

“Purple Haze”: Construction Industry Employer’s Rights in an Age Where Pot is Legal

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INTERESTING FACT:

Purple haze gets its name due to the **purple** tint of parts of the particular **Cannabis sativa** plant. This cannabis strain is named after Jimi Hendrix's classic 'Purple Haze' from 1967.



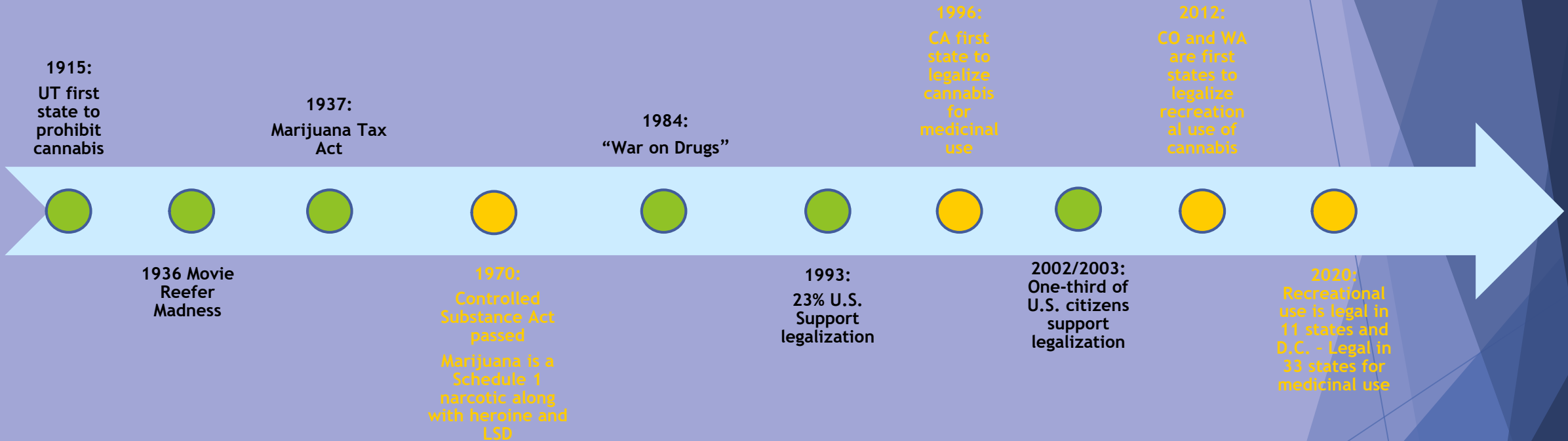
Today's Agenda

- Marijuana legislation in 2020
- Federal law on marijuana
- Employment issues created by legalization
- Marijuana and drug testing
- Best Practices

