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## Practical Approaches to Worker Impairment: Marijuana Legalization & Beyond




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### Today's Agenda

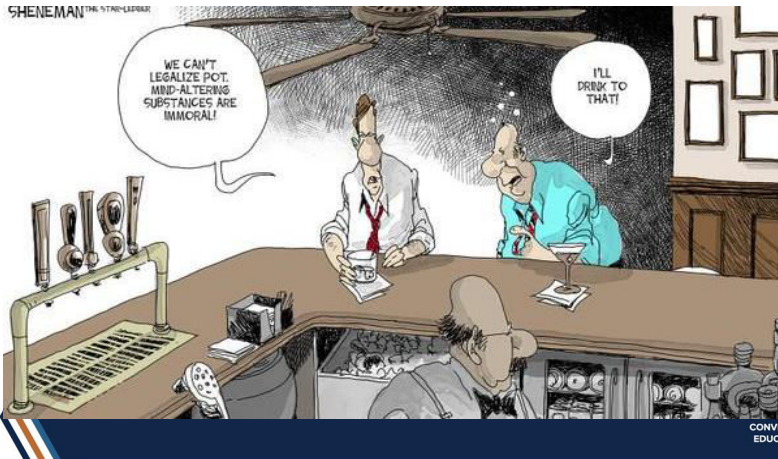
- I. Overview of Legalization Landscape & Worker Impairment
- II. Workplace Policies & Labor Impacts
- III. Preventative Measures




### I. Overview of Legalization Landscape & Worker Impairment



## The Times They Are A-Changin'



## Marijuana Legalization – By State

- Alaska (2014)
- Arizona (2020)
- California (2016)
- Colorado (2012)
- Connecticut (2021)
- Delaware (2023)
- District of Columbia (2014)
- Illinois (2019)
- Maine (2016)
- Maryland (2023)
- Massachusetts (2012)
- Michigan (2018)
- Minnesota (2023)
- Missouri (2022)
- Montana (2020)
- Nevada (2016)
- New Jersey (2020)
- New Mexico (2021)
- New York (2021)
- Oregon (2014)
- Rhode Island (2022)
- Vermont (2020)
- Virginia (2021)
- Washington (2015)

## Legalization Versus Decriminalization

- Marijuana legalization means an individual cannot be arrested, ticketed, or convicted for using cannabis if he or she followed the state's laws as to age, place, and amount for consumption.
- Decriminalization means possession remains illegal, but the legal system does not prosecute a person for possession under a specified amount (e.g., a small amount of cannabis for personal use).
- Courts across the United States continue to uphold an employer's right to maintain a drug-free workplace. However, where recreational cannabis use has been legalized, an employer's drug-free workplace policy should provide clear guidelines specifically concerning an employee's use of cannabis.

## Incidence/Use Statistics

- Approximately half of Americans, some 78 million people, claim to have used marijuana at some point in their lifetime
- 55 million American adults currently use marijuana (16.9%)
- 72% of Americans say that regular alcohol use is more of a health risk than the regular use of marijuana
- Studies also show that more than half of Americans (at least 56%) believe using marijuana is "socially acceptable"
- No deaths have been reported due to cannabis overdose

Source: National Center for Drug Abuse Statistics

## Health & Safety Statistics

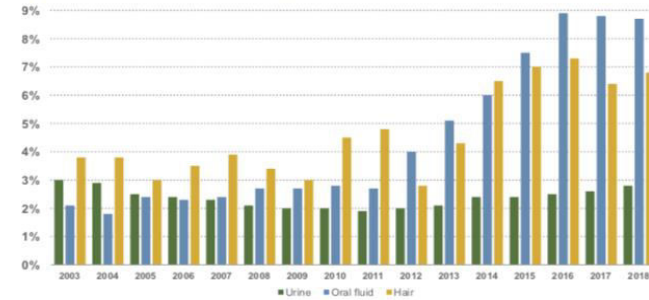
- Employees who tested positive for marijuana experienced 55% more mishaps and 85% more injuries than workers who tested negative
- Respiratory problems occur more frequently in marijuana smokers (may impact use of workplace respirator)
- Memory retention problems may lead workers to forget key safety procedures
- Marijuana users are absent and tardy for work 75% more than non-users

Source: Journal of the American Medical Association



## Marijuana positivity in general U.S. workforce

Tops the list of the most commonly detected illicit substances



Rises in marijuana positivity across nearly all employee testing categories

Source: Quest Diagnostics Drug Testing Index Full Year 2018  
10 Clearly through the Haze | August 28, 2019



## Other Cannabinoids of Concern

- Over 100 Cannabinoids have now been described along with over 300 related substances from cannabis, many with physiologic activity, including but not limited to:
  - CBD – Full Spectrum vs. Broad Spectrum
  - CBG
  - CBN
  - DELTA 8 Tetrahydrocannabinol (Delta 8 THC)
    - Delta 8 THC is a synthetic cannabinoid with very similar impairment effect and physiology profile to its chemical brother, Delta 9 THC, but it is not detectable in current lab assays for marijuana (urine, saliva or hair).
    - Widely available and inexpensive.



