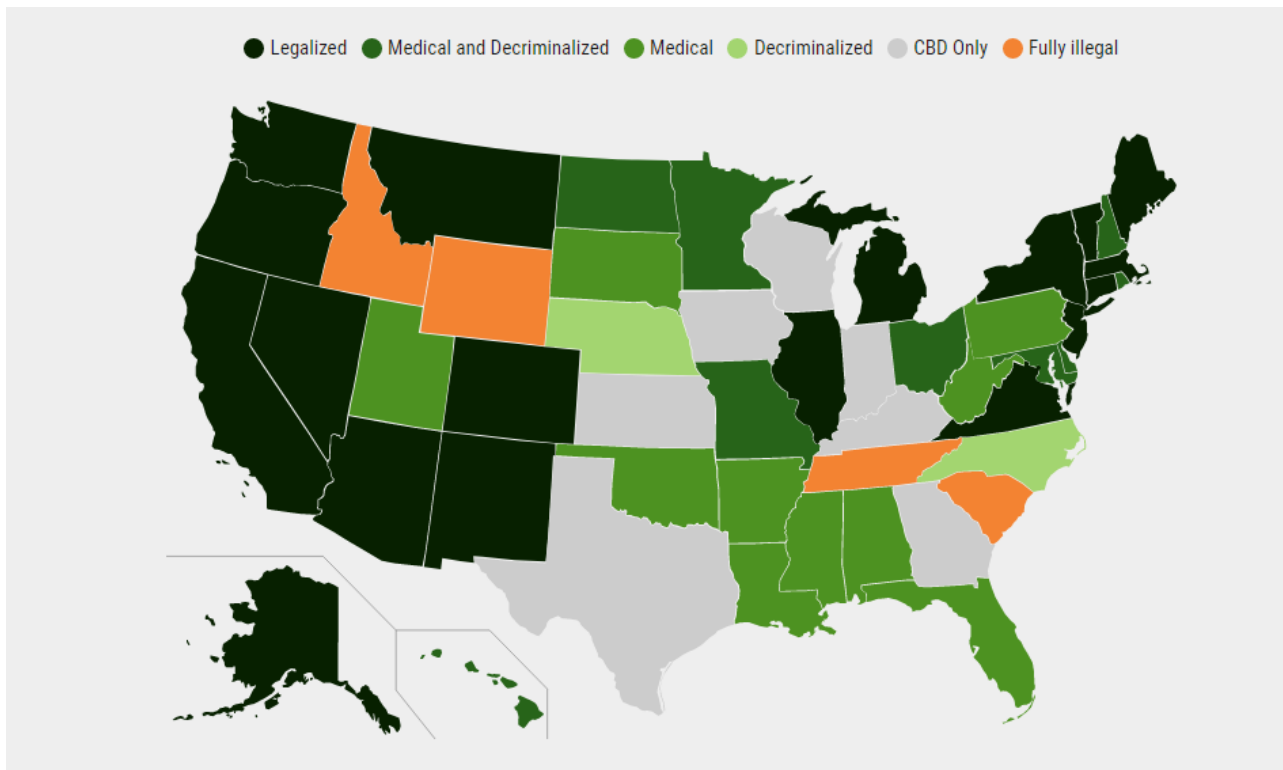


Business Effects of Shifting Cannabis Rules & Regulations

Terence Scanlan and Rochelle Doyea
Cairncross & Hempelmann – Seattle, WA

The Cannabis Trend



Discussion

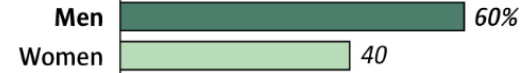
- What does this mean for GBA employees?
 - OSHA considerations
 - Drug testing best practices
 - ADA accommodations and compliance for medical use
- What does this mean for GBA clients?
 - Risks with working with cannabis businesses
 - Design considerations in this highly regulated industry



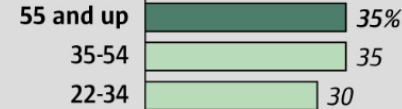
One in Four cannabis users admit to getting high at or before work