The United States History of the Legalization of Cannabis



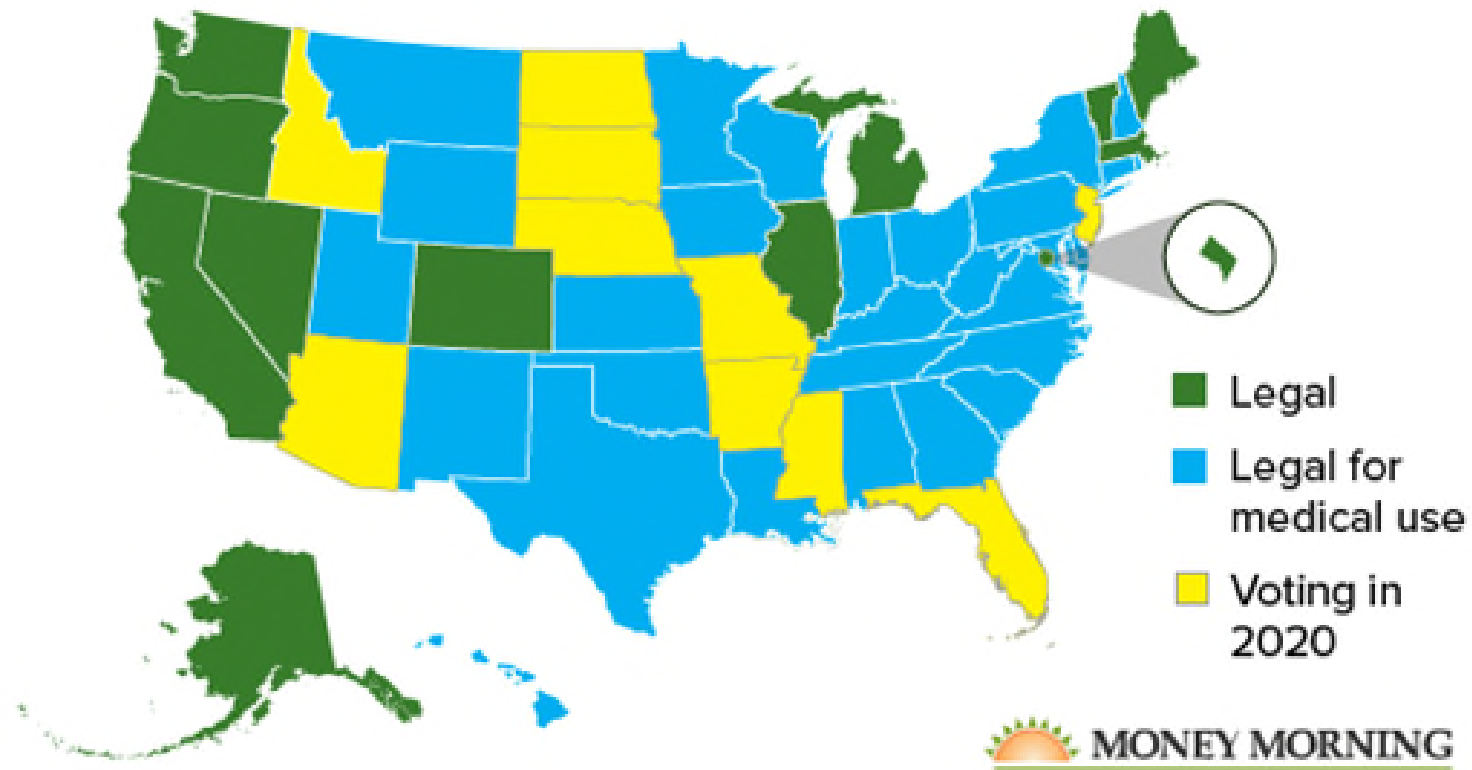
Cannabis History



The State of Cannabis Legalization in 2020

States Voting on Marijuana in 2020

Ten states could have some form of legal marijuana on the ballot next year.





Marijuana is illegal under federal law



Signs the federal government is moving toward cannabis tolerance.

