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Managing Workplace Risks: Legal Trends in Medical Marijuana and Other Disability-Related Topics
Introductory Statement

The materials contained in this presentation were prepared by the law firm of Jackson Lewis P.C. for the participants' own reference in connection with educational seminars presented by Jackson Lewis P.C. Attendees should consult with counsel before taking any actions and should not consider these materials or discussions thereof to be legal or other advice.

Agenda

1. Medical and Recreational Marijuana – Must Employers Allow It?
2. Legal Issues in Implementing Drug and Alcohol Testing in the Workplace
3. Prescription Drug Use By Employees; Workplace Testing for Prescription Drugs
4. Current Trends in Reasonable Accommodations of Employees' Disabilities
Under the federal Controlled Substances Act, marijuana is a Schedule I illegal drug that may not be used, possessed, manufactured or distributed, even for medical purposes. Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. 21 U.S.C. § 812(b)(1).

The U.S. Supreme Court has reiterated this fact in a number of cases. E.g., United States v. Oakland Cannabis Buyers’ Cooperative, 532 U.S. 483, 121 S. Ct. 1711 (2001) (holding that there is no medical necessity exception to the federal prohibition against manufacturing and distributing marijuana).

Shortly after taking office, Attorney General Eric Holder announced formal guidelines for federal prosecutors in states that have authorized the use of medical marijuana, stating “as a general matter, pursuit of these priorities should not focus federal resources in your States on individual’s whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”

On August 29, 2013, the Department of Justice announced that it would not challenge Washington’s and Colorado’s laws legalizing marijuana (not just medical marijuana).

In Dec. 2014, Congress passed 2015 budget bill providing that the DOJ may not use federal funds to prevent certain states from implementing their own state laws authorizing medical marijuana.

However, in April 2015, U.S. DOJ announced it will continue to prosecute medical marijuana cases. DOJ maintains that the 2015 federal budget bill only prevents it from prosecuting cases where States or State officials are parties.
In March 2015 a U.S. Senate bill was introduced (CARERS Act) seeking to amend the CSA and downgrade marijuana to a Schedule II drug. (Schedule II means that although the drug has a high potential for abuse, it has a currently accepted medical use in treatment in the U.S. or a currently accepted medical use with severe restrictions). In addition, the bill proposes: allowing interstate transport of medical marijuana; allowing veterans to obtain medical marijuana from the V.A.; and relaxing financial restrictions on banks and credit unions who seek to do business with marijuana growers and dispensaries.

Nebraska and Oklahoma seek to sue Colorado in U.S. Supreme Court on the grounds that marijuana legalization is unconstitutional. They argue that Colorado’s “legal” marijuana overflows into their states and creates law enforcement problems for them. Supreme Court is not required to take the case. On 5/4/15, the Supreme Court asked the Solicitor General to file a brief expressing the views of the U.S.

Medical marijuana laws are now in 24 states + DC: AK, AZ, CA, CO, CT, DE, DC, GA, HI, IL, ME, MA, MD, MI, MN, MT, NV, NH, NJ, NM, NY, OR, RI, VT and WA.
Recreational marijuana laws: AK, CO, DC, OR and WA.
AK, CO and D.C. laws permit employers to have policies prohibiting marijuana use.
OR permits federal contractors to prohibit marijuana use.

States with medical marijuana laws where courts have held that employers need not accommodate marijuana use at work:
- California;
- Colorado;
- Michigan;
- Montana;
- Oregon;
- Washington State.

States with medical marijuana laws that say employers need not accommodate marijuana use at work:
- Alaska;
- Hawaii;
- Massachusetts;
- New Hampshire;
- New Jersey;
- Rhode Island;
- Vermont.

States with medical marijuana laws that do not address employment issues at all:
- District of Columbia;
- Maryland;
- New Mexico.
States with medical marijuana laws which define employers’ responsibilities regarding employee-medical marijuana users (anti-discrimination provisions):

- Arizona;
- Minnesota;
- Connecticut;
- Nevada;
- Delaware;
- New York;
- Illinois;
- Rhode Island;
- Maine.

