University of Rhode Island’s Annual Labor Arbitration Conference

November 2017
Let’s Be Blunt: *Drug Testing Under RI and MA Law and Before Arbitrators*
Agenda

• Setting the Stage: Basics and Background

• Federal Laws Regarding Marijuana Use

• State Legalization of Marijuana
  – Recreational Use
  – Medical Use and Limited Medical Use

• Employer Issues with Medical Marijuana
  – Americans with Disabilities Act
  – Family and Medical Leave Act
  – Duty to Provide a Safe Workplace
  – Drug Testing and Discipline
  – Arbitration
But Wait… *What Does it Mean?*

- **Legalization**: Removing all legal prohibitions against it
- **Decriminalization**: To reduce or abolish criminal penalties for marijuana use
- **Medical use**: Use of cannabis or marijuana, including constituents of cannabis, THC and other cannabinoids, as a physician-recommended form of medicine or herbal therapy
- **Cannabidiol**: One of the active ingredients in cannabis/marijuana, and is used for medical purposes; the non-psychoactive compound in marijuana
- **Tetrahydrocannabinol ("THC")**: The chemical responsible for most of marijuana’s psychological effects
Where Do the Feds Stand

• Controlled Substances Act

• Federal enforcement of marijuana laws
Federal Law

• **Controlled Substances Act**
  – Establishes the federal drug policy under which the manufacture, importation, possession, use and distribution of certain substances is regulated
  
  – Signed into law by President Richard Nixon
  
  – Created five Schedules (i.e., classifications), of substances
  
  – The Drug Enforcement Administration and the Food and Drug Administration, determine which substances are added to or removed from the various schedules, although the statute passed by Congress created the initial listing
• Marijuana is listed as a Schedule I drug under the CSA
• Use, sale, and possession of all forms of marijuana – medical and recreational – is illegal and considered a federal crime
• Views marijuana as highly addictive and a substance for which there are no currently accepted medical uses
Marijuana is a Schedule I Drug, So?

- Other Schedule I Drugs: heroin, LSD, peyote, ecstasy, BZP

- Because the federal government views marijuana as a substance for which they are no currently accepted medical uses, physicians cannot prescribe marijuana under this law
  - Physicians can recommend its use in states where it is legal

- In *United States v. Oakland Cannabis Buyers’ Coop*, 532 U.S. 483 (2001), the U.S. Supreme Court *unanimously* held that there is **no medical necessity exception** to the CSA’s prohibition of manufacturing and distributing marijuana
The President & Marijuana

• Under the Obama Administration, the United States Attorney General relaxed federal enforcement of criminal marijuana laws

• President Donald Trump has sent a mixed messages on his views regarding marijuana
  – Appointed Jeff Sessions as U.S. Attorney General, an opponent of the marijuana reform movement/marijuana legalization
    • “Good people don’t smoke marijuana.”
  – Nominated Dr. Scott Gottlieb for the Food and Drug Administrator Commissioner position, who has admittedly prescribed medical marijuana to patients
Legalization of marijuana has swept across the United States.

The majority of states and the District of Columbia have legalized marijuana.

The legalization varies by state:
- Some states permit recreational use.
- Other states permit medical use only.
- Some states only permit cannabidiol derivatives to be used.
States Permitting Recreational Marijuana

- Alaska
- California
- Colorado
- District of Columbia
- Maine
- Massachusetts*
- Nevada
- Oregon
- Washington
States Permitting Recreational Marijuana

• None of these recreational marijuana statutes contain employment protections for recreational users
  – Employer’s can still enforce a zero-tolerance policy
  – Employers are not required to accommodate recreational marijuana use
  – If an individual tests positive, employers may take an adverse action against them
### States Permitting Use of Medical Marijuana

- Alaska
- Arizona
- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Hawaii
- Illinois
- Maine
- Maryland

- **Massachusetts**
  - Michigan
  - Minnesota
  - Montana
  - Nevada
  - New Hampshire
  - New Jersey
  - New Mexico
  - New York
  - North Dakota
  - Ohio
  - Oregon

- Pennsylvania
- Rhode Island
- Vermont
- Washington
States With Limited Marijuana Use Laws

- A low-THC form of cannabis is currently legal in:
  - Alabama
  - Florida
  - Georgia
  - Iowa
  - Kentucky
  - Louisiana
  - Mississippi
  - Missouri
  - North Carolina
  - South Carolina
  - Tennessee
  - Texas
  - Utah
  - Virginia
  - Wisconsin
The Firsts

