Substance Use & Marijuana in the Workplace

September 24, 2015
2:00 PM – 5:00 PM

Southern California Chapter
Moderator
Michelle Foster Earle, ARM, President
OmniSure Consulting Group

Panelists
Lise Rogers, RN, Medical Auditor, Clinical Risk Consultant, OmniSure
Kent Johnson, MS/FT, NRCC/TC, RP-SAMHSA, Toxicologist, Exceltox
Will Klatte, III, Klatte, Budensiek & Young-Agriesti, LLP
John L. Barber, Lewis, Brisbois Bisgaard & Smith, LLP
Debra Goldberg, J.D., MPH, RPLU, Markel
Chris Reese, Director of Underwriting, NAS Insurance
Marijuana use has increased since 2007
Is Marijuana addictive?

Contrary to common belief, marijuana can be addictive. Research suggest that about 1 in 11 users becomes addicted to marijuana (Anthony, 1994; Lopez-Quintero 2011). This number increases among those who started as teens (1 in 6 or 17%) and to (20-25%) with daily use.

Long term users trying to quit have reported withdrawal symptoms of:

- Grouchiness
- Sleeplessness
- Decreased appetite
- Anxiety
- Cravings
What Ailments Can Be Treated with Medical Cannabis?

Under California’s medical marijuana law, patients may be recommended marijuana for the following conditions:

- Anxiety
- Arthritis
- Cancer
- Chemotherapy Side Effects
- Chronic Pain
- Fibromyalgia
- Glaucoma
- HIV-AIDS
- Migraine Headaches
- Multiple Sclerosis
- Radiation Therapy Side Effects
• Legalized marijuana for medicinal use is a relatively new concept:
  – California was the first state to legalize Medical Marijuana in 1996
  – It is currently legal in some form in 25 states and legal for recreational use in 4 states and the District of Columbia
  – Medical Marijuana is projected to grow to a $15 billion per year industry by 2019
  – Marijuana remains a Schedule I drug under federal law
• Case law clarifying statutory rights and duties is sparse
States Allowing Medical Marijuana Use
How to Qualify for Medical Marijuana in California

- You must be a California Resident with a valid California I.D. as proof of residency. If you do not have a California I.D. an out of state I.D., passport, or other photo I.D. with proof of residency such as bank statement, utility bill, etc. is acceptable.
- You must obtain legitimate medical records or documentation from your primary care physician describing their diagnosis.
- You must be 18 years of age or, if under 18, be accompanied by a parent or guardian.
- You must obtain a medical marijuana recommendation from a state licensed physician stating you will benefit from the medicinal use of cannabis.
States Providing Workplace Protection for Medical Marijuana Users
The Scorecard

- 26 prohibit any marijuana use for any purpose.
- 5 permit medical marijuana and provide workplace protections.
- 3 plus 1 permit medical marijuana but exclude workplace protections.
- 15 plus DC permit and are silent on workplace protections.
States Where Marijuana Use Is Unlawful
Conflict Between State and Federal Law

- Informs the discussion on liabilities surrounding the manufacture, distribution and possession of Medical Marijuana
- Federal position: marijuana is a Schedule I drug — it has no acceptable medical use but it is an inefficient use of federal resources to prosecute medical marijuana related crimes when the action is in compliance with state law
- States’ Medical Marijuana laws differ but common elements include:
  - Available only for enumerated conditions
  - Marijuana access must be pre-approved by a licensed physician
  - Dispensaries are strictly licensed by the state
Other Recent Cases:

– Casias v. Wal-Mart Store  695 F.3d 428 United States Court of Appeals, 6th Circuit; Medical Marijuana and Title II of the ADA
– James v. City of Costa Mesa 700 F.3d 394 United States Court of Appeals, 9th Circuit; Medical Marijuana and Title II of the ADA
– Ross v. RagingWire Telecommunications Inc. 42 Cal.4th 920 Supreme Court of CA; No FEHA protection for medical marijuana user.
WHO’S FOR AND AGAINST MEDICAL MARIJUANA?

PRO

• Civil Liberty Organizations (ACLU)
• Student Organizations
• Dalai Lama
• Health Organizations (AIDS Action Counsel, Epilepsy Foundation, Kaiser Permanente)
In the Middle

- Many Medical Associations
  - Want more scientific research, regulated dosing, clinical studies
  - Legalization is cart before the horse
  - American Medical Association, American Cancer Society, National MS Society
Against

• Pharmaceutical Companies
  – Abbott Labs maker of Vicodin
  – Purdue Pharma maker of OxyContin

• Police Unions/Local Law Enforcement

• Non-Profits Relying on Fed Drug Prevention Grants
THE MARIJUANA MELEE

Nebraska & Oklahoma v. Colorado
(SCOTUS docket no. 220144, filed Dec. 18, 2014)
Marijuana Melee

- **WHAT** - Nebraska and Oklahoma (NO states) are seeking to invalidate Colorado’s regulatory regime that allows for legal commercial growing and distribution

- **CURRENT STATUS** - May 2015 - SCOTUS requested Solicitor General file brief expressing the view of the US

- **WHY SHOULD I CARE?** - Fed’s brief will be good indicator of future - either continue trend of legalization, or pull back
Marijuana Melee

Why Feds Should Side With NO States

- Supremacy Clause- CSA makes marijuana illegal. Federal law trumps any state law that directly contradicts
- Not about weed- Setting precedent that if states don’t like laws, they can disregard
  - 2012 Arizona v. US- ruled that federal law preempted AZ immigration law
Marijuana Melee

Why Feds Should Side With Colorado

- Regulation of drugs and enforcement of criminal laws is area generally best left to states (unlike immigration that requires unified national approach)
- Federal supremacy does not force states to pass similar laws or keep prohibitions on books
- CSA provides room for inconsistent state laws
Interaction With Other Employment Laws

- Federal Contractors / Federally Regulated Agencies
- Disability Laws
- Medical Leave Laws
MARIJUANA IN THE WORKPLACE?
Do Employers Have to Accommodate Use To Treat a “Disability” under FEHA?

