

Cannabis and the Workplace

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Marijuana Use Trends

- 52 million Americans (18.7%) aged 12 or older used marijuana in the past twelve months.
- Nearly 50% of Americans have reported using marijuana at some point in their lifetime.
- Marijuana users are more prevalent than cigarette smokers.
- 72% of Americans believe regular alcohol use is more of a health risk than marijuana.
- 56% of Americans believe marijuana use is socially acceptable.

Legalization in Maryland Timeline

- 2014 – Maryland Medical Cannabis Commission established.
 - Legalized and regulated the cultivation, processing, possession, sale, and consumption of medical marijuana.
 - Made possession of small amounts of marijuana a civil infraction instead of a crime.
- 2016 – Maryland decriminalized possession of marijuana paraphernalia and smoking in public.
 - Rolling papers, pipe, bongs were no longer illegal.
 - Smoking in public became a civil offense with a fine of up to \$500.
- 2017 – Maryland’s Medical Marijuana Program began.
 - Medical marijuana became available to patients who were registered through the MMCC.
- 2022 – HB1 passes and puts the legalization of marijuana on the ballot via referendum to legalize marijuana as of July 1, 2023.
- November 2022 – Question 4 passes: 67.2% in favor.

House Bill 556 (2023)

- General Assembly was required to take action this year.
 - “The General Assembly shall, by law, provide for the use, distribution, possession, regulation, and taxation of cannabis with the State.” (Question 4)
- HB 556:
 - Addresses the implementation of recreational sales by modifying the medical marijuana provisions.
 - Does not address anything about employment – with the exception of requirements for licensed cannabis growers.
 - Original draft included language authorizing employers to take disciplinary action based on a positive test.

Language Removed from HB 556

16 ~~(F) NOTHING IN THIS SECTION MAY BE CONSTRUED TO PREVENT OR~~
17 ~~PROHIBIT ANY EMPLOYER FROM DENYING EMPLOYMENT OR A CONTRACT TO AN~~
18 ~~INDIVIDUAL OR DISCIPLINING AN EMPLOYEE OR A CONTRACTOR FOR TESTING~~
19 ~~POSITIVE FOR THE PRESENCE OF CANNABINOIDS OR CANNABINOID METABOLITES~~
20 ~~IN THE URINE, BLOOD, SALIVA, BREATH, HAIR, OR OTHER TISSUE OR FLUID OF THE~~
21 ~~EMPLOYEE'S OR CONTRACTOR'S BODY, IF THE TEST WAS CONDUCTED IN~~
22 ~~ACCORDANCE WITH THE EMPLOYER'S ESTABLISHED DRUG TESTING POLICY.~~

Language Removed from HB 556

- Employers and the Maryland Chamber of Commerce objected to removal of the employer protection language.
- Attorney General opined in March 2022 (regarding HB 1 & HB 837 (2022 legislative session)) that:
 - “Neither bill limits any existing requirements or authority of an employer with respect to maintaining a drug free workplace or prevents an employer from making employment decisions based on an employee’s or employment applicant’s use or positive drug test for the presence of cannabis, which remains a prohibited controlled substance under federal law. Neither bill appears to contain any provisions establishing a protected class for employment for users of cannabis.”
 - “Neither bill appears to contain any prohibition against an employer making an employment-related decision or taking disciplinary action against a prospective or existing employee for the use of, or testing positive for the presence of, cannabis. Additionally, neither bill contains any restriction against an employer from discriminating against a prospective or current employee based on the use of, or positive test for, cannabis.”

MMCC Patient FAQ

- “Maryland law does not prevent an employer from testing for use of cannabis (for any reason) or taking action against an employee who tests positive for use of cannabis (for any reason).”
 - Maryland Medical Cannabis Commission, Patient FAQ, https://mmcc.maryland.gov/Pages/patients_faq.aspx
- Unlike other states (e.g., New York), Maryland does not have a law that prohibits employers from taking employment actions based on any off-duty conduct . . . YET.

Maryland's Drug Testing Law

- An employer with a legitimate business purpose may require an employee or job applicant to submit to a test for use or abuse of controlled substances or alcohol. Md. Code Ann., Health-Gen. § 17-214(b)(1), (h).
- Controlled substances are those listed in Schedule I through V under the Federal Controlled Substances Act. Md. Code Ann., Crim. Law § 5-101(g)(1).
- Tests must be performed at state-approved laboratory and employer must inform the individual of the name and address of the testing facility. COMAR 10.10.10.05; Md. Code Ann., Health-Gen. § 17-214(b)(1).

