Medical Marijuana: When are Employees One Toke Over the Line?

Presented By:
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AGENDA:

I. Learning Objectives
II. History of Marijuana Legalization Initiatives
III. Overview of the Medical Marijuana Laws in the New England States
IV. Workplace Impact of Medical Marijuana
V. Policy Development
VI. Where Do We Go from Here?
LEARNING OBJECTIVES:

- Understanding protections in the New England States for Medical Marijuana Use
- Court Decisions and Trends
- Understanding the impact of legalization of marijuana on Workplace Policies and other Considerations
- Court Decisions and Trends
TEST YOU KNOWLEDGE OF MARIJUANA

Laws and History
Prior to the recent state initiatives to legalize Marijuana, had its use ever been legal in the United States for medicinal purposes?

When did marijuana become illegal under federal law?

Is there a synthetic legal drug derived from marijuana?
ANSWERS:

- Under federal law, marijuana did not become illegal in the United States until 1941.
- According to written records from China and India, the use of marijuana to treat a wide range of ailments goes back more than 2,000 years.
- From 1850 to 1941, cannabis was included in the United States Pharmacopoeia as a recognized medicinal.
History of Marijuana Laws in the United Stats
By the end of 1936, all 48 states had enacted laws to regulate marijuana.

In 1937, the federal Marihuana Tax Act of 1937 was approved, causing all medicinal products containing marijuana to be withdrawn from the U.S. Market due to the heavy tax.

In 1970, the federal Controlled Substances Act (CSA) placed marijuana and its derivatives in Schedule I, the most restrictive of five categories of controlled substances.
Controlled Substance Act:

Schedule II and III Substances Are Probably Already in Your Workplace
Schedule I Definition:

- Schedule I substances are defined as those which have:
  - a high potential for abuse,
  - no currently accepted medical use in treatment in the United States, and
  - a lack of accepted safety [standards] for use of the drug . . . under medical supervision.
Drugs of abuse with recognized medical uses, such as opium, cocaine, and amphetamine, are assigned to Schedules II through V, depending on their potential for abuse.

Schedule II substances are those that

- have a high potential for abuse,
- but have a currently accepted medical use
- with risk for severe psychological or physical dependence.
Schedule III:

- Schedule III substances are those that
  - have a potential for abuse less than the drugs or other substances in schedules I and II, and
  - are currently accepted for medical use in treatment in the United States
  - with risk for moderate or low physical dependence or high psychological dependence.
Marijuana

- Is a Schedule I drug.
- But . . . .
Two cannabinoid drugs are currently licensed for sale in the U.S.; dronabinol [Marinol®] and nabilone [Cesamet®]).

- They are in pill form.
- These drugs were approved in 1985 and 1992, respectively, for nausea and vomiting associated with cancer chemotherapy and for anorexia associated with weight loss in patients with AIDS.
Marketed as a capsule, Marinol was originally placed in Schedule II.

In July 1999, in response to a rescheduling petition from Unimed, it was moved administratively by the DEA to Schedule III to make it more widely available to patients.

Thus – your employees may already be using a marijuana substance in your workplace – or another highly controlled narcotic on Schedule II or III.
CHANGING PUBLIC OPINION
Recent Gallup Poll Shows ....
October 2013 Gallop Poll: 58 percent responded marijuana should be legal.
States Legalizing medical Marijuana Continue to Increase:

Twenty-One States since 1999!
By the early 1990s, political activists turned to the state legislatures to create an avenue for treatment of patients who would benefit from medicinal marijuana.

By 1997, two states, California and Arizona, had passed state medical marijuana initiatives.

By 1999, five states had approved medical marijuana, adding Arkansas, Oregon and Washington.

