



## **A NEW REALITY/MARIJUANA IN THE WORKPLACE**

### **INTRODUCTION**

A driver in Lansing, Michigan receives a six year sentence for hitting and killing a motorcyclist while driving “under the influence” of marijuana. Prosecution cases for marijuana possession dismissed after the historic passage of legislation to accept recreational marijuana use in Michigan. Driver in Detroit strikes a trooper’s vehicle on the shoulder of I-75 and is arrested for “driving under the influence”.

Marijuana use is not new, however acceptance of the drug as a successful medical application and the recent passage of legislation legalizing recreational marijuana has forced employers to react on how personal choices to use marijuana may affect work rules and operations. Alcoholic influence, long a part of the occupational equation, has established testing protocols and clearer behavioral indicators of impairment. Marijuana is, to be honest, somewhat uncharted territory in the workplace.

Much of what is known about the effects of marijuana are anecdotal by nature due to its, until recently, illegal status. The scientific and medical conclusions available are confusing as they expose both beneficial and negative impacts often contradicting each other. Consequently, some evidence can be found for both sides of the debate. What is not in dispute, as is the case for most drugs legal or otherwise, marijuana may impact the behavior of the user who may be operating vehicles and hazardous equipment.

What does this mean for employers and employees? When does personal choice override providing a safe and productive workplace? How do multi-state employers enforce an overall drug program when legislation differs state by state? How does this new reality change the rules; or does it?

## CHALLENGES

Construction companies have historically been especially cognizant of the challenges of maintaining a drug-free workplace. Operation of heavy equipment, hazardous tools, dangerous work areas and operations are generally deemed “safety sensitive” and require full attention to task. In addition those companies holding federal contracts are required to have a “Zero-Tolerance” policy for both their own and their sub-contractors’ employees. Companies working in multiple states with differing legislation on marijuana adds to the difficulties of finding qualified employees who will not test positive on pre-employment and random testing.

These thoughts were echoed by Paul Wrzesinski, Safety Director for the Associated General Contractors (AGC), Lansing. “The challenge will be finding and hiring drugfree workers who can pass the pre-employment screening.” Most companies he works with are sticking with their zero tolerance programs as there are currently no legal determinations of what constitutes “under the influence” when it comes to marijuana unlike what has been established for alcohol.



The underlying thought is although medical and recreational use of marijuana is legal in many jurisdictions, determining impairment poses a dilemma for employers. Zero-positive testing is the safest course of action until corroborated testing is developed and impairment legally defined.

Wrzesinski uses, as an example, a crane operator climbing to their perch 20 floors above the ground and entombed for the entire shift. If there is the slightest possibility of impairment the potential consequences could be disastrous.

Industrial Hygiene Manager for Fibertec, David Woods, states his company has had a zero tolerance drug and alcohol policy in place for quite some time. “It (marijuana) is an illegal drug as far as we are concerned; between Federal work and client requirements we are not going to make any changes.” They also require a five panel testing protocol for lab personnel and ten panel for the geo-probe division.

Companies that do not normally perform pre-employment or random drug tests may have a post-accident testing policy when an accident appears to be suspicious or because of documented observance of unusual/suspicious behavior. Such testing would not be

specifically for marijuana but would constitute “reasonable suspicion” for any drug or alcohol impairment in the workplace.

## **MARIJUANA USE**

According to publications from the CDC and the National Institute on Drug Abuse (studies from 2013 & 2015), representatives in all age groups have or are presently using marijuana in its various forms (buds, hashish, concentrates, edibles). However the largest group are those between the ages of 18 and 25 (although there is a slight bounce for users over 65 which includes the “baby boomers”). The 18-25 group is also the age when many are seeking their first full-time employment which may impact the pre-employment testing and challenge drug and alcohol policies that have become standard in many workplaces.



Adding to employment difficulties is, unlike alcohol, there is not a standard in which to measure cannabis impairment, only a test that detects use or the level of tetrahydrocannabinol (THC) present. What constitutes impairment has yet to be definitively accepted. Ongoing and future court challenges will eventually set those standards, rightly or wrongly,

possibly lacking scientific evidence.

Without a definitive, medical and legal definition of “under the influence” for marijuana in place, some employers are taking the position that a positive test is subject to discipline up to and including termination.

