

HR Issues with the Opioid Epidemic and Marijuana Legalization

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AGENDA

- Impact of substance abuse on your business
- Marijuana laws and the current landscape
- HR challenges and implications
- Action Steps
 - Revisit drug policies
 - Supervisor training and education
 - Employee education
 - Monitor compliance

WHAT IS SUBSTANCE ABUSE?

APHA Definition

The use of illegal drugs and the inappropriate use of legal substances, such as alcohol and prescription drugs

IMPACT OF EMPLOYEE SUBSTANCE ABUSE



More than two-thirds (68.9%) of illicit drug users are employed full or part-time



1 in 12 (7.8%) people have reported using marijuana recently



Two out of three (66%) adults who misuse opioids are employed

Source: <https://www.nsc.org/work-safety/safety-topics/drugs-at-work/substances>

IMPACT OF EMPLOYEE SUBSTANCE ABUSE

- Diminished productivity
 - \$74 billion lost per year in reduced work productivity due to alcohol consumption
 - \$25.6-\$53.4 billion lost per year in reduced productivity due to Rx drug misuse
 - Productivity can be affected by absenteeism, presenteeism, job turnover, etc.
- On-the-job injuries = greater work comp rates
- Increased health care and disability claims
- Potential employer liability

Source: <https://www.nsc.org/work-safety/safety-topics/drugs-at-work/substances>

MARIJUANA LAWS – FEDERAL AND STATE

- Marijuana is still illegal under federal law
 - Listed as a Schedule I drug on the federal Controlled Substances Act, which means that it: (1) has a high potential for abuse; (2) has no currently accepted medical use in the U.S.; and (3) there is a lack of accepted safety for use under medical supervision



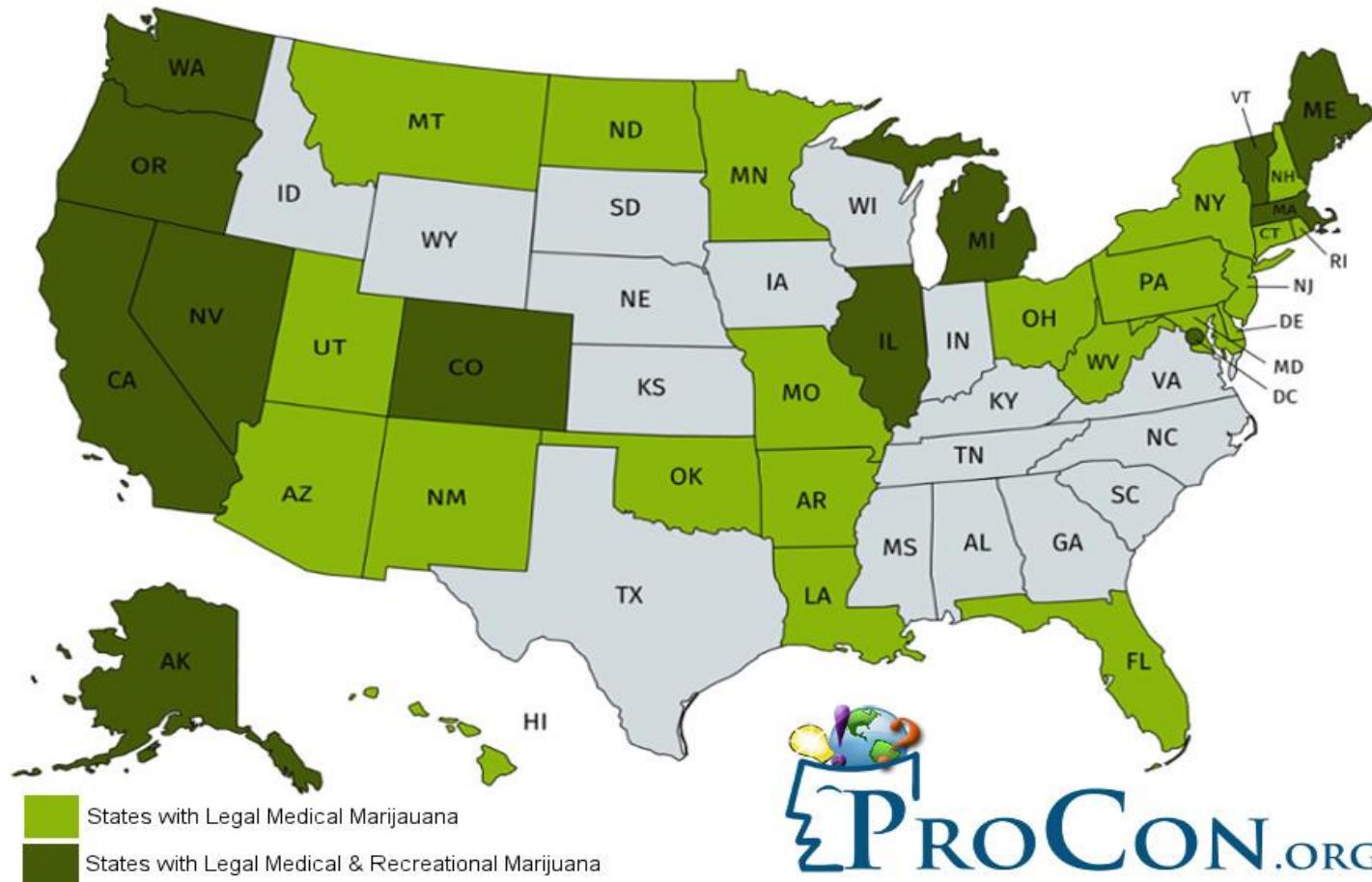
- DOT Drug and Alcohol Testing Regulations – 49 CFR Part 40
 - Does not authorize “medical marijuana” under a state law to be a valid medical explanation for a transportation employee’s positive drug test result
 - It remains unacceptable for any safety-sensitive employee subject to drug testing under the DOT’s drug testing regulations to use marijuana

