Weed in the Workplace: Safety up in Smoke?
Drugs in Workplace Problem?

- 70% of estimated users of illegal drugs are employed
- Marijuana, cocaine, prescription drug
- 24% of workers report drinking at least once during work day in past year
- Cause 35% of injuries
- 38% to 50% of all claims
- Perform at 67% of their potential
Drugs in Workplace Problem?

• 8.7% of full time workers have heavy alcohol use in a month

• 5 or more drinks on 5 or more days in a month

• 8.6% are heavy drug users

• 9.5% have been dependent on alcohol or drugs in past year

• Marijuana use up 75% since 2013

• Meth use up 64%

• Cocaine use up 12%
Drugs in Workplace Problem?

• Highest drug use industry: Food industry—19.1%

• Highest rate of alcohol abuse: Mining—17.5% and Construction—16.5%

• Construction industry:
  • 11.6% drug use
  • 16.5% alcohol use
  • 14.3% substance abuse

• Most people admit they use drugs on way to work or during lunch
  • Parking lot, car, and bathroom most common places
Legalized Marijuana

• Medical marijuana is legal in 33 states and D.C.

• Recreational marijuana is legal in 11 states and D.C.

• 62% of people are in favor of legalization
  • Only 31% in favor in 2000

• NY is the first state to enact a law prohibiting pre-employment drug testing for marijuana—takes effect May 2020
  • Exception for certain safety sensitive job positions
WV Medical Cannabis Act

• Became effective July 1, 2019

• Implemented and administered by Public Heath Bureau

• Requires a “serious medical condition” to be certified
Qualifying Medical Conditions

- Cancer
- HIV
- Amyotrophic lateral sclerosis
- Parkinson’s
- MS
- Spinal cord damage
- Epilepsy
- Neuropathies

- Huntington’s disease
- Crohn’s Disease
- PTSD
- Intractable seizures
- Sickle cell anemia
- Severe chronic pain
- Terminally ill
Acceptable Forms

- Pill
- Oil
- Topical forms, including gels, creams, or ointment
- A form medical appropriate for administration by vaporization or nebulization (excluding dry leaf or plant form)
- Tincture
- Liquid
- Dermal patch
Unlawful Use

- Smoking and edible cannabis
- Growing, unless the grower/processor has a permit from bureau
- Growing or dispensing unless authorized as health care medical cannabis organization
- Dispensing medical cannabis unless dispensary has a permit from bureau
Prohibitions

• Patients cannot operate or be in control of any of the following while under the influence with a blood content of more than 3 nanograms of active tetrahydrocannabis per mm of blood in serum:
  • Chemicals which require a permit issued by the Fed gov’t or state gov’t
  • High-voltage electricity or any other public utility
  • Vehicle, aircraft, train, boat or heavy machinery
  • Patient cannot perform any employment duties at heights or confined spaces, including mining
Can Employers Prohibit Medical Cannabis Use?

• Yes.
• Employers can prohibit an employee under the influence of medical cannabis from performing:
  • Any task the employer deems to be life-threatening to either the employee or any other employee
  • Any duty which could result in a public health or safety risk
• Prohibition will not be deemed an adverse employment decision, even if results in financial harm to employee
However...

- Employers cannot discharge, threaten, refuse to hire or otherwise discriminate against an employee who is a certified to use medical cannabis
  - Does not require employers to make any accommodation for use of medical cannabis
  - Does not prohibit employers' ability to discipline employee for being under the influence in the workplace when conduct falls below standard of care
  - Does not require employers to commit any act in violation of federal law
Employer Concerns

• 3 nanograms of active tetrahydrocannabinol?  
  • How do you know?
• Vague and overly broad language  
  • Does not expressly authorize employers to maintain drug-free workplace policies
Employer Concerns

- **Anti-discrimination provision**
  - Act prohibits discrimination based on individual’s status as a certified medical cannabis user
    - Cannot refuse to hire
  - No “Under the influence” definition
    - Difficult to prove that someone is “under the influence”
  - “Standard of care”
    - Only protects employer’s ability to discipline if conduct falls below “standard of care”
  - Adverse action against certified users
OH Medical Marijuana Law

• Billed signed into law June 2016, first legal sale in Jan. 2019
• For qualifying conditions only—21 conditions (most of the same conditions as WV statute)
• Nothing in bill requires employers to permit/accommodate use, possession, or distribution of medical marijuana, nor does it prohibit adverse employment action
• Does not prohibit drug testing policy, drug-free workplace policy, or zero tolerance policy
PA Medical Marijuana Law

• Bill signed into law April 2016
• Must have “serious medical condition”—17 qualifying conditions (again many of the same conditions)
• Employers may not discharge, threaten, refuse to hire, or discriminate *solely* on the basis of EE’s status as medical marijuana user
• However, employers are not required to accommodate use of medical marijuana on property and Act does not limit employers ability to discipline EE’s under the influence while working if conduct falls below standard of care
Low THC/High CBD Laws

- 17 states have enacted laws specifically about CBD, with limits on the amount of THC for treatment of conditions such as epilepsy.

- Kentucky: enacted law in 2014 excluding CBD from definition of marijuana—does not include limits on the THC levels allowed.