## What Is Impairment?

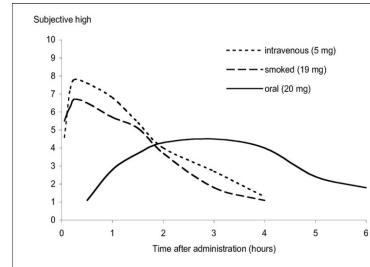
- Impairment exists when a person's faculties are reduced so that his or her ability to see, hear, walk, talk and judge distances is below the normal level as defined by the state.
- Some examples of how an employee may be impaired if they are on a substance could include hallucinations, abnormal space and time perception, inability to concentrate, non-linear thinking, labile mental status (i.e., rapid exaggerated changes in mood), paranoia, loose associations, and difficulty multitasking.
- Examples of how these symptoms might manifest themselves on the worksite include safety rules not being followed, careless acts, repeated accidents, erratic behavior or behavior suggesting drug or alcohol use, the individual's gait, odor, mood changes, slurred speech, abusive action, alcohol smelled on the breath, a credible report of alcohol or drug use from other workers, or other job performance problems.



## Timeline of Impairment

- Factors To Consider:

1. Form of Consumption
2. Quantity
3. THC Concentration
4. Environment
5. Metabolism
6. Tolerance



## Drug Test Specimen Types

- Urine
  - Easily obtained in larger volume and typically not observed collection
  - Detection window is days to weeks (greatly impacted by usage pattern)
  - Not correlated with effects/impairment
- Blood
  - Specialized/invasive collective/observed
  - Best correlation with effects/impairment
  - Few "per se" levels and vary by state
- Oral Fluid
  - Easily obtained/observed collective (most non-invasive of common specimen types)
  - Detection window (THC), 2-8 days
  - Not well correlated with effects/impairment
  - Measures residual THC in oral fluid mucosa
    - No THC detected in oral fluid patients treated with dronabinol
    - Being considered now for acceptance in federal DOT testing
- Hair
  - More specialized collective/observed
  - Detects pattern of repetitive use
  - Not correlated with effects/impairment

## Sample Detection Times

- Testing data shows how difficult it is to separate recent use from remote use due to THC's fat solubility:

	<u>Urine</u>	<u>Saliva</u>	<u>Hair</u>
Amphetamine	3 days	3 days	60-90 days
Methamphetamine	3 days	3 days	60-90 days
Heroin	20 hours	2 days	60-90 days
Oxycodone	3 days	2 days	60-90 days
<b>Marijuana</b>	<b>3-60 days</b>	<b>2-4 days</b>	<b>60-90 days</b>
Xanax	5 days	3 days	60-90 days
Valium	10 days	3 days	60-90 days

## Federal Law

- **Controlled Substances Act of 1970** → Cannabis classified as a Schedule I drug, citing "high risk of addiction," "no currently accepted medical use," and "lack of accepted safety for use under medical supervision"
- **Supremacy Clause of U.S. Const. (Art. VI, Cl. 2) & 10<sup>th</sup> Amendment** → Federal law controls where state law and federal law conflict. However, there is an exception when it comes to police powers of the 10<sup>th</sup> Amendment delegating power to the states.

## Federal Drug Free Workplace Act

- Federal government contractors with contracts of \$100,000 or more and federal grant recipients of any amount must:
  - Prepare and distribute a formal drug-free workplace policy statement that prohibits, among other things, use or possession in the workplace;
  - Establish a drug-free awareness program;
  - Ensure that all employees working on the federal contract understand their personal reporting obligations;
  - Take direct action against an employee convicted of a workplace drug violation; and
  - Maintain an ongoing good faith effort to meet all statutory requirements.
- Violations can risk federal contracts or grants



## DOT's Position on Recreational Cannabis Laws

- Medical qualification of drivers (49 C.F.R. Part 391)—drivers consuming any cannabis product are medically disqualified from operating a commercial motor vehicle.
- Any level of THC “remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation’s drug testing regulations to use marijuana.”
- Because CBD remains a federal DEA Schedule I drug, it cannot be consumed by any DOT-covered drivers or employees. It is not an acceptable alternative explanation for THC positive tests.