MARIJUANA LAWS – FEDERAL AND STATE

- Over the last 10 years, the government has not enforced the law making marijuana illegal, and has allowed state medical and recreational marijuana laws to proliferate
- 33 states + DC have medical marijuana laws
- 11 states + DC have recreational marijuana laws
- 17 states have CBD laws
- These lists are constantly growing!

STATE MARIJUANA LAWS – EFFECTIVE JANUARY 1, 2020

33 Legal Medical Marijuana States & DC
11 Legal Recreational Marijuana States & DC



RECENT LITIGATION – THE TREND FAVORS EMPLOYEES

- Prior to 2017, employers prevailed in cases involving job applicants or employees who used medical marijuana by arguing that marijuana was illegal under federal law.
- Example: Steel Fabricators v. Bureau of Labor: Employment discrimination claim based on Oregon's medical marijuana law was pre-empted by federal law.
- Since 2017, the trend is not favorable to employers.
- As more states pass medical marijuana laws, courts are becoming less receptive to the argument that marijuana is illegal under federal law.

RECENT LITIGATION – THE TREND FAVORS EMPLOYEES

- Barbuto v. Advantage Sales and Marketing, LLC
 - 2017 decision from Massachusetts Supreme Court
 - Applicant offered position conditioned on passing drug test
 - Applicant told employer she was a medical marijuana user under Massachusetts' medical marijuana law, but did not use daily and would not use before or during work
 - Applicant fired shortly after she started when drug test came back positive for marijuana.
 - Court ruled that permitting offsite medical marijuana use may be a reasonable accommodation under Massachusetts' disability law
 - Employer failed to engage in interactive process

RECENT LITIGATION – THE TREND FAVORS EMPLOYEES

- Wild v. Carriage Funeral Holdings, Inc.
 - 2019 decision from New Jersey Superior Court
 - Employee with cancer prescribed marijuana under N.J. medical marijuana law
 - Employee's vehicle struck by another vehicle that ran a stop sign
 - At hospital, Employee advised doctor that he was medical marijuana patient
 - Doctor said it was clear that Employee not under influence, did not order any blood tests, prescribed painkillers
 - Employer required Employee to get a blood test before he could return to work
 - Employee terminated due to positive drug test
 - Court held that Employer may have to accommodate off-site use of medical marijuana under N.J. Law against Discrimination