## **DEFINITIONS**

### **Under the influence**

Under the influence is a term used to describe a state of intoxication which is criminal during certain activities, such as public intoxication or driving under the influence. Public intoxication is appearing in a public place under the influence of alcohol, narcotics or other drugs to the degree that one endangers themselves or another person or property, or by offensive conduct that annoys another person in the vicinity. All States have laws against driving intoxicated.

### **Impaired**

The second paragraph of the Michigan State Police impaired driving law (first paragraph deals with alcohol) reads as follows:

“Drivers with any amount of a Schedule I controlled substance and/or cocaine are subject to the same fines and penalties as drunk drivers, even if they show no signs of impairment. The only exception is an individual who has a valid medical marijuana card and is driving with marijuana in his or her system. Under the law, an officer must show they are impaired due to that marijuana.”

Outside of an observation of unusual behavior or a positive drug test, there is no certifiable definition for being under the influence for marijuana. Recently, the Michigan State Police completed a one-year pilot in five counties to roadside test drivers suspected to be driving under the influence of drugs. Of the 92 drivers tested, 89 were arrested with over 70 positive for marijuana. “The oral fluid roadside test instrument correlated well with independent lab results and/or evidentiary blood test results,” according to MSP Special First Lt. Jim Flegel. The testing recognizes many drugs in addition to cannabis and opioids and gives a reading in a few minutes. Due to the success of the program it is going to be extended State-wide. Consequently, regardless of the legality of marijuana possession and use, driving under the influence is still illegal and may lead to arrest and conviction.

## **OPINIONS/INTERPRETATIONS**

In researching opinions on employment law there was an ongoing theme among attorneys. Regardless of how employers respond to the legalization of marijuana use, the change in law opens the door to other claims – discrimination or third party liability. It may be easier and more economical to contest an employee wrongful termination than deal with a third party liability lawsuit which could result in expensive judgments and/or impacting corporate reputation.

Upon a positive drug test of a current employee, Attorney Wendy Lane of Greenberg, Glusker, Fields, Claman & Machtinger, in Los Angeles recommends a middle ground of accommodation “...unless you engage in an interactive process, how can you assess whether you’re reasonably accommodating this person?” She further suggested if the employee is motivated and wants the job it might be worthwhile to give them another chance.



Drug and alcohol policies explaining when and what tests will be performed appear to be a credible means of explaining to employees the consequences of a positive test. According to the National Safety Council some studies indicate employees are three times less likely to produce a positive test result if they know they will be tested.

Consequences for a positive test could include discipline and termination but also temporary reassignment, probation, insistence on counseling and follow-up testing. In this manner the

employer is not passing judgment or controlling personal choices or medical treatment options, but demonstrating insistence on a drug and alcohol free workplace.

## COURT DECISIONS



Marijuana is still illegal according to federal law, which classifies it as a Schedule I drug with no accepted medical use and a high potential for abuse. Employers have, for the most part, prevailed when they have clearly defined drug and alcohol policies that are equally enforced. Where there is zero-tolerance for a positive drug test, discipline or termination has been upheld even for those holding Marijuana medical cards.

The “Drug Free Workplace Act (DFWA)” requires those granted federal contracts or grants must have a drug-free workplace as a condition of employment. The program must include: policies and discipline that are applied to all employees; an adequate drug and alcohol testing program under all scenarios (pre-employment, random and reasonable suspicion accident); putting all employees, including sub-contractors, on notice of the program.

Although lawsuits and ongoing legislation will change and establish some parameters for workplace drug issues, some court cases have already provided interpretations. It should be noted that this is not an exhaustive listing of all decisions affecting employers and employees. Clearly different States have unique wording and interpretations in the laws covering medical and recreational use of marijuana in their jurisdiction. These cases are offered as a quick overview and employers should always seek guidance from their own legal advisor in their State.

**Casias vs Walmart (Michigan 9/2012)** – upheld termination. It determined tolerance of an employee with a marijuana medical card was not a reasonable accommodation to modify the company drug program.

