

**Baker
McKenzie.**

Medical Marijuana in the Workplace – How to Avoid Getting Lost in the Weeds

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A vertical photograph on the left side of the slide shows three markers (blue, pink, and green) standing on a shelf. The background is a plain, light-colored wall.

Agenda

1 Overview of Laws in the US

2 State Spotlight – CA and MA

3 Canadian Update

4 Fact Patterns

5 Takeaways



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Overview of Laws in the US

Where are we today?

- Under federal law, marijuana remains an illegal drug under the Controlled Substances Act
- But, 31 states and the District of Columbia have legalized it for medical purposes
 - 9 of those states + DC have decriminalized it for recreational use
- 8 states provide specific employment protections for medical users
 - Arizona, Arkansas, Connecticut, Delaware, DC, Illinois, Maine, Minnesota, NY, Pennsylvania, Rhode Island, West Virginia



Complex web of legislation

State	Decriminalization / Legalization	Medical Legalization	Statutory Employee Protection
California	Legalized	Authorized medical use allowed	Explicit: No protection
Colorado	Legalized	Authorized medical use allowed	Explicit: No protection
Illinois	Decriminalized	Authorized medical use allowed	Medical users protected
Kansas	None	None	None
Massachusetts	Legalized	Authorized medical use allowed	None
New Jersey	None	Authorized medical use allowed	Explicit: No protection
New York	Decriminalized	Authorized medical use allowed	Medical users protected
Texas	None	Low THC-CBD only for patients with epilepsy	None

Workplace Safety & Medical Marijuana

- Obvious safety concerns that arise if marijuana is used before operating vehicles and machinery
- Potential morale and employee relations issues if people come to work impaired
- Possible allergic reaction issues to third parties
- The best offense is a good defense



Pre-employment screening and random drug testing

- Pre-Offer
 - Caution: Disability-Related Questions
- Post-Offer
- After Employment Begins
- Illegal v. Non-Illegal Drugs



Disability Accommodation

ADA Provisions

- ADA explicitly permits “the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.” 42 U.S.C. § 12114(d).
- “A qualified person with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the [employer] acts on the basis of such use.” 42 U.S.C. § 12114(a).





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State Spotlight – CA and MA

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Compassionate California? Or . . .



- As of November 2016, recreational marijuana is legal in California
 - California courts continue to uphold an employer's right to terminate employees for testing positive for marijuana
- Medical marijuana has been legal since 1996
 - In 2008, California Supreme Court ruled that employers have a right to drug test and fire patients who test positive for marijuana, regardless of their medical use
 - In 2012, the Ninth Circuit similarly held that the ADA does not offer job protection for medical marijuana users because marijuana is an illegal substance under Federal law

Massachusetts becomes 1st to protect medical marijuana user

- In *Barbuto v. Advantage Sales & Mktg., LLC*, Massachusetts Supreme Judicial Court ruled in June 2017 that a fired medical marijuana user can sue for disability bias
- 1st decision nationwide to find affirmative employment-related protection for a medical marijuana user in the workplace
 - Court rejected Advantage Sales' argument that Barbuto can't sue because her proposed accommodation (continued use of medical marijuana to treat her Crohn's disease) would be a federal crime.
 - Concluded that Barbuto's status under state law is no different from any other employee using legally prescribed medication to treat her condition





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Canadian Update

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Oh Canada!