So, what next?

- Drug testing.
- Reasonable accommodations.
- Workplace safety concerns.
- Disciplinary action.

Pre-Employment

- Employers that want to conduct pre-employment drug tests must register with Office of Health Care Quality at the Department of Health and Mental Hygiene.
- Employers may use single-use tests meeting FDA requirements at an appropriate collection site. Md. Code Ann., Health-Gen. § 17-214(a)(9), (b)(2).
- If the result is positive, the sample must be sent to a state-approved lab for testing. Md. Code Ann., Health-Gen. § 17-214(d).

Positive Tests

- The employer must send the individual:
 - a copy of the lab results;
 - a copy of the employer's written policy on the use or abuse of controlled substances or alcohol;
 - notice of rights to request independent testing of the same sample or results; and
 - notice of intent to take disciplinary action up to and including termination.
- The information must be sent within 30 days of the test by certified mail or personal delivery. Md. Code Ann., Health-Gen. § 17-214(c).
- Applicants or employees who request an independent follow-up test must pay for the cost of the new test. Md. Code Ann., Health-Gen. § 17-214(e)(2).

Penalty

- Failure to comply with Maryland's drug testing law is a misdemeanor punishable by a \$100 fine for a first offense and \$500 for each subsequent offense. Md. Code Ann., Health-Gen. § 17-216.

Federal v. State Law

- The U.S. Constitution and the laws made under it are the “supreme law of the land.”
- If there is a conflict between federal and state law, federal law will generally control.
 - Particularly true in issues of interstate commerce.
- Controlled Substances Act, 21 U.S.C. § 812
 - Schedule I Narcotic =
 - High potential for abuse.
 - No accepted medical use.
 - Lack of accepted safety for use under medical supervisor.
 - Still illegal under federal law, unless used in conjunction with research.

Practical Problems with Marijuana Testing

- Presence does not necessarily mean impairment.
 - A positive test does not mean that the person is currently under the influence of marijuana.
- Marijuana can be detected in blood, saliva, urine, and hair based on prior usage.
- Heavy users can test positive for up to a month (or more).
- No BAC or “breathalyzer” equivalent.
- No current test can tell the line between impairment and non-impairment.
- Can supervisors spot impairment?

More Practical Issues

- THC concentration and psychoactive effects peak within minutes of smoking.
- But takes 1-4 hours for ingestion.
- Functional impairment lags behind the THC peak.
- Acute impairment generally lasts 3-4 hours.
- THC fat soluble, but insoluble in water, which causes it to stay in body for weeks – long after the high has passed.
- Effect varies person to person.
- Mood and setting are important.

Training Considerations

- Reasonable suspicion management training:
 - Required by some states.
 - Specific, articulable symptoms of impairment.
 - Presents a safety danger to self or others.
 - An opportunity to challenge the basis for the determination.
 - Mandatory supervisor training or certification.
 - Mandatory referral to counseling instead of termination.
- Example: New Jersey, Workplace Impairment Recognition Expert (WIRE)
 - Requires (1) positive test and (2) evidence-based documentation of physical signs of impairment during work.
- Cognitive impairment tests.
- Use of Reasonable Suspicion Observed Behavior Report.

CAUSE FOR REASONABLE SUSPICION

NOTE: A manager or supervisor must complete this form. A combination of one or more observable signs and symptoms of drug or alcohol use must be observed to establish reasonable suspicion. Determination of reasonable suspicion must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, body odors or speech (ABBS) of the employee. The observations may include indications of the chronic and withdrawal effects of controlled substances. In making a determination of reasonable suspicion, additional factors may include, but are not limited to the following:

- Pattern of unsatisfactory job performance or work habits;
- Occurrence of a serious or potentially serious work-related accident that may have been caused by human error or flagrant violations of safety, security, or other operating procedures;
- Evidence of illegal substance use, possession, sale, or delivery while on duty and/or possession of drug paraphernalia;
- Information provided by either a reliable or credible source independently corroborated or having corroborative evidence from a supervisor;

Physical Signs or Symptoms (CIRCLE ALL THAT APPLY)

Flush/pale/sweaty face
Profuse/excessive sweating
Red/bloodshot eyes
Glassy/watery eyes
Closed eyes
Droopy eyelids
Dilated/constricted pupils

