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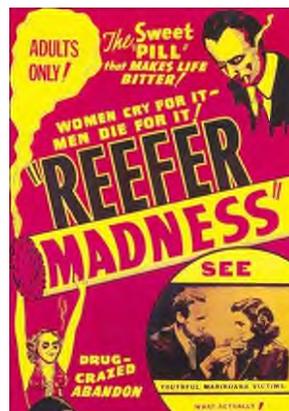
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## Today's Agenda

- An overview of the various laws and regulations of marijuana and CBD as it relates to issues in the workplace
- Discussion of recent case law applicable to issues which arise regarding marijuana in the workplace
- Strategies for employers going forward

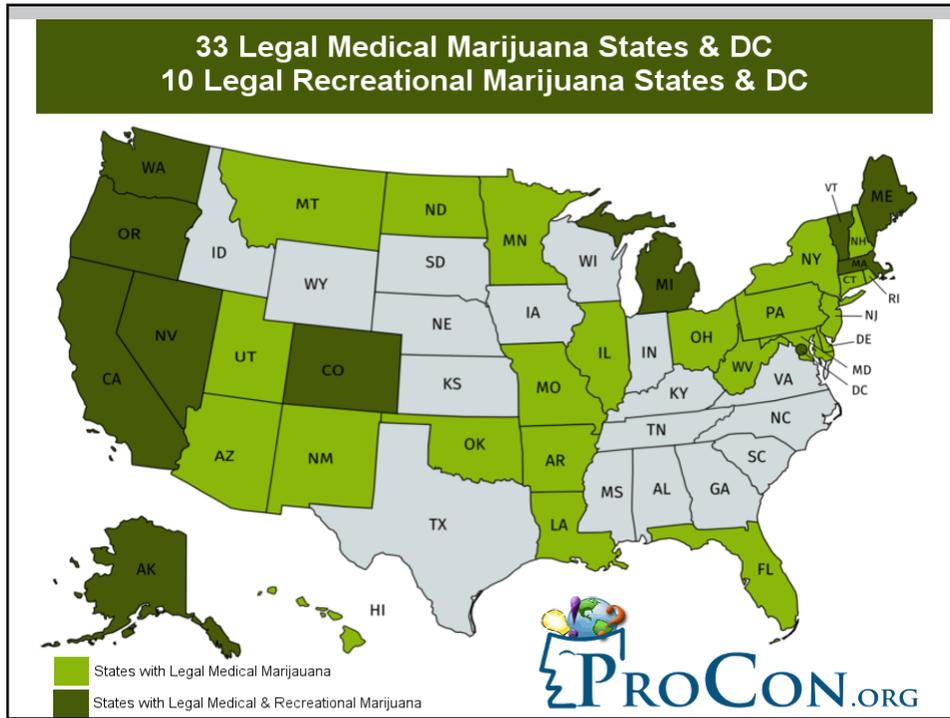
## The Criminalization of Marijuana

- Marihuana Tax Act of 1936 passed in response to increased use of marijuana and its purported social ills
- Some scholars contend that Andrew Mellon and the Du Pont family were seeking to outlaw hemp given the recent invention of nylon



## A Recent History of Marijuana Laws

- In 1996, California voters passed Proposition 215, making the Golden State the first in the union to allow for the medical use of marijuana. Since then, 32 more states, the District of Columbia, Guam and Puerto Rico have enacted similar laws.
- In November 2012, Colorado legalized the recreational use of marijuana.
  - Adults aged 21 or older can grow up to six marijuana plants (with no more than half being mature flowering plants) privately in a locked space, legally possess all marijuana from the plants they grow (as long as it stays where it was grown), legally possess up to one ounce of marijuana while traveling, and give as a gift up to one ounce to other citizens 21 years of age or older.



## More States on the Horizon for Recreational Use

- Illinois
- Connecticut
- New Hampshire
- Also, trend is for states to pass laws on expungement



## Marijuana Remains Illegal Under Federal Law

- Classified as a Schedule 1 substance under the federal Controlled Substances Act
  - Along with heroin, LSD and some other drugs
  - No accepted medical use and a high potential for abuse
- James M. Cole, Deputy AG U.S. DOJ, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013)

## Cole Memo Didn't Speak for All Federal Regulatory Regimes

- Banking/Treasury
- DEA
- U.S. DHHS
- IRS



## Trump Administration

- Former Attorney General Jeff Sessions – Throughout his career, Sessions has been an avowed opponent of legalization of marijuana.
- Rohrabacher-Farr (Blumenauer) Amendment has blocked the Justice Department from using federal tax dollars to go after states that have legalized medical marijuana. It remains in place.
- What is the likelihood of federal legislation to clear up the mess?



