

The Highs (and Lows) of Managing Brewery Employees in the Wake of Legalized Marijuana

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Potential Employer Issues:



- Can we still refuse to hire marijuana users?
- Can we fire if we discover marijuana is being used by a current employee outside of work?
 - Does it make a difference if it is off duty use?
 - What about safety sensitive positions?
 - Or post-accident drug testing?
 - DOT Motor Carrier Regulations?

Potential Employer Issues:

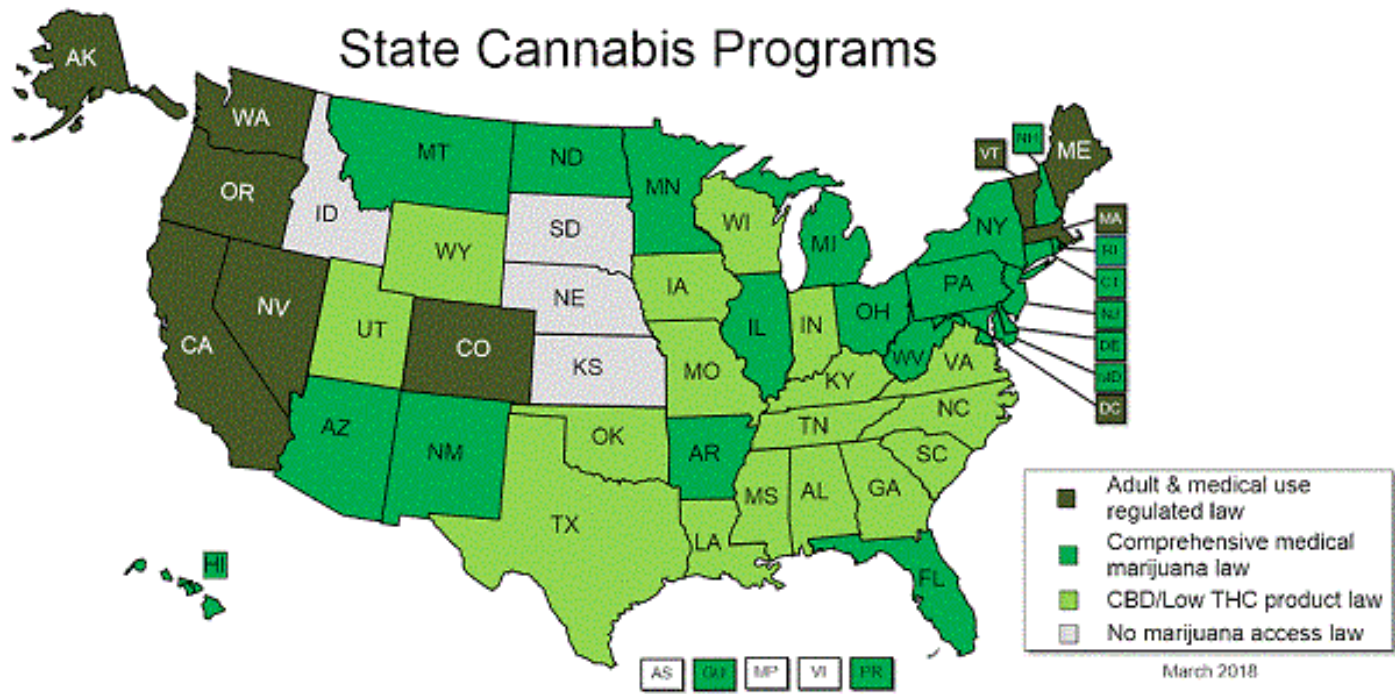


- Do we need to change our drug free workplace policy?
- How do the marijuana laws impact my government contracts?
- Do we have a duty to accommodate medical marijuana?