RECENT LITIGATION – THE TREND FAVORS EMPLOYEES

- Noffsinger v. SSC Niantic Operating Co.
 - 2017 case from federal court in Connecticut
 - Applicant with PTSD was qualified patient under Connecticut's medical marijuana law
 - Law prohibited discrimination against qualifying patients
 - Applicant was asked to pass a drug test for work
 - Applicant advised employer that she could not pass because of her medical marijuana use
 - Employer rescinded job offer
 - Employer defended lawsuit by arguing marijuana illegal under federal law
 - Court held that federal law did not speak to issue of employing marijuana users, did not pre-empt state law

RECENT DECISIONS – SUMMARY

- Primarily from New England/East Coast
- Reasoning based on state law protections
 - Protection built in to medical marijuana law;
 - State anti-discrimination laws
- Expect trend to continue and become the norm

IMPLICATIONS – DRUG TESTING FOR MARIJUANA

- Marijuana stays in the system for long periods of time (weeks in urine and months in hair)
- Some state laws...
 - Prohibit pre-employment drug testing for marijuana
 - Prohibit adverse action on the basis of a positive drug test alone
 - Require employers to explore reasonable accommodation for legal medical marijuana users with disabilities
- Consider a more flexible policy in regards to marijuana for non-safety sensitive positions
 - Consider eliminating pre-employment screenings – they only detect marijuana use outside of work
 - Focus on reasonable suspicion

LEGAL COMPLIANCE

- State marijuana legalization laws (medical and recreational)
- State-specific drug testing laws
- DOT regulations
- Americans with Disabilities Act (ADA)
- Family and Medical Leave Act (FMLA)
- Local Ordinances
- Title VII of the Civil Rights Act of 1964



IMPLICATIONS – AMERICANS WITH DISABILITIES ACT

- ADA defines disability as the following:
 1. Physical or mental impairment that substantially limits one or more major life activities
 2. A person who has a history or record of such an impairment
 3. A person who is perceived by others as having such an impairment
- Does not protect an employee or applicant who is ***currently engaging*** in the illegal use of drugs
- ***May*** protect a recovered drug addict who is no longer engaging the illegal use of drugs and meets the requirements of the definition of “disability”

