

# The Impact of Marijuana Legalization on Drug Free Workplace Policies and an Employer's Accommodation Obligations

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# Terminology

- Medical marijuana
- Recreational marijuana
- CBD oil
- Controlled substances



# Substance Abuse Policies

Most employers have substance abuse policies that among other things:

- prohibit the use, possession, sale, or distribution of alcohol or controlled substances;
- provide for pre-employment, reasonable suspicion, post-accident, and/or random drug testing;
- set forth the consequences of a positive test result.

The substance abuse policy may also provide:

- EAP assistance for those individuals who seek help voluntarily before a violation of the policy.



# Benefits of Substance Abuse Policies

1. Promotes a safe and healthy work environment;
2. Sets forth clear expectations of acceptable workplace conduct;
3. May provide a defense to unemployment and/or workers' compensation claims (in the event employee tests positive in conjunction with a workplace accident);
4. Depending on the industry, may be required to comply with federal law (e.g., DOT, federal contractor or federal grant recipient, or other statutory or contractual obligations).



# The Movement Towards Legalizing Marijuana Use

- 28 states and Washington, D.C. have legalized the use of marijuana for medical purposes;
  - may be prescribed to treat Crohn's, Alzheimer's, cancer, and a variety of other conditions.
- 8 states (including Colorado, Massachusetts, California, Maine, Washington, Oregon, Alaska, Nevada, and Washington, D.C.) have legalized recreational use;
- Other states have created carve-outs for CBD oil;
- Missouri Amendment



# What the Amendment Says



# Purposes

- This section is intended to permit state-licensed physicians to recommend marijuana for medical purposes to patients with serious illnesses and medical conditions
- The section allows patients the right to use medical marijuana for treatment under the supervision of a physician
- This section is intended to make only those changes to Missouri laws that are necessary **to protect patients from civil and criminal penalties**
- The section does not allow for the **public use of marijuana** and **driving under the influence of marijuana**

**(Emphasis added throughout.)**



# Definitions

- "Physician certification" means a document, whether handwritten, electronic or in another commonly used format, signed by a physician and stating that, in the physician's professional opinion, the patient suffers from **a qualifying medical condition**



# "Qualifying medical condition"

- "Qualifying medical condition" means the condition of, symptoms related to, or side-effects from the treatment of:
  - Cancer;
  - Epilepsy;
  - Glaucoma;
  - Intractable migraines unresponsive to other treatment;



# "Qualifying medical condition"

- "Qualifying medical condition" means the condition of, symptoms related to, or side-effects from the treatment of:
  - A **chronic medical condition that causes severe, persistent pain** or persistent muscle spasms, including but not limited to those associated with multiple sclerosis, seizures, Parkinson's disease, and Tourette's syndrome;
  - **Debilitating psychiatric disorders**, including, but not limited to, **post-traumatic stress disorder**, if diagnosed by a state licensed psychiatrist;



# "Qualifying medical condition" (cont'd)

- "Qualifying medical condition" means the condition of, symptoms related to, or side-effects from the treatment of:
  - Human immunodeficiency virus or acquired immune deficiency syndrome;
  - A **chronic medical condition that is normally treated with a prescription medication** that could lead to physical or psychological dependence, when a physician determines that medical use of marijuana could be effective in treating that condition and would serve as a safer alternative to the prescription medication;
  - Any terminal illness; or



# "Qualifying medical condition" (cont'd)

- "Qualifying medical condition" means the condition of, symptoms related to, or side-effects from the treatment of:
  - In the professional judgment of a physician, **any other chronic, debilitating or other medical condition**, including, but not limited to, hepatitis C., amyotrophic lateral sclerosis, **inflammatory bowel disease, Crohn's disease**, Huntington's disease, autism, neuropathies, **sickle cell anemia**, agitation of Alzheimer's disease, cachexia, and wasting syndrome.



# "Qualifying Patient"

- "Qualifying Patient" means a **Missouri resident** diagnosed with at least one qualifying medical condition.