Overview:

- Status of the Law – State vs. Federal
- Overview of Legalization
- Recreational Marijuana
- Drug Testing
- Medical Marijuana and Accommodation
- Recommendations Moving Forward

State Cannabis Programs



Vermont adult use law signed Jan. 22, 2018. Effective July 1, 2018
 Limited adult possession and growing allowed, no regulated production or sales: DC, VT

Status of the Law

Status of the Law – the States:

- Legal Recreational Marijuana – 9 + the District of Columbia.
- Legal Medicinal Marijuana – 30 states.
- Legal CBD for Limited Medical Use – 46 states.
- 65 million Americans live in states allowing some form of marijuana use.
- \$6.7 billion dollar industry, with \$21.8 billion projected by 2020.
- Over 2 million registered medical marijuana patients in the U.S.

Status of the Law - Federal

Still a Schedule I drug under the federal Controlled Substances Act, which means according to the Feds:

- (1) high potential for abuse,
- (2) no currently accepted medical use in treatment in the US, and
- (3) lack of accepted safety for use of it.



Status of the Law - Federal



- August 2013 – DOJ issues the Cole Memo - US Attorneys, don't go out of your way to prosecute marijuana cases
- Instead, focus their efforts on several priorities, including:
 - Prevent distribution of marijuana to minors;
 - Prevent marijuana revenue from funding criminal enterprises, gangs or cartels;
 - Prevent marijuana from moving out of states where it is legal;
- Jeff Session – Rescinded the Cole Memo. Up to local US Attorneys whether to pursue marijuana prosecutions

Status of the Law - Federal



- New developments in 2018 indicate the federal government may be changing its tone on marijuana:
 - The Food and Drug Administration (FDA) [requested public comments](#) on the “abuse potential, actual abuse, medical usefulness, trafficking, and impact of scheduling changes” of cannabis substances.
 - The FDA advisory panel [unanimously recommended](#) approval of a cannabis-based medication, intended to treat severe seizures in children.
 - Senate Minority Leader [Chuck Schumer announced](#) that he would soon introduce a bill to decriminalize marijuana under federal law.
 - President Donald Trump [promised a senator from Colorado](#) that the he would support efforts to protect states with legalized marijuana.



– Legal Recreational Marijuana –

Legal Recreational Marijuana:

Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Vermont, Washington, and the District of Columbia

- Allow adults age 21 or older to smoke or ingest marijuana for recreational use.
- Permit adults to possess limited quantities of marijuana for personal use.
- Impose various taxation, licensing requirements and regulations pertaining to the commercial growth and sale of marijuana.

Legal Recreational Marijuana:

Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Vermont, Washington, and the District of Columbia

- Individuals can possess at least one ounce of marijuana.
- Most states allow individuals to possess a limited number of marijuana plants.
- All states prohibit the consumption of marijuana in public.

**So, what does
all of this
mean for
employers?**



Legal Recreational Marijuana – For Employers:

The logo for Fisher Phillips, consisting of the name "Fisher Phillips" in white text on a red, tilted rectangular background.

- Employers are still entitled to enact and enforce policies related to marijuana. You do not need to tolerate marijuana in the workplace.
- Generally, legal recreational marijuana laws do not:
 - Restrict employers' rights to maintain a drug and alcohol free workplace;
 - Require employers to permit marijuana consumption or possession in the workplace; and
 - Affect the ability of employers to have policies prohibiting use by employees and applicants, or prevent employers from complying with state or federal law.

The Simple Answer:



1. Marijuana is still federally an illegal drug.
2. Employers can still enforce drug policies and drug test employees;
3. So far, courts have not treated marijuana the same as traditional prescription drugs; and,
4. So far, employers in most states do not need to accommodate marijuana.*



Courts Agree!

The Courts:

Several courts have held that employers may prohibit marijuana use in their workforces:

- In 2008, **California's** Supreme Court found the state's medical marijuana law only protects individuals from criminal prosecution, ruling in favor of an employer who refused to hire an injured veteran who used marijuana to treat chronic back pain after he failed his pre-employment drug test.

Ross v. RagingWire Telecommunications, Inc., 42 Cal.4th 920

- Courts in Oregon, Washington and Colorado have issued similar decisions.

