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Bio.

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Howard has been quoted in *USA Today*, *the Wall Street Journal*, *Forbes*, *CNBC*, and *NPR*. Howard was named one of the "50 Most Influential EHS Leaders" by *EHS Today*, and recognized as a *Top Author* in the 2016 JD Super Readers' Choice Awards. He was selected as one of the *Best Employment Attorneys in the U.S.* in 2016 - 2018.

Howard speaks regularly at Georgia Tech and the Georgia Tech Research Institute. He is one of the instructors at the AGC's Advanced Safety Management Training Class and serves on the AGC – National, Georgia, and Carolinas Safety Committees.

Workplace Drug Use: New Problems and Employment Challenges.

I. Introduction.

It is dispiriting that after the Reagan era "War on Drugs," the Miami Vice era, and over 30 years of DOT-driven drug testing, Drugs in the Workplace remains one of the most troubling workplace issues. Society's views are changing about marijuana and workplace drug use. Those changing views are beginning to affect state legislation. However, the hazards created by drug use are, if anything, increasing in the workplace and in society in general. There is a conflict in how employers may view marijuana use in the privacy of their employees' homes versus the potential harm in the workplace.

Although employers are nervous about their right to maintain a drug free workplace, there are only three states with clear court decisions that have found that such use is not automatically justified for discharge and that there may be a duty to accommodate medical marijuana use. However, the trend is that legislatures are drafting their state medical marijuana laws to get around the approach taken in 2015 by the Colorado Supreme Court in [*Coats v. Dish Network*](#), which best describes how most state courts have approached the issue.

Recently, there has been a lot of discussion about employers stopping pre-employment drug testing, but no Fortune 100 company has publicly admitted that they will do so. However, tech companies are talking about doing so, and AutoNation received a lot of attention for announcing that is was doing so.

Unfortunately, even lawful Marijuana use affects performance and safety, which presents problems when Marijuana use is legalized. Marijuana use can affect more than safety sensitive jobs. Does any employer want an employee analyzing financial data and making important decisions while past use may subtly affect their higher levels of judgement?

Employers are increasingly affected by employee misuse of prescribed medications. Similarly, states such as Colorado are experiencing an increase in emergency room admittance for drug overdose, increased in petty theft, and huge increases in impaired driving incidents.

Most management labor firms argue for at least pre-employment/post-offer testing for unlawful use drugs and requiring employees to report to work free from the presence of unlawfully used drugs. Unlike alcohol, marijuana's active metabolite stays in the system for days and can affect higher level reflexes and judgment. However, the employee may not show signs of impairment such as slurring their words which may be present with alcohol impairment.

Unlike for alcohol, no urine or blood drug test has yet been devised where the result will be treated as proof of impairment or of being under the influence. Various states and provinces have passed laws establishing presumptive or per se amounts of THC in one's blood, but their legal effectiveness has not yet been determined. Field sobriety tests may also still be utilized.

The best evaluation of employee unlawful drug use trends is the annual **Quest Diagnostics survey**. Every year Quest parses its 10 million+ workplace drug test results.

For the last few years unlawful drug use has increased after almost 16 years of decline. Prescription opiate positives have skyrocketed, but finally declined a little bit last year. This reflects the government's attacks on "pill mills" and physicians over-prescribing opiates. Nevertheless, the problem is not yet addressed. Nature abhors a vacuum and so does drug use. As prescription opiate abuse drops, black tar heroin consumption rises.

Similarly, methamphetamine positive has skyrocketed in certain areas.

Even cocaine use has reappeared in many areas.

II. Nagging Questions Facing Employers.

Employers are asking:

- Should I still drug test?
- What drugs should I test for?
- Can I refuse to hire an employee who uses medical marijuana?
- Do I have to accommodate an employee who uses medical marijuana?
- How do I know if the Medical Marijuana use is valid?
- Is Cocaine still a problem?
- How do I deal with Opiate issues?

III. The Changing Environment.

A. Changing Views on Marijuana, including by Business and Investors.

- WSJ: "Wall Street's Marijuana Madness: 'It's Like the Internet in 1997.'" Investors have begun to invest in Canada and even the U.S.
- The giant Constellation Brands bought a large stake in the Marijuana Industry in 2018.
- October 2017 Gallup Poll – 64% favor legalization of Marijuana.
- Depending on which Poll one reads, as many as 1 in 5 have used Marijuana.
- Companies such as AutoNation and some tech firms no longer conduct pre-employment drug testing. Sun Sentinel Article.
- Employers in States with legal Marijuana are more likely to cease testing. (2017 Mountain States Employer Association example).
- In the 2018 election, Michigan and Missouri passed new Marijuana laws and more are expected in 2019.
- Over 30 States have Med Marijuana laws.

B. The Tough Labor Market Is a Concern.

- Approximately a 3.7% unemployment rate.
- As a result, more employers are hiring employees with no high school degree – the unemployment rate of applicants with no high school degree has gone from an unemployment rate of 6.5% to 5.5%.
- WSJ: Low Unemployment, Slow Wage Growth Bring Renewed Labor Strife.

C. Even With the Changes in Societal Views, Employer Practices Have Changed Little.

- Approximately 57% of employers still drug test.
- Almost all Fortune 500 Companies engage in some type of drug testing.
- Businesses with "Safety Sensitive" positions, or who do work with the Government, or who are in heavily regulated industries test ... and have lower positive rates.
- Industries with more injuries or "higher hazard" industries experience more Opiate positive test results.

- Different regions have markedly different patterns of positive drug test results and have different varieties of drug problems.
- DOT/FMCSA Drug Test requirements have resulted in lower positive rates for affected industries.

D. Marijuana Impairment May be Invisible and remains a Problem.

Most behavioral and physiological effects of marijuana use return to baseline levels within 3-5 hours after drug use, although some investigators have demonstrated residual effects in specific behaviors up to 24 hours, such as complex divided attention tasks.

