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# **Medical and Recreational Marijuana Updates for ASC Employers**

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# Learning Objectives

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- Identify Current Legal Atmosphere and trends.
- Identify Potential Legal Scenarios For Employee Use Of Marijuana (Legal and Illegal)
- Consider Patient Consent Issues
- Discuss General Guidance And Suggestions On Handling Workplace Questions, Issues, and Scenarios.

# Federal Overview

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- Under the Federal Controlled Substances Act (CSA), Marijuana Continues To Be Listed As A Schedule I Controlled Substance.
- A Schedule I Controlled Substance Is One In Which The Drug Or Substance:
  - Has a high potential for abuse;
  - Has no currently accepted medical use in treatment in the United States; and
  - There is a lack of accepted safety for use of the drug or other substance under medical supervision.

# Federal Marijuana Enforcement Efforts

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- In 1970, Congress Studied Marijuana.
- Study Concluded That Marijuana was NOT a Schedule I substance.
- Nevertheless, Marijuana remained a Controlled Substance.
- 2009 AG Memo Relaxes Enforcement. Do Not Interfere With State Legalization.
- 2018 Memo of AG Sessions Places More Focus on Illegal Use.
- However, No Crackdown Since And Federal Prosecutions Down By 20%.

# Recent Proposed Legislation

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- December 2020: House Passes Bill to Legalize Marijuana.
- 2021 Cannabis Administration and Opportunity Act Falls Short.
- MORE Act: Marijuana Opportunity Reinvestment and Expungement Act – H.R. 3884. March 2022.
- Gaining Support in Senate and Supported By Senate Chair of Senate Finance Committee.
- President Position, However, Still Unknown. May Lower Substance Classification to Class II Drug, Allow For Medical Use, and Permit States To Regulate.

# State Law Overview

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- 47 States, Plus The District Of Columbia And US Territories, Have Some Form Of Legalization Laws, Including THC Or CBD.
- Up to 38 States Have Legalized Medical Marijuana Programs.
- Up to 21 States, Plus DC and Guam Permit Recreational Use.
- Up from 13 Only 2 Years Ago, Now Approximately 37 States Have Some Anti-Discrimination Protections For Cannabis Use.

# Where Does This Leave Us?

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- Significant Gray Area In the Law.
- Still Not Permissible To Show Up At Work Under The Influence.
- Gaps In Employment Law And How To Treat Off-Duty Marijuana Use.
- No Clear Requirement To Terminate Employment, But Employers Need To Remain Consistent With Enforcement.

# Disability Discrimination Under the ADA

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- The Americans With Disabilities Act Protects Employees From Discrimination Based On A Disability.
- “Disability” Is Defined Broadly, And Includes Treatment Using Prescription Drugs.
- ADA Does Not Require You Provide An Accommodation To Use Marijuana, Even For Medical Purposes.
- ADA Excludes Current Illegal Drug Use From The Law.



# Common Trends Among States

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- Laws Regarding Pre-Employment Screening For Marijuana, Including No Hire Policies For Failed Cannabis Test.
- Laws Prohibiting Employment Discrimination Against Use of Medical-Marijuana For Patients or Caregivers of Patients.

# Employer Considerations

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- Zero-Tolerance (Illegal) Drug Policies.
- Drug-Free Work Place.
- Accommodation Requests.
- Medical v. Recreational Carve Outs Or Considerations.
- Internal Enforcement, e.g., Revenue Earners v. Support Staff.
- No Right or Wrong Answer For Internal Policies, But Must Remain Consistent And Follow Updated (And Changing) State Laws.

# Examples Of State Law Enforcement

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- Colorado, Oregon, Michigan, Ohio, Washington, Montana: Because Marijuana Is Illegal Under Federal Law, Employers Not Liable For Adverse Employment Actions Resulting From Marijuana Use, Even If Medical Use Or Off-Duty.
- These States Do Not Have State Law Protections In Place, But Laws – Federal or State – Are Expected To Change.
- Ironic In The Case of Colorado Where Marijuana Was Legalized Early.

