding or affecting workers compensation laws. 29 USC 653(b)(4).

Recreational Marijuana: Another Game Changer?

Recreational Use?

- Maine (Legal)
- Massachusetts (Legal)
- Vermont (Legal)
- Connecticut (Efforts to Legalize)
- Rhode Island (Efforts to Legalize)
- New Hampshire (Efforts to Legalize)

Massachusetts Recreational Marijuana Referendum?

- Effective December 15, 2016, recreational marijuana use is legalized up to 10 oz. inside homes and less than 1 oz. in public.
- Will be legal to grow up to six marijuana plants in the home.
- Retailers subject to state sales tax.
- Created a Cannabis Control Commission to regulate legalization and issue retailer licenses.
- Workers Comp. carriers assert now like any other OTC; is it? Or is there a "prescription strength?"
- Just because is it not illegal, does not mean employer has to allow use, possession, dispensing, or impairment on company property (like guns and alcohol). Except in Maine after February 2018??

So where are we going?

Action Plan. . .

- Stay tuned….
- Several New England courts have recently issued decisions and provided guidance for employers; State laws vary widely
- NH HRC (unofficially) is in accord with the MCAD (off duty use like any other medication). NH law, employers may allow employees to possess, smoke, or be under the influence, but also may discipline for use on the property or working under the influence.
- For accommodation, how is marijuana different than opioids? Cesamet? Marinol? Epidiolex (FDA approved CBD derived drug)
- Impairment more easily assessed with other drugs?
- National Conference of State Legislatures adopted a resolution seeking removal of marijuana from Schedule I (denied by DEA)

Employers Need to Consider:

- Deep dive into drug testing, smoking, and vaping policies.
- Keep an eye on the Big Picture: like other impairing medications and/or alcohol use (unless federal contractor).
- Review job descriptions (essential functions; physical and mental requirements).
- Train supervisors on the law(s) and signs of impairment.
- Conduct meaningful performance reviews to identify declining performance and failure to meet job requirements (including attendance).

QUESTIONS????

As the Rhode Island court said: "our civil jurisprudence will undoubtedly face an onslaught of litigation concerning the lawful use of marijuana." Callaghan, (RI Super. 2017).

NAJJAR EMPLOYMENT LAW GROUP, P.C.

- **Debra Dyleski-Najjar** founded the Najjar Employment Law Group, P.C. in April, 2008 as a labor, employment and benefits boutique law firm providing top quality legal advice, as well as litigation expertise, for employers to keep employers ahead of the curve.
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