

The Evolution of Marijuana Laws and its Impact on Workplace Drug and Alcohol Policies

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Current State of the Law:

Medical and Recreational Marijuana

Medical and Recreational Marijuana

- 29 states (plus D.C.) allow for some form of medical marijuana usage
- 9 states (plus D.C.) allow for some form of recreational marijuana usage
- Marijuana remains illegal under federal law

Current State of the Law

Illinois

- Medical marijuana legal for certain conditions since 2013
 - List of conditions has expanded
 - Funding has remained consistent
- Decriminalization for small amounts (2016)
- Recreational:
 - Cook County advisory referendum
 - Bill introduced in General Assembly but no vote imminent

Current State of the Law

Indiana

- Neither medical or recreational marijuana is legal
- Legislation passed in 2018 to study legalization of medical marijuana

Current State of the Law

Kentucky

- Neither medical or recreational marijuana is legal
- Proposal for legalization of medical marijuana in 2018 did not pass.
 - May be re-proposed in 2019

Importance of Schedule I Status

- ADA defines the “illegal use of drugs” as the use, possession, or distribution of drugs when doing so is unlawful under the federal Controlled Substances Act (CSA).
- Marijuana remains listed as a Schedule I substance.
- No physician may prescribe a Schedule I substance under federal law (no exception for medical marijuana).

Interplay with the ADA

- Discrimination prohibited against a qualified individual because of the person's disability, or because the person is regarded as disabled.
- ADA defines "disability" as a "physical or mental impairment that substantially limits one or more major life activities . . ."

Problem?

Legitimate user of medical marijuana will likely have a condition that substantially limits a major life activity defined under the ADA.

However...

- “[A] qualified individual with a disability” shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.
- ADA allows employers to prohibit the use of illegal drugs in the workplace.
- Poor performance because of illegal drug use does not warrant the protection of the ADA.

An employer may:

- Ensure that the workplace is free from the illegal use of drugs and alcohol;
- Test employees for the illegal use of drugs and for the use of alcohol; and
- Comply with federal laws and regulations regarding alcohol and drug use.

ADA TAKE-AWAYS

- The ADA does not cover an otherwise qualified person who is currently engaging in the illegal use of drugs, provided that employer acts on the basis of such use.
- Employer may require drug tests without violating the ADA.
- An employer may also make employment decisions based on such test results. (42 U.S.C. §12114(d)).

Cannot make decision based on employee's underlying “condition”

- A *bona fide* medical marijuana user likely will have a condition that qualifies as a disability under the ADA.
- Defensible firing presented where the use of medical marijuana, and not the underlying disability, caused the adverse employment decision.

ILLINOIS NON-DISCRIMINATION STATUTE

Case Law: A shifting tide?

- Coats v. Dish Network, LLC, 350 P.3d 849 (Colo. 2015)
 - Colorado Lawful Activities statute not violated when employee terminated due to medical marijuana use because it is unlawful under federal law.
- Noffsinger v. SSC Niantic Operating Company, 273 F.Supp. 326 (D.Conn. 2017)
 - State law permitting use of medical marijuana is not preempted by federal law prohibiting use of certain substances.
- Workplace accommodation?
 - Barbuto v. Advantage Sales & Marketing, LLC, 78 N.E.3d 37 (Mass. 2017)
 - Employer should have engaged in the process to determine whether an employee's use of medical marijuana could be accommodated.

MSHA

- No standard addressing drugs and alcohol in Coal (there is in metal/non-metal).
- MSHA's failed rulemaking attempt in 2008 (withdrawn in 2009).

DOT and Federal Motor Carrier Safety Administration

- Schedule I Drugs Prohibited
- No driver shall report for duty or remain on duty requiring the performance of safety sensitive functions when the driver uses any drug or substance identified as a Schedule I drug.

49 C.F.R. § 382.213

Drug Testing and Section 105(c)

§105(c)(1) of the Mine Act

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or

§105(c)(1) of the Mine Act

applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1)

Perry v. Phelps Dodge Morenci, Inc.

19 FMSHRC 1964 (Bulluck 1997)

- Suspicion miner was taking crystal meth – drug test requested
- Miner refused to sign consent form or provide urine sample
- Placed on 5 day suspension
- Negative test 18 ½ hours later
- Terminated, but reinstated after inter-company appeal process
- HOLDING: not discharged for engaging in protected activity
- TAKEAWAY: Company clearly communicated that non-compliance with drug testing policy would subject employee to discipline; other employees treated consistently; miner would have been discharged for refusing to consent to drug testing, irrespective of his complaint that driving trucks posed a safety hazard

***Price, Vacha and United Mine Workers v.
Jim Walter Resources, Inc.
14 FMSHRC 1549 (Review Commission 1992)***

- Miners refused to provide urine samples during random drug testing
- Policy language:

Any employee whose duties, whether by job title or by reason of elected office, involve safety, shall be subject to random testing for substance abuse up to four times per calendar year. Physicals for hoistmen shall also include testing for substance abuse. All provisions of the program shall apply to employees in this category.
- ALJ found the drug program was discriminatorily applied – Review Commission affirmed
- ALJ held policy targeted safety committee men, but no other rank and file miners, facially discriminatory

Price, Vacha and United Mine Workers v. Jim Walter Resources, Inc.

- Held that the drug program was not facially discriminatory because it did not single out safety committeemen. All safety positions were targeted for drug testing.
- BUT: “[A]n operator does not establish a *Pasula-Robinette* affirmative defense if a work rule or policy that the miner is alleged to have violated was applied discriminatorily to the miner or in a manner deliberately calculated to render his compliance difficult or impossible. In such cases, the claimed “independent” basis for discipline is actually an extension of the operator’s discriminatory conduct.”
- Commission affirmed ALJ’s conclusion that JWR applied the drug program in a discriminatory manner against the Complainants.
- Evidence that they were “constant targets of discipline,” and belittled while trying to provide urine specimens, such that they were physically unable to do so.
- Other miners with difficulty urinating had been accommodated.

Crafting a Policy

GENERAL POLICY GUIDELINES

Should provide details and notice to applicants and employees regarding:

- When drug testing is required.
- How testing will be conducted.
- The confidentiality of test results.

Policy should include:

- Rationale
- Prohibited behaviors
- Substances covered
- Employees affected
- Consequences of policy violations
- Enforcement
- Availability of assistance

Testing Scenarios

- Pre-employment
- Reasonable suspicion
- Post-accident
- Random
- Periodic
- Return-to-duty
- Follow-up
- Post-rehabilitation
- Blanket
- Probationary
- Pre-promotion

Steps to a Comprehensive Program:

- What are the goals?
- Drug-free workplace policy
- Supervisor Training
- Employee Education
- Employee Assistance
- Drug Testing

Resources

- elaws – Drug-Free Workplace Advisor:
<http://www.dol.gov/elaws/asp/drugfree/drugs/dt.asp>
- Drug and Alcohol Testing Industry Association (DATIA)
- Substance Abuse Program Administrators Association (SAPAA)
- U.S. Department of Transportation's (DOT) Office of Drug and Alcohol Policy and Compliance
- Substance Abuse and Mental Health Services Administration's (SAMHSA) Workplace Helpline
- American Association of Medical Review Officers (AAMRO)
- Employee Assistance Professionals Association (EAPA)
- Employee Assistance Society of North America (EASNA)
- Substance Abuse Treatment Locator: (800) 662-HELP or
www.findtreatment.samhsa.gov.

**For more information on these and other
occupational safety and health topics,
please visit:**

<http://safety-health.jacksonkelly.com/>

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