MEDICAL MARIJUANA IN THE WORKPLACE

AIHce 2013 Roundtable

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Presentation Outline

• Impairment in the Workforce – Facts & Figures
• State Medical Marijuana Laws
• Case study: Maine’s Medical Marijuana law
• Conflicting Federal laws
• Inquiring about legal drug use
• Alcohol, Drugs and Disabilities
• Fitness for Duty and the Direct Threat
• Workplace policies
• Case studies
Drug & Alcohol Impairment in America’s Workforce

- In 2011, roughly 8.7% of the U.S. population used illicit drugs in the past month (22.6 million) *
- 66% of adult users (13.3 million) are employed *
- 18.1 million used marijuana in the past month (14.5 million in 2007) *
- 6.7% of population reported heavy alcohol use *
- 3.1% of workers admitted to using drugs before or during work hours in the previous year †
- 8.7% of population classified with substance dependence or abuse (22 million) *

* This data is from the Substance Abuse and Mental Health Services Administration’s (SAMHSA) 2011 National Survey on Drug Use and Health.
† See, “Workplace Substance Use: Quick Facts to Inform Managers,” published by the Center for Substance Abuse and SAMHSA.
Effects of Drug & Alcohol Impairment in the Workplace

- Danger to employees & public
- Increased workplace accidents
- Increased absences
- Decreased productivity
- Decreased morale
Emerging Workplace Issues

- The legalization of medical marijuana.

- The use and abuse of prescription drugs (especially painkillers).
A Country Going Green

- **9** States where Medical Marijuana is not legal and has no pending or failed legislation
- **8** States with pending Medical Marijuana legislation
- **18** States (and District of Columbia) have already passed Medical Marijuana Laws
- **15** States where pending Medical Marijuana legislation failed
## The Medical Marijuana States

<table>
<thead>
<tr>
<th>State</th>
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<tbody>
<tr>
<td>Alaska</td>
<td>Massachusetts</td>
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<td>Arizona</td>
<td>Michigan</td>
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<td>California</td>
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<td>Colorado</td>
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<td>Connecticut</td>
<td>New Jersey</td>
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<td>Delaware</td>
<td>New Mexico</td>
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<td>District of Columbia</td>
<td>Oregon</td>
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<td>Hawaii</td>
<td>Rhode Island</td>
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<tr>
<td>Maine</td>
<td>Vermont</td>
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<tr>
<td>Maryland*</td>
<td>Washington</td>
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*Maryland passed two laws that, although favorable to medical marijuana, do not legalize its use. The laws do not prevent arrest and if used for medical purposes you must present evidence in court for affirmative defense. The maximum penalty is a $100.00 fine.*
## Snapshot: Registered Users by State *

<table>
<thead>
<tr>
<th>State</th>
<th>Number of Medical Users</th>
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<tbody>
<tr>
<td>Maine</td>
<td>Estimated 16,500 medical users (registration began 2011)</td>
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<tr>
<td>California</td>
<td>Estimated 550,000 medical users (voluntary registration)</td>
</tr>
<tr>
<td>Colorado</td>
<td>107,665 medical users</td>
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<tr>
<td>Rhode Island</td>
<td>4,466 medical users</td>
</tr>
<tr>
<td>Oregon</td>
<td>56,939 medical users</td>
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</tbody>
</table>

* Numbers from December 2012
(http://medicalmarijuana.procon.org/view.answers.php?questionID=001199)
Maine’s New State Seal?
DHHS Registry Card

Patient Grow Registration Card in the Name of:
First Last Name
Street Address
City, State Zip Code

Registration #: Control #: 897
Issued: 12/17/2010 Expires: 12/16/2011 DOB:
Becoming a Qualifying Patient

- Physicians may
  - submit a physician certification form
    - Opinion that person gets therapeutic benefit
    - Expires 1 year after issuance
  - Only recommend the use of medical marijuana in the course of a bona fide physician-patient relationship, evidenced by:
    - Evaluation
    - Treatment plan
    - Periodic review and documentation
Becoming a Qualifying Patient

