

MB



The logo consists of the letters 'M' and 'B' in a bold, serif font. Below the letters are two horizontal lines, with the top line being slightly longer than the bottom line. Underneath these lines are three vertical bars of equal height, each with a rounded top and a slightly tapered bottom.

“Marijuana and the Workplace: It’s the Technology That Needs to Catch Up”

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Introduction

Jeff Bezos, Mark Cuban, and Tony Robbins Don't PowerPoint. They Do This Instead?

Briefing Document

- Missouri has legalized medical marijuana, which is effective now but it is not yet being dispensed
- Illinois has legalized recreational marijuana effective in 2020
- Both states have provisions forbidding being under the influence of marijuana while working
- Technology is racing to keep up with the changes in the law, but employers don't have to race. This is familiar ground. It just sounds foreboding.
- Federal law remains the same – it is illegal to use marijuana. If you are regulated as a Drug Free Workplace under federal law, then you must follow federal law. But that is harder than it seems.

Missouri Medical Marijuana Statute

- Recertification at least once a year for a patient registration card in Missouri
- Qualifying conditions -- cancer, epilepsy, glaucoma, intractable migraines unresponsive to other treatment, conditions that cause persistent pain or muscle spasms (including MS, Parkinson's disease, and Tourette's syndrome), debilitating psychiatric disorders such as PTSD, HIV or AIDS, a chronic medical condition normally treated with prescription medication that can lead to dependence, when a physician determines that medical marijuana could be an effective and safer treatment, any terminal illness, hepatitis C, ALS, inflammatory bowel disease, Crohn's disease, Huntington's disease, autism, neuropathies, sickle cell anemia, Alzheimer's disease, cachexia, and wasting syndrome.

Missouri Medical Marijuana Statute

- No employee may "Bring a claim against any employer, former employer, or prospective employer for wrongful discharge, discrimination, or any similar cause of action or remedy, based on the employer, former employer, or prospective employer prohibiting the employee, former employee, or prospective employee from being under the influence of marijuana while at work or disciplining the employee or former employee, up to and including termination from employment, for working or attempting to work while under the influence of marijuana."

Missouri Medical Marijuana Statute

- No protections for qualifying patients built into the law prohibiting discrimination in hiring or employment – only protections against criminal or civil liability or sanctions under Missouri law for actions and conduct permitted by the medical marijuana law – but must produce on demand a qualifying patient identification card

Illinois Recreational Marijuana Statute

- Private businesses may restrict and prohibit the use of cannabis on its property, including parking lots
- Employers may adopt reasonable zero tolerance or drug free workplace policies
- Employers may adopt employment policies regarding drug testing, smoking, consumption, storage or use of cannabis in the workplace or while on call provided the policy is applied in a nondiscriminatory manner
- Employers not required to permit an employee to be under the influence of or use cannabis in the employer's workplace or while performing the employee's job duties or while on call
- Employers are forbidden from disciplining employees for lawfully using cannabis outside of work

Illinois Recreational Marijuana Statute

- An employer may consider an employee to be impaired or under the influence of cannabis if the employer has a good faith belief that an 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

Illinois Recreational Marijuana Statute

- irrational or unusual behavior
 - negligence or carelessness in operating equipment or machinery
 - disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment or property
 - disruption of a production or manufacturing process
 - carelessness that results in any injury to the employee or others.
- If an employer elects to discipline an employee on the basis that the employee is under the influence or impaired by cannabis, the employer must afford the employee a reasonable opportunity to contest the basis of the determination.

Illinois Recreational Marijuana Statute

- Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for:
 - (1) actions, including but not limited to subjecting an employee or applicant to reasonable drug and alcohol testing under the employer's workplace drug policy, including an employee's refusal to be tested or to cooperate in testing procedures or disciplining or termination of employment, based on the employer's good faith belief that an employee used or possessed cannabis in the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's employment policies;

Illinois Recreational Marijuana Statute

- (2) actions, including discipline or termination of employment, based on the employer's good faith belief that an employee was impaired as a result of the use of cannabis, or under the influence of cannabis, while at the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's workplace drug policy; or
- (3) injury, loss, or liability to a third party if the employer neither knew nor had reason to know that the employee was impaired.

Illinois Recreational Marijuana Statute

- Nothing in this Act shall be construed to interfere with any federal, State, or local restrictions on employment including, but not limited to, the United States Department of Transportation regulation [49 CFR 40.151\(e\)](#) or impact an employer's ability to comply with federal or State law or cause it to lose a federal or State contract or funding.