- Psychomotor impairment can persist after the perceived high has dissipated.
- In long term users, even after periods of abstinence, selective attention (ability to filter out irrelevant information) declines.
- The speed of information processing has been shown to be impaired with increasing frequency of use.
- Stronger doses may cause fluctuating emotions, flights of fragmentary thoughts with disturbed associations, a dulling of attention despite an illusion of heightened insight, image distortion, and psychosis.
- After alcohol, marijuana is the most frequently detected psychoactive substance among driving populations.

[NHTSA.gov Report.](#)
[NHTSA Report: Marijuana Impairs.](#)

Smoking marijuana has been shown to affect a number of driving-related skills. Laboratory, simulator and instrumented vehicle studies have shown that marijuana can impair critical abilities necessary for safe driving, such as:

- Slow reaction time, for example, responding to unexpected events - emergency braking (Casswell, 1977; Smiley et. al., 1981; Lenné, M.G., et al., 2010);
- Cause problems with road tracking - lane position variability (Smiley, et. al., 1981; Robbe and O'Hanlon, 1993; Ramaekers, 2004)
- Decrease divided attention - target recognition (Smiley, 1999; Menetrey, et. al., 2005), impair cognitive performance - attention maintenance (Ramaekers, et. al., 2004); and impair executive functions - route planning, decision making, and risk taking (Dott, 1972, Ellingstad et al, 1973; Menetrey, et al., 2005). Marijuana Impaired Driving – July 2017 Report to Congress.

E. September 2018 - The Rocky Mountain High Intensity Drug Trafficking Area Report (Excerpts from Executive summary below).

Section I: Traffic Fatalities & Impaired Driving

- Since recreational marijuana was legalized, marijuana related traffic deaths increased 151 percent while all Colorado traffic deaths increased 35 percent
- Since recreational marijuana was legalized, traffic deaths involving drivers who tested positive for marijuana more than doubled from 55 in 2013 to 138 people killed in 2017.
- This equates to 1 person killed every 2 1/2 days compared to one person killed every 6 1/2 days.
- The percentage of all Colorado traffic deaths that were marijuana related increased from 11.43 percent in 2013 to 21.3 percent in 2017.

Section II: Marijuana Use

- Colorado past month marijuana use shows a 45 percent increase in comparing the three-year average prior to recreational marijuana being legalized to the three years after legalization.
- Colorado past month marijuana use for ages 12 and older is ranked 3rd in the nation and is 85 percent higher than national average.

Section III: Public Health

- The yearly rate of emergency department visits related to marijuana increased 52 percent after the legalization of recreational marijuana. (2012 compared to 2016)
- The yearly rate of marijuana-related hospitalizations increased 148 percent after the legalization of recreational marijuana. (2012 compared to 2016)

- Marijuana only exposures more than tripled in the five-year average (2013-2017) since Colorado legalized recreational marijuana compared to the five-year average (2008-2012) prior to legalization.

Section IV: Black Market

- RMHIDTA Colorado Task Forces (10) conducted 144 investigations of black market marijuana in Colorado resulting in:
 - 239 felony arrests
 - 7.3 tons of marijuana seized
 - 43,949 marijuana plants seized
 - 24 different states the marijuana was destined
- The number of highway seizures of Colorado marijuana increased 39 percent from an average of 242 seizures (2009-2012) to an average of 336 seizures (2013-2017) during the time recreational marijuana has been legal.
- Seizures of Colorado marijuana in the U.S. mail system has increased 1,042 percent from an average of 52 parcels (2009-2012) to an average of 594 parcels (2013-2017) during the time recreational marijuana has been legal.

Section V: Societal Impact

- Marijuana tax revenue represent approximately nine tenths of one percent of Colorado's FY 2017 budget.
- Violent crime increased 18.6 percent and property crime increased 8.3 percent in Colorado since 2013.
- 65 percent of local jurisdictions in Colorado have banned medical and recreational marijuana businesses.

F. The Current Unlawful Drug Use Trends Based on 2017 Data.

Positive test rates fell from a whopping 13.6% in 1988 to 3.5% in 2012 – 20+ years of decline. In 2013, they began to rise again, led by a staggeringly fast rise in opiates positivity.

From the [Quest Diagnostic's May 8, 2018 release](#) of its analysis of 10,000,000 2017 drug test results:

Good News ... Prescription opiate positivity rate drops, but for the fifth year, Cocaine rose by double digits in certain states:

- Nebraska (91% increase between 2016 and 2017),
- Idaho (88% increase),
- Washington (31%),
- Nevada (25%),
- Maryland (22% increase), and
- Wisconsin (13%)

Between 2013 and 2017, methamphetamine positivity skyrocketed, especially in Midwestern and Southern states:

- **167%** in the East North Central division of the Midwest (Illinois, Indiana, Michigan, Ohio, Wisconsin);
- **160%** in the East South Central division of the South (Alabama, Kentucky, Mississippi, Tennessee);
- **150%** in the Middle Atlantic division of the Northeast (New Jersey, New York, Pennsylvania); and
- **140%** in Delaware, D.C., Florida, **Georgia**, Maryland, North Carolina, South Carolina, Virginia, WV.

Marijuana positivity rises considerably in states that recently enacted recreational use statutes, finds national analysis by **Quest Diagnostics**. [May 8, 2018 Quest Diagnostics Annual Drug Testing Index](#).

G. Effects of Opiates Abuse.

More Americans die of overdoses than in car crashes and gun homicides combined.

In 2016, 64,000 people died due to drug abuse.

- 23% related to prescription pain relievers.
- 24% related to heroin.
- 31% related to non-methadone, synthetic opioids (e.g., fentanyl)

In 2016, over 11.8 million people used heroin or misused prescription opioid pain relievers.

In 2015, 919,400 people 25 – 54 years old were not in labor force due to their opioid use.

- From 1999-2015, the decline in labor force participation cumulatively cost economy 12.1 billion work hours.
- During that period, the reduction in work hours slowed real annual economic growth rate by 0.2%, which translates to around \$702.1 billion in real output.