**Coats vs. Dish Network (Colorado 6/15)** – upheld the employer’s right to terminate an employee who tested positive on a random drug test even though the employee held a medical marijuana card. The Court ruled approval of the medical marijuana amendment statute did not overturn the lawful activities statute; (i.e., lawful activities both on and off the job-illegal under the Federal law). The Court also said a drug policy must clearly define “illegal drug use to include all drugs made illegal under federal, state or local law.”

The Coats case was used as one of the benchmarks for employers to support termination until employees sought relief under the Americans with Disabilities Act (ADA).

**Barbuto vs. Advantage Sales & Marketing (Massachusetts 7/17)** employee stated she held a medical card and would test positive on a drug test. Upon testing positive she was terminated. The Court determined that the employer failed to consider a reasonable accommodation solution. The Massachusetts Supreme Court allowed that employees can sue for failure to accommodate a disability if terminated or disciplined for prescribed medical marijuana outside of work hours. However the Court also upheld that the employee could not use the drug right before or during work hours.

**Chance vs. Kraft Heinz Foods (Delaware 12/18)** is one of the first cases to dispute the Colorado ruling of 2015 in that the employer should not prevail on the premise that marijuana is illegal by Federal law if the State has approved medical use.

**Eplee vs. Board of Water & Light (Michigan Appeals Court 2/2019)**

Just decided in February of this year, the Appeals Court ruled that a conditional offer of employment could be rescinded after a medical card marijuana user tested positive on the pre-employment drug test. The opinion further stated the employee had no standing as an at-will employee and could be terminated or denied employment for any reason or none.

Ballot language for Michigan's recently approved recreational marijuana law states, in part "...this Act does not prevent an employer from refusing to hire, discharging, disciplining or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions or privileges of employment because of that person's violation of a workplace drug policy or because that person was working while under the influence of marijuana..." The Court stated in its opinion that the marijuana laws also **do not** provide protections for cardholders.

Following this decision Miller, Canfield, Paddock and Stone, PLC in Detroit, wrote that public employers now "should feel comfortable maintaining and enforcing zero-tolerance drug policies for their at-will employees, including medical marijuana cardholders."

Previous cases in California, New Mexico, Oregon, Washington, Montana, Colorado have held there is no duty for private employers to accommodate the use of medical marijuana and can terminate for a positive test. The Board of Water and Light decision was significant as it was setting the same standard for public employers as well according to the Miller, Canfield, Paddock and Stone opinion.

## SNAPSHOT OF COMPANY POLICIES

Generally, most respondents who have a program are not making any changes based on the recent acceptance of marijuana both medically and recreationally. If they had a zero-tolerance policy before, they are not changing that stance. Employers do not want to be accused of legislating or controlling off-duty behaviors. As long as they advertise their intent to test pre-employment, randomly and for cause, and, apply consequences uniformly and consistently, respondents believe they will remain in compliance.



Multi-state contractors are faced with an imposing task of having one drug-testing policy across their operations, due to differing laws, and finding workers who will successfully pass drug tests. However, with the prevalence of federal contracts and safety-sensitive work, they are successfully defending a zero tolerance policy.

Carl Granger, Safety Director for Woods Construction, has oversight of his company's safety and health programs including the Drug and Alcohol Policy. They appended their program in 2015 to specifically address medical cards for marijuana which states in part, "Woods Construction workers, because of the nature of our work and our proximity to the general public and associated construction hazards are in a "safety-sensitive occupation" and are subject to our Drug Test Policy and/or the MUST/MOST protocol". It goes on to say that those found in possession or testing positive for marijuana will be subject to company disciplinary procedures up to and including termination of employment. This was reemphasized in a 2018 addendum after the legalization of recreational marijuana use in Michigan.

The State of Michigan has long had a policy of preemployment testing and disciplinary actions pertaining to drug/alcohol use and has not signaled any changes to those policies at this time. The current MIOSHA Fact Sheet (CET #0198, Revised 8/28/18) entitled "Medical Marihuana Industry-Potential Health and Safety Hazards provides an overview of safety and health hazards that *may* be present in the cultivation, processing, and sale of marijuana." It does not address employee use of the drug in the workplace, nor should it. Though not outside the realm of possibility, it would be very rare that drug use would be investigated initially by MIOSHA in the event of a work-related accident or injury.