IMPLICATIONS – AMERICANS WITH DISABILITIES ACT

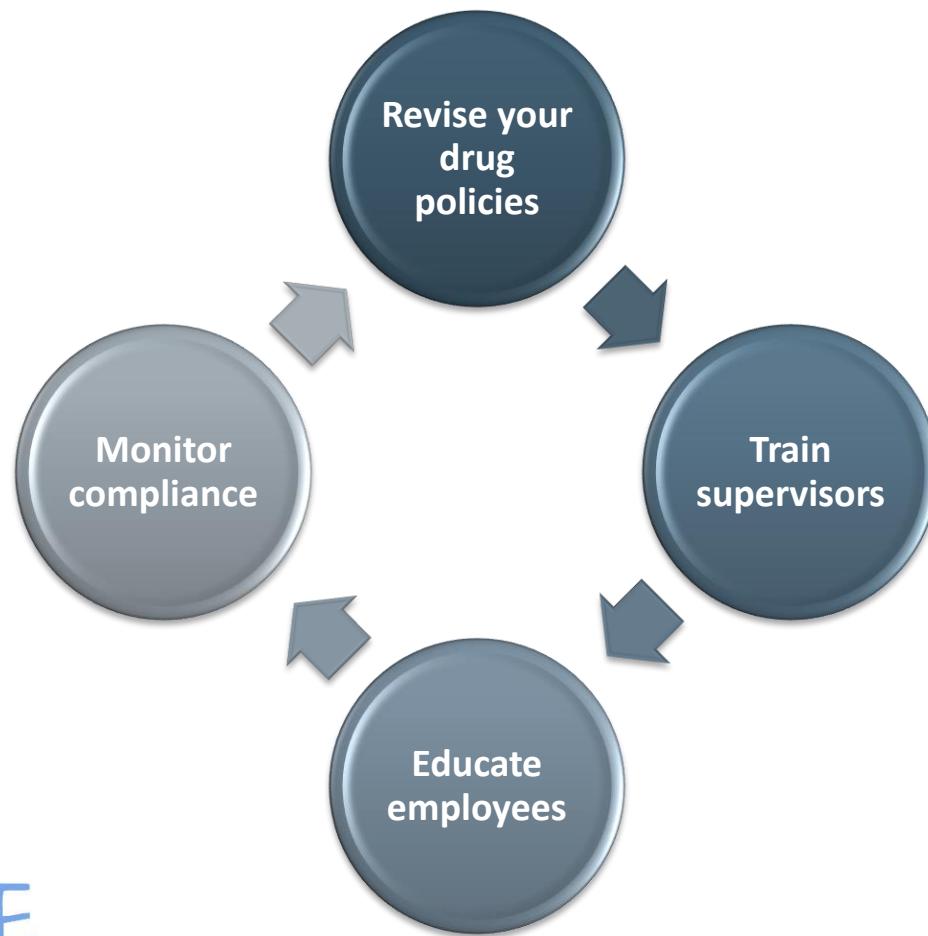
- Engaging in the “interactive process” with employees is key
- Determine whether the employee is a qualified individual with a disability
- Determine whether a reasonable accommodation exists that would allow the employee to perform their job duties
- This process involves an individualized assessment (essential functions, safety requirements, etc.) similar to that of other medications
 - There are no reasonable accommodations that would work in every circumstance
 - Avoid blanket rules about medical marijuana

IMPLICATIONS – RECREATIONAL MARIJUANA

- Generally prohibit employers from refusing to hire or terminating employees for using legal recreational marijuana off the employer's premises during nonworking hours
- This **does not** mean that employers must permit employees to be under the influence at work
 - This is the case for alcohol, medical marijuana, and recreational marijuana



ACTION STEPS



ACTION STEPS – REVISE YOUR DRUG AND ALCOHOL POLICIES

- Revise your drug policies to address marijuana
 - “Using or possessing “recreational marijuana” or “medical marijuana” in the workplace is prohibited. All employee are prohibited from being under the influence of marijuana while at work.”
- Clear consequences for policy violations
- Make sure these policies are in writing!
- Signed acknowledgement from employees
- Legal counsel to review detailed drug testing practices/polices for compliance with all applicable federal, state, and local laws

ACTION STEPS – SUPERVISOR TRAINING

- Supervisors are often positioned to be the first to identify substance abuse in the workplace
- It's extremely important for supervisors to understand your company's drug and alcohol policy and what their role is
 - Ensure employees understand the policy
 - Identify warning signs (changes in employee's personal appearance, declining quality of work, attitude, and judgment).
 - Document observations
 - Respond to employee/discuss with HR if applicable
 - State and federal disability laws

ACTION STEPS – EMPLOYEE EDUCATION

- Drug and alcohol policies (acknowledged in writing)
- Education on the first signs of drug dependency
- Resources
 - Employee Assistance Program
 - Shared resource file
 - Resources available through your health plan



ACTION STEPS – MONITOR COMPLIANCE

- State legalization is something we'll continue to see
- Key takeaways and recommendations:
 - Think of marijuana in the workplace as you would think of alcohol in the workplace
 - Prohibit the use or possession of marijuana while at work and prohibit being under the influence at work
 - Focus on safety and testing when there's a reasonable suspicion of impairment



NOTES ON CBD OIL

- 17 states have CBD laws (separate from medical marijuana laws)
- The FDA's position is that CBD products are **not legal**
- CBD products are currently **unregulated**
 - Unlikely to cause a positive drug test but there's no way to be certain



QUESTIONS?

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