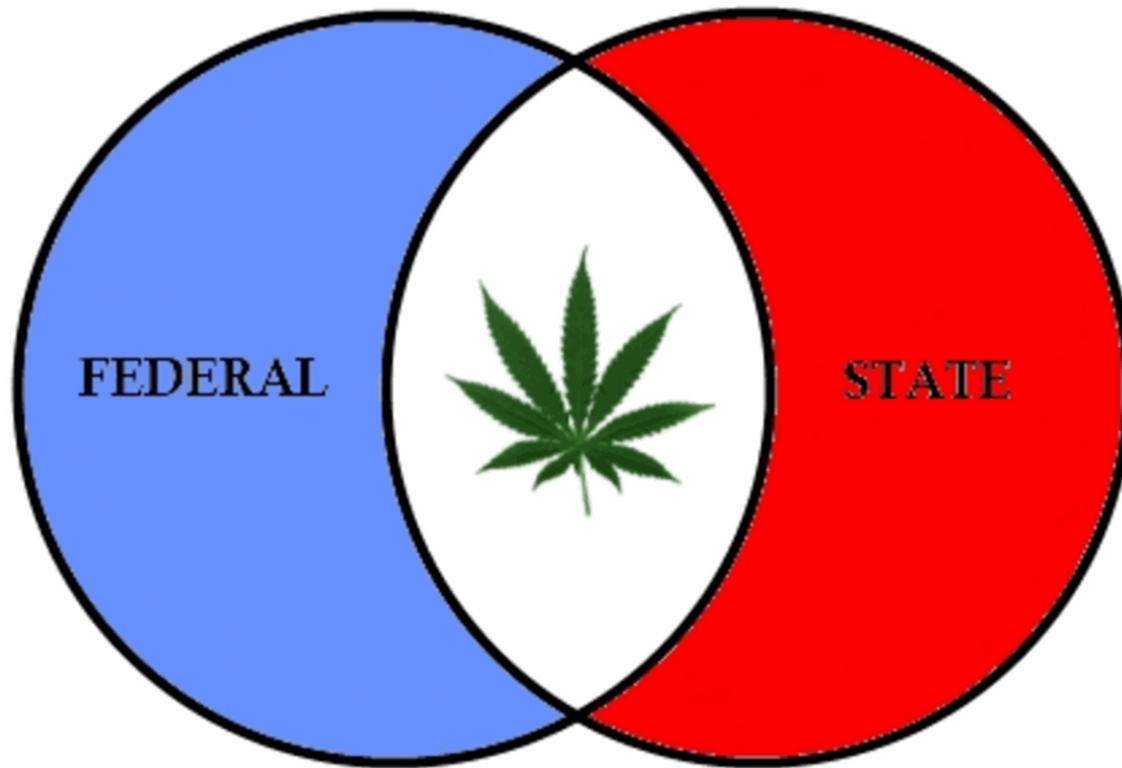


- The STATES Act: (Strengthening the Tenth Amendment Through Entrusting States Act) would amend the current Controlled Substances Act to prohibit federal interference in states that have their own legal marijuana laws on the books.
- **The Marijuana Opportunity, Reinvestment, and Expungement Act (“MORE”) of 2019:** This bill decriminalizes marijuana. Specifically, it removes marijuana from the list of scheduled substances under the Controlled Substances Act and eliminates criminal penalties for an individual who manufactures, distributes, or possesses marijuana.
- H.R. 1588: Ending Federal Marijuana Prohibition Act of 2019: This would change how the distribution and consumption of marijuana are covered under federal law. Marijuana would no longer be on the Schedule 1 list of controlled substances and would remove the prohibition on importing and exporting marijuana into and out of the US.
- Farm Bill: Legalizes the growing of hemp in the United States with serious restrictions.

“MORE” ACT

- ▶ Nov. 20, 2019: House Judiciary Committee passed the Act by a vote of 24-10, becoming the first Congressional Committee to vote in favor of legalizing cannabis.
- ▶ Sept. 2020: House scheduled a vote on the Act but it was delayed.
- ▶ De-schedule cannabis thereby ending federal prohibition on marijuana, expunge the records of those with prior marijuana convictions, and impose a federal five percent tax on sales, revenue from which would be reinvested in communities most impacted by the drug war.
- ▶ Resentencing those incarcerated for marijuana offenses, protect immigrants from being denied citizenship over cannabis, and prevent federal agencies from denying public benefits or security clearance due to its use.
- ▶ **Where the Presidential candidates stand:** President Trump has expressed support but this is not certain; Joe Biden his running mate Kamala Harris is the co-sponsor of the MORE Act.

Conflict Between Federal and State: What Law Does the Employer Follow?





Employment issues in the “Haze” of marijuana legalization





Take away: Treat marijuana the same as alcohol or prescription drugs when not working under a federal contract and you are in a state that has legalized marijuana

Federal Laws Governing the Workplace

- ▶ **Americans with Disabilities Act (“ADA”)** requires employers to provide reasonable accommodations for qualified workers with disabilities. A person who is “currently engaging” in the illegal use of drugs is not a “qualified individual with a disability.” While cannabis remains illegal under federal law the ADA will not protect employees who use medical marijuana.
- ▶ **Omnibus Transportation Employee Testing Act of 1991, mandates** employers with employees requiring a Commercial Driver’s License (“CDL”) to be drug tested. DOT does not recognize medical marijuana use as a valid medical explanation for a positive drug test.
- ▶ **Federal Contract Compliance - Drug Free Workplace Act** applies to certain federal contractors and grant recipients. Requires a continuous good faith effort for companies to maintain a drug-free workplace. Zero tolerance policy.

Marijuana and the Americans with Disabilities Act *as amended* (“ADAAA”)

- ❑ The ADAAA prohibits discrimination against qualified individuals with a disability and requires employers to provide reasonable accommodation to disabled employees

- ❑ The ADAAA does not protect illegal drug use or medical marijuana use
 - What happens when employee has medical documentation permitting or requiring the use of marijuana for treatment of a medical condition?

 - Does this employee get a pass for failing a drug test?

Marijuana and the ADAA cont'd ***and* States Disability Discrimination Laws**

WORK WITH THE EMPLOYEE TO DETERMINE THE FOLLOWING:

- 1) Does the employee have a medical disability?
- 2) Is this employee otherwise qualified to perform the essential functions of the job with or without reasonable accommodation
- 3) Then proceed to engage in the interactive process by determining whether such accommodation is possible.
 - i) Employee must provide adequate notice to employer—Employee
 - ii) communication between employer and employee—once notified the employer must have communication and solicit what information is needed to determine if a suitable/reasonable accommodation exists.