American Action Forum (AAF), “The Labor Force And Output Consequences Of The Opioid Crisis” (March 2018).

H. Industries Most Affected by Opiate Abuse.

A Massachusetts Department of Public Health report broke down opioid-related overdose deaths by industry and occupation 2011 - 2015 and found:

“The rate of fatal opioid-related overdose was higher among workers employed in industries and occupations known to have high rates of work-related injuries and illnesses.”

- Construction and extraction: 150.6 deaths per 100,000 workers
- Material moving occupations: 59.1 deaths per 100,000 workers
- Installation, maintenance, and repair occupations: 54.0 deaths per 100,000 workers
- Transportation occupations: 42.6 deaths per 100,000 workers
- Production occupations: 42.1 deaths per 100,000 workers

I. Alcohol Abuse

- A recent hospital emergency room study showed that 35% of patients with an occupational injury were at-risk drinkers.
- Breathalyzer tests detected alcohol in 16% of emergency room patients who were injured at work.
- Large federal surveys show that 24% of workers admit to drinking in the workplace at least once in the past year.

J. Effects on Your Business.

- By 2016, over 30 million people used an illicit drug in the previous 30 days - about 1 in 10 Americans.
- In 2016, 23 million used marijuana in the previous 30 days.
- In 2016, about 4.5 million people reported nonmedical use of prescription pain relievers.

K. The Costs of Drug Using Employees.

According to one reputable recent analysis, Drug-using employees are:

- 2.2 times more likely to request early dismissal or time off,
- 2.5 times more likely to have absences of eight days or more,
- 3 times more likely to be late for work,
- 3 times more likely to be involved in a workplace accident, and
- 5 times more likely to file a workers’ compensation claim.
- Medicinal Marijuana Use.

There are perhaps 4 million medicinal marijuana users and the number is growing.

- Prescribed with increased frequency for ailments such as glaucoma, cancer, HIV, Hepatitis-C, MS, and Seizure disorders.
- Pain relief benefits are still debated.
- FDA has yet to approve it for medical use (THC is approved, however).
- Deemed a Schedule 1 controlled substance with high potential for abuse.
- AMA does not fully support medical use, but only further investigation.
- Most State Laws list the applicable conditions warranting use.
- May limit to cannabis oil and percentage.

IV. Most Recent Data on States with highest workplace positivity test rate for Marijuana.

Marijuana positivity for the American workforce is up for the fifth consecutive year, a trend showing no signs of slowing. Drug positivity in states without marijuana use statutes has kept pace with the national average of 2.1% for the combined U.S. workforce. However, data from Quest Diagnostics shows that the states with the highest positivity rates do not necessarily contain the cities or metropolitan areas with the highest marijuana positivity.

Quest Diagnostics [interactive drug testing map](#) reveals the 10 states with the highest marijuana positivity rates in 2017, averaging 2.96%.

1. Oregon (3.9%)
2. Maine (3.5%)
3. Massachusetts (3.1%)
4. Rhode Island (3.1%)
5. Vermont (2.9%)
6. Michigan (2.8%)
7. Nevada (2.7%)
8. Washington (2.6%)
9. Arizona (2.5%)
10. Colorado (2.5%)

V. Overview of State Marijuana Laws:

- Legal Recreational Marijuana – 11 + the District of Columbia
- Legal Medicinal Marijuana – 33 states and growing
- Legal (CBD) for Medical Use – 44 states
- Over 100 million Americans live in states allowing some form of marijuana use
- In 2018, marijuana was an \$8+ billion dollar industry, with \$21.8 billion projected by 2020 – some speculate \$100 million by then.

VI. An Explanation of Marijuana.

A. As many as 500 metabolites are present in Marijuana but we generally focus on two:

- Delta 9–Tetrahydrocannabinol (THC) - impairs.
- (CBH) – modulates some psychotropic effects of THC, may have medical benefits, debated whether may impair users. At least one Cannabinol product FDA approved.

Resources:

- NHTSA Risky Driving | Drug-Impaired Driving
- [*Marijuana Impaired Driving – July 2017 Report to Congress.*](#)

References studies: 1973, 1977, 1981, 1999, 2004, 2005, 2010).

B. Possible Medicinal uses of CBD and THC.

Medical uses of CBD

Anti-seizure

Anti-inflammatory

Analgesic

Anti-tumor effects

Anti-psychotic

Medical uses of THC

Analgesic

Anti-nauseant

Appetite stimulant

Reduces glaucoma symptoms

Sleep aid

Inflammatory bowel disease

Anti-anxiety

Depression

Muscular spasticity

Resources:

[Analytical Cannabis – Article – What are the Main differences between CBD and THC?](#)

Only FDA-approved Prescription Canabinol – [Epidiolex \(cannabinol\)](#) - FDA approves first drug comprised of an active ingredient derived from marijuana to treat rare, severe forms of epilepsy. Food and Drug Administration website. <https://www.fda.gov/newsevents/newsroom/press-announcements/ucm611046.htm>. Accessed June 29, 2018.

C. Problems with Marijuana Testing.

Blood testing is preferred for attempting to ascertain impairment in a criminal setting but is not yet effective or recognized.

There is not yet an accepted test result that is alone legal and technical proof of Marijuana Impairment.

Alcohol is blood soluble – THC is fat soluble and can be released into blood long after ingestion.

The primary psychoactive substance in marijuana is delta-9-tetrahydrocannabinol (THC). THC is one of over 500 known compounds in the cannabis plant, including more than 80 other cannabinoids. THC is associated with the psychoactive effects of ingesting marijuana plant material. THC has been shown to bind with receptors in the brain (and to a lesser extent in other parts of the body) and it is likely that this process underlies some of the psychoactive (behavioral and cognitive) effects of marijuana use.

While ethyl alcohol is readily soluble in water, and hence blood, THC is fat soluble. This means that once ingested, THC is stored in fatty tissues in the body and can be released back into the blood sometimes long after ingestion. Some studies have detected THC in the blood at 30 days post ingestion (Heustis, 2007).

