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CBD ... 1-2-3: Can An Employer Still Maintain a Drug-Free Workplace? Practical Solutions in Today's COVID-19 World

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SOAHR¹2020
ATLANTA HR CONFERENCE

Times Are Changing

- 66% of Americans favor legalization
 - That's double over last 20 years (only 31% in 2000)
- Generational Shifts
 - Millennials ('81-'97) – 70%
 - Gen X ('65-'80) – 66%
 - Boomer ('46-'64) – 56%
- Positive Test Results: Last 10 years
 - + 71% in Marijuana-Legal States
 - + 35% in Non-Marijuana States



Times Are Changing

- ***“If we had to turn away every applicant who tested positive for marijuana, we’d lose 80% of our potential hires.”***
 - Talent Acquisition Director (Fast Food Company)
- ***“We believed we were losing too many otherwise qualified candidates. We still screen for marijuana if we have reason to believe an employee is under the influence at work.”***
 - VP of Government Relations (Hospitality Company)
- **The COVID-19 Effect**
 - Do you think employees returning to work may have indulged in “recreation” while “working” at home on COVID recess?



Federal v. State Laws



■ Federal:

- Marijuana classified a Schedule I Narcotic (Controlled Substances Act)
- No DEA-certified doctor may prescribe marijuana
- Cannot cross state lines

■ State:

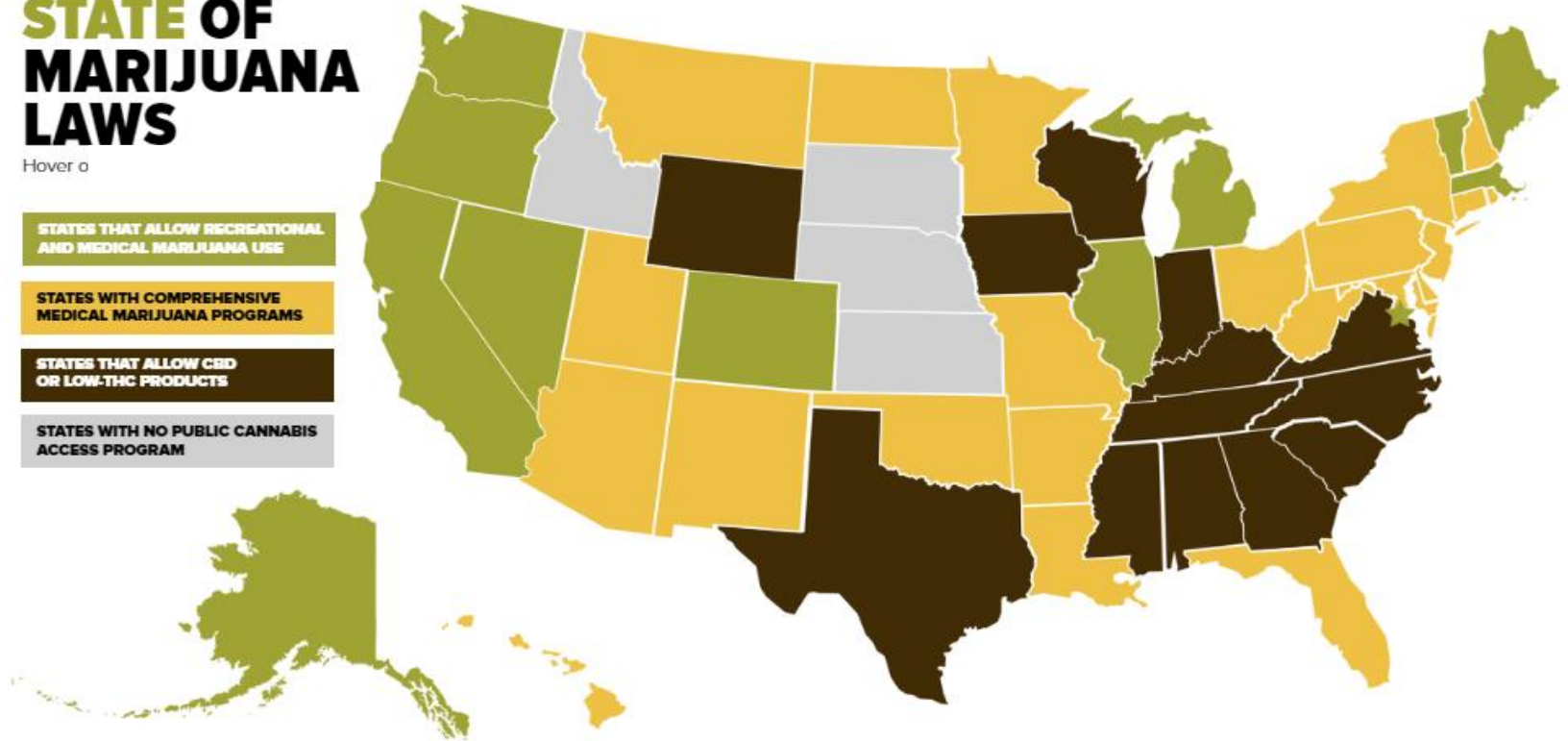
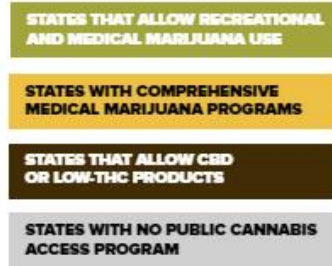
- **11 states** (plus D.C.) permit recreational marijuana
- **33 states** (plus D.C.) permit medical marijuana
- **26 states** (plus D.C.) have de-criminalized small amounts
- **Georgia:** Access to Medical Cannabis Commission – grow licenses granted