- California
  - First state to legalize marijuana for medicinal purposes
  - 1996 California Compassionate Use Act

- Colorado
  - First state to legalize marijuana for recreational use
  - In January 2017, marijuana sales were about $109 million in Colorado

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The Locals

• Rhode Island
  – Permits use of medical marijuana
    – The Hawkins-Slater Act
      • Aka, the “Medical Marijuana Act”

• Massachusetts
  – Permits use of medical marijuana
    – An Act for the Humanitarian Medical Use of Marijuana
      • Aka, the “Medical Marijuana Act”
  • Legalized recreational use
Rhode Island

  - § 21-28.6-3(18): in order to qualify for a medical marijuana card, an individual must have a "debilitating medical condition"
  - § 21-28.6-4(a): “[a] qualifying patient cardholder who has in his or her possession a registry identification card shall not be … denied any right or privilege … for the medical use of marijuana.”
  - § 21-28.6-4(c): “[n]o school, employer, or landlord may refuse to enroll, employ, or lease to, or otherwise penalize, a person solely for his or her status as a cardholder”
  - § 21-28.6-7(a)(1): the Act does not permit “[a]ny person to undertake any task under the influence of marijuana, when doing so would constitute negligence or professional malpractice”
  - § 21-28.6-7(a)(1): the Act does not permit any person “[to] operation, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marijuana”
    - Note: “A registered qualifying patient shall not be considered under the influence solely for having marijuana metabolites in his or her system”
  - § 21-28.6-7(b)(2): the Act does not require “[a]n employer to accommodate the medical use of marijuana in any workplace.”
Callaghan v. Darlington Fabrics,

- Plaintiff meets with HR and signs Fitness for Duty Statement, acknowledging pre-employment drug tests are required
- Plaintiff discloses that she held a medical marijuana card and pre-employment drug test would be positive, but she would not use or possess marijuana in the workplace
- HR says the company cannot hire her if she tests positive
  - But remember, R.I. employers are prohibited from refusing to employ “a person solely for his or her status as a cardholder”
- Plaintiff filed suit in November 2014 alleging violations of the Hawkins-Slater Act and the Rhode Island Civil Rights Act
Callaghan: Defendant’s Arguments

• Hawkins-Slater Act: It did not refuse to hire Plaintiff because of her status as a card-holder, but because of her inability to pass a mandatory drug-screen
  – The Act should be reviewed narrowly because it impedes on an employer’s common law right to employ at-will
  – The Act does not, and should not be interpreted to, require employers to accommodate medical marijuana use
  – Concern of work-place safety should take priority

• RICRA: Decision not to hire Plaintiff was based solely on her use of marijuana, not her underlying disability
  – Active drug use is not a disability under RICRA

• Even if either the Hawkins-Slater Act or RICRA entitles Plaintiff to relief, such an action cannot be maintained due to preemption by the federal Controlled Substances Act
**Callaghan: Holding and Take-Aways**

- The Court makes a distinction between medical and nonmedical use of marijuana
- The Hawkins-Slater Act permits a private right of action
- The Hawkins-Slater Act provides that employers cannot refuse to employ a person for his or her status as a cardholder and that that right may not be denied for the medical use of marijuana
- Employers that refuse to hire card-carrying prospective employees due to use of medical marijuana violate the Hawkins-Slater/Medical Marijuana Act
- A plaintiff’s status as a medical marijuana cardholder signals that he or she has a debilitating medical condition and is considered disabled under RICRA
- CSA does not pre-empt either the Hawkins-Slater Act or the RICRA
Massachusetts

- Massachusetts Marijuana Act: ch. 94C App., §§ 1-1 et seq.
  - ch. 94C App., § 1-1: “[T]here should be no punishment under state law for qualifying patients, physicians and health care professionals, personal caregivers for patients, or medical marijuana treatment center agents for the medical use of marijuana”
  - ch. 94C App., § 1-2 (K): a “qualifying patient” is defined as “a person who has been diagnosed by a licensed physician as having a debilitating medical condition”
  - ch. 94C App., § 1-4: “Any person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions”
  - ch. 94C App., § 1-7: “Nothing in this law requires any accommodation of any on-site medical use of marijuana in any place of employment, school bus or on school grounds, in any youth center, in any correctional facility, or of smoking medical marijuana in any public place.”