Qualifying Medical Conditions

- Cancer
- Glaucoma
- HIV/AIDS
- Hepatitis C
- Amyotrophic lateral sclerosis
- Crohn’s disease
- Agitation of Alzheimer’s disease
- Nail-patella syndrome
- Intractable pain
- Seizures (not limited to those associated with epilepsy)
- Severe and persistent muscle spasms (not limited to those characteristic of multiple sclerosis)
- Cachexia or wasting syndrome
- Severe nausea
- Any other medical condition that is approved by the commissioner
Marijuana may be cultivated by:

- Patients
- Primary Caregivers
- Dispensaries
The Maine Medical Use of Marijuana Act regulations prohibit:

- Undertaking any task under the influence of marijuana when doing so would constitute negligence or professional malpractice.
The Maine Medical Use of Marijuana Act regulations prohibit -

Operating a motor vehicle, aircraft, motorboat, snowmobile, or all-terrain vehicle while under the influence of marijuana.
Medical Marijuana User Protections

- THE STATUTE:
  - 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.

22 MRSA § 2423-E(2).
**BUT - There Are Limitations**

- Conflict with Federal requirements:
  - An employer may not discriminate “unless failing to do so would put the . . . employer . . . in violation of federal law or cause it to lose a federal contract or funding.”
- *E.g.* DOT regulated positions
More Limitations

• Workplace Consumption:
  – Can impose “a restriction on the administration” of marijuana on the premises when “inconsistent with the general use of the premises”
  – May refuse to accommodate the ingestion of marijuana in the workplace
The Biggest Limitation

- **Under the Influence:**
  
  “These rules [don’t require] an employer to accommodate... any employee working while under the influence of marijuana.”
State vs. Federal Law

- Marijuana remains an illegal drug under federal law.
- The cultivation, manufacture, sale and distribution are crimes.
- In 2009 Attorney General Holder reassured people that the feds would not prosecute.
- But in 2011 the tide turned:
  - U.S. Attorneys said we “might” prosecute.
  - California prosecutors target dispensaries.

“Unless and until ordered otherwise, we will continue to do our duty in enforcing federal narcotics laws.”

Is “Medical Marijuana User” a New Protected Class?

• It depends...
  – Litigation by terminated employees in California, Oregon, Washington, Montana and Michigan has been unsuccessful.
  – But marijuana lobby is promoting state laws with employment non-discrimination protections for medical marijuana users.
The Casias case

- Walmart employee in Michigan terminated after testing positive for marijuana. Casias used marijuana legally under state law for an inoperable brain tumor. Walmart argued that it would terminate all employees who tested positive regardless of the reason for their use.

- Held Michigan law did not protect Casias from termination.
James v. City of Costa Mesa, CA

Cases decided May 21, 2012:

• Seriously ill patients sued two California cities who were raiding marijuana collectives.

• Claimed that their medical marijuana use was protected under ADA.

• The Court ruled that medical marijuana remained an illegal drug under federal law, and that no protections available under the ADA.
Can an Employer inquire about Legal Drug Use???
The ADA Amendments Act of 2008 states that "questions regarding medication use are appropriate only if the employer can demonstrate that it is job-related and consistent with business necessity."
Q: Would you want to know if an employee was using this drug?

When using this product do not use more than directed. Drowsiness may occur. Avoid alcoholic drinks.

Alcohol, sedatives and tranquilizers may increase drowsiness. Be careful when driving a motor vehicle or operating machinery.
In a landmark case, a Tennessee company, Dura Automotive Systems (DAS), fired employees who tested positive for hydrocodone (a pain killer) based on safety reasons. Several fired workers sued Dura for discrimination and invasion of privacy.
• The jury found that Dura's drug testing was not "job-related and consistent with business necessity".

