



What is the Impact of the New Marijuana Laws on Employers?

*By: Elizabeth P. Hodes
Davis Wright Tremaine LLP*

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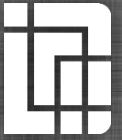
Agenda



- Before the Initiative
- What Does the Initiative Say?
- Recommendations for Employer “Next Steps” and Policy Language



Nationwide Perspective



- 23 States have decriminalized or legalized medical marijuana use (trend started in 1996, but generally picked up in last 5-10 years).
- 5 States now have laws legalizing recreational marijuana: Alaska, Colorado, Washington, Oregon, and Washington D.C.
- We can learn from the Colorado and Washington Experience - Watch Colorado.





- 1975: *Ravin v. State of Alaska* - Privacy Rights
 - Federal and Alaska constitutions establish fundamental right to privacy, and therefore the State has the burden of demonstrating a compelling state interest in prohibiting possession of marijuana
 - Citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution.
 - This encompasses the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home unless the state can meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest
 - Limitations:
 - possession must be for purely private, noncommercial use in the home
 - right must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare

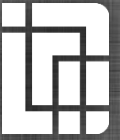


- 1997: Alaska's Safe Harbor Statute for Employer Drug Testing: AS 23.10.600-.699
 - If an employer has an established drug and alcohol testing policy that follows the statutory requirements, employer is protected from liability resulting from:
 - actions in good faith based on the results of a positive drug test or alcohol impairment test;
 - failure to test for drugs or alcohol impairment or failure to test for a specific drug or another controlled substance;
 - failure to test or, if tested, failure to detect a specific drug or other substance, a medical condition, or a mental, emotional, or psychological disorder, or condition; or
 - termination or suspension of a drug or alcohol prevention or testing program or policy.
 - Employer also has protection from claims for defamation of character, libel, slander, or damage to reputation.

Alaska Law Before the Initiative, cont.

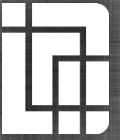


- 1998: Alaska’s Medical Uses of Marijuana for Persons Suffering from Debilitating Medical Conditions Act, AS 17.37.010–.080 (“Medical Marijuana Act”)
 - An individual may not “engage in the medical use of marijuana in a way that endangers the health or well-being of any person.”
 - Does not require any accommodation for “medical use of marijuana . . . in any place of employment...”
 - Some employers adopted policies permitting medical marijuana use, subject to review by MRO to confirm registry card and so long as no evidence of on the job impairment or safety concerns arise.



- Alaska's Medical Marijuana Act, cont.
 - Alaska Supreme Court has not decided any cases testing the scope of the caveat for employment-related policies and decisions.
 - In other states with similar statutes, plaintiffs have argued that off-duty use must be accommodated because it is not “use . . . in any place of employment.” *See e.g., Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 257 P.3d 586, 591-92 (Wash. 2011); *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200, 207-08 (Ca. 2008).
 - Statute designed to exempt individuals from criminal liability, not to alter the employer-employee relationship. *See Roe*, 257 P.3d at 591-92; *Ross*, 174 P.3d at 205-08.

NOV. 2014, ALASKA VOTED TO:



Legalize (Decriminalize)



Regulate (production, sale, labeling)



Tax the sale or transfer from cultivation facility to retail store or product manufacturing facility



Law effective 90 days after initiative passed, but no regulations yet

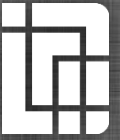
The Initiative Does Not:



- Make buying marijuana immediately legal. The ABC or Marijuana Control Board will issue the first licenses in May of 2016;
- Limit any privileges or rights of medical marijuana under AS 17.37;
- Legalize use for any person under 21; or
- Legalize consumption in public.



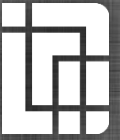
Local Government Control



- Local governments can still prohibit the marijuana cultivation and production facilities and retail stores
- Local governments can also enact any regulations governing marijuana establishments
- However, the proposed regulations include extending the local option to allow prohibition of selling marijuana and marijuana products, or the importation of marijuana for sale.



Status of Regulations



- The Alcoholic Beverage Control Board is drafting the regulations
- Board has nine months from February 24, 2015, to enact regulations
 - If the Board does NOT enact regulations by that time, then local governments will have the option of establishing their own regulations
- Emergency Regulations: February 25, 2015, the Board adopted emergency regulations defining the term “in public”
 - "in public" means in a place to which the public or a substantial group of persons has access and includes highways, transportation facilities, schools, places of amusement or business, parks, playgrounds, prisons, and hallways, lobbies, and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence

THE MAIN THING TO REMEMBER



The initiative does not: “require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.”