## Medical Marijuana, How Does It Work?

- Generally, requires a visit or consultation with a doctor who then approves
- “Certification” is the “qualified physician’s authorization for a qualified patient to receive marijuana and a marijuana delivery device from a medical marijuana treatment center”
- Not a “prescription”
- Background check
- Issuance of card which allows purchase from an approved vendor

## Generally, Physician “Certification”

- To certify a patient for medical marijuana, a physician must:
  - diagnose a patient with “qualifying condition”
  - physically present in the same room as the patient when conducting this examination
  - re-evaluate

## This is What HR Departments Are Faced With



## What's NOT in Most States' Laws?

- An unqualified right to use medical marijuana once prescribed by a physician
- An anti-retaliation provision preventing employers from disciplining employees at work or providing other employment related protections for the otherwise legal use of medical marijuana at work or at home
- This creates a huge disconnect between what employees **think** their rights are and what their rights **really** are
- **But.** This is changing!

## Drug Testing

- No good test to determine if employee is *currently* under the influence of or impaired by THC or even how much they have used or when they have used it
- Urine and hair test past usage and how the body has metabolized THC
- What are the “spillover effects” to the workplace from off duty use?



## Employers' Current Obligations

- Employers that are federal contractors or grantees are required to adhere to the federal Drug-Free Workplace Act
- Use or possession of marijuana is specifically prohibited by the DFWP Act
- Requires good faith effort to maintain a drug-free workplace
- Requirements of act "co-exist" with state and local laws
- What other obligations has the employer made by law or contract?

## American with Disabilities Act and State and Local Laws

- Requires an employer to make reasonable accommodations to an employee or applicant's disability
- Medical marijuana is intended to alleviate the symptoms of some underlying medical condition (i.e., ALS, glaucoma, cancer, HIV)



## American with Disabilities Act and State and Local Laws

- The ADA requires covered employers to engage in the interactive process regarding employee disabilities
- Interactive process requires an individualized analysis of the essential functions of the specific job and the employee's specific restrictions
- While the federal EEOC is not likely to require an employer to accommodate the use of medical marijuana, there still may be a duty to accommodate the underlying medical condition

## American With Disabilities Act and Equivalent State Anti-Discrimination Laws

- For example, an employee that is going through chemotherapy and is using medical marijuana to help with a loss of appetite would likely not be protected from zero tolerance drug policy
- However, employer would still need to engage in the interactive process to determine if a reasonable accommodation is needed for the underlying cancer treatments (i.e., time off for seeking treatment)

## The Law Is Changing

- Most of the first generation of state marijuana laws had no effect on employers
  - Eliminated state law prohibitions against marijuana use, but did not require employers to allow use or employ users
  - Business as usual
- A second generation of state marijuana laws insert themselves into the business of private employers
  - What good is a theoretical “right” if it keeps you from being able to get a job?

## Recent State Law Provisions

- Rhode Island: No employer may refuse to employ or otherwise penalize a person solely for his or her status as a cardholder.
  - Similar provisions in Arkansas, Connecticut, Delaware, Illinois, Maine, Oklahoma, Pennsylvania, West Virginia
- Massachusetts: A person 21 years of age or older shall not be denied any right or privilege for possessing or using marijuana consistent with the state law
  - Similar provisions in Maryland, Montana, New Jersey, North Dakota

## Recent State Law Provisions

- Arizona: An employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either:
  - The person's status as a cardholder.
  - A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.
- Similar provision in Minnesota
- Catch 22?
  - You can punish an employee for being under the influence, but you can't assume he was under the influence based on a failed test
  - No reliable field sobriety test for marijuana

## Recent State Law Provisions

- New Hampshire: This chapter shall in no way limit an employer's ability to discipline an employee for ingesting cannabis in the workplace or for working while under the influence of cannabis.