Thus, while THC can be detected in the blood long after ingestion, the acute psychoactive effects of marijuana ingestion last for mere hours, not days or weeks. Also, unlike alcohol, which is metabolized at a steady rate, the metabolism of THC occurs in a different fashion such that THC blood levels decline exponentially. Some studies have reported a fairly wide variability that is affected by the means of ingestion (smoking, oil, and edibles), potency, and user characteristics. Most research on the effects of marijuana has used smoking and often do not measure the concentration of THC in the blood. July 2017 NT TSA Marijuana-Impaired Driving: A Report to Congress. p 4

The decline of alcohol is predictable – THC is not. July 2017 NTTSA Marijuana-Impaired Driving: A Report to Congress. p.3.

The amount of alcohol in the bloodstream is closely related to impairment, but not THC. See the above Report.

In summary, ethyl alcohol is a relatively simple drug whose absorption, distribution and elimination from the body along with the behavioral and cognitive effects are fairly well documented. July 2017 NTTSA Marijuana-Impaired Driving: A Report to Congress. p.9.

Criminal Law – There is only a limited ability to prove impairment based on Blood Alcohol Content (BAC). Field Sobriety tests may still be necessary.

Generally, prosecution on a drug-impaired driving offense will include evidence that the driver had used a specific potentially impairing drug, and that an observed impairment likely resulted from that drug use. It is difficult, though not impossible, to obtain a conviction for drug-impaired driving without evidence of drug use by the suspect. For example, a suspect may refuse to provide a specimen for testing and/or the officer may be unable to obtain a search warrant in a timely fashion.

Evidence of drug use is typically obtained by the investigating law enforcement officer (physical evidence, odor of marijuana use, etc.), but most often comes from forensic testing conducted in a laboratory of a biological specimen taken from the suspect. Laboratory testing of biological specimens can be time consuming and expensive. July 2017 NTTSA Marijuana-Impaired Driving: A Report to Congress. p 9

- Illegal everywhere in America to drive under the influence of alcohol, marijuana, opioids, methamphetamines, or any potentially impairing drug—prescribed or over the counter.
- 15 States’ Zero Tolerance Laws prohibit the presence of any drugs.
- At least five states present the presence of any “prohibited drugs.”
- Several States have established a specific BAC result such as 5 nanograms of THC per millilitre of blood.

VII. Applicable Employment Laws

A. Overview.

- The Americans with Disabilities Act (ADA)
- State and Local Disability and Discrimination Laws.
- Family and Medical Leave Act (FMLA).
- State Drug Laws regulating how testing is carried out.
- State Laws protecting Legal Off-duty Activities.
- State Medical and Recreational Marijuana laws.
- Fed/State DOT/Motor Carrier Safety regulations.
- OSHA Interpretations.

B. Status of the ADA.

- Drug and alcohol addiction is considered a disability.
- A rehabilitated drug or alcohol addict is protected under the ADA.
- A Leave of absence for rehabilitation may be considered reasonable accommodation (before violation of policy is detected).
- A “current” user of illegal drugs is not protected under the ADA.
- A “current” user of alcohol is protected under the ADA, but may be disciplined for violating Company policy or work rule, depending on facts (case-by-case basis).

C. Drug & Alcohol Policies and the ADA.

- The EEOC has stated that “current” means “recently enough” to justify the employer’s reasonable belief that drug use is an ongoing problem.
- Courts have indicated that “currently engaging” is not limited to “the day of” or even within a matter of days or even weeks before the employment act (i.e. workplace accident) took place.
- It is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in illegal drug use.
- The EEOC regulations explain that “individuals disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities.”
- Although courts generally do not consider alcoholism a “per se” disability – an alcoholic is a person with a disability when the condition “substantially limits” him or her in at least one “major life activity.”
- The ADA also protects individuals who do not currently drink alcohol but have a record of alcoholism.
- Employers may require an employee who is an alcoholic or engages in the illegal use of drugs to meet the same performance standards of performance and behavior as other employees;
- Employers do not have to tolerate poor job performance or unsatisfactory behavior such as absenteeism, tardiness, insubordination or on the job accidents related to an employee’s alcoholism or illegal use of drugs if similar performance or conduct would not be tolerated in other employees.
- The ADA specifically permits employers to prohibit the use of alcohol or drugs in the workplace and to discipline employees for such use.
- Employers may maintain a drug free workplace standard.

D. Drug & Alcohol Policies and the Family and Medical Leave Act (FMLA)

- The FMLA provides twelve weeks of leave and reinstatement for employee with a “*serious medical condition.*”
- In most cases, drug addiction will be considered a “*serious medical condition.*”
- Substance Abuse Rehabilitation may count as FMLA leave.

VIII. The Status of the Federal Controlled Substances Act and its Effect on State Laws.

A. Marijuana remains a Schedule I Drug under the Federal Controlled Substances Act, which means according to the Federal analysis, marijuana presents:

1. **A high potential for abuse;**
2. **No currently accepted medical use in treatment in the US; and**
3. **Lack of accepted safety for use of it.**

Despite a multiyear push by numerous Democratic Congress members and various organizations, the Obama Administration declined to change the Scheduling of Marijuana in an August 11, 2016 Notice [DEA Press Release](#), and [DEA Controlled Substances](#).

[August 2016 Article](#) on not the DEA’s decision to not Reschedule Marijuana:

The DEA’s current approach and many helpful facts are contained in the 2017 [DEA Guide to Drugs of Abuse](#):

On October 19, 2009, the U.S. Dept. of Justice (“DOJ”) issued a statement that it will not:

“Focus federal resources in your states on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the use of medical marijuana.”

The DOJ approach reiterated this position in the [2013 Cole Memo](#):

Former Attorney General Sessions issued a new [Memorandum on January 4, 2018](#), which unnerved proponents of marijuana legalization but has not yet resulted in changes in Federal enforcement. [Analysis](#).

