

Weeding Out Cannabis Issues in the Workplace



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Weeding Out Cannabis Issues in the Workplace




All I need are some tasty waves, a cool buzz, and I'm fine.



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Marijuana vs. Cannabis vs. Marihuana

- ◆ Marihuana Tax Act of 1937
- ◆ Michigan adopted its statutory definition in the Public Health Code utilizing the federal spelling
- ◆ An act of Michigan Legislature required to change spelling
- ◆ Cannabis is the botanical plant



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Michigan Legalizes Marihuana


- ◆ On November 6, 2018, Michigan voters voted “YES” on Proposal 1
- ◆ Marihuana is now legal in Michigan, becoming the first state in the Midwest to legalize marihuana
- ◆ Marihuana still is illegal at the federal level



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Legal Marihuana


- ◆ Legalization took effect December 6, 2018
- ◆ Individuals 21+ can purchase, possess, and consume marihuana legally
- ◆ Individuals can possess up to 2.5 ounces in public
- ◆ Individuals can grow up to 12 plants in their home for personal use
- ◆ Individuals are permitted to have up to 10 ounces in their residence



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Legal Marihuana


- ◆ A state licensing system was created for the cultivation and distribution of marihuana
- ◆ Sales subject to 10% excise tax that is in addition to the state’s 6% sales tax
- ◆ First dispensaries opened to the public on December 1, 2019



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Federal Prohibition


- ◆ Controlled Substances Act (CSC), 22 U.S.C. § 812.
- ◆ Zero Tolerance
- ◆ Cannabis continues to be a Schedule I drug.
 - ◆ Have a high potential for abuse.
 - ◆ Have no currently accepted medical use in treatment in the United States.
 - ◆ Lack accepted safety for use under medical supervision



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Federal Prohibition


- ◆ Strictly Prohibited
- ◆ 21 U.S.C. § 841 states:
 - ◆ a. "...it shall be unlawful for any person knowingly or intentionally –
 1. To manufacture, distribute or disperse or possess with intent to manufacture, distribute or dispense a controlled substance..."
 - ◆ Cannot be prescribed by physicians



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Federal Prohibition


- ◆ Strict Prohibition
- ◆ 21 U.S.C. § 856 states:
 - (a) "...it shall be unlawful to ---
 - (1) Knowingly **open or maintain any place** for the purpose of manufacturing, distributing, or using any controlled substance;
 - (2) **Manage or control** any building, room or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and **knowingly and intentionally rent, lease, or make available for use**, with or without compensation, the building, room, or enclosure for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.



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Federal Prohibition


- ◆ Drug-Free Workplace Act of 1988
 - ◆ Requires federal grantees and contractors to implement a drug-free workplace and establish a drug-free awareness program as a precondition for receiving a federal grant or contract.
- ◆ Department of Transportation
 - ◆ Employers in safety-sensitive transportation industries (trucking, aviation, railroads) must comply with vigorous drug-testing requirements, including prohibitions on the use of marijuana.



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Federal Prohibition


- ◆ Federal pre-emption.
 - ◆ State sovereignty generally respected.
 - ◆ Federal law controls if conflicts with state law.



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Scenario


- ◆ AA female w/ dreadlocks comes to work and walks by a supervisor. He smells marijuana and she has bloodshot eyes.
 - ◆ What would you do, if anything?
 - ◆ Obligation of employee and/or employer?
 - ◆ Issues with confronting employee?
 - ◆ Look to anything for guidance?



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What Does it Mean for Employers?


- ◆ Employers are not obligated to “permit or accommodate conduct otherwise allowed by this act in any workplace”—i.e. although legal, employees cannot use marihuana at work and can be not hired or discharged or disciplined for violating a workplace drug policy by testing positive
- ◆ For employers with federal contract or whose employees are licensed through federal agencies – you will still have to have a zero tolerance policy



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What Does Legal Marihuana Mean for Employers?


- ◆ The initiative included specific language regarding employers
- ◆ Employers are not obligated to “permit or accommodate conduct otherwise allowed by this act in any workplace or on the employer’s property.”
- ◆ Does not prohibit an employer from taking an adverse action because of a violation of a workplace drug policy or because that person was working while under the influence



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What Does Legal Marihuana Mean for Employers?

- ◆ Employees cannot smoke or consume marihuana at the workplace
- ◆ Employees can be disciplined, up to and including termination, for violations of workplace drug policies or working while under the influence
- ◆ Issue to monitor—recreational bill did not define “under the influence”
- ◆ For employers with federal contracts or whose employees are licensed through federal agencies – you will still have to have a zero tolerance policy



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Michigan Medical Marihuana Act


- ◆ Medical marihuana in Michigan has been legal since 2008
- ◆ The Michigan Medical Marihuana Act (“MMMA”) permits individuals with medical cards to consume, store, and grow similar quantities of marihuana as the recreational bill
- ◆ Individuals must be a “qualifying patient” to obtain a card



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Medical Marihuana & Employers


- ◆ Notably, the MMMA does not require employers to “to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana”



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Marihuana and Job Safety


- ◆ Marihuana contains tetrahydrocannabinol (THC) which is a psychoactive compound
- ◆ Negative effects: changes in sensory perception, impaired thinking and learning
- ◆ Negative physical effects: impaired motor performance, loss of balance and coordination, decreased attentiveness and alertness, prolonged response time to stimuli and danger, decreased ability to judge distance and space, and impaired ability to perform complex tasks



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Marihuana and Job Safety


- ◆ Operation of heavy equipment, hazardous tools, dangerous work areas, and operations are generally deemed “safety sensitive” and require full attention to task
- ◆ Truck drivers, piolets
- ◆ Effects of marihuana can prove deadly to someone operating a crane, forklift, or working on a roof