## Courts Are Taking These Laws Seriously

- Rhode Island: *Callaghan v. Darlington Fabrics* (May 2017)
  - Applicant allergic to most painkillers is a card holder under state law
  - Discloses that she will fail drug test, and employer states that it cannot hire her
  - Employer claims that it is not discriminating against employee because of “her status as a cardholder,” but because she can’t pass a drug screen
  - Court rejects this argument and holds that employer’s refusal to hire employee violates state medical marijuana law

## Courts Are Taking These Laws Seriously

- Massachusetts: *Barbuto v. Advantage Sales and Marketing, LLC* (July 2017)
  - Applicant suffering from Crohn’s Disease is a registered user under state law
  - Terminated for failing pre-employment drug test despite disclosing her condition and status
  - Filed a claim of disability discrimination under Massachusetts law
  - Court held that employer has, at a minimum, the obligation to engage in interactive process to determine if accommodating off-duty marijuana use is a reasonable accommodation

## Courts Are Taking These Laws Seriously

- Arizona: *Whitmire v. Wal-Mart* (February 2019)
  - Employee injured when bag of ice fell on her wrist
  - Sought medical attention two days later and was required to take a post-accident urine drug test
  - Employee failed the test, and claimed it was because of medical marijuana
  - Employer fired employee because of failed test
  - Court held that there was no evidence that employee was impaired at work and that termination violated the Arizona Medical Marijuana Act

## Lawful Products / Lawful Activity Laws

- Several states make it illegal for employers to take action against employees who use “lawful products” off-duty or who engage in “lawful activities”
  - Began in tobacco-producing states to prevent employers from firing tobacco-using employees
  - Broad provisions currently exist in California, Colorado, Illinois, Minnesota, Missouri, Montana, Nevada, New York, North Carolina, North Dakota, Tennessee, and Wisconsin
- Is consuming marijuana a “lawful activity”?
  - Colorado Supreme Court: No (*Coats v. Dish Network, LLC* (2015))
  - Other states have not yet weighed in

## What's On The Horizon?

- Cases thus far have dealt with medical marijuana
  - More sympathetic plaintiffs
  - Better facts to question “zero tolerance” policies
- Recreational marijuana laws mostly carve out employer exceptions
  - Only a matter of time until a state tries to protect recreational users from employment decisions
- More cases from states with use of lawful products laws

**Continuing Legal Education Credit**  
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## CBD: It's GOT To Be Legal, Right?

**Vitamin Shoppe to sell edible CBD supplements as consumers clamor for cannabis compound**

**KEY POINTS**

- There's now one stop for all your vitamins, including A, B and CBD
- The Vitamin Shoppe is now started stocking its shelves with CBD-infused
- Vitamin Shoppe will add CBD drops later this month
- CVS, Walgreens and Rite Aid all recently said they would carry CBD-infused products in some states

**Miami's Best CBD-Infused Food and Drinks**

**U.S. Pet Market for CBD Supplements and Treats Grows**

**Where to Try CBD-Infused Food and Drinks in Chicago**

Bars and restaurants are offering CBD cocktails, doughnuts, and more

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## Well...Not So Fast.

- What does the FDA say (from FDA website Q&A)?
  - "Q. Is it legal for me to sell CBD products?"
  - "A. It depends."
- However, FDA is clear that CBD cannot legally be added to food or sold as a dietary supplement
  - FDA considers CBD-containing foods to be "adulterated" under the FD&C Act
  - CBD cannot be legally sold as dietary supplements because CBD is an active ingredient in a drug that has already been approved by FDA (Epidiolex)
  - FDA holding public hearing to discuss this issue at the end of this month
- Requires a state-by-state analysis

## What Is In My CBD Product?

- Prohibition at federal level also means that CBD products are not subject to FDA approval process that may otherwise provide quality assurance
- Journal of American Medical Association study of 84 CBD products found 43% had more THC in them than labeled
- There are recent examples of CBD product manufacturers facing potential consequences for offering products containing substances that should not be there (i.e., THC, K2/“Spice”) or making unfounded health benefit claims
  - FDA sending out warning letters to manufacturers that make unsubstantiated claims regarding health problems (e.g., cures cancer and autoimmune diseases)
  - NJ trucker fired for failing drug test going to trial against CBD manufacturers alleging RICO violations where companies claimed product had no THC
- CBD producers *proactively asking* federal government for regulation to provide more certainty and predictability