# Certification

- Qualifying Patients under this section **shall obtain and annually renew an identification card** or cards from the Department
- If the Department fails to deny and fails to issue a card to an eligible Qualifying Patient within thirty days, then their **physician certification shall serve as their Qualifying Patient identification card** for up to one year from the date of physician certification



# Additional Patient, Physician, Caregiver and Provider Protections

- Actions and conduct by Qualifying Patients, as permitted by this section and in compliance with Department regulations and other standards of legal conduct, **shall not be subject to criminal or civil liability or sanctions under Missouri law**, except as provided for by this section



# Additional Patient, Physician, Caregiver and Provider Protections

- Nothing in this section shall provide immunity for negligence, either common law or statutorily created, nor criminal immunities **for operating a vehicle, aircraft, dangerous device, or navigating a boat under the influence of marijuana**



# Legislation

- Nothing in this section shall limit the General Assembly from enacting laws consistent with this section, or otherwise effectuating the patient rights of this section. **The legislature shall not enact laws that hinder the right of Qualifying Patients to access marijuana for medical use as granted by this section**



# Additional Provisions

- Nothing in this section permits a person to:
  - **Undertake any task under the influence of marijuana** when doing so would constitute negligence or professional malpractice; or
  - **Operate, navigate, or be in actual physical control of any dangerous device or motor vehicle, aircraft or motorboat while under the influence of marijuana**



# Additional Provisions

- Nothing in this section **permits** a person to:
  - **Bring a claim against any employer, former employer, or prospective employer** for wrongful discharge, discrimination, or any similar cause of action or remedy, **based on the employer, former employer, or prospective employer prohibiting the employee, former employee, or prospective employee from being under the influence of marijuana while at work** or disciplining the employee or former employee, up to and including termination from employment, **for working or attempting to work while under the influence of marijuana.**



# Additional Provisions (cont'd)

- No Qualifying Patient shall consume marijuana for medical use **in a public place**, unless provided by law. Violation of this prohibition shall subject the violator to sanctions as provided by general law
- A Qualifying Patient must obtain a new physician certification at least annually
- Nothing in this section shall be construed as mandating **health insurance coverage** of medical marijuana for Qualifying Patient use



# The Limits of Drug Tests



# The Limits of Drug Tests

- A drug test (saliva, urine, hair) does NOT establish “impairment” or “under the influence” of any controlled substance.
- It does (“only”) establish the presence of the substance’s metabolites in the tested individual’s body.
- Most current status to least: Saliva (a/k/a “oral fluid”), urine, hair.
  - Each is very individually-dependent
- Saliva/oral fluid – not yet accepted by DOT
  - Expected any moment
  - Due 12/31/18
  - Perhaps delayed by government shutdown



# Missouri (Criminal) Driving Statutes

- 577.001. Chapter definitions. — As used in this chapter, the following terms mean:
  - (13) "Intoxicated" or "intoxicated condition", when a person is under the influence of alcohol, a controlled substance, or drug, or any combination thereof
- 577.010. Driving while intoxicated — sentencing restrictions.
  - 1. A person commits the offense of driving while intoxicated if he or she operates a vehicle while in an intoxicated condition.



# Missouri (Criminal) Driving Statutes

- 577.037. Chemical tests, results admitted into evidence, when, effect of.
  - DUI Alcohol: “2. If a chemical analysis of the defendant’s breath, blood, saliva, or urine demonstrates there was eight-hundredths of one percent or more by weight of alcohol in the person’s blood, this shall be prima facie evidence that the person was intoxicated at the time the specimen was taken.”
- No similar objective test for “under the influence” of --or “being intoxicated” by -- controlled substance/drug.
- Currently, ANY amount of a drug that impairs the individual from being able to drive safely can be enough to be charged with a DUID.
- A “drug” can include illegal drugs, narcotic prescriptions, and even in some cases over the counter medicines.



# Interplay With Other Statutes



# Federal Preemption

- Federal Law preempts CONFLICTING State Laws
  - Marijuana is (still) a Schedule I drug under Federal Controlled Substance Act
- Federal Drug-Free Workplace Act
  - Federal Contractors with a federal contract of 100k or more
  - Any organization receiving a federal grant in any amount



# Federal Preemption

- Regulated Employees/Industries:
  - DOT–regulated employees
  - MSHA-regulated employees
- DOT: “The Department of Transportation’s Drug and Alcohol Testing Regulation – 49 CFR Part 40, at 40.151(e) – does not authorize ‘medical marijuana’ under a state law to be a valid medical explanation for a transportation employee’s positive drug test result....”
- “It remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation’s drug testing regulations to use marijuana.”



