

# Medical Marijuana in the Workplace: Today's issues

**Oklahoma  
Labor/Management Conference**

August 5, 2021

presented by  
**Charlie Plumb**  
MCAFEE & TAFT



# Today's topics

- Where we're at
- Federal law inconsistencies
- Examples of employment protections for lawful marijuana users
- Examples of lawful workplace restrictions where marijuana has been legalized
- Current testing challenge
- Practical suggestions



# Where We're At



# Legalized marijuana

- Medical use – 33 states
- Recreational use – 11 states



# Regional recap

- **Missouri** – Medical marijuana for qualifying conditions
- **Arkansas** – Medical marijuana for qualifying conditions
- **Oklahoma** – Medical marijuana
- **Kansas** – Medical marijuana bill in Legislature



# Trend: Increasing acceptance

- Every marijuana ballot measure in a six-month period passed
  - Voting on a referendum (petition)
  - State legislature approval
- Includes states considered “conservative” – e.g., Mississippi, Montana, and South Dakota
- Next step: States that approved medical use legalizing recreational use



# Common features for legalized marijuana

- State-regulated cultivation, production, and sales
- Prohibited for minors
- Cards, licenses, or prescriptions
- Medical use limited to specified conditions
- Limits on amount that may be possessed
  - Amazon removed marijuana from its pre-employment drug testing and will treat marijuana the same as alcohol in the workplace
  - Legalization means increased workplace issues



# Federal Law Inconsistencies





# Controlled Substance Act

- Marijuana is a Schedule I prohibited narcotic – like heroin
- Federal government not actively enforcing for lawful use consistent with state laws



# Federal regulations

- Federal regulations prohibiting marijuana use and requiring marijuana testing in the workplace
  - For example, DOT, FAA, Department of Defense
  - Associated with particular industries – e.g., trucking, pipeline, maritime, aviation
- Employers subject to federal regulations or contracts
  - permitted to satisfy marijuana prohibition and testing requirements, although in a marijuana-legalized state



# Drug Free Workplace Act (DFWA)

- Applies to federal contractors (\$100,000) and federal grant recipients
- Does not require employer to conduct substance testing
- Does not regulate employee marijuana use outside the workplace, with the exception of criminal drug convictions
- Does not prohibit federal contractors from employing individuals who use medical marijuana outside the workplace in conformity with state law



# Examples of Employment Protections for Lawful Marijuana Users



# Employment protection examples

- No employment discrimination based upon their status as a lawful medical marijuana user (or card/license holder)
  - Hiring, advancement, assignments, discipline, etc.
- No employment action taken against an individual based **solely** upon a positive drug test for marijuana



# Employment protection examples

*(cont'd)*

- The “safety-sensitive” exception
  - Employment protections do not apply to those who hold safety-sensitive positions
  - Safety-sensitive positions frequently defined by state laws – e.g., healthcare, public safety, child care, utilities, manufacturing, transportation/driving, mining, oil & gas
  - Positions should be designated by employer



# Examples of Lawful Workplace Restrictions Where Marijuana has been Legalized



# Workplace restriction examples

- May prohibit use or possession of marijuana while on employer's property
- May prohibit use or possession while working ("during the hours of employment")
  - Third party locations (customers, job sites); work travel
- May prohibit impairment or being under the influence while working





# The Current Testing Challenge



# Employer testing

- Employers may continue to test for marijuana
  - Types of testing: pre-employment, reasonable suspicion/for cause, post-accident, scheduled/periodic, random, return-to-work
  - Comply with any state substance testing law
  - Comply with applicable federal regulatory testing requirements – DOT



# Limitations of testing

- No test that can determine when marijuana consumed
  - Did an employee use marijuana while working or on their own time?
- No test that can determine whether an employee testing positive for marijuana is impaired
  - No blood alcohol or breathalyzer test



# Test is positive. What next?

- Are they permitted to consume marijuana – i.e., a license holder or a state that permits recreational use?
- Are they applying for or do they hold a safety-sensitive position?
- Any evidence they used or possessed marijuana on employer's property?
- Any evidence they used or possessed marijuana while working?
- Any evidence they were impaired or under the influence of marijuana while working?



# Practical Suggestions



# Practical suggestions

- ✓ **Make this about workplace safety – not about the politics around marijuana legalization**
- Put in place no possession/use/impairment while working policies
- Follow a substance testing policy that tests for marijuana and is consistent with the law
- When appropriate, designate safety-sensitive jobs



# Practical suggestions *(cont'd)*

- Educate the workforce about these policies – dispel information
- Train supervisors
  - How marijuana laws work
  - The “no possession/use/impairment” policies
  - Identifying and documenting “under the influence” situations”



# Questions?

## **Charlie Plumb McAfee & Taft**

Williams Center Tower II  
Two W Second Street, Suite 1100  
Tulsa, OK 74103

(918) 574-3003  
[charlie.plumb@mcafeetaft.com](mailto:charlie.plumb@mcafeetaft.com)