Currently, 21 states and the District of Columbia have legalized medical marijuana.
All New England States Have Legalized Medical Marijuana:

- The New England States have approved Medical Marijuana as follows:
  - Maine (1999)
  - Vermont (2004)
  - Rhode Island (2006)
  - Connecticut (2012)
  - Massachusetts (2013)
  - New Hampshire (2013)
The New England Marijuana Laws:

Overview of Workplace Provisions
In Massachusetts, a licensed qualifying patient with a **debilitating medical condition** may use medical marijuana.

An individual must register with the Department of Public Health to receive a Registration Card.

A Qualifying Patient may possess a 60 day supply of marijuana.
A “debilitating medical condition” is defined as:

Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome (AIDS), hepatitis C, amyotrophic lateral sclerosis (ALS), Crohn’s disease, Parkinson’s disease, multiple sclerosis and other conditions as determined in writing by a qualifying patient’s physician.
Employer Provisions:

(B) Nothing in this law requires any health insurance provider to reimburse any person for the expenses of the medical use of marijuana...

(D) Nothing in this law requires any accommodation of any on-site medical use of marijuana in any place of employment.

(F) Nothing in this law requires the violation of federal law or purports to give immunity under federal law.
New Hampshire Law:

- The new NH law is one of the strictest in the country because it allows an individual to use medical marijuana to treat a debilitating condition **only where** the patient has not responded to traditional forms of treatment.
NH Debilitating Conditions:

- Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C currently receiving antiviral treatment, amyotrophic lateral sclerosis, muscular dystrophy, Crohn’s disease, agitation of Alzheimer’s disease, multiple sclerosis, chronic pancreatitis, spinal cord injury or disease, traumatic brain injury, or one or more injuries that significantly interferes with daily activities as documented by the patient’s provider; and
NH Debilitating Conditions (cont.)...

- A severely debilitating or terminal medical condition or its treatment that has produced at least one of the following:

  - elevated intraocular pressure, cachexia, chemotherapy-induced anorexia, wasting syndrome, severe pain that has not responded to previously prescribed medication or surgical measures or for which other treatment options produced serious side effects, constant or severe nausea, moderate to severe vomiting, seizures, or severe, persistent muscle spasms.
The New Hampshire law allows an employer to grant an employee permission to smoke or be under the influence of marijuana in the workplace.

However, the law expressly provides that nothing in this chapter shall exempt any person from arrest or prosecution for being under the influence of or possessing cannabis while . . . in his or her place of employment, without the written permission of the employer...
The law also provides that it **shall not be construed to require**: 

- (a) Any health insurance provider, health care plan, or medical assistance program to be liable for any claim for reimbursement for the therapeutic use of cannabis; or 

- (b) Any individual or entity in lawful possession of property to allow a guest, client, customer, or other visitor to use cannabis on or in that property; or
NH Law Further Provides...

(c) Any accommodation of the therapeutic use of cannabis on the property or premises of any place of employment ...

The statute provides:
- This chapter shall in no way limit an employer’s ability to discipline an employee for ingesting cannabis in the workplace or working while under the influence of cannabis.
- NH Human Rights Commission???
A patient with a “debilitating medical condition” may use medical marijuana after obtaining a written certification from his or her physician and registering with the Department of Consumer Protection.
Debilitating Condition in Connecticut:

- (A) cancer, glaucoma, positive status for human immunodeficiency virus or acquired immune deficiency syndrome, Parkinson’s disease, multiple sclerosis, damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, epilepsy, cachexia, wasting syndrome, Crohn’s disease, posttraumatic stress disorder, or …
(B) any medical condition, medical treatment or disease approved by the Department of Consumer Protection pursuant to regulations.
Connecticut law expressly prohibits the use of medical marijuana in the workplace and states as follows:

“The provisions of subsection (a) of this section do not apply to...(2) The ingestion of marijuana...(B) in the workplace.”

However . . .
Connecticut law prohibits adverse action based on:

- an individual’s status as a qualified patient or as a primary caregiver to a qualified patient.