WEED @ WORK

THE STATE OF MARIJUANA LAWS

Hover o



Slippery Slope of CBD

“Don’t Worry, It’s Legal Now!”

- Over **64% of Americans** live in a state with medicinal marijuana ...
- The dire predictions are unfortunately true
- CBD is everywhere
- Is CBD really ok?
- Is the Genie out of the bottle?



Slippery Slope of CBD

“Don’t Worry, It’s Legal Now!”

“I fear that the marijuana story is a slow-moving train wreck. We’re witnessing widespread use of largely unregulated and untested products which may be more toxic in themselves, as well as adulterated or counterfeited.”

Barton Cobert, MD
WSJ (Jan. 7, 2020)



“Does it really matter at work?”

- Those who test positive for marijuana have ...
 - 55% more industrial accidents
 - 85% more injuries
 - 75% more absenteeism

- Journal of the American Medical Association

Workplace Drug Testing and Drug Policies: Best Practices



Medical Marijuana Laws

Impact on Employer Substance Abuse Policies

- Employers generally are not required to accommodate use, consumption, possession, sale, etc. of marijuana in the workplace
- Employers in most states can prohibit marijuana use by employees, even off duty
- Employees cannot be impaired while working or on company property

Can Company Still Require Applicants to Pass Pre-Hire Drug Test?

- Department of Transportation (DOT) jobs must be tested
 - Trucking and rail workers
 - Safety of the public
- Most states, company can still follow “zero tolerance” policy
 - Can reject new hires who test positive for use of drugs

Marijuana Statutes with Job Protections

14 states with medical marijuana laws contain express job protections/anti-discrimination provisions:

- Arkansas
- Arizona
- Connecticut
- Delaware
- Illinois
- Maine
- Minnesota
- Nevada
- New Jersey
- New York
- Oklahoma
- Pennsylvania
- Rhode Island
- West Virginia



Beware of state & local limitations

- NEV, NJ & NYC: employers cannot refuse to hire applicants who test positive for marijuana
- Excluding from job would constitute impermissible “discrimination”
- “Lawful, off-duty conduct” protections

Can Company Terminate Employees Who Test Positive?

