THE CHANGING LANDSCAPE OF MARIJUANA LAW AND HOW IT IMPACTS YOUR WORKPLACE

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WHERE ARE WE?
CHANGING ATTITUDES TOWARDS MARIJUANA
MARIJUANA AS ALTERNATIVE

• US OPIOID OVERDOSE DEATHS INCREASED FOURFOLD IN UNDER 20 YEARS

• INCREASE HAS BROUGHT SCRUTINY TO PRESCRIPTION OF OPIOID MEDICINES AND TO THEIR MAKERS

• INCREASINGLY, MANY STATES HAVE FRAMED THE MEDICAL MARIJUANA QUESTION AS AN ALTERNATIVE TO WIDESPREAD USE OF OPIOID PRESCRIPTIONS
MISSOURI MEDICAL MARIJUANA

• IN 2018, MISSOURI VOTERS APPROVED A CONSTITUTIONAL AMENDMENT TO PERMIT MEDICAL MARIJUANA.
  ▪ 66% IN FAVOR
  ▪ 34% OPPOSED

• MISSOURI’S LIMITED PRIOR LEGALIZATION HISTORY:
  ▪ IN 2014, MISSOURI LEGALIZED THE USE AND PRODUCTION OF CBD OIL (DERIVED FROM MARIJUANA) FOR USE IN TREATING PATIENTS SUFFERING FROM CONDITIONS SUCH AS EPILEPTIC SEIZURES
MISSOURI MEDICAL MARIJUANA

• AMENDMENT 2 APPROVED OVER TWO OTHER INITIATIVES:
  ▪ 4% TAX ON MARIJUANA SALES
  ▪ PROJECTED TO GENERATE $14 MILLION TO FUND VETERANS’ HEALTHCARE
  ▪ $6 MILLION FOR LOCAL GOVERNMENTS THROUGH TAXATION AND FEES

• STATUTE ESTABLISHED A TIMELINE:
  ▪ REGULATIONS NEEDED TO BE FINALIZED BY JUNE 6, 2019
  ▪ MEDICAL MARIJUANA CARDS ARE CURRENTLY BEING ISSUED
  ▪ DISPENSARY LIST RECENTLY RELEASED
MISSOURI MEDICAL MARIJUANA

• QUALIFIED PATIENTS CAN:
  • GROW UP TO SIX (6) MARIJUANA PLANTS
  • PURCHASE AT LEAST FOUR (4) OUNCES OF CANNABIS PER MONTH FROM A DISPENSARY
  • USE MEDICAL MARIJUANA FOR TREATMENT UNDER A PHYSICIAN’S SUPERVISION

• CARETAKERS CAN GROW UP TO EIGHTEEN (18) PLANTS

• RECERTIFICATION AT LEAST ONCE A YEAR FOR A PATIENT REGISTRATION CARD IN MISSOURI
QUALIFYING MEDICAL CONDITIONS

- CANCER
- EPILEPSY
- GLAUCOMA
- HIV OR AIDS
- TERMINAL ILLNESSES
- INTRACTABLE MIGRAINE UNRESPONSIVE TO OTHER TREATMENT
- DEBILITATING PSYCHIATRIC DISORDERS, INCLUDING PTSD

- CHRONIC MEDICAL CONDITIONS, INCLUDING MULTIPLE SCLEROSIS, SEIZURES, PARKINSON’S DISEASE, AND TOURETTE’S SYNDROME
- CHRONIC MEDICAL CONDITIONS NORMALLY TREATED BY ADDICTIVE PRESCRIPTIVE MEDICATION IF MARIJUANA WOULD BE A SAFER ALTERNATIVE
- OTHER CHRONIC OR DEBILITATING MEDICAL CONDITIONS AS DETERMINED IN THE PROFESSIONAL JUDGMENT OF A PHYSICIAN
MISSOURI’S 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.”
FEDERAL STATUS – STILL A HARD NO

• MARIJUANA REMAINS, UNDER FEDERAL LAW, A SCHEDULE 1 DRUG, MEANING IT HAS “NO CURRENTLY ACCEPTED MEDICAL USE.”

• OBAMA ERA MEMOS HAD ENCOURAGED LOCAL U.S. ATTORNEYS TO CONSIDER WHETHER INVESTIGATION AND ENFORCEMENT WAS THE BEST USE OF LIMITED RESOURCES

• IN JANUARY OF 2018, ATTORNEY GENERAL SESSIONS’ MEMO RECOGNIZED THE CONTINUED ILLEGALITY OF MARIJUANA UNDER FEDERAL LAW THOUGH ALSO RECOGNIZING PROSECUTORIAL DISCRETION
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

• THE DRUG FREE WORKPLACE ACT REQUIRES THAT FEDERAL CONTRACTORS:
  ▪ 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
* THERE IS NO TESTING REQUIREMENT, BUT IF CONVICTIONS OCCUR IN THE WORKPLACE, FEDERAL FUNDING IS AT RISK.
WHAT’S A FEDERAL CONTRACTOR 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.
  • MARIJUANA STILL CONSIDERED UNLAWFUL UNDER FEDERAL LAW (CONTROLLED SUBSTANCE 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, OREGON, COLORADO)

• RECENTLY SOME STATES HAVE PROHIBITED DISCRIMINATION AGAINST AUTHORIZED MEDICAL MARIJUANA USERS (NEW YORK, ALASKA, CONNECTICUT, ILLINOIS, RHODE ISLAND, PENNSYLVANIA ARIZONA, DELAWARE, MINNESOTA AND NEVADA).

• FEDERAL COURTS HAVE GENERALLY HELD THAT THESE ANTI-DISCRIMINATION PROVISIONS ARE NOT PREEMPTED
MISSOURI’S MEDICAL MARIJUANA LAW

- MISSOURI’S MM LAW **DOES NOT** CONTAIN AN ANTI-DISCRIMINATION PROVISION.

- RATHER, IT SPECIFICALLY PROHIBITS EMPLOYEES FROM FILING CLAIMS AGAINST A BUSINESS FOR DISCRIMINATION BASED ON PROHIBITING AN EMPLOYEE FROM BEING UNDER THE INFLUENCE OF MARIJUANA WHILE AT WORK – **MISSOURI EMPLOYERS CAN PROHIBIT EMPLOYEES FROM BEING UNDER THE INFLUENCE WHILE AT WORK**

- HOWEVER, WE WILL HAVE TO WAIT AND SEE HOW MISSOURI COURTS HANDLE THEIR INTERPRETATION OF WHETHER EMPLOYERS CAN DISCRIMINATE BASED ON MARIJUANA USAGE UNDER ADA AND/OR MHRA CLAIMS

- THE QUESTION WOULD BE WHETHER EMPLOYERS CAN PROHIBIT USE OF MEDICAL MARIJUANA **OUTSIDE OF WORK** WHICH THE STATUTE DOES NOT ADDRESS
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.

• 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.