B. Most Courts Have held That Federal Criminal Scheduling Trumped State Marijuana Law with regard to Employment Claims.

The Supreme Court set the tone with *Gonzales v. Raich*, 541 U.S. 1 (2005)

- Congress may ban use of cannabis even where approved by states for medicinal use
- The controlled Substances Act trumped California law (Prop. 215) pursuant to Commerce clause
- Banning marijuana growth for medical use is a permissible way of limiting its access for other uses
- As a result, employers in most states may safely refuse to accept medical marijuana as a reasonable explanation for a positive test result.
 - In 2008, **California's highest court** found that the state's medical marijuana law only protects individuals from criminal prosecution, ruling in favor of an employer who declined to hire an injured vet using marijuana to treat chronic back pain after he failed his pre-employment drug test.
 - In 2010, **the Oregon Supreme Court handed employers a comprehensive victory**, ruling that medical marijuana's status as an illegal drug under federal law meant that no employer should be forced to accommodate it.
 - In 2011, **the Washington Supreme Court handed employers a similar victory**, deciding that employers need not accommodate an employee's use of medical marijuana, and that employees terminated for medical marijuana use – even offsite use – have no basis to sue their employers.
 - In 2012, **the Montana Supreme Court ruled** that medical marijuana users and providers had no special right to their employment despite the state's new law.
 - This was followed by **a unanimous 2015 Colorado Supreme Court decision** holding that employers were still free to prohibit employee marijuana use in their workforces, and can still discipline and terminate employees who test positive for the drug, despite state law permitting its medicinal (and recreational) use.
 - Most recently, in January 2016, **a federal court judge in New Mexico dismissed a lawsuit** brought by an employee terminated after testing positive for the drug, finding that state law does not require employers to accommodate medical marijuana use.

C. The June 6, 2015 Colorado Supreme Court decision [Coats v. Dish Network](#), represented the typical approach until recently as new State Marijuana laws were drafted expressly to protect legal employee use.

“We therefore agree with the Court of Appeals” ... “that the commonly accepted meaning of the term ‘lawful’ is ‘that which is ‘permitted by law’ or, conversely, that which is ‘not contrary to, or forbidden by law.’”

The Court rejected argument that the General Assembly, in drafting CLODA, intended the term “lawful” to mean “*lawful under Colorado state law.*”

“In sum, because Coats’s marijuana use was unlawful under federal law, it does not fall within [CLODA’s] protection for ‘lawful’ activities.”

Having decided the case under Federal law, the court declined to address the second issued – whether Medical Use Amendment makes use lawful.

IX. Examples of Developing State Law Issues about Marijuana.

- A. **New York** –has incorporated medical marijuana users into other laws prohibiting discrimination based on disability. N.Y. Pub. Health Law § 3369.
- B. **Rhode Island** - “No employer may refuse to employ or penalize, a person *solely for being a cardholder*” R.I. Gen. Laws § 21-28.6-4(c).

***Callaghan v. Darlington Fabrics Corp.*, 2017 WL 2321181.**

- The “solely on the basis” clause was tested in *Callaghan v. Darlington Fabrics Corp.* where a young woman who used medical marijuana to treat Crohn’s disease applied for an internship. She was offered the position contingent on a drug test and she informed the employer that she would fail. Not surprisingly, she did fail and the employer rescinded the offer.
- In Court, the employer made several arguments, including the same argument everyone else had successfully used, i.e. that marijuana is illegal under federal law and therefore it was permitted to rescind the offer.
- For the first time in the country, the trial court judge found that it was possible to bring such a claim, regardless of federal law, and found that Rhode Island’s anti-disability discrimination statute would support the plaintiff’s claim.

C. *Barbuto v. Advantage Sales and Marketing, LLC* (Mass Supreme Judicial Court 8/2017).

The Court concluded that, as with the use of any properly prescribed medication, the use of lawfully prescribed marijuana must be accommodated - Chief Justice Gants:

“An exception to an employer’s drug policy to permit its use is a facially reasonable accommodation.”

The Court left open the possibility that accommodating an employee’s use of medical marijuana could pose an undue burden to employers, holding that the use of marijuana could impair performance or cause a safety issue, which would impose an undue burden on employers.

Essentially the same analysis employers have been using for years with respect to employee use of other lawful controlled substances.

The Court also confirmed that the statute does not require employers to permit the use of medical marijuana in the workplace.

D. *Noffsinger v. Niantic Operating Company* (USDC Connecticut) (9/17).

Held that Connecticut employees who have received approval from the state agency to use medical marijuana outside of work cannot be fired just because they test positive for marijuana during a drug screening.

The court held that employees and job applicants can sue based on a termination or a rescinded job offer.

X. Examples of State Marijuana Laws.

Missouri
[Medical marijuana.](#)

Amendment 2 does not change federal law, which continues to classify marijuana illegal under the Controlled Substances Act, even if it is used for medical reasons.

Under the new Missouri law, qualified patients who have approval from their physician will receive identification cards from the Missouri Department of Health and Senior Services that will allow them and their registered caregivers to grow up to six marijuana plants and purchase at least four ounces of cannabis from dispensaries on a monthly basis.

The list of medical conditions that will permit medical marijuana use is broad and somewhat open-ended; more so than some state laws. Qualifying medical conditions include specific conditions or symptoms related to, or side-effects from, the treatment of cancer, epilepsy, glaucoma, HIV, intractable migraines unresponsive to other treatment, and any terminal illness, as well as a litany of chronic

medical conditions and psychiatric disorders such as Crohn's disease, autism, Alzheimer's disease, and post-traumatic stress disorder, to name just a few.

Should employees or applicants have one of the qualifying conditions or, in the professional judgment of their physician, have a debilitating or other medical condition, they may be a qualifying patient eligible to apply for a medical marijuana identification card.

Missouri employers may continue to enforce their drug-free workplace policies prohibiting employees from working under the influence of marijuana even after the new law takes effect. Employers will be pleased with the express language in Amendment 2 which provides a safety net for employers.