# State Enforcement (Cont.)

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- Massachusetts and Connecticut: Employees Afforded Protections For Legal Use, Accommodations To Be Considered For A Disability.
- Nevada, **New York, New Jersey, Connecticut**, Montana, Rhode Island, California and Missouri Have Policies Written Into Law Protecting Employee Rights To Legally Use Marijuana Off-Duty.
- **New York City, D.C.**, San Francisco, Nevada, Atlanta, Philadelphia, Baltimore, Rochester, NY, Richmond, VA, Kansas City MO, St. Louis, MO Pass Laws Protecting Employee Rights. (Medical or Recreational).

# MRTA – New York’s Workplace Cannabis Law

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- Marijuana Regulation and Taxation Act (“MRTA”), an employment may take adverse employment action where:
  - Required by federal or state law, or would violate such laws;
  - Would lose a federal contract or funding;
  - Employee manifests specific articulable symptoms of cannabis impairment that decrease or lessen the employee’s performance of the employee’s tasks or duties;
  - The employee, while working, manifests specific articulable symptoms of cannabis impairment that interfere with the employer’s obligation to provide a safe and healthy workplace as required by state and federal workplace safety laws.

# Common MRTA Dos and Don'ts

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- Can require a drug free workspace. No use of cannabis during work day, including breaks/off site.
- Can prohibit possession at work.
- Cannot use smell alone as sign of impairment.
- Cannot drug test for cannabis.
- Cannot ban cannabis use outside workplace.
- You do not have to terminate someone's employment for cannabis use. Can give a warning. But a best practice in healthcare setting may be termination.

# What About CBD?

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- CBD, Which Contains Trace Amounts of THC, Is Legal At Federal And State Level.
- Therefore, Employers Cannot Rely On Federal Controlled Substance Act, To Take Adverse Action.
- North Carolina For Example Has Laws Protecting Employees Using Legal Medications To Treat Medical Conditions. What If An Employee Taking CBD Tests Positive For THC?
- Could It Be Explained Away and Protected?



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# **DEALING WITH SIGNS OF IMPAIRMENT**



# Articulable Symptoms Of Impairment

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- There is not one specific test or factor that is going to be dispositive.
- With alcohol, you could potentially detect an employee's impairment with the use of a breathalyzer.
- With Cannabis, however, drug testing is not an option because cannabis can remain in your system and give a “false-positive” in terms of if the individual is presently under the influence.

# Objective Signs of Impairment

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- Employer must look to “objectively observable indications that the employee’s performance of the duties of the position are decreased or lessened.”
- **WARNING:** Signs of potential marijuana impairment could also be signs or symptoms of a disability. For example, an employee who is caught sleeping on the job and presumed to be “high”, may just be suffering from sleep apnea.
- Smell of cannabis alone is not sufficient to warrant objective standard either.

# Specific Impairment Requirements

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- New Jersey Example.
- NJ Law permits state residents to engage in recreational use of cannabis.
- NJ Law also prohibits discrimination solely based on off duty cannabis use.
- However, employers can enforce workplace policies that prohibit employees from being under the influence at the office.
- But, cannot rely solely on drug test, need independent evidence.

# Case Example On Impairment (cont.)

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- Creation Of: Workplace Impairment Recognition Expert (WIRE).
- An Individual is designated by the employer, and is certified, to assess impairment.
- 18 months with no guidance of how to become a WIRE, what do look for, what they can do.
- Current Guidance:
  - Establish evidence-based protocols.
  - Document Observed Behavior.
  - Then utilize a drug test.
  - Complete a Reasonable Suspicion Observation Report.

## REASONABLE SUSPICION OBSERVED BEHAVIOR REPORT

Behavior that provides reasonable suspicion supporting a test for controlled substances or alcohol use must be observed and documented by a supervisor. If possible, the behavior should be observed and documented by two supervisors. The documentation of the employee's conduct shall be prepared by the observing supervisor(s) within 24 hours of the observed behavior or before the results of the tests are released, whichever is earlier. Distribute this report to appropriate authorities based on agency policy and procedures while maintaining employee confidentiality.