Duty to Accommodate?

Employer Friendly Decisions

State courts that have issued rulings in favor of employers who have taken adverse action against an employee based on his or her legal cannabis use have relied on federal law and the respective state's cannabis law.

- ▶ **California and Colorado** - Rely on cannabis use being illegal under federal law to allow employers to take adverse action against employee.

Warning: This view is shifting

- ❖ *Ross v. Raging Wire Telecommunications, Inc.*, 70 Cal.Rptr.3d 382 (2008).
- ❖ *Coats v. Dish Network, LLC*, 2015 CO 44 (2015).
- ▶ **Washington** - Relies on statutory language in cannabis law that explicitly states the law is in effect as an affirmative defense against criminal action.
 - ❖ *Roe v. Teletech Customer Care Management, LLC*, 171 Wn.2d 736 (2011).

Duty to Accommodate?

Employee Friendly Decisions

No preemption of federal law: The current trend is in those courts where the state's Medical Marijuana Act creates a private right of action for medical marijuana users to sue their employers when the use results in adverse action.

- **Pennsylvania:** *Palmiter v. Commonwealth Health Systems, Inc.*, C.A. No., 19 CV 1315 (Pa. Ct. C.P. Lackawanna County, Nov. 22, 2019).
- **Arizona:** *Whitmire v. Wal-Mart Stores, Inc.*, 359 F.Supp.3d 761 (D. Az. 2019).
- **Delaware:** *Chance v. Kraft Heinz Foods Co.*, C.A. No. K18C-01-056NEP (Del. Super. Ct. Dec. 17, 2018).
- **Connecticut:** *Noffsinger v. SSC Niantic Operating Co.*, 338 F.Supp.3d 78 (2018).
- **Massachusetts:** *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (2017).

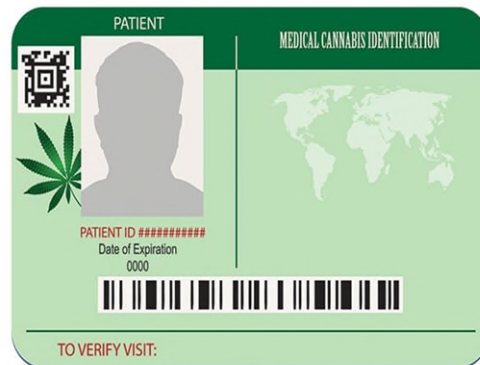
Duty to Accommodate?

Medical Marijuana Act

Some state medical marijuana laws explicitly offer users protection from employment discrimination for use outside the workplace.

Some states prohibit employment decisions based solely on the person's status as a medical marijuana user or cardholder.

AR, AZ, CT, DE, IL, ME, MN, NY, NV, PA, and RI.



Duty to Accommodate: Medical Marijuana Act

Positive test for medical marijuana will not result in adverse action, unless the individual used, possessed, or was impaired by marijuana in the workplace or during work hours. Exceptions from the employment protections include safety-sensitive positions and/or when it would result in the loss of a business license or a government contract.

AR, AZ, CT, DE, IL, ME, MN, NY, NV, PA, and RI



Duty to Accommodate?

Medical Marijuana Act

Delaware - Title 16, ch. 49A, § 4905A:

“Unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations, an employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon either of the following:

- a. The person’s status as a cardholder; or
- b. A registered qualifying patient’s positive drug test for marijuana components or metabolites, unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment.”

MEDICAL MARIJUANA and WORKPLACE ACCOMMODATIONS

- ▶ Duty to accommodate is found in the language and terms of the respective state's discrimination and cannabis statutes.
- ▶ Engage in the interactive process with any employee who discloses a disability and use of medical marijuana for that disability to evaluate the employee's ability to safely perform the essential functions of the job with or without reasonable accommodation.
- ▶ States that protect medical marijuana users prohibit refusing to hire or terminate an employee who disclosed medical marijuana use, the exception is for **safety sensitive jobs**.

Safety Sensitive Position

- ▶ The states prohibit off-duty use because the workers in these roles must have full use of their skills and faculties while performing their jobs.
- ▶ Negative effects of use includes impaired motor performance, impaired mind, 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.



Safety-Sensitive Position

When an occupation is designated as **safety-sensitive**, it is permissible for employers to inquire:

- ❖ whether an employee is currently taking any prescription drugs or medications;
- ❖ whether the employee has taken any such drugs or medications in the past;
- ❖ or monitoring an employee's taking of such drugs or medications.