Illinois Recreational Marijuana Statute

- “Workplace” means the employer’s premises, including any building, real property, and parking area under the control of the employer or area used by an employee while in performance of the employee’s job duties, and vehicles, whether leased, rented, or owned. “Workplace” may be further defined by the employer’s written employment policy, provided that the policy is consistent with this Section.

Illinois Recreational Marijuana Statute

- An employee is deemed “on call” when such employee is scheduled with at least 24 hours’ notice by his or her employer to be on standby or otherwise responsible for performing tasks related to his or her employment either at the employer’s premises or other previously designated location by his or her employer or supervisor to perform a work-related task.

Missouri Workers' Compensation Law

- Missouri's workers' compensation laws provide some additional relief for employers:
 - Mo. Ann. Stat. § 287.120 – Workers' Compensation:
 - “Where the employee **fails to obey any *rule* or *policy*** adopted by the employer relating to a drug-free workplace or the use of alcohol or nonprescribed controlled drugs in the workplace, the **compensation and death benefit provided for herein shall be reduced fifty percent** if the injury was sustained in conjunction with the use of alcohol or nonprescribed controlled drugs.”
 - “If, however, the **use of alcohol or nonprescribed controlled drugs in violation of the employer's *rule* or *policy*** is the proximate cause of the injury, then the **benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited**.”

Illinois Workers' Compensation Law

- Illinois' workers' compensation laws provide relief for employers:
 - No compensation is owed under the Illinois Workers' Compensation Act if:
 - (1) the employee's intoxication proximately caused the injury; or (2) the employee was so intoxicated at the time of the accident that the intoxication was a departure from the employment. 820 ILCS 305/11.
- If at the time of the accidental injuries, there is evidence of impairment due to the unlawful or unauthorized use of:
 - (1) cannabis as defined in the Cannabis Control Act;
 - (2) a controlled substance listed in the Illinois Controlled Substances Act;
 - (3) intoxicating compound listed in the Use of Intoxicating Compounds Act; or
 - (4) if the employee refuses to submit to testing of blood, breath, or urine
 - Then there shall be a rebuttable presumption that the employee was intoxicated and that the intoxication was the proximate cause of the employee's injury

Technology and Marijuana – Why It Matters

- An interdisciplinary team from the Department of Chemistry and the Swanson School of Engineering has developed a breathalyzer device that can measure the amount of tetrahydrocannabinol (THC), the psychoactive compound in marijuana, in the user's breath. (August 2019)
- Current drug testing methods rely on blood, urine or hair samples and therefore cannot be done in the field. They also only reveal that the user has recently inhaled the drug, not that they are currently under the influence.
- Hound Labs just raised \$30 million in funding for its dual alcohol/marijuana breathalyzer
- Both Illinois and Missouri forbid an employee from working while under the influence of marijuana.
- Absent advances in technology, employers must rely on observation and documentation.

Federal Drug-Free Workplace Act

- Federal contractors and grantees are subject to the Drug-Free Workplace Act of 1988 (DFWA).
- Under the act, a drug-free workplace policy is required for:
 - Any organization that receives a federal contract of \$100,000 or more
 - Any organizations receiving a federal grant of any size

Federal Drug-Free Workplace Act

- Maintain a workplace absent illegal drugs
- Create a drug-free awareness program and require employees to sign contracts pledging to comply
- Report any drug convictions against employees to the federal government
- Appropriately discipline employees for drug convictions
- Note: there is no drug testing requirement, but if drug convictions occur in the workplace, federal funding is at risk

What's a federal contractor or grantee to do?

- At least one court (in Connecticut) has held nothing in the DFWA requires drug testing or not hiring someone who uses illegal drugs outside the workplace, and especially does not prohibit an employer from hiring someone that uses medical marijuana.
 - The federal district court did not agree that DFWA required an employer to rescind a job offer after a positive drug test for marijuana because the person was allowed under state law to use the drug.
 - “That defendant has chosen to utilize a zero tolerance drug testing policy in order to maintain a drug free work environment does not mean that this policy was actually ‘required by federal law or required to obtain federal funding.’”

Americans with Disabilities Act

- The ADA does not consider individuals who currently use illegal drugs to be qualified disabled individuals entitled to reasonable accommodation. 42 U.S.C. § 12114(a).
 - Marijuana still considered unlawful under federal law (Controlled Substances Act), even if used medicinally under a licensed physician
- Some of the first states to legalize marijuana have generally held that the ADA does not protect medical marijuana use (California, Colorado, Michigan, Montana, Oregon, & Washington)
- However, later states have specifically carved out prohibitions against discriminating against people who have a lawfully held card (Arkansas, Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, & West Virginia)
- Federal courts have generally held that these anti-discrimination provisions are not preempted by federal law

Americans with Disabilities Act

- So what does this mean for employers?
 - It is a mistake to talk about “accommodating” medical marijuana use by employees.
 - Unfortunately some courts don’t see it that way
 - Barbuto v. Advantage Sales and Mktg., LLC, 477 Mass. 456 (2017), where the Massachusetts Supreme Judicial Court held that, “an exception to an employer's drug policy to permit [medical marijuana] use is a facially reasonable accommodation.”
- The accommodation process remains the same – the focus is on helping folks do the essential functions of their jobs, with or without accommodation.