## Federal Regulations

- OSHA – General Duty Clause § 5(a)(1) – OSH Act of 1970 (29 USC § 654)
  - Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.
- To prevail on violations of the General Duty Clause, OSHA must establish:
  - (1) Employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
  - (2) The hazard was recognized;
  - (3) The hazard was causing or was likely to cause death or serious physical harm; and
  - (4) There was a feasible and useful method to correct the hazard.



## OSHA Rules

- **Post Accident Testing** → Reporting of work-related injuries/illnesses is a protective activity. Resulting discipline or discharge may violate:
  - **OSHA Recordkeeping Rules:** (29 CFR 1904.35 & 1904.36)
  - **Whistleblower Protection Rules:** §11(c) of the OSH Act.
- **OSHA Protected Activity Rationale** → Employee knowledge of impending drug test, regardless of drug contribution will result in less injury reporting. Want to shield workers from retaliation by promoting open reporting.





## II. Workplace Policies & Labor Impacts



## Developing Prevention Programs

- Policy Considerations
  - Development of a comprehensive written policy
  - Supervisory/management training
  - Drug testing options
  - Employee education and notification
  - Availability of employee assistance programs
- Contractual Considerations
  - Addressing incorporation of substance abuse policies into project subcontracts
  - Revising previously instituted substance abuse policies, including adopting nationwide versus state/local policies
  - Labor impacts, collective bargaining negotiations



## Developing a Comprehensive Written Policy

- From the standpoint of developing a policy, there are a number of critical junctures where contractors must evaluate how their policy will be effectuated:
  - Policy Purpose
  - Policy Terms
  - Definition of Key Terms
  - Testing Procedures and Detection Thresholds
  - Circumstances to Justify Testing
  - Defining Reasonable Suspicion
  - Training to Recognize Impairment
  - Maintaining Records
  - Employer Actions When Specific Articulatable Symptoms Exist
  - Consequences Following Testing
  - Assistance & Rehabilitation Programs
  - Financial Obligations
  - Confidentiality
  - Posting and Distribution
  - Administration of the Policy



## Policy Purpose

- The purpose should be focused on the magnitude of risk of even one employee using cannabis or other intoxicants on site.
- The policy's purpose should be clearly stated at the beginning of the policy and include:
  - Organizational goals for implementing the policy
  - A rationale explaining that the policy is necessary to protect the workforce, equipment, facilities, and visitors to the project site
  - Who is covered under the policy (e.g., workers, subcontractors, suppliers, vendors, consultants, agents, and others involved in providing goods or services on the project premises)
  - Expectations for compliance (e.g., what are the rules of the policy, when will it be enforced, and where will the policy be in effect)



## Sample “Purpose” Provision

- “General Contractor, Owner, and their affiliated entities are committed to providing a safe, healthy, and productive workplace that is free from alcohol and intoxicating drugs during working hours, while workers are on the project site (either on or off duty), and while workers are operating vehicles or equipment on behalf of the project. While the use of cannabis has been legalized under New York law for recreational and medical purposes, it remains an illegal drug under federal law and its use as it impacts the project site is prohibited by this policy. Workers under the influence of alcohol or intoxicating drugs, including cannabis, pose a safety risk to themselves and others with whom they work.”



## Definition of Key Terms

- Contractors will need to consider how to define key terms, including but not limited to Alcohol, Applicant, Company, Employer, Medication/ Prescription Drugs/Over-the-Counter Drugs, Project Premises, Testing Facilities, Accident/Near Miss, Worker(s)/Employee(s), and any types of drug testing that will be imposed upon employees.
- The terms “illegal drug” should also be clearly defined:
  - “‘Illegal Drug’ and/or ‘Controlled Substance’ means any drug or drug-like substance, whose sale, use or possession is unlawful (as defined by section 802 (6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title) or any drug whose use is legal but which has not been legally obtained. The term ‘illegal drugs’ does not mean the use of a controlled substance pursuant to a valid prescription or **other uses authorized by law.**”



## Testing Procedures & Detection Thresholds

- What type of testing will be used?
  - Urinalysis (presumptive tests and secondary tests); Blood test; Hair test
  - THC breathalyzer (some on the market, but results are not reliable)
  - Other scientifically valid drug or alcohol screening
- Will employees undergo presumptive then confirmatory testing?
- Where will the confirmatory testing be performed?
  - State licensed facility
  - National Laboratory Certification Program (NLCP) certified facility
  - Tests should be reviewed by a certified Medical Review Officer (MRO)
- What detection threshold and testing standards will be adopted?
  - U.S. Department of Transportation (DOT)
  - Substance Abuse and Mental Health Services Administration (SAMSHA)