# Americans with Disabilities Act (ADA)

- Sec. 12210. Illegal use of drugs
- (a) In general
- For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.



# Americans with Disabilities Act (ADA)

- Sec. 12210. Illegal use of drugs
- (d) "Illegal use of drugs" defined
- (1) In general
- The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 801 et seq.). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.
- (2) Drugs
- The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).



# Missouri Human Rights Act (MHRA)

## § 213.010. — Definitions

- "Disability," a physical or mental impairment which substantially limits one or more of a person's major life activities, being regarded as having such an impairment, or a record of having such an impairment, which with or without reasonable accommodation **does not interfere with performing the job**, utilizing the place of public accommodation, or occupying the dwelling in question. For purposes of this chapter, the term "**disability**" **does not include current, illegal use of or addiction to a controlled substance** as such term is **defined by section 195.010, RSMo.**



# Missouri Worker's Comp

## 287.120. Liability of employer set out — compensation increased or reduced, when — use of alcohol or controlled substances

6. (1) Where the employee fails to obey any rule or policy adopted by the employer relating to a drug-free workplace or the use of alcohol or **nonprescribed controlled drugs** in the workplace, the compensation and death benefit provided for herein shall be reduced fifty percent if the injury was sustained in conjunction with the use of alcohol or **nonprescribed controlled drugs**.

(2) If, however, the use of alcohol or **nonprescribed controlled drugs in violation of the employer's rule or policy** is the proximate cause of the injury, then the benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited.



# Missouri Worker's Comp

## 287.120. Liability of employer set out — compensation increased or reduced, when — use of alcohol or controlled substances

- (4) Any positive test result for a **nonprescribed controlled drug or the metabolites of such drug** from an employee shall give rise to a rebuttable presumption, which may be rebutted by a preponderance of evidence, that the tested nonprescribed controlled drug was in the employee's system at the time of the accident or injury and that the injury was sustained in conjunction with the use of the tested nonprescribed controlled drug if:
- (a) The initial testing was administered within twenty-four hours of the accident or injury;
  - (b) Notice was given to the employee of the test results within fourteen calendar days of the insurer or group self-insurer receiving actual notice of the confirmatory test results;
  - (c) The employee was given an opportunity to perform a second test upon the original sample; and
  - (d) The initial or any subsequent testing that forms the basis of the presumption was confirmed by mass spectrometry using generally accepted medical or forensic testing procedures.



# Missouri Unemployment Compensation

**288.045. Misconduct connected with the claimant's work, when — controlled substance and blood alcohol content levels — notice — tests conducted, when**

1. If a claimant is at work with a detectible amount of ...a controlled substance as defined in section 195.010 in the claimant's system, in violation of the employer's alcohol and controlled substance workplace policy, the claimant shall have committed misconduct connected with the claimant's work.

**8. Use of a controlled substance as defined under section 195.010 under and in conformity with the lawful order of a healthcare practitioner, shall not be deemed to be misconduct connected with work for the purposes of this section.**



# Other States' Cases



# Other States

- Courts **ALLOWING** termination/withdrawal of offer based on positive test result – even with prescription: Colorado, California, and Washington Supreme Courts



# ***Barbuto v. Advantage Sales & Mkt's, LLC*** **(Mass. S.Ct. 2017)**

- Employee possessed a prescription for medical marijuana for Crohn's disease;
- No evidence employee used marijuana before or during work hours;
- Employee tested positive for THC and was terminated.
- Court found:
  - Under state anti-discrimination disability law, employer must engage in the interactive dialogue to determine whether equally effective medical alternatives exist that would not violate its drug policy;
  - If no alternative available, then employer must demonstrate that allowing the employee's use of medical marijuana (or a positive drug screen) would cause an undue hardship; or
  - Federal contractor or grant recipient, or some other evidence that use would violate another statutory or contractual obligation that would compromise the employer's ability to do its business.



*Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680 (R.I. Super. Ct., May 23, 2017).*

- Employers cannot refuse to employ a medical marijuana card holder, even if the applicant would fail the pre-employment drug test.
- Found an “implied right of action” under state medical marijuana law
- Held, “What an employee does on his or her off time does not impose any responsibility on the employer.”