Dry mouth/lip smacking
Vomiting/excessive belching
Shaking hands/body tremors/twitching
Disheveled appearance
Needle tracks or puncture marks
Frequent sniffing
Shortness of breath/difficulty breathing
Runny nose/sores around nostrils

Odor of alcohol
Odor of marijuana
Odor of chemicals

Behavioral Indicators (CIRCLE ALL THAT APPLY)

Agitated/insulting speech
Combative/threatening speech
Incoherent/slurred/slow speech
Rapid/rambling/repetitive speech
Delayed/mumbling speech
Shouting/whispering/silent
Uncharacteristically talkative

Irritable/angry/impulsive
Use of profanity/argumentative
Swaying/stumbling/staggering
Lack of coordination
Disoriented/confused
Euphoric
Tearful
Impaired judgment
Sleepy/stupor

Sad, depressed, withdrawn
Anxious/fearful
Cannot control machinery/equipment
Excessive yawning/fatigue/lethargy
Unaccounted time/extended breaks
Loss of inhibition
Inappropriate wearing of sunglasses
Falling down/reaching for support
In appropriate wearing of outerwear

Marijuana-Related Convictions & Hiring

- Not recommended to use as a bar to hiring decisions.
 - Equal Employment Opportunity Commission.
 - Permitted only when (1) job related for position in question and (2) consistent with a business necessity.
- Requires individualized inquiry:
 - nature and gravity of offense;
 - time that has passed since the conviction and/or completion of sentence; and
 - the nature of the job held or sought.

Accommodations

- Duty under the Americans with Disabilities Act (ADA) and the Maryland Fair Employment Practices Act (FEPA) to accommodate employees.
- BUT, the ADA does not provide protection for an individual who is currently engaging in the use of illegal drugs.
- As long as marijuana remains illegal under federal law, courts have concluded that medical marijuana use is not protected by the ADA.
- Cannot use medical marijuana as a pretext for an issue with underlying disability.

Accommodations Continued

- Consider the positions for which off-duty usage could be an accommodation.
- Make clear that use on property and/or during work hours is strictly prohibited and does not qualify as an accommodation.
- Determine what jobs are “safety-sensitive” to permit an accommodation:
 - Examples:
 - “substantial bodily injury, property damage or death”
 - “might endanger the integrity of our Nation’s borders or the life of the citizenry”
 - “particularly dangerous if performed under the influence of drugs or alcohol”
 - “the risk to public safety is substantial and real”
 - “public safety is genuinely in jeopardy”

How Does this Apply to Cannabis

- Cannabis can be used to treat a mental or physical impairment.
- The EEOC has taken the position that policies requiring applicants to disclose prescription drugs that could impair job performance or potentially pose a safety concern can pose problems with the ADA.
- The Rehabilitation Act is largely not affected by medical cannabis use due to its application to federal contracts and employment, where cannabis is considered an illegal drug with no recognized medical application.

How Does this Apply to Cannabis

- Employers need not tolerate any employee's use of marijuana in the workplace. 42 U.S.C. § 12114(c)(4); 29 C.F.R. § 1630.16(b).
- Since marijuana is still illegal under Federal law, employers need not reasonably accommodate the current use of marijuana under the ADA.
- BUT, be careful to ensure the facts indicate current use. *Shirley v. Precision Castparts Corp.*, 726 F.3d 675 (5th Cir. 2013); *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182 (9th Cir. 2001); *Scott v. Harrah's LLC*, 2017 WL 1927927 (D. Nev. May 9, 2017).
- The ADA covers recovering or recovered drug users. 29 C.F.R. § 1630.3(b).

Marijuana and the Unionized Workplace

- Collective bargaining provides an opportunity to establish rules and guidelines that are appropriate for the particular workforce and workplace.
 - IAFF Local 1 and the Pittsburgh Fire Department negotiated medical marijuana protections for fire-fighters—the ultimate safety sensitive employees.
 - Protects the use medical marijuana to treat conditions caused by the job: cancer, anxiety, PTSD, chronic pain, opioid use disorder
- Any changes to existing policies should be negotiated with union (do not make unilateral changes to terms and conditions of employment).
- “Just Cause” standard for discharge:
 - Be clear about what is “just cause” as it relates to marijuana (e.g., positive test, suspected impairment at work, confirmed impairment at work, etc.)
- Note the difficulties with determining use and timing in connection with discipline and discharge.