Safety Sensitive Position

What is a “**safety-sensitive position?**”

A safety-sensitive position is one 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 his or her safety and/or the safety of others.**

Safety Sensitive Position

Examples of Safety-Sensitive Positions:

- Driving any motor vehicle (contractors for on-site repairs, road repair and tire services, parts delivery, valets, shuttle drivers);
- Working with power tools;
- Operating equipment (manufacturing industry);
- Working on elevated surfaces (ladders, scaffolding);
- Construction industry; and
- Security guards (or any industry/profession where employees carry weapons)



Employers Can Prohibit Use and Impairment in the Workplace.

On-Duty Use

None of the medical or recreational marijuana laws require employers to allow employees to use, possess, or be impaired by cannabis during work hours or in the workplace, even if for medicinal purposes.

None of these laws place restrictions on employer's right to administer drug tests (but the state may have separate laws regarding how to use the results from the drug tests).

Off-Duty Use

Maine is the only state that protects employees from off-duty use of recreational cannabis.

Arizona, Arkansas, and Delaware (along with other states) prohibit an employer from taking adverse action if an employee is using cannabis for medical purposes the employer cannot rely on the positive drug test *unless the employer had reason to believe employee was under the influence at work.*

Florida and Ohio's medical marijuana laws specifically state employers have the right to establish and enforce a zero tolerance drug testing and drug use policy.

Drug Testing for Cannabis

Employers are allowed to conduct drug testing for certain positions (i.e., safety position) and not others, so long as everyone in that position is treated equally and there is prior notice of when the employer would conduct testing.



When Should An Employer Drug Test?

Pre-Employment Screening

- ▶ Employers ceasing this testing over concerns of viable workforce candidates.
- ▶ Due to the unreliability and the infringement of one's legal right to use cannabis off-duty there is a movement toward prohibiting employers from conducting pre-employment tests for cannabis.
- ▶ Nevada and New York City prohibit employers from taking adverse action based on a positive pre-employment test.

Post-Accident Testing

- Issues with cannabis staying in the employee's body for so long that if there is an accident and employee tests positive does not mean that employee was under the influence at the time of the accident.

Reasonable Suspicion

- Recognize Impairment **AND** Drug Test to Support Evidence of Impairment.

Why is it so difficult to have accurate testing for cannabis?

Testing for Cannabis

There is no reliable metric for determining when a particular level of THC from cannabis usage impairs the user and for how long the user is impaired.

- **Occasional user:** 1 to 5 days
- **Regular user:** 1 to 3 weeks
- **Multiple daily user:** 4 to 6 weeks



Testing for Other Illegal Drugs and Alcohol

Alcohol -

- ▶ Breath tests: 24 hours
- ▶ Urine test: 10 to 12 hours
- ▶ Blood tests: Up to 12 hours

Cocaine

- Breath tests: 24 hours
- Saliva test: 1 to 2 days
- Urine test: 1 to 3 days

Amphetamine

- Urine test: 2 to 5 days
- Blood test: Up to 2 days
- Saliva test: 1 to 5 days



Marijuana Intoxication: How can we know?

- ❑ 5 ng (nanograms) of THC per milliliter in the blood (Intoxication Standard)

(Standard in a few states: ex: Washington and Colorado)

This is a very controversial standard. It is an arbitrary number because blood levels of THC decline 74 percent in the first 30 minutes of use and 90 percent by 1.4 hours after use. Also, people report feeling intoxicated well after the THC disappears from the blood. This is because THC distributes to cells, fatty tissues, organs and the brain. It does not hang out in the blood like alcohol.

- ❑ Do not rely on testing alone- always document observations
- ❑ Best way to detect intoxication is to be well trained to observe signs of impairment.
- ❑ Frequent users are less impaired than Occasional Users.

Breathalyzer for Cannabis

A company located in Oakland, California believes it has made the major breakthrough for a reliable cannabis use test. Unlike other attempts at testing, this company has found a way to test for THC. Company scientists discovered that THC can be detected in one's breath for 2 to 3 hours. Based on this research the company designed and developed a cannabis breathalyzer.

Cost for breathalyzer: **\$5,000**



What Can the Employer Do When Suspects Employee is Under the Influence?