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Marihuana and Job Safety


- ◆ According to National Institute on Drug Abuse, employees who tested positive for marihuana had 55% more industrial accidents, 85% more injuries, and 75% greater absenteeism compared to those who tested negative
- ◆ Impacts bottom line: decreased productivity, increase worker compensation and unemployment comp claims, higher turnover, and lawsuits



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The Testing Dilemma


- ◆ Unlike alcohol, there is not a standard to measure cannabis impairment
- ◆ Only a test that detects use or level of THC is present
- ◆ THC is detectable for 30 days or even longer depending on the test used



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Steps for Employers

- ◆ Employers should maintain written policies prohibiting employees from using or being under the influence of drugs while at work
- ◆ Maintain written drug testing policies
- ◆ Supervisors/managers should be aware of how to recognize the signs of impairment in their employees
- ◆ Enforce any and all drug policies in a uniform manner



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Marihuana and Interaction with Other Laws


- ◆ Americans with Disabilities Act
- ◆ Michigan Persons with Disabilities Civil Rights Act
- ◆ Unemployment Benefits



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Americans with Disabilities Act

- ◆ Again, marihuana is illegal under federal law
- ◆ Under the ADA, an individual engaging in the illegal use of drugs is not considered an “individual with a disability”
- ◆ Employees who use drugs may still be required to meet the same performance and conduct standards as other employees
- ◆ Since marihuana is illegal under federal law, the ADA does not recognize marihuana as a reasonable accommodation



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Michigan Persons with Disabilities Civil Rights Act


- ◆ Thus far, Michigan courts have not dealt with the issue of medical marihuana and the Michigan Persons with Disabilities Civil Rights Act
- ◆ Thus, it is not clear if employers need to accommodate use of medical marihuana
- ◆ However, Massachusetts and Connecticut, states with similar medical marihuana laws, have dealt with this issue



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Barbuto v Advantage Sales and Marketing


- ◆ Employee suffered from Crohn's disease, and had valid medical marihuana prescription
- ◆ Advised her employer she would test positive if given a drug test, and was told it would not be an issue
- ◆ She was then terminated for testing positive
- ◆ No evidence that she was under the influence at work or using at work



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Barbuto v Advantage Sales and Marketing

- ◆ Employee filed a discrimination lawsuit, alleging in part disability discrimination
- ◆ Supreme Court of Massachusetts held that the employee could seek a civil remedy for disability discrimination
- ◆ Equated medical marihuana to any other prescription, and that marihuana could be a reasonable accommodation under state law



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PDCRA and Marihuana as a Reasonable Accommodation


- ◆ In Michigan, prior bills have been introduced to amend the MMMA to prohibit employers from terminating employees for using medical marihuana
- ◆ It is unclear if any such bill will be introduced again
- ◆ However, a Michigan court could follow *Barbuto's* lead and find medical marihuana to be a reasonable accommodation



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Unemployment Benefits & Marihuana


- ◆ Michigan Courts have held that an individual is not disqualified from receiving unemployment benefits if that individual tested positive for marihuana while in possession of a valid medical marihuana card
- ◆ *Braska v. Challenge Manufacturing Co.*



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Unemployment Benefits & Marihuana


- ◆ *Braska v. Challenge Manufacturing Co.* involved three consolidated cases, all of which dealt with employees that were terminated after testing positive for marihuana, while in possession of a valid MMMA card
- ◆ Key MMMA clause:
 - ◆ "A qualifying patient who has been issued and possesses a registry [ID] card shall not be subject to . . . Penalty in any manner . . . for the medical use of marihuana in accordance with this act" MCL 333.26424



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Unemployment Benefits & Marihuana


- ◆ Court reasoned that the only reason the individuals were denied benefits was because of their positive test, BUT there was no evidence that the individuals had breached the MMMA
- ◆ Thus, because the positive tests were caused by medical marihuana, and because the MMMA contains a broad preemption clause, the employees could not be denied unemployment benefits based on the positive tests



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Casias v. Wal-Mart Stores, Inc.


- ◆ Employee tested positive for marihuana and was terminated
- ◆ Employee suffered from sinus cancer and inoperable tumor, and used marihuana for medicinal purposes
- ◆ 6th Circuit Court of Appeals held that the MMMA does not restrict private employers
 - ◆ Federal decision and not binding on Michigan Courts
 - ◆ *Braska* court implied it may take a more expansive view than *Casias*



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Unemployment Benefits & Marihuana


- ◆ UIA will deny benefits if the claimant's
 - ◆ Positive drug test for marihuana was caused by consumption in the work place;
 - ◆ Termination is based on the fact that the claimant was under the influence of marihuana at the work place; or
 - ◆ The claimant cannot demonstrate they are a qualifying patient who has been issued and possesses a valid MMMA card



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Unemployment Benefits & Marihuana


- ◆ Not clear how recreational marihuana will impact unemployment benefits
- ◆ Again, the recreational initiative did not define “under the influence” which may impact the UIA’s decision making process



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Impact on Employers


- ◆ PDCRA—Michigan courts have not decided the question of whether employers have a duty to accommodate medical marihuana
 - ◆ Exercise caution
- ◆ Unemployment benefits
 - ◆ Terminating an employee solely for testing positive for medical marihuana will not preclude the employee from obtaining unemployment



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Common Themes for Consideration

- ◆ Do not tolerate marijuana on the job, treat it like alcohol.
- ◆ Train managers to spot signs of impairment.
- ◆ What type of test company uses and stay on top of developments in technology and testing.
- ◆ Operate in different states, know that testing policies may need to vary by location. Also, accommodating medical marijuana.
- ◆ Have a drug-free workplace policy.
- ◆ Educate employees about company marijuana use policy and the repercussions for failed test, including random, post-accident, or reasonable suspicion test.



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