*Noffsinger v. SSC Niantic Operating Co., LLC, d/b/a Bride Brook Health & Rehab. Ctr., (D. Conn. Aug. 8, 2017).*

- Federal Court: federal law does not preempt Connecticut medical marijuana statute's prohibition on employers' firing or refusing to hire qualified medical marijuana patients, even if they test positive on an employment-related drug test.
- Further held: There is an implied right of action under the State medical marijuana law
  - Even employers who are federal contractors or are otherwise regulated by federal law are not exempt from the State law's discrimination prohibition



# Open Questions



# Open Questions

- Protections applied narrowly or broadly?
  - Meant to protect from criminal prosecution?
  - Not meant to affect employment?
- Will a “public place” (where consumption is prohibited) include Employer’s premises?
- What effect on Disability Claims under MHRA?
- What effect of worker’s comp?
- What effect on unemployment comp?

# The Myth of CBD Oil

- CBD Oil typically contains a low level of THC (0.3 or less) and lacks its psychoactive properties;
  - as a consequence, many believe and at least one drug testing company has suggested, it will not result in a positive drug test.
- BUT: The jury is still “out” on the effects:
  - CBD oil, taken in conjunction with marijuana use, may actually increase THC in the bloodstream as well as the length of time it remains; and
  - evidence that CBD oil taken orally may convert to THC in the stomach.
- In the end: because CBD oil is a marijuana derivative, and because marijuana remains a Schedule 1 drug under the Controlled Substances Act, its use will not excuse a positive test.



# What's An Employer To Do?



# Managing The Risk – Pre-Employment (and Perhaps Random) Testing

- You can still require drug tests – including for marijuana
  - Applicant/Employee who tests positive must be “Qualifying Patient”
  - Must be able to produce Physician’s Certification/Identification Card
- IF positive test result for marijuana AND Qualifying Patient with Identification Card:
- Can the applicant/employee in fact perform the essential functions of the job with or without a reasonable accommodation?



# Managing The Risk – Pre-Employment (and Perhaps Random)

- Is the job “safety-sensitive”? If yes, the applicant/employee may pose a “direct threat” to the health and safety of himself/herself and/or others.
- Engage in the “interactive dialogue”
  - Even if accommodation of medical marijuana use is not likely to be granted
  - Interactive Dialogue (almost) always begins with proof of condition/prescription



# Managing The Risk – Reasonable Suspicion or Post-Accident

- Test+
- Test (alone) will not establish “under the influence” of marijuana
- Elements that establish “Reasonable Suspicion,” and/or contributed to Accident MIGHT establish “under the influence.”



# Supervisor's Role

- Enforce safety and performance standards
- Document policy violations
  - Basis for test; Independent basis for discipline/termination
- Identify and document justification for test
  - Document -- do not diagnose
  - Write down the observed signs
  - Observed phenomenon -- not conclusions, reasons or opinions.
- Confront situation privately, in a constructive and effective manner



# Documentation

- Objective and job-related behaviors and/or characteristics
  - OBSERVATIONS are what we can experience with our five senses:
    - Hearing, Seeing, Feeling, Smelling, Tasting
  - INFERENCES are the conclusions we draw from what we observe
- Seriousness of conduct
  - Relation to job and/or safety risks
- Supervisor action(s)/recommendation(s)
- Supervisor signature and incident date



# Physical Signs & Symptoms

## – Bases of Reasonable Suspicion

- Red, glassy eyes; distinctive odor on clothing
- Slow speech - “wow man”; “I don’t care”
- May develop “munchies”, desire for fluids
- Distorted sense of time, speed; slowed reactions
- Irritating cough, chronic sore throat
- Chronic fatigue, lack of motivation
- Runny nose; reddened and sore nose; cold or chronic sinus/nasal problems; nosebleeds
  
- Unusual energy, accelerated movements and activities
- Excessive sweating & shakiness
- Irritability, anxiety & aggressiveness
- Panic & nervousness
- Impaired tracking (ability to follow moving objects with eyes)



# Mental Signs & Symptoms of Drug Use

- Talkative but conversation often lacks continuity
- Changes subjects rapidly
- Getting “hung up,” disoriented
- Agitated, depressed, euphoric, mood-swings
- Poor concentration, tendency to isolate



# Substance Abuse Policies & Testing Programs

- Carefully drafted policy
- Careful selection of specimen collection and analysis vendors
- Plan transportation of employees
- Train supervisors (particularly on determining and documenting reasonable suspicion testing is allowed)
- Handle results strictly confidentially



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