## **POLICY SUGGESTIONS**

The following are a few suggestions for creating or reviewing a drug and alcohol policy. Each company has their own unique situation and should tailor a policy for their employees and work situations. The policy should be reviewed by the company's legal representation and analyzed as necessary, but at least annually.

Review all policies, collective bargaining agreements, job descriptions (determining safety sensitive), Human Resources manuals, policies, regulations and work rules.

Review any employment agreements and contracts to assure appropriate wording on alcohol and drug use is addressed.

Create a clear statement that it is against company policy to consume or possess alcoholic beverages on company property or to report to work impaired or under the influence of alcohol or drugs.

Create a clear statement that the possession, use, sale or consumption of any controlled substance or illegal drug as defined by state or federal law (including marijuana) while on company property or while in the course and scope of employment is prohibited.

Create a statement that an employee who is prescribed medication by a healthcare provider which may affect or impair the employee's ability to safely or competently perform his or her job, must inform his or her supervisor of the situation.

Include a summary of the policy for pre-employment, random, post-accident or reasonable suspicion testing for drugs or alcohol.

Explain consequences for positive results

Conduct management training that makes managers more likely to enforce the policy.

Conduct training or retraining of supervision, managers and employees that cover all aspects of the policy.

Conduct supervisory awareness training for signs and symptoms of drug or alcohol behaviors.

Provide access to support for employees with drug problems, which can range from a formal assistance program to a referral to local services.

Include a self-reporting rule that employees report any drug-related convictions.

Those positions covered by the Department of Transportation Rule 49CFR 40, Sec. 40.1 (Federal Motor Carrier, Federal Railroad Administration, Federal Aviation Administration and Pipeline or Natural Gas Operations) have very specific requirements for testing, training and consequences.

## FINAL THOUGHTS

A definition for “impaired” or “under the influence” may receive some assistance. As of March of 2017 a Commission was formed in Michigan (MCL 28.793) charged with research which recommends a scientifically supported threshold of THC bodily content to provide evidence for per se impaired driving in this State. Although there is some skepticism that such an endeavor will prove successful in actually providing such evidence.

As anticipated (March, 2019) the Commission issued its report to Gov. Gretchen Whitmer recommending no defensible limit for the amount of THC in someone’s blood, but to continue using roadside sobriety tests to determine whether a driver is impaired. However until legislators pass a bill, to be signed by the Governor, to change it, the current law states drivers can have no THC in their blood.

Interpretations will continue to evolve both in the Courts and in everyday practice. Already in some States employers are, or are considering, removing marijuana from the substances identified in pre-employment drug testing to increase the employable labor pool. Just recently Senator Cory Booker, with some support, introduced legislation at the federal level to remove marijuana as a Schedule 1 controlled substance under the Controlled Substance Act.

Wrzesinski from AGC found it heartening that a prototype instrument is being tested that can measure “fitness for duty” which does not involve a drug test as a step in the right direction. An employee’s level of alertness can be impacted by fatigue as well as drugs or alcohol. If successful, products like this may help remove some assumptions and provide a safer work situation for tired or ailing employees.

Maybe this new reality does not change the rules. As Safety Professionals, we are all charged with the responsibility of assuring safe and healthy workplaces while providing excellent goods and services for our customers. We can continue to do both with a willingness to work together to meet the challenges of successfully managing people and resources with integrity and trust.

*(This article is referenced in the Michigan Safety Conference 2019 Transportation Division program “Recreational Legalization of Marijuana – What is an Employer to Do” presented by Vern Jones, President, Alternative Safety and Testing Solutions, Inc. This class handout can be downloaded from the event mobile app and/or the Michigan Safety Conference website)*

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Joe Galusha, currently serves on the Board and is the Past Chairman of the volunteer based Michigan Safety Conference. Joe is also the Group Managing Director of Aon's US Risk Control and Claims group. In his more than 25 years of experience as a safety professional and risk management consultant, Joe has served in a number of roles including the Corporate Director of Safety and Health for Fruit of the Loom, serving as the Corporate Ergonomist for Mazda Corporation and more recently as a consultant in various areas of safety and risk management. Joe, also has significant experience in Event Risk Management and security serving as risk consultant to the NFL on five Super bowls, numerous corporate events, and as a risk consultant to the 2014 World Cup.