• The damages awarded to the plaintiffs ranged from a nominal $1 award to a combined compensatory and punitive damages award of $394,488.
Thorny Workplace Issues

- Considering the applicant who you know is a medical marijuana user.
- Learning of the medical marijuana use through a post-offer drug test or medical screening.
- Dealing with an employee’s positive drug test.
- Disciplining (?) the employee impaired by medical marijuana, legal drugs, illegal drugs and alcohol.
- Possessing and using medical marijuana and other substances at work.
- Returning the substance user to work.
Alcohol, Drugs and Disabilities

- ADA
  - ADA Amendments Act has lowered the threshold for establishing a Disability.
  - A current user of illegal drugs is not disabled.
  - A recovering drug addict is disabled.
  - An alcoholic (either using or in recovery) is disabled.

- Many state human rights Acts contain similar protections.
The Implications

• Refusal to hire based solely on these disabilities would be discrimination.
• As disabled employees they are entitled to reasonable accommodations.
  – Examples
    – Medical leave for treatment
    – Intermittent leave
    – Time off or schedule changes for appointments

**But you are **not** required to:**
  – Lower performance standards or productivity
  – Excuse misconduct
  – Tolerate absenteeism and tardiness
The “Direct Threat”

• A disabled employee is not qualified for his job if he poses a “direct threat” to his safety or the safety of others.

• “Direct threat” is a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. 42 U.S.A. § 12111(3).
Direct Threat Factors

1. The potential duration of the threat;
2. The nature and severity of the threat;
3. The likelihood that the threat will occur; and
4. The imminence of the threat.
Case Law

• *Chevron v. Echazabal* (U.S. Supreme Court)
  – Assess direct threat based on individualized assessments founded on objective medical evidence.
  – Evidence that the threat cannot be eliminated by reasonable accommodation.
  – Engage in a good faith interactive process.

• *Gillen v. Fallon Ambulance* (1st Circuit)
  – Must read case for direct threat issue/ ability to perform the essential functions of the position.
Recommendations for Employers

1. Rely on qualified medical opinion.
2. Communicate with medical provider about job requirements and employee’s work experience.
3. Avoid “gut” decisions.
4. Pose the right questions to the provider.
   - Ability to perform the essential functions.
   - Whether the employee poses a direct threat.
1. Use an individualized assessment.
2. Rely on a qualified medical opinion.
3. Implement any drug testing in accordance with state and federal law.
4. Discuss any reasonable accommodation requests.
5. Maintain confidentiality of medical information
6. Consider applicability of FMLA.
7. Finalize discipline and establish expectations
8. Offer of EAP.
Case Study Teaser #1

Joey & Jessie

- They are both a bit “off” at work on Sunday evening
- It turns out that they were at a friend’s house for a football game earlier in the afternoon
- Joey admits to having a “beer or two”
- Jessie “might” have smoked marijuana because his back was bothering him; he shows you his medical marijuana card and insists that he did nothing illegal

• What action do you take?
  – Change the facts:
    • Jessie tells you he has a prescription for medical marijuana use at his interview, but he uses it only to sleep at night.
Case Study Teaser #2

• Monique is a Registered Nurse working in a hospital. She has been working long hours, sometimes even double shifts. Monique was diagnosed with glaucoma and her Doctor has recommended medicinal marijuana use. Monique reports to your office and informs you of her medical condition and advises that she will be consuming the marijuana through food such as brownies. She asks if it would be ok for her to bring them to work when she works the double shifts. Monique would need to extend her breaks and consume her medical marijuana on the job.

• What action do you take?
  – Change the facts:
    • Monique asks if she can bring in her prescribed Vicodin for her pain to take during work.
George had a back injury several years ago and has returned to work with restrictions. George reports to work one day and you notice that he seems “out of it.” You ask him to come to your office. He is glassy-eyed, his gait is clumsy and he smells of marijuana. After questioning he tells you that he’s treating his back pain with medical marijuana. He acknowledges he had more than usual this morning, and smoked a joint in his car during his break.

What action do you take?

- Change the facts:
  - George tells you he took prescription painkillers.
  - George tells you that he drank alcohol.
  - George tells you he smoked marijuana illegally.
QUESTIONS?