- Virginia: enacted law in 2015 allowing affirmative defense from prosecution of possession of cannabidiol oil for treatment of epilepsy—oil must contain at least 15% CBD and no more than 5% THC.
Federal Law Confusion

- Still a Schedule I drug under federal law
- Law is still evolving, but fed courts have relied on marijuana’s federal illegality to conclude the ADA doesn’t require employers to accommodate pot use
- However, definition of “illegal use” is important
  - ADA doesn’t protect “illegal” use of drugs
  - If medical marijuana is not considered “illegal” by state law, it may not be “illegal use” under ADA
Barbuto v. Advantage Sales

- MA case—also legalized medical marijuana
- Employee with Crohn’s disease (qualifying condition—like WV)
- Told employer she would test positive for marijuana on new-hire drug test
- Was initially told it would not be a problem
- Fired after first day—HR told her employer followed federal law, not state
Barbuto v. Advantage Sales

- **Violation of federal law**
  - Supreme Court said accommodation that violates federal law is not per se unreasonable—employer was not at risk of federal prosecution
  - Off-site use—no risk of aiding and abetting for employer

- **2nd argument: failed drug test**
  - SC rejected—drug test policy resulted in employee being denied employment because of handicap
  - Employee needed marijuana to manage condition

- **Court ultimately concluded that med. marijuana users could assert claims for handicap discrimination under MA Fair Employment Practices Act**
Whitmire v. Wal-Mart

- Whitmire injured wrist at work and was sent for a drug test pursuant to Wal-Mart’s employee policy for on-the-job injuries
  - Had medical marijuana card for chronic pain
  - Smoked marijuana before bed the night before
- Whitmire was fired afterwards with the positive drug screen cited as the only reason for termination
Whitmire v. Wal-Mart

- Arizona medical marijuana act allows discrimination suits against employers for lawful use of marijuana
- Whitmire sued Wal-Mart claiming that Wal-Mart violated the AMMA by terminating her because she was a medical marijuana user.
- The Court found that employers cannot rely only on positive drug test, but must have evidence that the employee was impaired while working.
Maez v. Riley Industrial

- Maez suffered two back injuries while working for Riley—received TTD benefits and was entitled to reasonable and necessary medical benefits
- Treating doctor authorized medical marijuana after traditional methods failed
- New Mexico WCJ ruled that medical marijuana did not constitute reasonable and necessary medical care because it was not prescribed for his pain
Maez v. Riley Industrial

- New Mexico Court of Appeals reversed WCJ and found that “compassionate use” laws allow medical marijuana authorization to be treated as prescription for workers’ comp
- The court further found that it was medically reasonable and necessary because traditional methods had failed
WV Safer Workplaces Act

• Became effective 7-7-17
• Recognizes right to privacy in WV but . . .
• Finds, as matter of public policy, that right is outweighed by need to create and maintain safe workplaces for West Virginians
• Declares drug and alcohol testing -- consistent with the Act and written policies -- legal
• Broad sweeping liability protections too
Basics – Policies and Consequences

• Employer *MUST* have a written policy that covers its alcohol and drug testing program

• Provided to employees or available to prospective employees

• Confirmed positive results required before adverse employment action

• Employees may forfeit workers’ compensation and unemployment benefits (if advised so in policy)
Sample Collection

• Employers determine the type of test sample -- urine, blood, saliva, hair

• Collection must be done under reasonable and sanitary conditions
  • If a urine sample, observer must be same sex as employee

• Must use reasonable procedures to guard against misidentification
  • Labeling
  • Chain of custody
Sample Collection

• Employee must be provided opportunity to provide any information believed relevant
  • Current or recently used prescriptions or nonprescription drugs
  • Other relevant medical information

• This requirement may be satisfied by providing for review by a qualified medical professional to verify a laboratory sample which tests positive in a confirmatory test
Confirmed Positive Test . . .

Now What?

• Confirmed positive drug or alcohol test in violation of the written policy opens the door to legally-protected discipline
  • Refusal to test?
  • Prospective employees?

• Action in response to confirmed positive test is limited only by employer’s imagination
Legal Protections

• No cause of action against employer unless action based on a false positive test and employer had actual knowledge that result was in error and ignored true test result
  • Rebuttable presumption test result is valid
  • No liability if reliance on false positive test was reasonable and in good faith

• No claims for defamation unless inappropriate disclosure and other elements of claim
Workers’ Compensation

• Post accident testing is a different scenario
• W. Va. Code 23-4-2 still applies and controls
  • Must be a blood test
  • Must have reasonable and good faith objective suspicion of intoxication
    • Alcohol: Two hours after incident, .0005 by weight
    • Drugs: Evidence of on or off the job use of a nonprescribed controlled substance
• Refusal to test?
Excuses for Positive Test

• Smoked pot at Christmas party last year (October test)
• I was told laid off four months. Not my fault you called me back and tested me after one month
• I buy shampoo from China (opiates in the product)
• I was carrying a joint in my pocket
• I use hemp oil to make salad dressing
• I kissed my girlfriend and she uses cocaine
Excuses for Positive Test

- My hairdresser is a cocaine addict. My hair must have absorbed from her hands
- I ate poppy seed muffins – tested positive for marijuana
- Ate a whopper at Burger King – sesame seeds
- I should not have used another person’s urine
- Cross-pollinated tomatoes
- Ate too much veal
- Had a dream about meth that activated body enzymes