Thus, Connecticut allows an employer to discipline an employee for being under the influence during working hours.
Maine Law:

Maine law allows a “qualifying patient” who has been diagnosed by a physician as having a debilitating medical condition and who possesses a valid written certification regarding medical use of marijuana, to possess up to 2 ½ ounces of marijuana.
Maine Debilitating Condition:

- (A) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn’s disease, agitation of Alzheimer’s disease, nail-patella syndrome or the treatment of these conditions;
- (B) A chronic or debilitating disease or medical condition or its treatment that produces intractable pain, which is pain that has not responded to ordinary medical or surgical measures for more than 6 months;
Maine Debilitating Condition (Cont.)...

- (C) A chronic or debilitating disease or medical condition or its treatment that produces one or more of the following: cachexia or wasting syndrome; severe nausea; seizures, including but not limited to those characteristic of epilepsy; or severe and persistent muscle spasms, including but not limited to those characteristic of multiple sclerosis; or

- (D) Any other medical condition or its treatment as provided for in section 2424, Subsection 2.
Maine Employer Provisions:

“An employer may not refuse to employ or otherwise penalize a person solely for that person’s status as a qualifying patient or a primary caregiver unless failing to do so would put the employer in violation of federal law or cause it to lose a federal contract or funding.”
However, . . . Maine Permits:

- A … business owner may prohibit the smoking of marijuana for medical purposes on the premises of the … business
  > if the … business owner prohibits all smoking on the premises and posts a notice to that effect on the premises.
  > (Human Rights Commission Decision)
Maine Law Does Not Require Accommodation:

- The law, however, states that it:
  - “shall not be construed to require an employer to accommodate the ingestion of marijuana in any workplace or any employee working while under the influence of marijuana.”

- Furthermore, the law prohibits any person from undertaking any task under the influence of marijuana when doing so would constitute negligence or professional malpractice or would otherwise violate any professional standard.
RI law allows for the medical use of marijuana to treat debilitating medical conditions.

Individuals must obtain a written certification from a physician with whom they have a bona-fide relationship.

The certification must state that in the physician’s professional opinion the potential benefits of the medical use of marijuana would likely outweigh the health risks for the qualifying patient.
Rhode Island Registry:

- The individual must then register with the Department of Public Health, which will issue a Registry Identification Card.
Rhode Island Debilitating Condition:

- In RI, a “debilitating medical condition” means:
  
  (i) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, Hepatitis C, or the treatment of these conditions;

  (ii) A chronic or debilitating disease or medical condition or its treatment that produces one or more of the following:
cachexia or wasting syndrome; severe, debilitating, chronic pain; severe nausea; seizures, including but not limited to, those characteristic of epilepsy; or severe and persistent muscle spasms, including but not limited to, those characteristic of multiple sclerosis or Crohn’s disease; or agitation of Alzheimer’s Disease; or

(iii) Any other medical condition or its treatment approved by the department, as provided for in § 21-28.6-5.
The law states: “No... employer... may refuse to... employ... or otherwise penalize a person solely for his or her status as a cardholder.”

But, it does not permit any person to undertake any task under the influence of marijuana, when doing so would constitute negligence or professional malpractice.
RI also does not permit the smoking of marijuana in any public place.

Moreover, the RI law explicitly states that it shall **not be construed** to require an employer to accommodate the medical use of marijuana in any workplace.
Vermont Law:

- Vermont legalized medical marijuana use for registered patients.

- To become a registered patient, a person must be diagnosed with a debilitating medical condition by a health care professional in the course of a bona fide health care professional-patient relationship.

- The individual must then register with the Department of Public Health, which issues a registration card.
Vermont Debilitating Condition:

“Debilitating medical condition,” is diagnosed after reasonable medical efforts have been made over a reasonable amount of time without success to relieve the symptoms of:

- (A) cancer, multiple sclerosis, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, or the treatment of these conditions, if the disease or the treatment results in severe, persistent, and intractable symptoms; or
Vermont Debilitating Condition (Cont.) ...