Employers in states that have legalized medical marijuana will need to balance a number of competing interests:

- Complying with federal law, versus
- Complying with state law.

and

- The employer’s right and duty to establish and maintain a safe and productive workforce, versus
- The employer’s obligation to accommodate, when reasonable, employees with disabilities that may require provide for the use of medical marijuana.

The federal Controlled Substances Act states that marijuana is illegal and has “no accepted medical use.” Accordingly, it cannot be considered a reasonable accommodation for a disability.

The Americans with Disabilities Act expressly excepts illegal drug use from coverage – employers do not need to accommodate illegal drug use. Therefore, terminating an employee for medical marijuana use will not implicate federal anti-discrimination law.
So far, no court has concluded that any state law requires employers to accommodate medical marijuana use. However, the cases litigated so far involved medical marijuana statutes \textit{without} an anti-discrimination provision. We do not yet know how the anti-discrimination provisions of the newer medical marijuana laws will be interpreted. Even in these states, however, there is a strong argument that federal law pre-empts state law.

Despite the strong federal pre-emption argument, however, there may be risk in state courts, given that state courts do not always feel bound to follow federal courts or federal law.

- Michigan court that granted unemployment benefits to medical marijuana users stated that a state court is not bound by decisions of a federal court.
- New Mexico court that required reimbursement of medical marijuana expenses noted that the federal government has changed its position on marijuana.
- Rhode Island court recently denied a motion to dismiss a medical marijuana case; suit still is pending.

In the states with anti-discrimination provisions, when analyzing accommodation requests, consider:

- Can the applicant/employee really perform the essential functions of the job with or without a reasonable accommodation? (Consider nature of employee’s illness; when and how frequently must he/she use medical marijuana).
- Is the job “safety-sensitive”? If yes, the applicant/employee may pose a “direct threat” to the health and safety of himself/herself and/or others.
- What is your tolerance for risk? How important is it to have one nationwide policy with regard to marijuana use?
Urine drug tests cannot determine exactly when a drug was used. They generally detect drug usage in the last few days. For a chronic marijuana user, a drug test may detect usage in the past 30 days.

Lawsuits arise when the applicant/employee alleges that s/he used marijuana lawfully and while off-duty, but then tested positive on a workplace drug test.

Employers should consider how they will address these situations and decide on a policy/practice.

If a medical marijuana user tests positive on a reasonable suspicion drug test or a post-accident drug test, there is a good argument for termination (assuming state law permits). Implication is that the employee was under the influence at work, or just prior to the accident.

Pre-employment testing may pose risk in certain states. (The laws permitting employers to prohibit marijuana use at work are not helpful in the pre-employment context).

Random tests – also may pose risks in certain states.

Review your drug testing policies re: medical and recreational marijuana. Generally OK to prohibit the use of marijuana at work.

With regard to positive drug tests results, will you follow federal law (still illegal)?
- Before making this decision, determine whether you are a recipient of any federal funds or licenses, or subject to the Federal Drug Free Workplace Act.
- If you are subject to federally-regulated safety standards, i.e. a driver subject to the DOT regulations, you cannot accommodate medical marijuana, or tolerate recreational marijuana, in any state.
Or, will you consider possible compliance with state medical marijuana laws? Certain states pose more risk than others. In the states with anti-discrimination language, engage in the “interactive dialogue” (even if accommodation of medical marijuana use is not likely to be granted).

Consider whether the job is safety-sensitive. "Direct threat" analysis.

How important is it to have one uniform nationwide policy?

Discuss your drug testing policy and procedures with your Medical Review Officer – do not let MRO decide what your policy will be! (e.g., do not let MRO decide whether a medical marijuana card excuses a positive test result). Ultimately, it is the employer who must make the employment decision (and comply with applicable laws), so ensure that your MRO will advise you when a medical marijuana card is presented to excuse a positive drug test result.

If you employ safety sensitive employees, you might elect not to comply with state medical marijuana laws (even though there may be some risk in some states). Greater legal risk is that a known marijuana user causes an accident that injures/kills people.

Remember there is little case law out there – if you choose to follow federal law, you may run the risk of being your state’s “test case” for medical marijuana accommodation.