Business Decision:

- Generally, employers remain free to implement and utilize drug-free, workplace programs and policies in spite of the legal use of recreational marijuana.
- The choice is yours.



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Cannabis & Drug Testing





Reasons for Drug Testing –

- Improve safety and reduce workplace accidents
- Reduce absenteeism, tardiness, sick leave and PTO
- Improve productivity
- Deter recreational use



Drug Testing – Pre-Employment:

- Generally, employers may require applicants to undergo drug tests.
- However, the law is evolving – The District of Columbia passed the *Prohibition of Pre-Employment Marijuana Testing Act of 2015*, which prohibits employers from testing job applicants for marijuana use until after a conditional offer for employment has been made.
- CO Example - Employers may also experience difficulty hiring.

Drug Testing – During Employment:

- Random Testing
- Reasonable Suspicion
- Post-Accident Testing
 - DOT Covered Positions



***Don't forget the
basics . . .***

Drug Testing – During Employment:

WATCH OUT FOR PRIVACY - LEGAL OFF-DUTY ACTIVITY LAWS:

- While you may prohibit use in the workplace, current testing technology does not match the law. Most drug tests detect THC in the system for several days after use and cannot detect current intoxication. However, clinical trials are underway.
- TO WATCH – California and many other states have laws in place that protect employees who engage in legal off duty conduct from fear of losing their job.

Drug Testing – During Employment:

WATCH OUT FOR PRIVACY - LEGAL OFF-DUTY ACTIVITY LAWS:

Coats v. Dish Network, (June 15, 2015)

- Colorado paraplegic employee terminated after positive ***random*** drug test result.
- No safety sensitive position; did not impact job performance.
- Used while off-duty legally, to lessen symptoms of his condition.
- Argued a violation of CO's "Lawful Activities Statute."
- ***Court held that behavior was not protected by the statute;*** the conduct is not "lawful" under federal law.

What About OSHA?



What About Fed-OSHA?



OSHA issued guidance in October 2016 regarding:

- 1) Reasonable procedure requirement for employees to report work related injuries and illnesses; and
- 2) Prohibition on retaliating against employees for reporting work-related injuries or illnesses.

Reporting policies must ***not*** discourage employees from reporting.

Guidance addressed three types of policies that can be used to retaliate and therefore might deter employee reports: disciplinary policies, employee incentive programs & ***post-accident drug testing***.

What About Fed - OSHA?



Post-Accident Drug Testing:

- OSHA's commentary implies that post-accident drug testing policies will be scrutinized because of their potential to deter reporting.

What About Fed - OSHA?



OSHA will consider:

- Whether employer had an objectively reasonable basis for concluding drug use could have contributed to the injury or illness.
- Whether other employees involved in an accident were also tested.
- Whether employer has a heightened interest in determining if drug use contributed due to the hazardous nature of the job.

General Principle: drug testing may not be used as a form of discipline against employees who report an injury.

What About Fed - OSHA?



What does this mean?

- 1) Be careful of blanket policies
- 2) Consider switching to reasonable suspicion testing
- 3) Have a process in place
- 4) Consider safety sensitive positions

What About Federal Requirements & Insurance?

If your company is required by federal law or government contracts to maintain a drug-free workplace (Drug-Free Workplace Act), you are obligated to follow federal law and cannot employ an individual who tests positive.

Also, if the employee performs a job that concerns public safety or operates heavy machinery, you will likely still be permitted to test for THC or any other drugs.