The new law specifically prohibits employees from filing claims against Missouri businesses for wrongful discharge, discrimination, or similar causes of action based on the employer prohibiting the employee from being under the influence of marijuana while at work or disciplining the employee for working or attempting to work while under the influence of marijuana. It is important for an employer to review its policies to ensure that the language expressly prohibits working under the influence of medical marijuana.

No. The express language of the amendment also prohibits public use of marijuana. In addition to enforcing a drug-free workplace policy, an employer can also similarly adjust other policy language prohibiting smoking, ingesting, or otherwise consuming marijuana at the workplace in any form (vapor, edible, oil, etc.).

Michigan

Employers are not required to accommodate marijuana use at the workplace or allow an employee to work under the influence of marijuana under this 2018 law. Employers may discharge an employee for testing positive for marijuana on a drug test, even when the use was off duty and the employee had a valid medical marijuana card.

See, *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (2012).

Georgia Medical Marijuana Law

General Provisions.

- Lawful for any person to possess up to 20 fluid ounces of low-THC oil ("medical marijuana") if such substance is in a pharmaceutical container labeled by the manufacturer, indicating the percentage of tetrahydrocannabinol therein and:
- The person has a registration card issued by the Georgia Department of Public Health or
- The person has a registration card issued by another state's Department of Health.

Employer-Exemption Provision

- Employers are not required to permit or accommodate the use, consumption, possession, transfer, display, transportation, or sale of marijuana in any form.
- Employers may maintain a written zero tolerance policy prohibiting the on-duty or off-duty use of marijuana.
- Employers may maintain a written zero tolerance policy prohibiting any employee from having a detectable amount of marijuana in their system while at work.

Georgia Drug Free Workplace Law.

The Georgia State Board of Workers' Compensation certifies employers as a drug-free workplace. Those certified receive a 7.5% reduction of their workers' compensation premiums. ([O.C.G.A. §33-9-40.2](#)) ([O.C.G.A. §34-9-412](#))

Applicant, Reasonable Suspicion, Post-rehab, Routine Fitness-for-Duty, and:

- “When employees have caused or contributed to an on the job injury that resulted in a loss of work time, which means any period of time during which an employee stops performing the normal duties of employment and leaves the place of employment to seek care from a licensed medical provider.”
- Even though the above is required for certification, an employer still may send employees for a substance abuse test if they are involved in on the job-accidents where personal injury or damage to company property occurs.

California

Cal. Health & Safety Code §§ 11362.5, 11362.7 to 11362.9; Cal. Health & Safety Code §§ 11362.1 to 11362.45.

Employers are not required to accommodate medical or recreational marijuana use in the workplace. Employers may fire employees who test positive for marijuana, even if the use was off duty and for a medical condition with a valid medical marijuana card.

Ross v. RagingWire Telecommunications, Inc., 42 Cal.4th 920 (2008).

Bills failed in the 2018 California Assembly that would have required accommodation and made medical marijuana users a protected class. The bill failed, but there are several similar bills in the works and we will likely see it again next term.

Maine

Medical Use of Marijuana Act, 22 M.R.S. § 242

Maine approved the use of medical marijuana in 2009, and it is one of the few states that actually addresses the employment relationship in its medical marijuana statute, declaring that it is unlawful for an employer to refuse to employ a medical marijuana user “solely” for that person’s status as a qualifying patient.

Maine also expressly acknowledges that there is an exemption for employers to comply with federal law (where marijuana is still illegal)

There is no duty to accommodate a medicinal marijuana user at work, you do not need to allow your employees to smoke or otherwise ingest marijuana on during work or while on your property.

Massachusetts

An Act for the Humanitarian Medical Use of Marijuana (Acts 2012, Ch. 369)

Massachusetts voters overwhelmingly approved the use of medical marijuana via ballot initiative in 2012, with 63% voting in favor.

The Act does not include any express employment protections but does state that no user may “be denied any right or privilege”. Remember this because it will be important later.

Like every other state, there is no requirement to accommodate workplace use of medicinal marijuana

The Regulation and Taxation of Marijuana Act, M.G.L. C. 94C. (Massachusetts)

In 2016, marijuana was again on the ballot, this time for recreational use, and again Mass. voters approved it can possess up to 1 ounce outside the home and up to 10 ounces at home. Regulated largely like alcohol, 21+, can’t use it in public. Mass Department of Revenue anticipates more than \$700 million in revenue.

Statute provides express provision under which employers are not required to accommodate use of marijuana in the workplace, and has no impact on employer policies regarding the use of marijuana.

Vermont

Act Relating to Marijuana Use by Persons with Severe Illness, Vt. St. tit. 18, § 4471 (2003).

Vermont was the first state in New England to permit the use of medical marijuana. Its law contains no specific protections for employees, but does state that employees cannot be under the influence at work and that there is no employer obligation to accommodate on-site use.

While Vermont has the oldest medicinal marijuana law, it has the newest recreational statute, and it is the only state in the country where the law was passed by the legislature, instead of with a citizen petition or ballot referendum.

Similar to the Massachusetts recreational statute, Vermont employers do not need to accommodate use or consumption in the workplace.

There is no cause of action against employers who terminate employees for using recreational marijuana. This means that employees cannot successfully sue you if you terminate them due to their use of recreational marijuana

Rhode Island

R.I. Gen. Laws §§ 21-28.6-4, 21-28.6-7.

Like Maine, Rhode Island joined the medicinal marijuana party in 2009, but has not yet legalized recreational use.

Also like Maine, Rhode Island is a “*solely on the basis*” state and employers do not have to accommodate on-site use.