DOT Employers

- The federal Department of Transportation has required alcohol and drug testing for employees involved in various transportation industries.
- Supremacy issue – State marijuana laws do not have bearing on DOT drug-testing requirements.
- As to manner of drug testing, certain federal regulations only preempt state and local laws where compliance with state and local laws is impossible (See, e.g., FMCSA regulations, 42 C.F.R. § 382.109).

Federal Contractors

- Drug Free Workplace Act of 1988
- Requires some federal contractors and grantees to agree that they will provide a drug-free workplace as a pre-condition of receiving a contract or grant from a federal agency.
- Applies to: (1) Federal contracts of \$100K or more; and Federal grantees.
- Requirements:
 - Written policy statement;
 - Establish a drug-free awareness program;
 - Inform employees of personal reporting obligations;
 - Notify contracting agency of any violations;
 - Take direct actions against violators; and
 - Maintain an on-going good faith effort at compliance.

Workplace Safety

- Employers have an obligation to protect workers from threats to safety under federal and state occupational safety laws and regulations.
- Effective policies in place, monitoring, testing, and treating the same as prescription drug or alcohol use.
- Consider additional restrictions on those in safety sensitive positions.
- Look at tasks and risk of injury.

Workplace Safety

- Despite 2016 regulatory changes regarding post-accident drug and alcohol testing, OSHA has since made clear that post-accident drug testing is not illegal.
- Still cannot blanket drug test (with exceptions).
- Should be limited to situations where drug use is likely to have contributed to the incident.
- Drug test must accurately identify impairment caused by drug use.

Lessons from Other States

- The sky is not falling.
- Employers in California, District of Columbia, New York, and Colorado have managed lawful recreational marijuana use.
- Most employers will likely see little to no impact as a result of the legalization of cannabis.
- Where we are going in Maryland:
 - Anti-discrimination?
 - Off-duty conduct?

Federal Preemption?

- Certain cases hold that the Controlled Substances Act preempts state law, while others hold that the CSA and the Drug Free Workplace Act do not preempt state law.
- Ultimately, these cases are of limited value to Maryland employers because:
 - Decided on unique facts; and
 - Based on protections in existing law that Maryland has not enacted.
- No Maryland court has addressed these issues yet.

What Now?

- Employers should review and update drug and alcohol policies (including pre-employment testing).
- Employers should ensure they have a state-compliant testing procedure and determine whether federal requirements apply (i.e., as a federal contractor or grantee).
- Before taking an adverse action, employers should:
 - Determine the issue (i.e., on-premises, working hours, suspected influence, or positive test issue).
 - Determine if it is a recreational v. medical-use issue.
 - If a medical-use issue, determine if there is a duty to otherwise accommodate the health condition.
 - Determine if there is a bright-line rule and, if not, conduct analysis to determine no pretext.

Employer Options

- Ban use of cannabis at the workplace?
- Ban use of cannabis during work hours?
- Ban possession of cannabis at work?
- Maintain a drug-free workplace?
- Conduct drug-screening and take action against employees who test positive?
- Consider needs of employees and the business, and accommodation-related issues.

Employee Options

- Know what rights you do and do not have
- Employees have no obligation to disclose use of marijuana unless they know they will be given a drug test
- If an employee will undergo a drug test, disclose lawful and medical use
- Know your employer's drug free workplace policies
- Find employers that do not have ties to federal contracts

The Extent of Cannabis's Protected Status

- Is there a requirement to accommodate?
 - Employees under the influence during work hours or on the premises of the workplace outside of work hours?
 - Use during working time that does not present safety concerns or result in performance issues?
- Cannot require an employer to commit an act that would:
 - cause the employer to be in violation of federal law;
 - that would result in a loss of a licensing-related benefit pursuant to federal law;
 - create a situation of an unsafe work condition or otherwise create a safety hazard;
 - that would result in the loss of a federal contract or federal funding.

Best Practices When Dealing with Cannabis

- **Engage in the interactive process** to determine whether there is a reasonable accommodation that would address any medication concerns.
- **Recognize the protected right** employees have to use prescribed controlled substances and come to work, unless such use creates an undue risk of harm or presents a safety issue.
- **Do not adopt a blanket drug-testing policy** that fails to leave room for the interactive process.
- **Adopt reasonable workplace policies** that do not require employees to disclose prescription medication use unless required by federal contract or due to safety concerns.
- **Consider refraining** from prohibiting employee cannabis use as long as it does not interfere with performance expectations, safety, federal laws or regulations.