- Plaintiff had a prescription for medical marijuana to treat her Crohn’s disease
- She accepted a job offer that was contingent upon her taking a drug test
- Plaintiff then told her supervisor that she would fail the test because of her use of medical marijuana
- She was fired after testing positive (which remains illegal under Federal law)
- Plaintiff sued, claiming that her employer failed to accommodate her disability
Barbuto: Defendant’s Argument

- Plaintiff failed to state a claim of handicap discrimination:
  - She did not adequately allege that she is a “qualified handicapped person” because the only accommodation she sought—her continued use of medical marijuana—is a Federal crime, and therefore was facially unreasonable
  - Even if Plaintiff were a “qualified handicapped person,” she was terminated because she failed a drug test that all employees are required to pass, not because of her handicap
Barbuto: Holdings and Take-Aways

• The use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication

• Just because possession of marijuana is a federal crime “does not make it per se unreasonable as an accommodation” for an employee’s disability
  – Employers must still engage in the interactive process to determine whether the employer could reasonably accommodate the employee
  – Can start that interactive process by obtaining confirmation from the employee’s doctor that medical marijuana is the most effective medication

• Employers can reject a proposed accommodation if it poses an “undue hardship,” e.g., if the use of medical marijuana impaired the employee’s performance, posed an unacceptably significant risk to the public, employee, or her co-workers, or violated an employer’s contractual or statutory obligation

• Employers can still prohibit employees from coming to work under the influence of marijuana or from using marijuana at work and discipline employees for issues related to recreational marijuana

• There is not a separate private cause of action for aggrieved employees under the Medical Marijuana Act, where such employees are already provided a remedy under our discrimination law, and where doing so would create potential confusion
Reconciling Federal v. State Laws

• In *Gonzales v. Raich* (2005), the United States Supreme Court held that the federal government has the constitutional authority to prohibit marijuana for all purposes.

• Thus, federal law enforcement officials may prosecute medical marijuana patients or users, possessors, or sellers of marijuana, even if those individuals grow their own medical marijuana, reside in a state where marijuana is legalized or decriminalized, or medical marijuana use is protected under the state law.
What Does this Mean for Employers: Legal Issues with Marijuana

- Americans with Disabilities Act
- Family and Medical Leave Act
- Duty to Provide a Safe Workplace
- Arbitration
Drug Testing in the Workplace

• Not required to allow possession, use or impairment at work
• Safety Sensitive Jobs
  – Virtually all field construction, maintenance and installation and/or repair jobs, working with power tools, heavy equipment, motorized equipment, power-driven equipment
  – Forklift drivers, mechanics, warehouse packers
  – BUT transfers may need to be offered
Practical Challenges

• OSHA seeks employer focus on testing for impairment, but is forced to concede that drug tests do not measure impairment
What About Impairment Testing?

- Blood tests are impractical
- Detection Windows: Urine, oral fluids, and hair

<table>
<thead>
<tr>
<th>Detection Window</th>
<th>Occasional use: 1 to 5 days; Habitual/chronic use: up to 30 days</th>
<th>Occasional use: 1 to 5 days; Habitual/chronic use: up to 30 days</th>
<th>24-36 hours</th>
<th>1-3 months</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amphetamines</td>
<td>24-72 hours</td>
<td>24-72 hours</td>
<td>24-36 hours</td>
<td>1-3 months</td>
</tr>
<tr>
<td>Cocaine/Metabolite</td>
<td>24-72 hours</td>
<td>24-72 hours</td>
<td>24-36 hours</td>
<td>1-3 months</td>
</tr>
<tr>
<td>Opiates</td>
<td>24-72 hours</td>
<td>24-72 hours</td>
<td>24-36 hours</td>
<td>1-3 months</td>
</tr>
<tr>
<td>PCP</td>
<td>Occasional use: 1 to 5 days; Habitual/chronic use: up to 30 days</td>
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<td>24-36 hours</td>
<td>1-3 months</td>
</tr>
<tr>
<td>THC/Metabolite</td>
<td>Occasional use: 1 to 3 days; Habitual/chronic use: up to 30 days</td>
<td>Infrequent use: 1 to 3 days; Habitual/chronic use: up to 30 days</td>
<td>&lt; 24 hours</td>
<td>1-3 months</td>
</tr>
</tbody>
</table>
Should You Ignore Positive Marijuana Results?

• No!
• Regulated workforce: can’t!
• What about litigation: negligent hire, negligent retention, punitive damages claims?
• OSHA 101: providing a safe workplace
• What about negative publicity?
• Jury decision as to whether you are responsible
Drug Testing Policy Recommendations

- Institute policy that requires employees to disclose use of medications that may impair their ability to work if this request is job-related and consistent with business necessity.