- The “solely on the basis” clause was tested last year in *Callaghan v. Darlington Fabrics Corp.* where a young woman who used medical marijuana to treat Crohn’s disease applied for an internship. She was offered the position contingent on a drug test and she informed the employer that she would fail. Not surprisingly, she did fail and the employer rescinded the offer.
- In Court, the employer made several arguments, including the same argument everyone else had successfully used, i.e. that marijuana is illegal under federal law and therefore it was permitted to rescind the offer.
- For the first time in the country, the trial court judge found that it was possible to bring such a claim, regardless of federal law, and found that Rhode Island’s anti-disability discrimination statute would support the plaintiff’s claim.

Callaghan v. Darlington Fabrics Corp., 2017 WL 2321181.

Connecticut

Palliative Use of Marijuana Act, Ct. Gen. Stat. Ch. 420f, § 21a (2012)

Connecticut is also a “*solely on the basis*” state, but has an expressed exemption for compliance with federal law.

In August 2017, a federal court in Connecticut held that the state’s medical marijuana law was not preempted by federal law, and that an employee can make a claim where she was not hired as a result of testing positive.

In *Noffsinger v. SSC Niantic Operating Co., LLC*, F. Supp. 3d 2017 WL 3401260 (D. Conn. Aug. 8, 2017), the employee’s job offer was rescinded after she tested positive for medical marijuana. The court held that the fact that the ADA allows employers to prohibit the illegal use of drugs at the workplace did not give employers the power to regulate non-workplace activity. This is the first federal court to rule that federal law doesn’t preempt a state law that expressly prohibits employers from firing or refusing to hire someone who uses marijuana for medical purposes.

See, Noffsinger v. SSC Niantic Operating Co., LLC, F. Supp. 3d 2017 WL 3401260.

Pennsylvania

Medical Marijuana Act (effective April 17, 2016).

The Act includes an express provision prohibiting employers from discriminating against employees “solely on the basis of” their status as certified medical marijuana users, *but does not require an employer to permit a medical marijuana user to accommodate use of medical marijuana in the workplace or to tolerate an employee undertaking to perform job duties while meaningfully impaired by his or her use of medical marijuana.* This portion of the Act reads as follows:

Section 2103. Protections for patients and caregivers.

(b) Employment.—

- (1) No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana.
- (2) Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment. This act shall in no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position.
- (3) Nothing in this act shall require an employer to commit any act that would put the employer or any person acting on its behalf in violation of Federal law. Act Sec. 2103(b).

There is confusion and concern in the employer community about where the Pennsylvania law may go. While there has not been a Pennsylvania case protecting medical marijuana users from termination, if/when there is, the *Noffsinger* case out of Connecticut is likely to be instructive as the language in both states' statutes are nearly identical.

Arkansas

Ark. Const. amend. XCVIII, §§ 3, 6.

[Arkansas article.](#)

An Employer with nine or more employees may not discriminate against applicants or employees based on past or present status as a medical marijuana cardholder or as a designated caregiver for a physically disabled medical marijuana patient. Employers may take adverse action against employee based on a good faith belief that the employee used, possessed, or was impaired by medical marijuana on company property or during work hours. A positive drug test alone is not sufficient grounds for a good faith belief.

“Employers may, however, exclude employees from safety-sensitive positions based on a positive drug test.”

Arizona

Ariz. Rev. Stat. § 36-2813.

Employers may not discriminate against medical marijuana users based solely on their status as registered cardholders or for testing positive on a drug test for marijuana, unless it would cause the employer to lose money or licensing benefits under federal law. Employers may fire or take other

adverse action against employees who use, possess, or are impaired by medical marijuana on company property or during work hours.

Florida

Fla. Stat. Ann. § 381.986.

Employers are not required to accommodate the use of medical marijuana in the workplace or allow an employee to work under the influence of marijuana. [Analysis.](#)

New Jersey

N.J. Stat. Ann. §§ 24:6I-1 to 24:6I-16.

Employers are not required to accommodate use of medical marijuana. Employers may enforce a zero-tolerance drug policy and terminate employees for testing positive for marijuana, even for off-duty use.

Cotto v. Ardagh Glass Packing, CV-18-1037 (D.N.J. August 10, 2018).

Marijuana State Laws: In Conclusion.

- Many medical marijuana state laws expressly allow employers to “discriminate” against medical marijuana users, including California.
- However, a few states, especially those states with newly drafted laws, have anti-discrimination policies which may be interpreted to protect using employees.
- Massachusetts, Connecticut, and Rhode Island are the current problem states, but more will come.

XI. OSHA’s Position on Automatic Post Injury Drug testing.

A. The actual OSHA Rule set out in the revised Injury and Illness recordkeeping standard is simple ad short:

What must I do to make sure that employees report work-related injuries and illnesses to me?

(i) You must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness.

B. Obama OSHA’s Interpretation of the Rule.

- Maintain incentive programs which reward employees for experiencing no recordable workplace injuries and illnesses;
- Maintain rules requiring disciplining employees who do not immediately report workplace injuries;
- Automatically conduct post-accident drug testing of injured employees
- Also Emphasized in an October 19, Memo: Disproportionate discipline against injured employees.

C. Obama OSHA’S Initial Interpretation of the Rule.

- To strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use.
- Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing. In addition, drug testing that is designed in a way that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting.

Based on the Obama Administration’s position, many employers ceased automatic post injury testing.

D. Practical Problems with OSHA'S Interpretation.

- Marijuana Impairment May Not Be Obvious. Remember the 1980s landmark study showing carry-over Effects?
- Marijuana carry-over effects on aircraft pilot performance.
- Study found evidence for 24 and 48 -hour carry-over effects of a moderate social dose of marijuana on piloting tasks.
- While seven of the nine pilots showed some degree of impairment at 24 h after smoking, only one reported any awareness of the drug's effects.

Exceptions to Obama OSHA's Interpretation.

DOT mandated testing is exempt.

OSHA's interpretation exempts post injury testing conducted pursuant to State Workers Comp Drug Free Workplace Programs (DFWPs) or related insurer plans.

Not all State DFWP Laws require automatic Post Accident Testing.