But if you make the decision to accommodate, you are choosing to abandon compliance with federal law.
Is the employer required to conduct drug and alcohol testing? (e.g., federal DOT agency regulations; state laws that apply to employees in certain industries.)

Is the workforce unionized? Drug testing is a mandatory subject of collective bargaining.

Are you testing in order to obtain a workers’ compensation premium discount? If yes, there are specific statutory requirements that differ by state.

Does your state have any laws regulating workplace drug and alcohol testing?

Pre-employment.

Pre-assignment (i.e., before assignment to customer):
  - May be restricted or prohibited in certain jurisdictions.

Reasonable suspicion (i.e., when there is reason to suspect employee has used drugs or alcohol).

Random:
  - May be restricted or prohibited in certain jurisdictions.

Post-accident:
  - May be restricted or prohibited in certain jurisdictions.
Best Practices For an Effective and Legal Drug and Alcohol Testing Policy

- Have a written policy (required in some states) and ensure it complies with all applicable state and local laws.
- Define who is covered.
- Define (and explain) circumstances that will require a drug and/or alcohol test (e.g., pre-assignment; reasonable suspicion).
- Define “refusal to submit” to a test (very important).
- Explain testing procedures so there is no guesswork (e.g., specimens, on-site or off-site collections, review by Medical Review Officers, negative dilute results, insufficient urine or breath procedures, confirmatory re-test procedure).
- Articulate disciplinary consequences for refusing to test, and testing positive (be consistent).

Where Are The Tests Conducted?

- Where are specimens being collected and analyzed?
  - On-site (by the employer):
    - May be restricted or prohibited by state or local laws.
    - Advantages: timing, cost.
    - Disadvantages: need to train personnel; company personnel involved (liability); possible chain of custody issues; scientific reliability of the test may be questioned.
  - Off-site (at an outside collection facility):
    - Generally recommended—more defensible in litigation.
    - Trained personnel, secure location, laboratory certification.
    - Some states require approved laboratories.

What Specimens are Appropriate for Substance Abuse Tests?

- For drug testing:
  - Urine testing:
    - Most commonly used and widely accepted.
    - Generally detects drug usage within last 2-4 days.
    - Initial screen/confirmation test.
    - Medical Review Officer: Licensed physician with expertise in analyzing drug test results. MRO will discuss positive test results with employees (confidentially) to determine whether there is legitimate medical reason for the positive test result.
    - Confirmatory Re-testing (or Split Specimen Testing): Second laboratory reviews original specimen that has been confirmed positive (required in some states).
Oral fluid testing (for drugs):
- Pros:
  - Ease of collection makes test good for use in remote locations.
  - More difficult for tested individuals to cheat (although there are mouthwashes and gums available to cheaters).
- Cons:
  - Shorter "look back" period (48 hours; 24 hours for marijuana).
  - Due to shorter "look back" period, it's good for reasonable suspicion and post-accident tests, but not others.
  - Not approved by federal government for drug testing.
  - Some studies say it is only 80% effective.

Hair testing (for drugs):
- Pros:
  - Longer "look back" period—90 days. Good for pre-employment and random tests.
  - More difficult to adulterate/substitute.
- Cons:
  - Cannot detect recent drug use; so not appropriate for reasonable suspicion testing and post-accident testing.
  - Sample must be taken from crown of head and as close to scalp as possible, to be accurate. Problem for bald individuals—testing hair from other body areas is not accurate.
  - Not approved by federal government.
  - More expensive than urine testing.

For alcohol testing:
- Breath: Generally recommended unless prohibited by state law (e.g., HI, LA, MD, MN, San Francisco, CA and Boulder, CO).
- Blood: Where breath testing is not permitted. Blood testing for alcohol not permitted in IA, MT and VT. More invasive than breath testing.
Define “refusal to submit”—includes adulteration and substitution, excessive delay, among other things.

Define the disciplinary consequences for refusing to submit — should be termination.

Define disciplinary consequences for testing positive on a drug or alcohol test — termination, or opportunity for evaluation and treatment if necessary. Some states do not permit termination for a first-time positive test result (IA — for alcohol only, ME, MN, RI and VT).