Steps Employers Should Take in Policies and Practice

- It's time to update your drug free workplace and drug testing policies
- Marijuana impairment varies dramatically by individuals under the same dose
- Chemical tests may still not tell us whether someone is under the influence, at least not yet
- Get your supervisors trained/certified for reasonable suspicion testing
- Train your supervisors on best practices regarding documentation when taking disciplinary action against someone arguably under the influence of marijuana

Steps Employers Should Take in Policies and Practice

- Employers can still drug test and the policy should be strictly enforced
- Review the policy to ensure it clearly prohibits employees from being under the influence at work
- Do you **NEED** a pre-employment drug screen?
- Is it required by law (DOT, safety sensitive)?
- Consider employee license requirements
- Safety-sensitive jobs - "any job that requires duties or tasks that could affect the safety or health of the employee performing the task or others."

Steps Employers Should Take in Policies and Practice

- Consider customizing the pre-employment drug screen if your industry permits limited testing
 - In a contracted labor market, will eliminating the pre-employment drug screen result in more employment candidates?
 - Drug screening facilities can customize tests beyond the standard 5 or 10 panel tests should employers choose to remove marijuana from pre-employment screening

Sample Policy Revisions

- Do prohibit use of any alcohol, illegal drugs, other controlled substances or intoxicants of any kind, whether illegal or legal, on your property, in your vehicles, or on equipment
- Prohibit illegal or unauthorized use of prescription drugs
- Prohibit intentional misuse or abuse of prescription medications
- Prohibit any employee from being under the influence of alcohol, marijuana or other intoxicants, drugs, and any controlled substances during working hours, including breaks and lunch periods.

Sample Policy Revisions

- Let employees know that if they are seen engaging in any prohibited activities, they may be subject to discipline after the company evaluates all of the evidence and makes a determination that the employee engaged in misconduct.
- Tell employees that using prescribed medical marijuana or legal marijuana or other hemp-related products which causes BOTH the presence of the drug to be in the employee's system and an impairment is a violation of the policy.
- Remind employees that they have to use all prescription and legal drugs and alcohol in a way that does not impact the safe and efficient performance of their job.
- Require employees to report to supervisor prior to commencing work if they are under the influence of any substance.
- Evaluate what positions are safety-sensitive and what are not.

Sample Policy Revisions

- Describe your reasonable suspicion drug testing procedures. Require that your supervisors be trained to recognized objective signs that create the reasonable suspicion, and train your supervisors in documenting those objective signs. Require HR or a more senior management official be notified if someone is going to be sent for a reasonable suspicion test.
- Look at the factors in the Illinois statute as examples to place in in your policy to let employees know what you will be using to evaluate whether someone is under the influence of drugs or alcohol.
- Other policies use the following: Drowsiness, Bloodshot eyes or dilated pupils, Slurred or incoherent speech, Alcohol on breath or odor of drugs, Poor physical coordination, An accident or other impaired work performance, Physical or verbal altercation, Unusual behavior or response to a situation (e.g., excessive laughter), Possession of alcohol or a prohibited substance

Sample Policy Revisions

- Describe your post accident testing in detail
- Let employees know examples of when post-accident testing will and will not be required
 - E.g., obvious failure of tools or environmental hazards may not require post-accident testing
 - Vehicle accidents will require them
- Describe your testing procedures.
- Describe what you will do if someone tests positive or self-reports (e.g., last chance, referral to drug or alcohol program).

Conclusion

- Technology is behind the law right now.
- Courts may end up having to define what “under the influence” of marijuana means.
 - But, driving and working are two different things – think about alcohol in the workplace. Courts may say that being under the influence at all is sufficient as long as your policies are clear on that issue.
- Employers are going to have to rely on training their supervisors to recognize signs of impairment, and when taking disciplinary action, document correctly.

QUESTIONS?

No information contained in this presentation should be relied upon by you as legal advice. An attorney's answer to a question depends on many facts, and the facts of each case are different. If you encounter a situation where you believe you need legal advice, contact an attorney and relay the facts of your case to him or her.