- If an employee tests positive for marijuana, confirm that employee is prescribed marijuana.
Take-Away for Employers

• Ensure a standard and thorough investigation and analysis of employees' use of medical marijuana

• The analysis does not end with human rights and discrimination if disciplinable misconduct occurs, an employer must again review the circumstances to determine if termination is warranted in the circumstances

• Just as in the human rights context, it is important that the employer not respond in a manner that is disproportionate in light of the circumstances regarding the use of medical marijuana

• Non-speculative information about the condition and effects of the medical marijuana should be sought and reviewed just as an employer would do with any other potentially impairing medication
Arbitration?

• How Arbitrators Rule
• On the Job Impairment
• The Industry
• What is Under the Influence
  – Standard of Proof Required
  – When Accidents Occur
• Employee’s Rights
  – Inferences
• Effect of Testing and Methods of Testing
  – Chain of Custody
  – Observation
• Reasonableness Required
How Arbitrators Rule

• *Calgary (City) v. CUPE, Local 37, [2015] AWLD 4209 [Calgary]*, arbitrator reinstated employee into safety sensitive positions
  – Employer can only discharge its obligation to accommodate if **undue hardship**

• The Newfoundland and Labrador Supreme Court (Trial Division), has taken the opportunity to remind not just employers, but arbitrators, that there must be a **full analysis** of the context and circumstances in which an employee uses medical marijuana.
  – In *IBEW, Local 1620 v. The Lower Churchill Lower Transmission Employee Association Inc.*, 2016 NLTD(G) 192 [IBEW] the court reviewed an arbitrator’s decision upholding termination of an employee for use of medically prescribed marijuana outside the workplace, non-disclosure of the same, and possession of medical marijuana in the workplace
  – The court held that the non-disclosure and possession in the workplace was misconduct but that the arbitrator’s decision to uphold the termination for this misconduct was unreasonable
    • The finding of misconduct required a further analysis of whether a lesser penalty short of termination was appropriate
On the Job Impairment

• “There is divided opinion among arbitrators about the necessity for showing on the job impairment before discipline is upheld for positive drug tests. The arbitrators who hold on the job impairment must be proven to do so on the theory that what an employee does on his own time is none of the employer’s business. The arbitrators who hold otherwise recognize the overriding need for an employer to prevent drug impairment on the job. That in many cases it is impossible to show actual impaired job performance.”
The Industry Matters

• “It is clear that there are jobs involving safety that deserve greater scrutiny as far as actual or possible drug or alcohol abuse are concerned . . . those workers dealing with safety have less expectation to privacy than the ordinary worker which has no such job duties.”
  – Bay Area Rapid Transit, 88 LA 1, 4 (Concepcion 1986)
Definition of ‘Under the Influence’

• “The influence must be more than a merely detectable one, it must be an appreciable influence which adversely affects the capability of the employee to competently perform his or her job duties in a safe manner.”
  – General Felt Industries, Inc., 74 LA 972, 976 (Carnes 1979)
“Under the just cause or proper cause standard an employee is presumed to be innocent of the charged offense and the employer bears the burden of proving the employee guilty of wrongdoing. However, the mandatory random testing procedures require the employee to give evidence against himself. [ ] In effect random testing places on all employees the burden of proving their innocence of drug or alcohol use without the necessity of a preliminary showing of probable cause or reasonable suspicion.”

– Ohio Star Forge Co., 110 LA 705, 707 (Gibson 1998)

Grievant has a “right not to have the burden of proof to demonstrate her fitness or of proving her innocence of a rule violation and the highly intrusive nature of mandatory, random drug testing outweigh the Company’s interest in such a rule.”

– Day & Zimmerman, 88 LA 1001, 1008 (Heinsz 1987)

“[A]ny doubts raised by the proof or lack of proof should, wherever possible, be resolved in favor of the grievant.”

– Bi-State Development Agency, 72 LA 198, 205 (Newmark 1979)
Standard of Proof Before Testing

• Probable cause
  – Trailways Inc., 88 LA 1073 (Goodman 1987)
  – Arkansas Power & Light Co., 88 LA 1065, 1070 (Weisbrod 1987)

• Reasonable cause or individual suspicion standard
  – Union Plaza Hotel, 88 LA 528, 532 (McKay 1986)
  – Day & Zimmerman, 88 LA 1001 (Heinsz 1987)

• Beyond a reasonable doubt standard
  – Holliston Mill, Inc., 60 LA 1030 (1973)

• Subjective test
  – General Felt Industries, Inc., 74 LA 972, 975 (Carnes 1979)