Consider including in your policy a requirement that safety-sensitive employees (e.g., drivers, employees with patient care responsibilities, etc.) must advise the company about warnings accompanying lawfully prescribed or obtained medications if it may impact the ability to perform the job safely, before reporting to work under the influence of such substances.

This triggers the requirement under the Americans with Disabilities Act (and state laws) to conduct an “individualized assessment” by having an “interactive dialogue” with the employee concerning a potential reasonable accommodation and/or “direct threat.”
Employer will evaluate and respond to this information on a case-by-case basis, including temporary job reassignment or modifications, a request for additional medical documentation and consultation, and/or an instruction that the employee not work until the restriction is removed.

Potential pitfalls when testing for prescription medications:
- Employers may not have blanket policies excluding individuals who use certain prescription medications – violates ADA.
- Use of prescription medications may mean the user has a disability—raises ADA issues. Important to have MRO review—MRO may verify lawful drug use as a negative result; or, in some cases MRO may report use of prescription medications to employer when the employee occupies a safety-sensitive position.
- If MRO discloses to employer the use of prescription medications (typically for safety-sensitive employees), employers must conduct an “individualized assessment” to determine how the medication affects the applicant or employee and impacts the performance of his or her job duties.

EEOC regularly pursues cases where employers take adverse action against applicants and employees who use prescription medications without conducting an “individualized assessment.”
- EEOC v. Dura Automotive Systems (Tenn. 9/5/12) – $750,000 settlement after employer tested all employees for 12 substances, including prescription medications, and made it a condition of employment for employees to cease using certain medications.
- Dura Automotive also was sued separately by six former employees for the same reason. After an $870,000 jury verdict against it, Dura appealed. In August 2014, the 6th Cir. Court of Appeals vacated the jury verdict and remanded for a new trial, finding that the question of whether Dura’s prescription drug testing program qualifies as a “medical examination” depends on the specific facts of the case, which must be determined by a jury. Case settled June 2015.
The ADA prohibits discrimination against a “qualified individual with a disability.” This is defined as one who can perform the essential functions of the job, either with or without a reasonable accommodation. Prohibited discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability,” unless the accommodation would impose an undue hardship on the employer.

**REASONABLE ACCOMMODATION**

- "In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."
- **Source:** EEOC’s Enforcement Guidance on Reasonable Accommodation and Undue Hardship.
With the ADA Amendments Act all but eliminating the question of whether an employee is "disabled," the success of many disability cases will depend upon:

- the Employer’s Interactive Process and
- the attempts at Reasonable Accommodation.

Once reasonable accommodation obligations are triggered, an employer must engage in an interactive process to identify appropriate accommodations.
It’s all about the Interactive Process

Examples of Accommodations
- Part-time or modified work schedules
- Reassignment to vacant position
- Leave of absence (beyond FMLA)
- Modification of equipment or devices
- Job restructure
- Modification of examinations
- Accessibility to work and off-site events
- Application assistance
- Readers or interpreters
- Exceptions to policies
- Leave for doctor’s appointment
- Periodic breaks for medication
- Breaks to eat or drink
- Modification of office temperature
- A place to rest after a seizure
- Permission to call doctors where the employer’s usual practice is to prohibit personal calls
- Permission to bring a service animal to work
- Removing items that cause allergic reactions

What is not a reasonable accommodation?
- Removing essential job functions
- Diluting uniformly enforced productivity standards
- Excusing or forgiving past misconduct or poor performance
- Promotion
- Bumping an employee from a job
- Creating another position or job
- Changing an employee’s supervisor (as compared to changing supervisory techniques, which is required absent a showing of undue hardship)
Failure to Engage in Interactive Process in Good Faith

There can be dire consequences for employers who do not engage in the interactive process in good faith.

EEOC v. Auto Zone, Inc., (7th Cir. 2/15/13). Store manager with back injury requested relief from floor-mopping duties; his requests were denied. Court affirmed jury verdict awarding:

- $100,000 compensatory damages
- $200,000 punitive damages (statutory cap) – due to employer’s "reckless indifference" to plaintiff’s rights under ADA
- Injunctive relief
  (in addition to $115,000 in back pay)

Recent Trends in Reasonable Accommodations

An extension of a medical leave may be a reasonable accommodation (one of the most frequently requested)

EEOC is bringing lawsuits alleging systemic discrimination under inflexible leave policies.