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Employee Name \_\_\_\_\_ Employee ID Number \_\_\_\_\_

Employee Job Title \_\_\_\_\_ Agency \_\_\_\_\_

Employee is reporting for duty \_\_\_\_\_ Employee is already on duty \_\_\_\_\_

**Behavioral observation timeline:**  
 From (date/time) \_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_am/pm To (date/time) \_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_am/pm

**Site or Location where observation(s) occurred:**

Street Address \_\_\_\_\_ City \_\_\_\_\_ Zip Code \_\_\_\_\_

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**CAUSE FOR REASONABLE SUSPICION**  
**NOTE:** A manager or supervisor must complete this form. A combination of one or more observable signs and symptoms of drug or alcohol use must be observed to establish reasonable suspicion. Determination of reasonable suspicion must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, body odors or speech (ABBS) of the employee. The observations may include indications of the chronic and withdrawal effects of controlled substances. In making a determination of reasonable suspicion, additional factors may include, but are not limited to the following:

- Pattern of unsatisfactory job performance or work habits;
- Occurrence of a serious or potentially serious work-related accident that may have been caused by human error or flagrant violations of safety, security, or other operating procedures;
- Evidence of illegal substance use, possession, sale, or delivery while on duty and/or possession of drug paraphernalia;
- Information provided by either a reliable or credible source independently corroborated or having corroborative evidence from a supervisor;

**Physical Signs or Symptoms (CIRCLE ALL THAT APPLY)**

Flush/pale/sweaty face Profuse/excessive sweating Red/bloodshot eyes Glassy/watery eyes Closed eyes Droopy eyelids Dilated/constricted pupils	Dry mouth/lip smacking Vomiting/excessive belching Shaking hands/body tremors/twitching Disheveled appearance Needle tracks or puncture marks Frequent sniffing Shortness of breath/difficulty breathing Runny nose/sores around nostrils	Odor of alcohol Odor of marijuana Odor of chemicals
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**Behavioral Indicators (CIRCLE ALL THAT APPLY)**

Agitated/insulting speech Combative/threatening speech Incoherent/slurred/slow speech Rapid/rambling/repetitive speech Delayed/mumbling speech Shouting/whispering/silent Uncharacteristically talkative	Irritable/angry/impulsive Use of profanity/argumentative Swaying/stumbling/staggering Lack of coordination Disoriented/confused Euphoric Tearful Impaired judgment Sleepy/stupor	Sad, depressed, withdrawn Anxious/fearful Cannot control machinery/equipment Excessive yawning/fatigue/lethargy Unaccounted time/extended breaks Loss of inhibition Inappropriate wearing of sunglasses Falling down/reaching for support Inappropriate wearing of outerwear
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# Reasonable Suspicion Documentation

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- Description of actions or behaviors
  - Behavior, Odors, Appearance, Speech
- Post Accident (If Applicable)
- Employee Interview Notes
- Checklist:
  - Impairment?
  - Impairment from Drugs/Alcohol?
  - Personally Observed?

# A Reasonable Accommodation

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- States Favoring Employee Rights Require Analysis Of Reasonable Accommodation For Off-Duty Use To Treat Medical Condition.
- Protects Employee Testing Positive Or From Being Disciplined.
- What About The Employee With Glaucoma, Or IBS, Or Parkinson's, Epilepsy, Chronic Pain?

# Your ASC And Enforcement

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- Recognized Talent Shortages.
- Nursing Shortages.
- Competition In The Market.
- Maintaining Consistency. Equal Treatment.
- Drug Testing Safety v. Non-Safety Positions.
- Zero-Tolerance Policy v. No Impairment Policy.



# Your ASC Enforcement (Cont.)

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- Drug-Free Workplace Programs And Medicare.
- Insurance Discounts.
- Added Concern For Practitioners Performing Life And Death Procedures.
- What About Physician Or Practitioner Licensure?

# Case Examples

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## Physician Tests Positive:

- Physician Offered A Job At Your ASC. You Test Her/Him For Drugs, Positive For Marijuana.
- Physician Says He Legally Used CBD To Treat Medical Issue.
- What Do You Do?
- What If Test Comes Back For THC And Physician Says I Legally Used Marijuana Off-Duty In Colorado, Where It Is Legal?
- What About Reporting To Medical Board?
- What If It Was A Front Desk Receptionist?

# Case Examples (Cont.)

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## Accident On-Duty:

- An Employee Operating Medical Equipment Has An Accident.
- Policy Requires Drug Testing.
- Employee Tests Positive For THC. But You Cannot Tell When It Was Used From Test. What Do You Do?
- What Questions Should You Ask?
- What If You Trust This Employee, But Another Employee Had a Similar Situation And You Want That Person Terminated?