## Circumstances to Justify Testing

- Contractors will need to consider under what circumstances they will be drug testing and for what substances:
  - Pre-employment/pre-assignment testing → Before an offer of employment (excluding screening for cannabis in states where legalized)
  - Testing based on reasonable suspicion → When the employee’s appearance, speech, attitude, mood, breath or odor of the employee indicates that the employee is under an intoxicant’s influence
  - Periodic/random testing for safety sensitive positions → Where impairment would interfere with the employee’s ability to take adequate care in the carrying out of their job duties and would pose an immediate risk of death or serious physical harm to the employee or others
  - Post-accident or near-miss testing → When employees are involved in any work-related accident or near-miss incident involving the violation of any safety or security procedures
  - When required by state and/or federal law → Where public or publicly-funded projects may impose certain drug testing requirements



## Sample “Pre-Employment Testing” Provision

- “No applicant shall be denied work on the project as a result of a pre-assignment substance test result that solely indicates a positive trace of tetrahydrocannabinol (THC). Applicants with a pre-employment test with only a positive THC analysis shall be deemed as ‘fit-for-duty’ by the applicant’s employer and no adverse employment action shall be taken against the applicant solely on this basis.”



## Issues with Random & Post-Accident Testing

- **Definition of Safety Sensitive** → A job position in which job performance can affect the safety of the employee and others. An employer must be able to demonstrate that the employee’s inability or impaired ability to perform job-related tasks could result in a direct threat to their safety and/or the safety of others. Many construction employers define all construction positions as safety sensitive.
- **No Safety Sensitive Carve Out** → In some states where cannabis has been legalized (e.g., New York and New Jersey), employers may not take adverse action against an employee solely on the basis of a positive result for cannabis unless the employee was manifesting specific articulable symptoms of impairment prior to entering or while on the jobsite prior to the request for random or post-accident testing.



## Maintaining Records

- Determine under what circumstances contractors and subcontractors/ vendors/ suppliers will be required to maintain records, and for how long, of supporting documentation to justify testing for cannabis based on reasonable suspicion and bolster any subsequent adverse employment action that may be taken against a worker as a result of a positive test.
- Supporting documentation may include:
  - Report(s) by the individual who evaluated the worker
  - Statements of any witnesses
  - Other physical or documentary evidence demonstrating impairment



## Employer Actions

- Determine what action will be taken when an employee is exhibiting “specific articulable symptoms” before entering or on the project site
- Relevant considerations include:
  - Evaluation of employee
  - Removal from the project site
  - Conducting immediate presumptive testing (i.e., how employee will be accompanied to testing site)
  - How long an employee must remain off the project site (e.g., until no longer deemed impaired, until results of drug test are received, etc.)





## Consequences Following Testing

- How a diluted/tampered with negative test will be addressed?
- How a contested positive test for cannabis will be addressed?
  - Whether retesting will be permitted?
  - Under what circumstances will an opportunity for a legitimate medical explanation will be allowed?
- What are the consequences of an uncontested positive test or refusing to submit to a test?
  - Sample provision: "All workers who refuse to submit to a drug and alcohol test, or who fail to pass a drug and alcohol test will be removed from the project premises by their employer and will be referred to their employer's personnel management to an Employee Assistance Program and/or for disciplinary action."



## Additional Policy Considerations

- Financial Obligations: Who will bear the costs of testing and/or retesting?
- Confidentiality: To what extent are employee drug test results confidential between general contractors and subcontractors?
- Posting and Distribution: How will policies be posted and distributed to employees and whether and how policies will be integrated into safety plans and contract documents for bids?
- Administration of Policy: Who will administer/enforce the policy and who will be the point of contact for employees with questions about the policy?



## Contractual Considerations

- Incorporate a well-developed and comprehensive substance abuse policy or drug-free workplace policy into each project's safety plan and incorporate into to any vendor/supplier/subcontract agreements (if applicable).
- Policies already in existence might contain language related to drug testing such as "to the extent permitted by law" or "subject to state and local law."
  - While this language may provide some modicum of protection for contractors, it does not provide any practical insight related to compliance with state and local laws as to how business is to be conducted on a day-to-day basis.
  - Drafting a rider to an existing contract indicating that a previous policy was modified may be key to clarifying contractors' and employees' obligations under new recreational marijuana laws.