Marijuana is still an illegal drug under federal law

EMPLOYERS CAN STILL



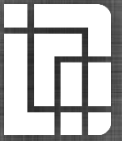
- Prohibit
 - possession, use of, or impairment by marijuana
- Test
 - as required (U.S. DOT's regulated drug testing program or other federally required testing)
 - by choice (own program)
- Discipline or terminate
 - for violation of drug and alcohol policies or a positive test





- Federal law is still a factor, particularly in safety-sensitive industries and for employers receiving federal funding.
- Most federal guidance still relates to medical marijuana, not recreational use:
 - Department of Justice (“DOJ”) has said it will not consider prosecution of *medical* marijuana users to be a priority, but no such position has been taken with respect to recreational use.
 - Some federal agencies have also made clear that they will continue to enforce federal law in highly regulated industries, regardless of the DOJ’s position regarding prosecution of medical marijuana users.
 - U.S. Department of Transportation, DOT 'Medical' Marijuana Notice (explaining the DOJ position “will have no bearing on the Department of Transportation’s regulated drug testing program.”)
 - Chief Medical Officer, IHS recommends “all IHS, Tribal, and Urban programs fully adhere and comply with Federal law by not prescribing, recommending, possessing, cultivating, processing, manufacturing, or distributing marijuana for medical or other purposes.” Dept. Health and Human Services, Letter to Tribal Leaders (2011).

WHAT IS HAPPENING ELSEWHERE?




Use is up

Positive tests are up

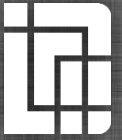
One study:

- Nationally 6.2%
- WA & Colorado
23% / 20%



More
employers
are testing

Marijuana Initiative - Open Questions

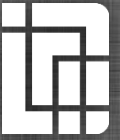


- Detection time periods for marijuana use vary based on several factors, such as the amount of use, frequency of use, personal dietary habits, personal metabolism, potency of substance, and method of ingestion. A positive test does not necessarily implicate on-duty conduct.
 - Colorado: illegality of marijuana under federal law precludes reliance on the off-duty statute (similar to privacy protections in Alaska).
 - Alaska Privacy Protections; 2-on, 2-off employees
- Disparate treatment or impact on the basis of a disability for which an individual was using medical marijuana; disparate impact on employees with particular medical conditions

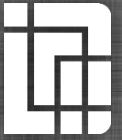


- *Coats v. Dish Network*, 350 P.3d 849 (S.C. Colo. 2015):
 - In 2012, Colorado decriminalized marijuana.
 - Another Colorado law prohibits employers from firing employees for engaging in lawful conduct while off-duty.
 - Employee wants to avoid disciplinary action based upon the “lawful” off-duty conduct statute (detection time periods for marijuana use vary based on several factors; state-licensed medical use).
 - In 2013, Appellate Court holds that illegality of marijuana under Federal law precludes reliance on the off-duty “lawful activities” statute.
 - In July 2015, Colorado Supreme Court upheld the decision. Activity must be lawful under state and federal law.

Off-Duty vs. On-Duty Activities:

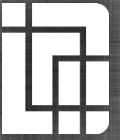


- The Alaska Supreme Court has recognized that employers have a legitimate interest in testing their employees for drugs to protect the health, safety, and welfare of the public and other employees.
- However, the Alaska Supreme Court also recognizes that an employee's interest in privacy in their after-work activities limit the scope of employers' drug testing programs.
- Program should be directed at impact on workplace, e.g., curbing drug use or impairment during work hours.



- Why are there different detection windows for the same substance?
 - Urine and Hair Follicle Analysis test for the presence of marijuana metabolites in the system
 - *Metabolites are inactive compounds produced from chemical changes of a psychoactive substance in the body and excreted in waste*
 - *Result shows recent marijuana use, not impairment or intoxication*
 - Oral Fluid and Blood Analysis test for the presence of marijuana in the system (parent drug)
 - *Result shows current intoxication (but not level), “under the influence” but not impairment*

Detection Windows



- Detection windows make a difference
 - **Urine Testing:** Positive test results from 2-5 hours after ingestion, to 1-3 days for occasional use, and up to 30 days for chronic users.
 - **Oral Fluid Testing:** (refers to lab-analyzed results, not instant products) Positive test result from within minutes of ingestion, to within 48 hours. Mimics a blood test. Substance must be currently in the system to test positive.
 - **Hair Follicle Testing:** Positive test results from 5-7 days after use, to up to 90 days.





- Zero Tolerance Policy
 - Pre-employment: *Urine (or Hair Follicle)*
 - Post-Accident, Reasonable Suspicion, Random: *Oral Fluids Or Urine*
- Tolerance outside of workplace policy (Treating Marijuana like Alcohol)
 - Pre-employment, Post-Accident, Reasonable Suspicion, Random: *Oral Fluids might be the best option*

FIVE STEPS EMPLOYERS SHOULD TAKE



ONE:

- Determine strategically how to treat marijuana.

TWO:

- Develop new policies if none exist or update existing policies.