1. Evaluate Employee's Behavior and Learn to Recognize Signs Of Impairment.
2. Immediately Send Employee for a Drug Test (a higher level of THC is an indicator of more recent use of cannabis).
3. Treat the Drug Test ONLY as Supporting Evidence to Impairment.

Drug Testing for Cannabis

RECOGNIZING IMPAIRMENT

Lack of focus
Slurred words
Lethargic
Glazed eyes
Stumbling
Paranoia

Aggressiveness
Impaired Judgment
Impulsiveness
Loss of Self Control
Tiredness
Lack of Motivation





Reasonable Suspicion Drug Testing:

Evaluate signs, symptoms and document what is observed:

- Be specific
- Contemporaneous and
- Articulate

For example: John came to work today late. He clocked in and then fell asleep in the break room. When I woke him, he was not startled to see me. He looked at me and went back to sleep. His eyes were blood shot.

Reasonable Suspicion Drug Testing:

- ❑ The recent Illinois Recreational Marijuana bill describes when an employer could “test” to see if an employee was under the influence

“An employer may consider an employee to be **impaired by cannabis** if the employer has a **good faith belief** that an employee was **under the influence** of cannabis and the employee manifests specific, **articulable symptoms** while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, **including symptoms** of the employee's *speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or involvement in an accident that results in serious damage to equipment or property, disruption of a production or manufacturing process, or carelessness that results in any injury to the employee or others.*”

Best Practices: Cannabis for Medical Use

- ▶ Be aware of the states who are or will be legalizing medical and recreational use of cannabis in the future.
- ▶ Recognize state cannabis laws are not the same, and each state affords different protections.
- ▶ Engage in the interactive process when discovering an employee is using cannabis for medical reasons (and is employed in a state that has legalized cannabis for medicinal use).
- ▶ Evaluate the employee's ability to safely perform the essential functions of the job with or without reasonable accommodations.
- ▶ Remember the “safety-sensitive” position exception.

Best Practices: Safety Sensitive Position

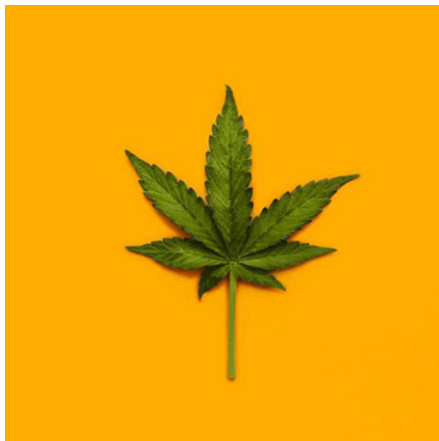
- Designate safety sensitive positions in writing and make sure that job descriptions reflect how impairment would pose a safety risk.
- Include in job descriptions a notice of potential drug testing for safety sensitive positions and that the respective position is deemed to be a safety sensitive position.
- Have employee take job description to their doctor for review to determine whether employee can safely perform the tasks.
- Offer employee assistance where appropriate (e.g., leave for drug/alcohol rehabilitation, Employee Assistance Program).

Best Practices: Drug Testing for Cannabis

- Company's Alcohol and Drug-Free Workplace policies should include when drug testing will occur and for what type of drugs.
- Company Policy Should Be Consistently Enforced.
- Drug Tests are not yet reliable source to establish whether employee is under the influence.
- ▶ Remind employees of Company's Zero Tolerance for On-Job Impairment.

Best Practices: Drug Testing for Cannabis

- ▶ Train Managers and Supervisors to Identify Signs of Impairment;
- ▶ Manage Employee's Expectations;
- ▶ Revise drug and alcohol policy to state that employees will be disciplined up to and including termination, when the employee is found to be displaying behaviors consistent with being **under the influence and tests positive for cannabis.**





Best Practices

Employment Policies and Procedures are **ESSENTIAL**

- Consider changes to drug policy based on workplace, federal work contract, specific state law, safety and culture
- If wish to prohibit and can lawfully do so in your state, ensure that policy addresses drugs “illegal under state or federal law, including marijuana”
- Consider only testing in reasonable suspicion/post-accident situations, so as not to capture off-duty use that doesn't affect work
- Consider only testing employees in safety-sensitive positions
- Have a clear policy, communicate it, and apply it consistently, so employees know what to expect!



REMEMBER:

- Marijuana Intoxication cannot be established by a failed drug test;
- Drug testing to determine Marijuana Intoxication is not reliable;
- You can discipline an employee for being under the influence at work;
- Learn the symptoms of marijuana intoxication and document