- “Medical” versus “Recreational”
- **The Cannabis Act**: effective Canada Day (already coined “Cannabis Day”) July 1, 2018, marijuana will be legal in all Canadian jurisdictions
- **Campaign Promise** fulfilled but without any forethought regarding the effect of non-medical use in Society, including the workplace, latter being Provincial
- **Legislative Stew** of potentially conflicting rights: cf. Ontario’s WHIMS Laws in direct conflict with right to smoke medical marijuana (now resolved but...)
- **Dramatic Shift** in societal and legal expectations, but with little established architecture for recreational use and its impact on employers



Oh Can-nabis

- **Legalization** of recreational marijuana does not give employees the right to use marijuana in the workplace
- **Intoxication** rules apply equally as in the case of alcohol
- **Discipline available** where use of intoxicant affects job performance
- **Drug Testing** on a random basis recently upheld by arbitration and Courts where tied to public and private safety
- **Smoking** in all public enclosures banned outright yet legalization has not addressed edibles
- **Accommodation** not required for non-medical recreational use - may promote medical basis for use via readily-available prescription for stress, arthritis, pain, etc.



Can-nabis Buzz

- **Manual Shift:** review and amend existing workplace policies and procedures
- **Off-Duty behaviors** previously sanctionable as societally unacceptable regarding disaffection of reputation, branding and reliability no longer actionable
- **Intrusion** into the workplace still actionable, as with intoxicants
- **Occupational Health legislation** protects all employees from influencers that may compromise safety; therefore employer responsible to police recreational cannabis use affecting the workplace



Can-nabis RX

- **Marijuana** medically-countenanced for several years (1999)
- **Pot Doctors** run clinics dedicated to prescription-based government cultivated and distributed cannabis
- **Benefit Plans** must by law provide prescription-based medical marijuana where a DIN available which under federal legalization will occur – employer review required
- **Human Rights** rulings confirm denial of coverage by employers and carriers of prescription pot is HR violation
- **Accommodation** of medical condition duty of employer including leaves of absence, alternative placement or duties, heightened employer receptivity and responsiveness to medical conditions treated by medical marijuana





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Fact Patterns

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Fact Pattern 1: What would you do?

- You're a national employer who has a "two strikes and you're out" drug and alcohol policy. Two long-time employees from a Minnesota branch, Ann and Bob, have just tested positive for marijuana. Both Ann and Bob have a prior positive marijuana test on their record from years earlier—both successfully completed drug counseling. Ann explains that she has cancer and takes medical marijuana, and shows you her medical marijuana registry card. Bob says he has no idea how he tested positive.
- Can you terminate Ann without violating the law? Bob?



Discussion

- ADA violations? No
- State law violations? Minnesota has a medical marijuana statute that prohibits employers from terminating employees with a medical marijuana registry card following a positive marijuana test
- Can a termination for a failed marijuana test ever form an ADA claim?
 - Michigan case—*EEOC v. The Pines of Clarkston, Inc.*
 - Court says failed marijuana test could be a pretext for discrimination
 - \$42k settlement for an employee that worked two days

Fact Pattern 2: What would you do?

- Back to the Ann and Bob Hypo: Assume Bob admits that he used marijuana, but did so while visiting Oregon the previous weekend.
 - Oregon is one of four states to permit the recreational use of marijuana
 - Minnesota, like a number of other states, has a “lawful activities” statute, which says that an employee cannot be terminated for engaging in lawful activities while he or she is off-duty
- What do you do about Bob now?



Discussion

- A similar issue arose in a Colorado Supreme Court case, *Coats v. Dish Network*
 - Employer had zero tolerance drug policy
 - Quadriplegic customer service representative used medical marijuana off-the-clock
 - Colorado has a “lawful activities” statute
- What does “lawful” mean?
- Implications of the decision



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Takeaways

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'Tangled Web We Weave' Walter Scott

- ❑ As always, state-by-state analysis imperative
- ❑ “Medical” marijuana use significantly different to recreational
- ❑ Where state legalizes recreational use “legalization” does not overwhelm employer right to compel unimpaired performance and non-intrusive use
- ❑ Where “legal”, like alcohol use, impropriety addressable through discipline
- ❑ In all instances employer’s rights preserved respecting safety in the workplace
- ❑ Change mandates review and updating of policies, procedures and manuals
- ❑ Updating must include employer obligation for corresponding benefit coverage

Thank You!