## Legality of CBD Founded on State Law

- States: all over the board. For example:
  - CO, OR, IN, UT: Legal as food additive and dietary supplement
  - ID, NE, SD: No cannabis products are legal, period
  - CA: Not legal as a food additive or dietary supplement
  - NY: May be sold as a dietary supplement but NOT in food; NYC Health Dept. has sent warning letters threatening fines and downgrades of health letter grades
- Risks of patchwork regulatory approach:
  - Consumer confusion
  - “Snake oil” products (i.e., that actually contain no CBD)
  - Private industry efforts at quality assurance (e.g., certified seals offered by Hemp Roundtable and Hemp Industries Association)
- **Advise caution** when counseling clients or leadership
  - Upfront message is that CBD is technically illegal under federal laws
  - Focus on claims made and likelihood of enforcement risk

## Candidate and Employee Drug Testing

- Trend of legalization for both cannabis and CBD oil products leave employers in a difficult position
- Recent Illinois recreational marijuana bill attempts to describe how an employer could “test” to see if an employee was under the influence
  - “An employer may consider an employee to be impaired by cannabis if the employer has a good faith belief that an employee was under the influence of cannabis and the employee manifests specific, articulable symptoms while working that decrease or lessen the employee’s performance of the duties or tasks of the employee’s job position, including symptoms of the employee’s speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or involvement in an accident that results in serious damage to equipment or property, disruption of a production or manufacturing process, or carelessness that results in any injury to the employee or others.”

## Candidate and Employee Drug Testing (continued)

- Reconsider zero-tolerance drug testing policies in light of each jurisdiction
  - NYC Council overwhelmingly banned pre-employment testing for marijuana use (with limited exceptions) and expected to be law next year
    - Similar law has existed state-wide in Maine since February 2018
  - Increasing number of candidates claiming they were only using CBD products
  - Dwindling pool of applicants in states where recreational use is legal
  - Efforts to protect recreational use like medical use may be coming (e.g., MA)

## Candidate and Employee Drug Testing (continued)

- A focus on compliance with federal law will not necessarily provide protection for employers
- Employers that are federal contractors or grantees are required to adhere to the federal Drug-Free Workplace Act (DFWA)
- Use or possession of marijuana is specifically prohibited by the DFWA
- Requires good faith effort to maintain a drug-free workplace
- Requirements of act “co-exist” with state and local laws
- But...

## *Noffsinger v. SSC Niantic Operating Co.* (D. Conn. Sept. 5, 2018)

- Federal contractor discriminated against potential employee in violation of CT’s medical marijuana law
  - CT law had specific provision prohibiting employers for refusing to hire based on medical marijuana unless required by federal law
- DFWA does not require drug testing and does not regulate employees who use illegal drugs off duty
- Difference between using drugs on the job and using drugs on their own time
  - “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.”

## Considerations For Employers

- Know the law on retaliation in your jurisdiction
  - Monitor developments in statutes and case law
- If you are doing employee drug testing, reevaluate the “Why?”
- Analyze your jobs and the true risk factors
- Make sure written job descriptions detail “safety sensitivity”
- Analyze why is it you believe you cannot accommodate off-duty use

## Considerations For Employers

- If you decide to accommodate, consider a written agreement
- Moral opposition will likely lead to legal liability
- If you drug test, consider eliminating marijuana from the panel
- Consider use of oral fluid testing for recent use
  - These test do not measure impairment
- Train managers to identify workplace impairment

## Field Sobriety Testing – Legally Accepted

- Requires professional training but typical elements include:
  - Horizontal Gaze Nystagmus: This term refers to the involuntary jerking of the eye that occurs naturally when the eye gazes to the side. But this jerking (or nystagmus) is exaggerated when someone is impaired by alcohol.
  - Walk and Turn: This is administered by requiring the suspect to take nine steps, heel-to-toe, along a straight line; turn on one foot; and then return in the same manner in the opposite direction.
  - One-Leg Stand: Suspects are asked to stand with one foot about six inches off the ground and count for 30 seconds. Swaying while balancing, using arms to balance, hopping or putting the foot down indicate possible impairment.

## Questions?



Thank You.

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