# Best Practices

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- Keep Cannabis Out Of Office, Same With Alcohol.
- Research And Careful Selection Of Type Of Test You Use And Stay On Top Of Developments In The Technology Of Testing.
- Consult GW About Relevant State Laws Before Setting Policies And Testing Rules.
- Educate Employees About The Company Marijuana-use Policy And The Repercussions For Failed Tests, Including Random, Post-accident Or Reasonable Suspicion Tests. Handbook Topic. Policies and Handbooks.
- Questionable On Whether To Train Managers To Spot Signs Of Impairment. Caution!



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# **PATIENT CONSENT ISSUES**

# How to Handle Patient Consent

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- Similar To Workplace Abilities, Capacity To Consent Must Be Viewed On A Case-By-Case Basis.
- Use of Cannabis Alone, May Not Affect Capacity.
- If Incapacitated, Cannot Give Consent.
- Incapacitation Signs: Inability to Speak Coherently, Confusion of Basic Facts, Inability To Walk Unassisted, Passing Out.
- Issue of Informed Consent. Capacity Alone Is Not The Standard. Must Be Informed, i.e., At A Minimum, Ensure The Patient Understands The Risks, Benefits And Reasonable Alternatives To Treatment.
- Consult Local Jurisdiction Rules on Capacity For Consent.
- Teach Back Technique.



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# **UPDATING POLICIES**

# Addressing Cannabis In Your Handbook

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- As laws surrounding legalization of Marijuana continue to evolve, our employee policies and practices must adapt as well.
- Issues including how to determine if an employee is under the influence at work is not straightforward.
- Zero-tolerance drug policy, including specifically marijuana, may be banned under State law.
- Accordingly, your policies must be updated to reflect the legal changes over the last few years.



# Sample Policy

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- It is the [Employer]’s desire to provide a drug-free, healthful, and safe workplace. To promote this goal, employees are required to report to work in appropriate mental and physical condition to perform their jobs in a satisfactory manner. While on the [Employer]’s premises and/or during working hours, no employee may use, possess, distribute, sell, or be under the influence of alcohol or illegal and/or unauthorized drugs. The legal use of prescribed drugs is permitted on the job only if it does not impair an employee’s ability to effectively and safely perform the essential functions of the job, and only if such prescription drugs are contained in an approved container including the name of the prescribing physician..

# Sample Policy (cont.)

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- In the event an employee appears to be unfit for work, a supervisor may attempt to verify their observation(s) with another staff member; however, a supervisor or member of management may determine, in their discretion, to immediately remove an employee from the workplace due to health, safety or similar concerns. Employees may be asked to submit to a drug and alcohol test if an employee's supervisor or other person in authority has a reasonable suspicion, based on specific articulable factors such as the employee's appearance, speech, behavior, or other conduct and facts, that the employee possesses or is under the influence of unlawful or unauthorized drugs, or alcohol, or both.

# Sample Policy (cont.)

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- The [Employer] will not take disciplinary action against employees that legally use cannabis outside of the workplace and outside of work hours. However, employees may not use cannabis during work or inside the workplace. Additionally, if an employee's cannabis use results in a decrease in job efficiency or interferes with workplace safety, the employee may be subject to disciplinary action. Employees may also be asked to submit to a cannabis test if state or federal law requires testing, or if the employee's use of cannabis would require [Employer] to commit any act that would cause [Employer] to be in violation of federal law or lose a federal contract or federal funding. Violations of this policy may lead to disciplinary action, up to and including immediate termination of employment.



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**QUESTIONS?**

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Salvatore Puccio has counseled and represented clients in a variety of fields including health care, cannabis, hospitality industry, construction, and landscaping. He has particular experience in counseling clients concerning the employer-employee relationship including the defense of wage and hour lawsuits, age, race, gender, national origin, and disability discrimination and sexual harassment lawsuits, compliance with workplace regulations and employment statutes, including COVID-19 laws and regulations. He designs, implements and conducts anti-harassment and anti-discrimination training and regularly oversees investigations for organizations of all sizes.

Sal's practice includes the defense of many federal and state class action lawsuits, including defense of FLSA, NYLL, and data breach class actions. His practice also includes complex commercial litigation matters and has represented clients in breach of contract matters, managed care disputes, partnership disputes and breakups, antitrust matters, construction litigation, and landlord/tenant disputes.



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