Large monetary settlements for groups of employees.

June 2014 - a New Jersey health care employer agreed to pay $1,350,000 to settle a case brought by the EEOC challenging the policy limiting leaves of absence to 12 weeks.
Some Courts have found that requests for extended leave are unreasonable. Courts will look at:

- The length of leave already provided.
- Whether there is a reasonable estimate for when the employee will return.
- The size of the company or worksite where the employee works.
- Whether the extended leave imposes an “undue hardship”.

EEOC v. Ford Motor Co. (6th Cir. April 10, 2015)
- Employee asked to telecommute “up to four days per week” to accommodate her IBS. Ford denied request because regular on-site attendance was required.
- The Sixth Circuit agreed, explaining that its holding that “[r]egular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs,” is supported by “case law from around the country, the statute’s language, its regulations, and the EEOC’s guidance.”

On July 14, 2014, the EEOC issued Enforcement Guidance on Pregnancy Discrimination and Related Issues, as well as a “Q&A” document and a “Fact Sheet for Small Businesses.”

The Guidance is the first comprehensive update of the EEOC’s position on discrimination against pregnant workers since 1983.

The Guidance supersedes earlier guidance and addresses the application to pregnant employees of laws passed in the past 30 years, such as the ADA, the FMLA and the ADAAA.
The Guidance requires "workplace adjustments" without saying it requires reasonable accommodation. According to the EEOC, employers are obligated to treat pregnant employees temporarily unable to perform their jobs the same as it treats other employees who are similar in their ability or inability to work.

Forms of Accommodation Could Include:
- Modify work schedule or shift
- Provide more frequent breaks
- Not engaging in certain physical tasks (e.g., bending, carrying over 10 pounds, kneeling, etc.)
- Not being able to attend certain meetings depending on time of day
- Having to eat more regularly
- Having to use restroom more regularly
- Sitting instead of standing
- More breaks to drink water
- Time off
- More frequent breaks
- Not engaging in certain physical tasks
- Not being able to attend certain meetings depending on time of day
- Having to eat more regularly
- Having to use restroom more regularly
- Sitting instead of standing
- More breaks to drink water
- Time off
Nurse has panic attacks and anxiety. He wants to be able to go home or be absent from work if he experiences episodic flare ups of depression and anxiety making it difficult to function. Is that reasonable?

“A request to arrive at work at any time, without reprimand, is not a reasonable accommodation because it would change the essential functions of a job that requires punctual attendance.”

Budget analyst with depression requested that she be allowed to work hours outside the prescribed workday on short notice. At times her job required tight, unpredictable and firm deadlines. Is that reasonable?

No per se rule that flexible hours are unreasonable. Technology means less essential for employees to be physically present.

Sales representative who lost vision in both eyes requests a full time driver or other transportation as an accommodation. Does the employer have to accommodate?

No. The requested accommodation would eliminate an essential function.
Applicant who is deaf applied for job as a lifeguard. At the pre-employment physical examination, the doctor concluded, "he's deaf, he can't be a lifeguard."

Employer (and doctor) assumed that he could not perform job duties of a lifeguard. But he held the world's record for the most lives saved! Applicant prevailed in the lawsuit. Don't assume… Get the facts.

Manager of rental car location states he needs to bring his Shih Tzu, "Sugar Bear" to work with him to help him control his stress related emotions and deal with his disability (depression and adjustment disorder).

Is accommodation required?
Case allowed to proceed – employer knew that emotional issues were symptomatic of his disability.

Employee had anxiety and a heart condition. She asked for a change in office location and a new supervisor as an accommodation.

Is the requested accommodation required?
Indefinite assignment to a different office and supervisor was not reasonable.
Pregnant employee requests accommodation of a different shift to accommodate the upcoming increase in her daycare costs. Reasonable accommodation?

- Not required to accommodate to help with financial needs; accommodation was not needed for medical needs.

Final Thoughts

- Engage in the interactive process in good faith – not once but several times if necessary
- Manage the performance, not the condition
- Do not make assumptions about the employee’s medical condition or physical limitations
- Do not stereotype
- Document all discussions with the employee