Not in California

• Ross v. RagingWire Telecommunications, Inc. (2008) 42 Cal. 4th 920
  – Use is still a crime under federal law (CSA)
  – Do not need to accommodate use of illegal drugs
Accommodation For Disability

- Need to provide “reasonable” accommodation, unless
  - Undue Hardship
  - Possess health or safety threat
- Employer’s duty is to talk to employee re: accommodations
  - Is there another way to accommodate? Not required to give accommodation asked for
DISCRIMINATION BASED ON MARIJUANA USE?

Employers in CA Can Still Require Drug-Free Work Environment

• Protected in firing or refusing to hire persons who use marijuana or test positive, even if prescribed by dr.
  – Marijuana use impacts productivity
  – OSHA requires safe workplace

• BUT… could be seen by jury as discrimination for underlying condition
Did *Ross* Get it Right?

*That doesn't make any sense.*
• Goes Against Purpose of Compassionate Use Act (legalizing medical marijuana in CA)

• How Is Use At Home Not A Reasonable Accommodation?

• Why Can Employee Use Prescription Drugs Like Vicodin, Ritalin, Adderall, OxyContin at Home to Treat, But Not Marijuana?
Human Resource Considerations

Source www.shrm.org/publications/hrmagazine/editorialcontent/2014/0614

a. Review the company’s drug related policies. Ensure that HR can clearly explain what the company’s expectations are of employees. What is the company’s drug testing policy? Random? Prior to employment?

b. Consider basing policies on expected job results.

c. Remind workers that they are subject to being fired. If an employee violates a company ban, the person can be fired.

d. Work with employees that have medical marijuana cards. Are there alternative forms of treatment? Is there a job that they can perform? Case by case basis. Is it possible to prevent the hazard?

e. Train managers. Train on the company policy; train to recognize signs of drug use.
a. Conflict with state law and federal law – can underwriters rely on Federal law trumping state law?
   i. Do the plaintiff’s attorney’s want to take these cases?
b. Can EPL underwriters assume that there are HR “best practices” related to marijuana in the workplace or is it too early?
   i. What are the defenses for the Employer?
c. Claim will typically fall under any of the following:
   i. ADA
   ii. Invasion of privacy
   iii. Wrongful termination – violation of public policy
• The next big question in Medical Marijuana Liability exposure: Can an employer terminate an employee for testing positive for marijuana use if that employee properly obtains the drug for medicinal purposes?
  – State Law – Split between states
  – Case Law: Coats v. Dish Network; James v. City of Costa Mesa
  – Federal Drug Free Workforce Act
• Dispensary Risks:
  – Dispensing risk
  – Failure to validate Medical Marijuana card
  – Interstate Commerce considerations

• Physician Risks:
  – Failure to properly evaluate a patient for medical marijuana use
  – Telemedicine risks/compliance with Medical Board regulations
• Risks:

• Premises Security Consideration:
  • Dispensaries and growers operate as all cash businesses
  • Increasingly have armed guards on premises

• Products Liability exposures:
  • Dispensaries that grow their own product
  • Growing market for edibles
Pre-employment and post-employment drug testing including marijuana

- Reasons for drug testing
- Pre-employment, random and accident/near miss testing
- Reasons not to drug test
- Reasons to include marijuana in drug testing
- Reasons not to include marijuana in drug testing
- Employee privacy versus public safety
- How is a drug test conducted
- Methods of drug testing
- How does a drug test determine if a person has been using substances?
- Mandatory guidelines for Federal Workplace Drug Testing
- How long are drugs in one’s system?
- Can a potential employee refuse a drug test?
- What recourse does a potential employee have if he is denied employment on the basis of a drug test?
Polling Instructions

How do you like the PLUS Session so far?

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Incredibly Amazing: 330433
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Standard text rates apply ($0.20 est.)
We have no access to your phone number
Please cast your vote for

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<tr>
<th>Team A</th>
<th>245857</th>
<th>57%</th>
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<tbody>
<tr>
<td>Team B</td>
<td>245862</td>
<td>43%</td>
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Case Study

Medical release for medicinal marijuana

- Argument for allowing workers to use medicinal marijuana with a doctor release
- Argument against allowing workers to use medicine marijuana with a doctor release
- Should an employee be required to disclose the use of marijuana in a state that has legalized the substance for medicinal purposes?
- Should an employee be required to disclose the use of marijuana in a state that has legalized the substance for recreational purposes?
- Employee privacy
- Public safety
Please cast your vote for

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Team A
246028 76%

Team B
246030 24%
Case Study

Discrimination in the workplace for medicinal marijuana use

– What is discrimination?
– What are the repercussions of termination or demoting an employee who has tested positive for marijuana use?
– Can an employer terminate or demote an employee who has tested positive for marijuana?
– Employee privacy
– Public safety
– ADA protection
– HIPAA
– Chronic versus acute use
Please cast your vote for

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Team A
246039  42%

Team B
246040  58%