■ Maybe ...

- *“the Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail ... including in the area of marijuana regulation”*
 - *Coats v. Dish Network (Col. Sup. Ct. 2015) (upholding termination of customer service rep with medical marijuana Rx, who tested positive due to marijuana use during non-work hours)*

Beware of possible need for “reasonable accommodation”

Barbuto v. Advantage Auto Sales (Mass. 2017)

- Applicant with Crohn’s preemptively told company she’d test positive for medical marijuana
- Company refused to hire when test confirmed her use
- Mass. Supreme Court required employer to engage in “interactive dialogue” to evaluate if exclusion from work would really be justified by work duties

Drug Rx & ADA

- Prescription drugs, and now marijuana, are often used to treat conditions that qualify as a disability
 - Does that mean employers must accommodate any and all uses?
 - Develop strategy for “interactive dialogue”
 - And of course, you need not “take employee’s word as gospel”
- When in doubt, run your business
 - Non-use may justified by “business necessity”
 - Allowing use could be “direct threat”
- But, what if it isn’t ...?
 - Really think about it ... what’s your company’s justifying reason ...?

Why should the Company care?

- Safety Sensitive
- Workers' Compensation Premiums
- Impact on Productivity
- Impact on Attendance
- Employer of Choice
 - Culture
 - “Right Thing to Do”



The Science of Drug Testing

- Positive test detects past use, but does not prove employee is currently impaired

“What you need to remember is it doesn’t matter if it’s urine, oral fluid or hair testing – it just reflects use. It doesn’t inform you whether someone was impaired or what their usage patterns are.”

Dr. Barry Sample
Quest Diagnostics

“You can’t come up with a single limit that is going to differentiate between impaired and unimpaired.”

Marilyn Huestis, Ph.D.
National Institutes of Health

The Science of Drug Testing

- What does a positive test mean?
 - What if employee offers plausible excuse, in a marijuana-allowing state?
 - Engage in “interactive dialogue” ... and document it
 - Then weigh the company’s objectives

The “Positive +” Standard

- Don't dwell on just a positive test
- Also focus on “other indicia of impairment”
- Document
 - Physical signs of impairment
 - Impact on others, productivity, etc.
 - Maybe, testing actually won't be needed
- Be proactive
 - “Plus up” job descriptions to emphasize safety components

Second Chances?

- Offer EAP in lieu of termination?
- Perhaps out of compassion?
- Perhaps out of business need?
 - Productive
 - Well-liked
 - Long term, clean record
 - Can't be easily replaced in tight job market
- Or, not so much ...?



Applying What We Know



Applying What We Know: Applicants

- Applicant gets offered office job as production analyst.
- Employer states all applicants must take pre-employment drug test before starting work.
- Applicant tells recruiter he has medical marijuana Rx and smokes to relieve severe arthritis.
- Can employer demand proof of Rx?
- Can employer withdraw the offer for (+) result?
- Does the answer change if individual is applying for machine operator position?

Applying What We Know: Employees

- Warehouse Manager observes fork lift driving erratically.
- Later in break room, supervisor smells nasty stench of bong water on fork lift operator's clothing.
- Can company mandate a "reasonable suspicion" drug test?
- What if employee tests positive for THC?
- What if driver says he uses medical marijuana to control anxiety?
- Does it matter in which state the facility is located?

Key Takeaways!

- Never tolerate marijuana or alcohol use on-the job
- Never tolerate any impairment on-the-job
- Re-think why and when the company imposes tests
- Develop decision tree in response to positive tests
 - Is there other proof of impairment?
 - Interactive dialogue – document it!
 - Offer EAP?
- Get counsel on unique vagaries of state law

**DRUG-RELATED QUESTIONS?
COVID-RELATED EMPLOYMENT QUESTIONS?**

**PPT COPY?
STATE LAW DESK REFERENCES?**

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