(B) a disease, medical condition, or its treatment that is chronic, debilitating, and produces severe, persistent, and one or more of the following intractable symptoms: cachexia or wasting syndrome; severe pain; severe nausea; or seizures.
Vermont Employer Provisions:

- Vermont does not exempt any person from arrest or prosecution for being under the influence of marijuana while:
  - (A) operating a motor vehicle, boat, or vessel, or any other vehicle propelled or drawn by power other than muscular power;
  - (B) in a workplace or place of employment; or
  - (C) operating heavy machinery or handling a dangerous instrumentality.
Vermont No Smoking At Work:

- The law further states that it does not exempt from prosecution or arrest any person smoking marijuana in any public place, including a workplace or place of employment.
When Is An Employee “One Toke Over The Line”?
Summary of Employer Rights:

- Despite few reported decisions in this developing area of the law, courts and agencies have been pro-employer.
Employers CAN...

- Can prohibit smoking marijuana on the job (except Maine if other smoking is permitted, and NH with the employer's written permission); and
- Prohibit employees from working under the influence.
Zero Tolerance

Employers can enforce “Zero Tolerance” policies
Further, the Medical Marijuana laws themselves do not require employers to provide accommodation or

Even to pay for medical marijuana under its insurance policies.
Other Considerations (cont.)…

- Negligent retention?
- Wrongful Discharge?
- Cross Border Employees?
Will this Anti-Marijuana Trend Continue for Employees with Debilitating Conditions?
What is Coming Down the Pike?

- Other Considerations . . . Employee rights:
“Status” Protection Laws

Many states give protection for “status” as a “qualified patient” or primary caregiver.
Disability Discrimination Laws For Disabled Employees

- Disabled employees are protected from discrimination and entitled to reasonable accommodation.
- Does smoked or pill form matter?
Privacy Protection Laws

› States have privacy laws (statute or common law).
  • Impact on drug testing
Off Duty Protection

> Off Duty Conduct (some states have lawful activities statutes).
State Drug Testing Laws:

- Protections under drug testing laws (CT, ME, RI, VT)
Smokers Rights Laws

Smokers Rights Laws (tobacco or smoking/ on or off duty?).
Policies for the Workplace:
Drug Testing

- Drug Free Workplace (federal obligation?)
  - Proper Testing
  - State Drug Testing Law
  - Who to test, for what and when
  - Risks of testing
Workplace Smoking Policy

- Permit or ban?
- Where permitted?
- What permitted to smoke?
- Maine Law considerations
State Disability Law: Duty to Accommodate a Disability

- Disability:
  - Reasonable Accommodation
  - Job descriptions
  - Leave policies (what about the pill form?)
  - Which state will break ranks with the federal decisions?
In December 2012, the California Fair Employment and Housing Commission inserted new language into its disability regulations:

- “An applicant or employee who currently engages in the use of illegal drugs or uses medical marijuana is not protected as a qualified individual under the FEHA when the employer acts on the basis of such use, and questions about current illegal drug use are not disability-related questions.”
- But the MCAD and NHHRC Suggest informally that they may take a different approach.
Where are we going?

- With 58% of Americans supporting legalization of marijuana;
- With 21 states approving medical marijuana, and two approving recreational use; and
- With a federal non-enforcement policy in states where medical marijuana is legal… what will be the future?
Iron Fist in a Velvet Glove?

- Why have there not been more reported cases since legalization in 1999?
- Why have the Employees always lost?
- Lawyers Ethics Opinion
- Doctors Federal Drug Licenses at Risk and participation in Federal reimbursement programs threatened
- Federal raid in Colorado at dispensary
QUESTIONS:

- WHEN WILL THE MINORITY OPINION BECOME THE MAJORITY?
- WHO WILL BE THE TEST CASE?
- WILL THE OBAMA ADMINISTRATION HAVE HSS MOVE MARIJUANA TO SCHEDULE II?
For now ... have good policies, so your case does not go *Up in Smoke* ...

- Cheech & Chong
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