## Sample Provision Within Policy

- "The General Contractor and all covered employers on the project will include the provisions of this policy and these procedures in their contracts with contractors, suppliers, consultants, agents, and others involved in providing goods or services on the project premises, and will require that they do the same with respect to their lower-tier subcontractors, suppliers, vendors, consultants, agents, and others involved in providing goods or services on the project premises."



## Labor Impacts

- Pre-employment drug testing is not a mandatory subject of negotiations.
- However, drug testing procedures and consequences for union members are mandatory subjects of bargaining or claims of NLRA Sec. 8(a)(1) violations (changes in terms and conditions of employments unilaterally by employer)
- Review CBA language for consistency with state and/or local law:
  - May be able to make changes necessary to comply with statutory obligations without extensive bargaining – e.g., just removing marijuana from list of substances included in random panels.
  - More substantial changes to the procedures for or consequences of testing must be bargained to agreement or impasse.



## What Voices Should Be In the Room?

- Safety directors and those with decision-making authority with regard to hiring and firing employees at the employer, union partners, should be included in the development and updating of policies related to drug testing.
- Qualified counsel should be involved because this is a rapidly developing area of law and there may be intersecting federal, state, and local laws or regulations that have an impact on how a policy should be drafted and implemented.



## III. Preventative Measures



## Practical Approaches

- Alcohol and drug abuse is considered a disability under the federal Americans with Disabilities Act and prohibits employment discrimination based on certain classifications, including disability. However, while some states define alcohol and/or drug use as a disability, some states do not (New York, for example).
- The foundation of the most successful workplace substance abuse policies tend to be those that are crafted to offer assistance to employees struggling with substance abuse while clearly communicating that use of alcohol and/or intoxicating drugs will not be tolerated in the workplace.



## Defining “Reasonable Suspicion”

- The standard for reasonable suspicion is elusive and often ill-defined.
- Generally, reasonable suspicion is a belief an individual is using or has used alcohol and/or intoxicating drugs based on a combination of facts, observed behaviors and balanced assumptions from those facts.
- A number of different factors may be and are often used in deciding whether this standard is met. If the factors viewed together result in concern about the impact of a person on the safety of the project site, then the reasonable suspicion standard has been met.
- Reasonable suspicion testing is also covered extensively in DOT rules and regulations.



## Training to Recognize Impairment

- To determine whether reasonable suspicion exists, contractors will need to consider having individual(s) trained and designated on site to assess impairment as well as determining how such persons will be trained.
  - Drug Recognition Expert (DRE) → perform on-site assessment
    - The New Jersey recreational cannabis law, enacted in early 2021, requires that employers use a Workplace Impairment Recognition Expert (WIRE) who would ostensibly be trained by state police to recognize impairment by cannabis.
  - Some employers are resorting to key enabling technologies (KETs) to monitor employees' behavior in the workplace (e.g., wearables to track employee behavioral patterns).



## Supervisor Training

- Supervisors' role → recognition (reasonable suspicion training), documentation, confrontation, referral, follow-up (not diagnosis or counseling)
- Supervisors need to be informed on how to identify an addiction-related problem in advance of a catastrophic event, as well as how to get help for addicted workers
- Workers who are suspected of being “under the influence” should be taken to a private area, and a second supervisor or witness should be present to document any action or statements
- Senior management should be notified immediately
- It may be necessary to suspend a worker until an investigation can take place and/or until the worker completes treatment or is evaluated by the company EAP



## Employee Assistance Programs (EAPs)

- The mark of a successful drug-free workplace program also depends on how well the employer can inform its employees of the hazards of drug use and on how much assistance is offered to drug users.
- General contractors will need to consider whether the policy will require subcontractors' involvement in EAPs and/or rehabilitation programs.
- EAPs are designed to assist employees with personal issues that may affect their job performance. Although some EAPs focus on addressing issues related to employee drug use, many provide services to cope with a wide range of performance-related issues.
- Two professional associations have developed certification procedures EAP providers:
  - International Employee Assistance Professionals Association
  - Employee Assistance Trade Association



## Final Considerations

- Ensure compliance with rules for government contractors
- Review laws pertaining to marijuana legalization of the applicable jurisdiction during the contract procurement process to prep contract and insurance requirements (i.e., may need different policies in different states)
- Inconsistency in violations issued. Invest in competent contractors to perform future work.
- Make sure all employees are treated fairly and policies are applied neutrally across your workforce.
- Train all supervisors on identifying impairment.
- Document, document, document!



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