ALL RESPONDENTS

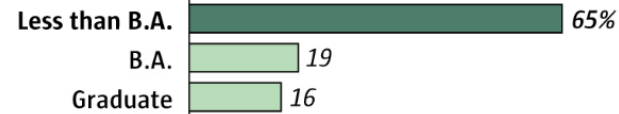
Gender



Age



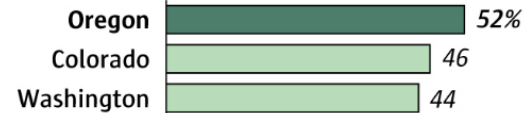
Education



Political affiliation



Consume cannabis at least a few times a week



Source: Quinn Thomas

EMILY M. ENG / THE SEATTLE TIMES

OSHA Considerations

Employers must furnish
“employment and a place of
employment which are free from
recognized hazards that are
causing or are likely to cause
death or serious physical harm to
his employees.”



Potential Liability

- State regulation prohibits allowing workplace consumption of alcohol or narcotics.
WAC 296-800-11025.
- Implications for Workers Compensation Coverage



Permissible Testing



- Random workplace drug testing
- Drug testing unrelated to the reporting of a work-related injury or illness
- Drug testing under a state workers' compensation law
- Drug testing under other federal law, such as DOT regs for CDL
- Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees

Post-Accident Testing

Blanket or automatic post-accident or post-injury drug testing will be presumed to be retaliatory and intended to deter or discourage reporting of injuries or accidents. See 29 C.F.R. § 1904.35(b)(1)(iv) (prohibiting employers from taking adverse, retaliatory action against employees based on a work-related injury report).



Reasonableness Factors

- Whether the employer had a reasonable basis for concluding that drug use could have contributed to the injury or illness (and therefore the result of the drug test could provide insight into why the injury or illness occurred).
- Whether other employees involved in the incident that caused the injury or illness were also tested or whether the employer only tested the employee who reported the injury or illness.
- Whether the employer has a heightened interest in determining if drug use could have contributed to the injury or illness due to the hazardousness of the work being performed when the injury or illness occurred.

§ 3:5.10. OSHA Rule on Reporting Workplace Injuries and Post-accident Drug Testing, 1 Drug Testing Law Tech. & Prac. § 3:5.10.

New Employment Considerations



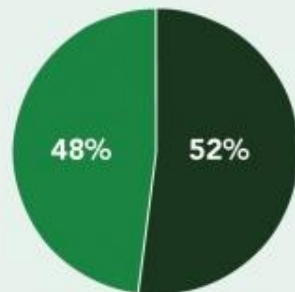
Can I screen for active cannabis use?

Do I need to accommodate medical (or even recreational) cannabis use?

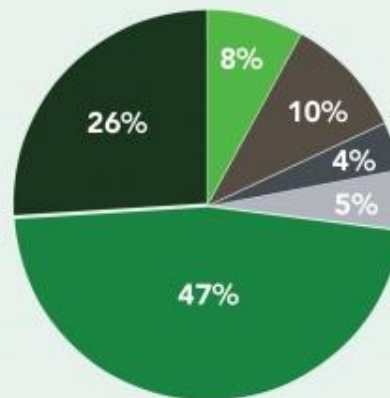
The Cannabis Conversation Is Growing

Consumers/Patients: Have you tried medical marijuana to alleviate your chronic pain, or related symptoms (eg, insomnia)?

■ Yes
■ No

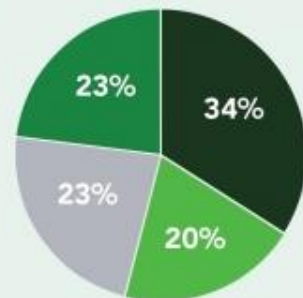


Clinicians: For which type of pain are you allowing or encouraging the use of cannabinoids in your clinical practice?



Clinicians: What percentage of your chronic pain patients have asked about medical cannabis?

■ Less than 25%
■ 26 to 50%
■ 51 to 75%
■ More than 75%



■ Inflammatory (connective, bone, skeletal-muscle)
■ Neuropathic
■ Nociceptive (thoracic, pelvic, or abdominal)
■ Related pain symptoms (eg, insomnia, anxiety, depression)
■ All types
■ None

Polls conducted on PracticalPainManagement.com (as of 4/15/2019)

Not Even a Consideration:

	Marijuana Laws by State	Duty to Accommodate Medical Cannabis Users?
Georgia	Illegal - CBD only	NO.
Idaho	Illegal - CBD only	NO.
Indiana	Illegal - CBD only	NO.
Iowa	Illegal - CBD only	NO.
Kansas	Illegal - CBD only	NO.
Kentucky	Illegal - CBD only	NO.
N. Carolina	Illegal - CBD only	NO.
S. Carolina	Illegal - CBD only	NO.
Tennessee	Illegal - CBD only	NO.
Texas	Illegal - CBD only	NO.
Wisconsin	Illegal - CBD Only	NO.
Wyoming	Illegal - CBD Only	NO.