THREE:

- Consider implementing a drug testing program, if you have not already done so. Be sure it complies with Alaska's Safe Harbor Statute.

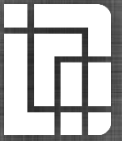
FOUR:

- Provide any changes in policy or new policy to employees.

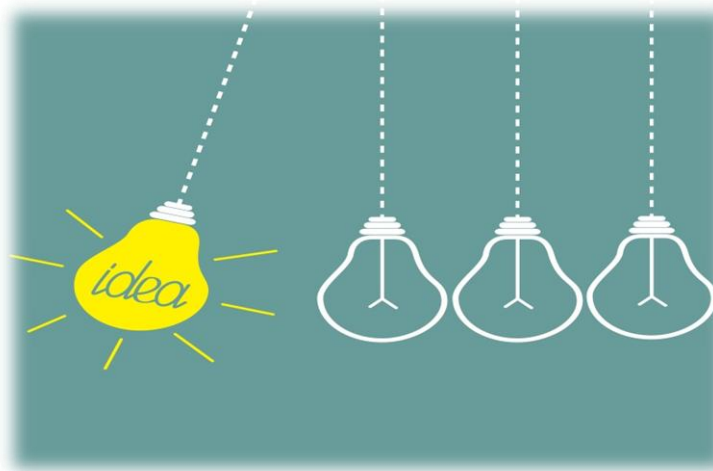
FIVE:

- Decide how you will treat breach of your policies or a confirmed positive test.

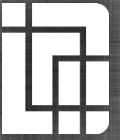
Policy Drafting Considerations



- Policies can be carefully drafted to explain: (1) marijuana continues to be treated as an illegal drug under the policy; and (2) any detectable amount will be treated as working under the influence.
- Since detection times vary, a bright-line rule regarding detection amount may be your best option, but oral fluid testing is available.



Sample Policies



- Company considers employee use of marijuana for medical and/or recreational purposes to be a potential health, safety, and security problem. To ensure the maintenance of safety, productivity, the quality of services, and the security of property, Company maintains a zero-tolerance policy for all employees, including but not limited to employees in “safety sensitive” positions.

OR

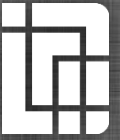
- Company prohibits the manufacture, sale, use, consumption, impairment by or possession of alcohol and illegal substances (except strictly in accordance with medical authorization), or any other substances which impair job performance or pose a hazard, on our premises or property, or during work time, or while representing us in any work-related fashion. Illegal substances include any drug illegal under either state or federal law, including marijuana, medical and recreational. Impairment is defined for purposes of this policy as having in one’s body any amount equal to or in excess of the detection cut-off level set forth in this policy.

Sample Policies, cont.

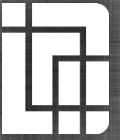


- Employees are strictly prohibited from possessing, selling, consuming or being impaired or under any influence (defined as having any detectable amount in his/her body) of alcohol or illegal drugs while on the job or in any other manner that may affect the employee's work performance or Company's interests or reputation. This prohibition includes marijuana, which remains an illegal drug under federal law. This prohibition also extends to legal drugs for which an employee may not have a valid prescription, or that are not used in a manner consistent with accepted frequency or dosage requirements.
- Any employee who is taking a medication that may be legally prescribed under both federal and state law should determine from his or her physician or pharmacist whether the prescription drug could impair his or her ability to perform the job safely and effectively. If the employee's performance may be limited at work by use of a legal drug, he or she should advise his or her supervisor and Human Resources so that reasonable accommodations can be considered.

Summary



- Whether it results from on-duty or off-duty use, a positive test for marijuana can support disciplinary action (including termination of employment) pursuant to well-written policies.
- Marijuana remains illegal under federal law, therefore federal contractors and grantees need to continue to treat marijuana as an illegal drug under their Drug Free Workplace policies.
- Federal agencies have made it clear in response to medical marijuana laws that they will continue to enforce federal law in highly regulated industries, regardless of the DOJ's position regarding prosecution of medical marijuana users. *See e.g.*, U.S. Department of Transportation, DOT 'Medical' Marijuana Notice (explaining the DOJ position “will have no bearing on the Department of Transportation’s regulated drug testing program.”)



Unresolved issues remain:

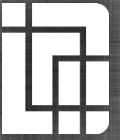
Legal:

- Employees look for ways to challenge terminations (disability/privacy/off duty use/public policy)
 - Employees have generally been unsuccessful, but theories continue to evolve
-

Business:

- Public sentiment and employee expectations changing
- How will your competitors treat marijuana use?
- Impact on recruiting, retention and work environment?

Questions?



Liz Hodes

Davis Wright Tremaine LLP

188 West Northern Lights Blvd, Suite 1100

Anchorage, AK 99503

Tel: (907) 257-5300 | Fax: (907) 257-5399

Email: elizabethhodes@dwt.com | Website: www.dwt.com



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