E. Current OSHA Position.

On October 11, 2018, OSHA took a moderate approach to responding to the Obama era interpretation. Rather than issue a new Guidance completely rescinding the Obama OSHA interpretation, the Agency issued a slightly more vague acquiescence to what many expected would be OSHA's real life approach.

The Obama OSHA interpreted the Standard to conclude that Section 1904.35(b)(1)(iv) found automatic post-accident drug testing to discourage employees from reporting recordable workplace injuries and illnesses. In reality, the burden would have been on OSHA to prove that the policy actually dissuaded employees from reporting injuries; which we interpreted as requiring showing actual occasions of this happening. This analysis would have to occur on a case-by-case basis.

The [October 11 Memo](#) returns "reasonableness" to OSHA's case-by-case analysis. In fact, note the recurrent use of the word, "reasonable" in the new guidance.

The Memo approves drug testing under 1910.35(b)(1)(iv) to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.

This is a more reasonable approach than simply prohibiting such testing. The approach also fits with good safety practices. Why would the employer test only the injured employee? The employer should test any employees who may have caused or contributed to an accident. It is suspect, even if unintentional, to focus on an injury.

This is a straightforward approach and as an example, does not require a tired third shift supervisor to engage in a tricky analysis of whether the facts of the accident suggests that maybe the injured employee was affected by unlawfully used drugs.

Logically, an employer should drug test employees who cause or contribute to an accident which mercifully did not result in an injury. However, OSHA did not go this far. The Memo did point out that its analysis of the employer's policy would be influenced by whether their overall safety efforts reflected an effort to prevent injuries:

In addition, evidence that the employer consistently enforces legitimate work rules (whether or not an injury or illness is reported) would demonstrate that the employer is serious about creating a culture of safety, not just the appearance of reducing rates.

Action taken under a safety incentive program or post-incident drug testing policy would only violate 29 C.F.R. § 1904.35(b)(1)(iv) if the employer took the action to penalize an employee for reporting a

work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health.

- OSHA provides that most instances of workplace drug testing are permissible. Examples of permissible drug-testing include:
- Drug testing unrelated to the reporting of a work-related injury or illness.
- Drug testing under a state workers' compensation law.
- Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees.
- If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.

XII. Many States' Laws Regulate When an Employer May Test Employees and the Procedures.

Some Examples:

- California State Constitutional limitations.
- Connecticut limits random testing to certain positions.
- Minnesota limits testing as part of a routine physical, and limits random testing to certain positions and imposes limits discharge rights.
- Montana limits random testing to certain positions.
- Rhode Island prohibits random testing.
- Massachusetts Privacy Act affects test occasions.
- Many States require specific test procedures, Notice to employees and opportunities to rebut.

XIII. The Drug Testing Process.

A. Most employers test in one or more of these circumstances:

- Post-offer/Pre-employment
- Reasonable suspicion
- Random
- Post-accident
- Fitness for duty/Return to work

B. Post-Offer, Pre-Employment Testing

- There are almost no testing limitations after making a conditional offer of employment.
- Don't invite discrimination claims:
- Test, or don't test, everyone who is offered the job position in question;
- Apply the same standards to everyone tested for that position;
- Protect confidentiality of test results.

C. Other Testing?

- Random
 - **Testing by randomly selecting employees**
 - **NOT an excuse to "catch" a particular person.**
 - **Random testing must in fact be *random*!**
- Fitness for Duty
 - **As part of a physical examination**

D. Zero Tolerance Policies

- Don't paint yourself into a corner.
 - **Termination for every infraction, big or small, is not effective.**
 - **Leaves no room for employer's discretion.**
- Scenario: Your policy says everyone who fails a drug test will immediately be terminated.
 - **All four members of one department tested positive today.**
 - ◆ **Can you operate without that department?**
 - ◆ **Can you terminate some, but not others?**
 - ◆ **The department employees' test results:**
 - **Two tested positive for marijuana.**
 - **One tested positive for Methadone.**
 - **One tested positive for heroin, and appeared high.**
 - ◆ **If the policy had left room for discretion, you could:**
 - **Give the marijuana smokers a last chance agreement.**
 - **Suspend the Methadone user, pending proof of prescription.**
 - **Terminate the heroin (opioid) user.**

E. What should you do if you think an employee is "under the influence?"

- Observe the employee carefully
- If possible, have another supervisor or management representative observe the employee
- Document findings
- Did you receive a report from someone?
- What behaviors did you observe?
- What other supervisor or manager observed the employee?
- What behaviors did the other supervisor observe?

F. Reasonable Suspicion Testing.

- More than mere suspicion but less than "*probable cause*."
- Balancing of employee's reasonable expectation of privacy against the employer's legitimate interest in imposing the test.
- Public-sector employers, in contrast, typically must articulate a "compelling" interest to justify a "search" under the Fourth Amendment to the U.S. Constitution. Similar considerations arise in California where the State Constitution's privacy provisions apply to employers.

What Constitutes "Reasonable Suspicion?"

- Typically established when there is reliable information or evidence that an employee is at work with drugs or alcohol in his/her system.
- We recommend that more than one person in a supervisory position confirm whatever facts or circumstances may become the reasonable suspicion basis for discipline.

Reasonable Suspicion – Conduct

- Extreme mood swings or changes, including inappropriate glee or excitement
- Slurred speech
- Unusual clumsiness
- Staggering/unsteady walk
- Sleeping on the job or lethargy
- Excessive sweating
- Smell of alcohol/marijuana
- Very large or small pupils
- Bloodshot/watery eyes

- Wearing sunglasses indoors without regard to weather or lighting
- Poor, careless, modified, or unacceptable work performance
- Erratic/unusual behavior on the job
- Irritability/unpredictable responses to ordinary requests and job circumstances
- Coworker reports and comments

G. Confidentiality.

- All information related to the substance abuse testing of an employee must remain confidential.
- Information should be divulged strictly on a “need to know” basis.
- Test results, medical reports and pertinent documentation should be kept in a confidential file consistent with requirements mandated by the ADA, FMLA and other laws.