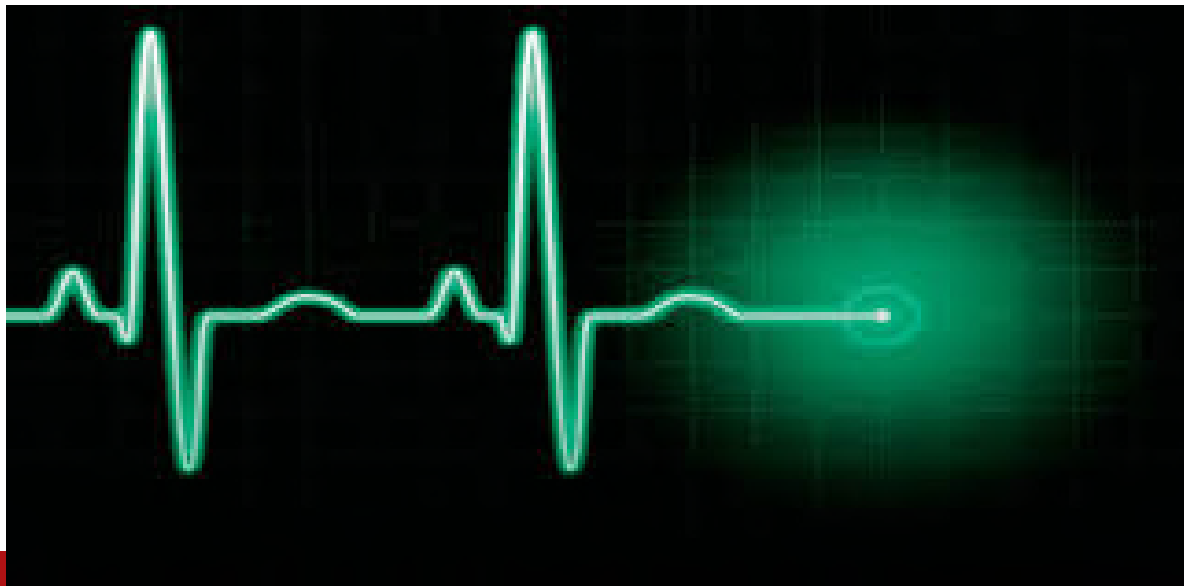
Post-Accident Testing Example:

- An employee driving a forklift strikes another employee, causing injury to both.
- Under OSHA rules, only the forklift driver can be drug tested, while the other employee cannot.
- Employee who was hurt, but not driving, had no culpability in the accident and a positive drug test has no impact on why the incident occurred.
- Testing the employee who was hit would be considered retaliatory.
- Forklift driver can be tested since the cause of accident could have been a result of impairment.



Is Medical Marijuana Different?

Do I Need to Accommodate a Prescription?



Accommodating Medical Marijuana:

- I have a prescription!
- Currently, employers are ***not*** required to accommodate an employee's need to use medical marijuana in most states.



Accommodating Medical Marijuana:

California Cases:

- *Ross v. RagingWire Telecom, Inc. (2008)*
- *Shepherd v. Kohl's Dep't Stores, Inc. (2016)*



Of Course, it's a Bit More Complicated – ANTI - Discrimination Statutes:



- Many medical marijuana states still allow employers to “discriminate” against medical marijuana users (including California).
- However, other states have anti-discrimination policies and more seem to be heading in that direction.

Of Course, it's a Bit More Complicated – ANTI - Discrimination Statutes:



11 states already have laws protecting medical marijuana cardholders against employment discrimination: Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania & Rhode Island.

Examples:

- **New York** – being a certified medical marijuana patient is deemed to be having a “disability” under NY’s fair employment practices law. N.Y. Pub. Health Law § 3369.
- **Rhode Island** - “No employer may refuse to employ or penalize, a person **solely for being a cardholder**” R.I. GEN. LAWS § 21-28.6-4(C)

* TREND IS TOWARD MORE AND MORE WORKPLACE RIGHTS FOR CANNABIS USERS . . .

What Should You Do?

1. Decide your position based on your business needs and business culture.
2. Consider a proactive memo to employees.
3. Update handbook and policy if needed, but ...
 - *BE CAREFUL and think expansively.
4. Apply policies uniformly.



What Should You Do?

5. Make Sure You're Not the "Test Case".
6. Publicize your policy and train supervisors and managers.
7. Consider eliminating strict post-accident/post-injury testing and replacing it with reasonable-suspicion testing.
8. Keep an eye on new developments in the law.





Final Questions?

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