• Shadow of a doubt standard
  – Cessna Aircraft Co., 52 LA 764 (Altrock 1969)

• What’s the difference?
  – “Although standard of proof terminology is bandied about in the decision, this Arbitrator feels that in analyzing some of these decisions, it is difficult to distinguish between one and the other regardless of what the arbitrator has said. Such standards blur into one another and the decision was based upon evidence that persuaded the arbitrator that the company had good cause to take the action for the conduct alleged.” Bi-State Development Agency, 88 LA 854, 861 (Brazil 1987)
Accidents

• Limits on probative value of industrial accident as evidence of employee being under the influence
  – Fruehauf Corporation, 88 LA 366 (Nathan 1986)
    • Injury was minor, treated with a band aid, tetanus for preventative measure, no workers compensation claim made; time lost from work was minimal (a few hours).
    • “The injury was so minor that it was almost pretextual as a basis for the testing.”

• Testing is appropriate where the accident is serious
  – Springfield Mass Transit District, 80 LA 193, 199 (Guenther 1983)
Negative Inferences

• Negative inference *may* be drawn in the event an employee refuses testing

• Refusal alone is not sufficient to prove that s/he is under the influence
  – Bay Area Rapid Transit, 88 LA 1, 6 (Concepcion 1986)
  – Bi-State Development Agency, 72 LA 198 (Nemark 1979)

• But, no admission of guilt can be implied from a refusal to take a test
Privacy Rights

• “An employee does not somehow abandon his right to privacy at the doorstep of the employer’s premises. To be sure, this is not some new or novel approach to the workplace. Religious and political beliefs, moral and social values, business and economic interests and off-work after-hour activities are, for the most part, none of the employer’s business.”
  – Trailways Inc., 88 LA 1073, 1080 (Goodman 1987)

• “The taking of a person’s urine without any suspicion that she may have been under the influence of drugs is highly invasive of personal privacy.”
  – Day & Zimmerman, 88 LA 1001, 1008 (Heinsz 1987)
Deterrent Effect of Testing

- Random drug testing has deterrent effect.
  - *Arkansas Power & Light Co.*, 88 LA 1065 (Weisbrod 1987)

- Deterrence effect of random drug testing “doubtful.”
  - *Ohio Star Forge Co.*, 110 LA 705, 707 (Gibson 1998)
Testing Methods

• GC/MS: gold standard; best at eliminating false positives
  – Amoco Oil Co., 88 LA 1010 (Weisenberger 1987)
  – Arkansas Power & Light Co., 88 LA 1065, 1071 (Weisbrod 1987)

• Importance of segregating samples and double checking each positive result
  – Washington Metro Area Transit Authority, 82 LA 150, 152 (Bernhardt 1983)

• Verification testing of initial results is recommended
  – Bay Area Rapid Transit, 88 LA 1, 4 (Concepcion 1986)
  – Boone Energy, 85 LA 233, 237 (O’Connell 1985)

• Probative value: the tests in question “merely indicate past exposure to prohibited substances, and they do not establish that an employee, at the time the test is given, is under the influence.”
  – Chase Bag Co., 88 LA 441, 447 (Strasshofer 1986)

• It is immaterial whether the drugs are prescriptive or not
  – American Standard, 77 LA 1085, 1088 (Katz 1981)
Chain of Custody

• Break in chain of custody can be fatal for employer
  – Holliston Mill, Inc., 60 LA 1030 (1973)
  – LCP Chemicals, 87 LA 1011 Dean 1985)

• Observation is necessary to maintain chain of custody - prevents contamination with adulterants, prevents test results from being negated
  – Arkansas Power & Light Co., 88 LA 1065, 1070 (Weisbrod 1987)
Reasonableness of Rule

• “Drug testing of employees by employers is not prohibited so long as the program is administered in a non-discriminatory and scientifically sound fashion, the employees have sufficient prior notice of the testing and the decision of the employer based upon a positive test result has a reasonable relation to the workplace.”
  – Amoco Oil Co., 88 LA 1010, 1017 (Weisenberger 1987)

• Examples
  – Union Plaza Hotel
  – Capital Area Transit Authority
Arkansas Power & Light Co., 88 LA 1065 (Weisbrod 1987)

Union Plaza Hotel, 88 LA 528 (McKay 1986)

Trailways Inc., 88 LA 1073 (Goodman 1987)

Holliston Mill, Inc., 60 LA 1030 (1973)

National Steel Corp., 88 LA 457 (Wolff 1986)

Cessna Aircraft Co., 52 LA 764 (Altrock 1969)
Questions
Thank You

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