State Expressly Says, No Duty:



- Alaska
- California
- Colorado
- DC
- Ohio
- Pennsylvania
- Vermont
- Washington

Examples

- Alaska Stat. § 17.38.220

“Nothing in this chapter is intended to require an employer to permit or accommodate the use, consumptions, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.”



Colorado

- Colo. Const. Art. XVIII, Section 14(10)(b) “Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place.”
- *Coats v. Dish Network* (affirming employers right to fire employees for using medical marijuana during non-working hours because employee was violating federal law).



Washington

- *Roe v. Teletch* (2011), Washington's Medical Use of Marijuana Act does not protect medical cannabis users from adverse hiring or disciplinary decisions based on employer's drug test.



No. 83768-6

SUPREME COURT OF THE STATE OF WASHINGTON

JANE ROE,
Petitioner,

v.

TELETECH CUSTOMER
CARE MANAGEMENT
(COLORADO), LLC,
Petitioner.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
MEMORANDUM OF THE AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON IN SUPPORT OF PETITION FOR
REVIEW

Duty to Accommodate Remains Unclear

- Alabama
- Alaska
- Florida
- Hawaii
- Louisiana
- Michigan
- Missouri
- New Hampshire
- New Jersey
- New Mexico
- North Dakota
- Oregon
- South Dakota
- Utah



Examples

- Fla. Const. art. X, § 29(c)(6) “Nothing in this section shall require any accommodation of any on-site medical use of marijuana **in any correctional institution or detention facility or place of education or employment, or of smoking medical marijuana in any public place.**”
- N.M. Stat. Ann. § 26-2B-5 “A. Participation in a medical use of cannabis program by a qualified patient or primary caregiver does not relieve the qualified patient or primary caregiver from: [...] (3) criminal prosecution or civil penalty for possession or use of cannabis: [...] (c) **in the workplace** of the qualified patient's or primary caregiver's employment.” *Vialpando v. Ben's Auto. Srvcs.*, 331 P.3d 975 (N.M. App. 2014).

Updated Obligation to Accommodate

- Arizona
- Arkansas
- Connecticut
- Delaware
- Illinois
- Maine
- Maryland
- Massachusetts
- Minnesota
- Montana
- Nevada
- New York
- Oklahoma
- Rhode Island
- Virginia
- West Virginia



Oklahoma

- Okla. Stat. tit. 63 § 425 “B. Unless a failure to do so would cause an employer to imminently lose a monetary or licensing related benefit under Federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either: 1. The person's status as a medical marijuana license holder; or 2. Employers may take action against a holder of a medical marijuana license holder if the holder uses or possesses marijuana while in the holder's place of employment or during the hours of employment. Employers may not take action against the holder of a medical marijuana license solely **based upon the status of an employee as a medical marijuana license holder or the results of a drug test showing positive for marijuana or its components.**”

New York

- N.Y. Pub Health Law § 3369(2)

“Being a certified patient shall be deemed to be having a "disability" under article fifteen of the executive law (human rights law), section forty-c of the civil rights law, sections 240.00, 485.00, and 485.05 of the penal law, and section 200.50 of the criminal procedure law. This subdivision shall not bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance. This subdivision shall not require any person or entity to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding.”



Can I Work with Cannabis Clients?

- 2013 Cole Memo
- 2018 Sessions Memo
- 2021 Garland Memo?



Client Considerations

- SAFE Banking Act



Working with *Almost* Cannabis Firms

- Businesses working with intermediaries to avoid working directly with cannabis clients
- Results of IRC 280e



Design Considerations

Nevada

- Regulated by Nevada Compliance Board
- Title 56 NRS 678A
- Regulations 9 and 10 for lighting, mechanical ventilation, filtration



Design Considerations

California

- Regulated by DCC
- CA Code Title 4, Div. 9
- MAUCRSA
- Local Ordinances



Questions

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