

CHRO Today Executive Network



“Legal Compliance in the Age of Legalized Marijuana”

Joe is a member of Fox’s Cannabis Law Practice Group. He frequently writes and speaks about developments in the cannabis sector and tracks legal issues in this highly regulated industry in Pennsylvania and nationwide. He is a member of the Pennsylvania Bar Association’s Medical Marijuana and Hemp Law Committee, where he leads the Employment Law Subcommittee.

January 14, 2020

Discussion facilitated by
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Legal Compliance in the Age of Legalized Marijuana

Joseph McNelis

January 14, 2020

AGENDA

- *How did we get here?*
 - Overview of Federal Marijuana Law & Policy
- *Where is Marijuana “Legal?”*
 - Medical & Recreational Marijuana Programs
 - Industry and Legislative Trends
- *What now?*
 - Practical tips and guidance for employers



Federal Law and Policy: The Controlled Substance Act

- Cannabis is classified as a Schedule 1 controlled substance under the CSA. 21 U.S.C. § 812.
 1. The drug or other substance has a high potential for abuse.
 2. The drug or other substance has no currently accepted medical use in treatment in the United States.
 3. There is a lack of accepted safety for use of the drug or other substance under medical supervision.
- Thus, it is illegal to possess, manufacture, distribute, or dispense cannabis, or conspire to do so. 21 U.S.C. §§ 841(a)(1), 846.



Beware! Young and Old—People in
All Walks of Life!

This



may be handed you





by the friendly stranger. It contains the Killer Drug
“Marihuana”—a powerful narcotic in which lurks
Murder! Insanity! Death!



Copyright, 1936, by the National Association of Manufacturers

WARNING!

Dope peddlers are shrewd! They may
put some of this drug in the  or
in the  or in the tobacco cigarette.

WRITE FOR DETAILED INFORMATION, ENCLOSED 12 CENTS IN POSTAGE—MAILING COST

Address: THE INTER-STATE NARCOTIC ASSOCIATION

(Incorporated not for profit)

53 W. Jackson Blvd.

Chicago, Illinois, U. S. A.

INTERNATIONAL FORCES is a part of the National Association of Manufacturers, Inc., a corporation organized under the laws of the State of New York. It is a non-profit organization. The National Association of Manufacturers, Inc., is a corporation organized under the laws of the State of New York. It is a non-profit organization. The National Association of Manufacturers, Inc., is a corporation organized under the laws of the State of New York. It is a non-profit organization.



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Federal Law and Policy: The “Cole Memo” and the “Sessions Memo”

- Cole Memo (2010-2018) –
 - Endorsed a “hands off” approach to enforcement actions against cannabis businesses
 - Set forth federal enforcement priorities focused on crime and public safety
- Sessions Memo (2018)
 - Rescinded Cole Memo
 - Will this affect the industry?



Federal Law and Policy: The Controlled Substance Act

- Proposed Legislative Changes – will marijuana be “rescheduled?”
 - “STATES Act” (one to watch)
 - Co-Sponsors include Senators Elizabeth Warren (D-MA) and Cory Gardner (R-CO)
 - Main effect: would amend the Controlled Substances Act such that the law would not apply to individuals or entities acting in compliance with state marijuana laws.
 - Banking Legislation (SAFE Act)



Legal Authority for State-Run Cannabis Programs

- Federal v. State Law Conflict
 - Supremacy Clause v. 10th Amendment
- History of State “Legalization”
- Does the Controlled Substances Act “preempt” state marijuana laws?



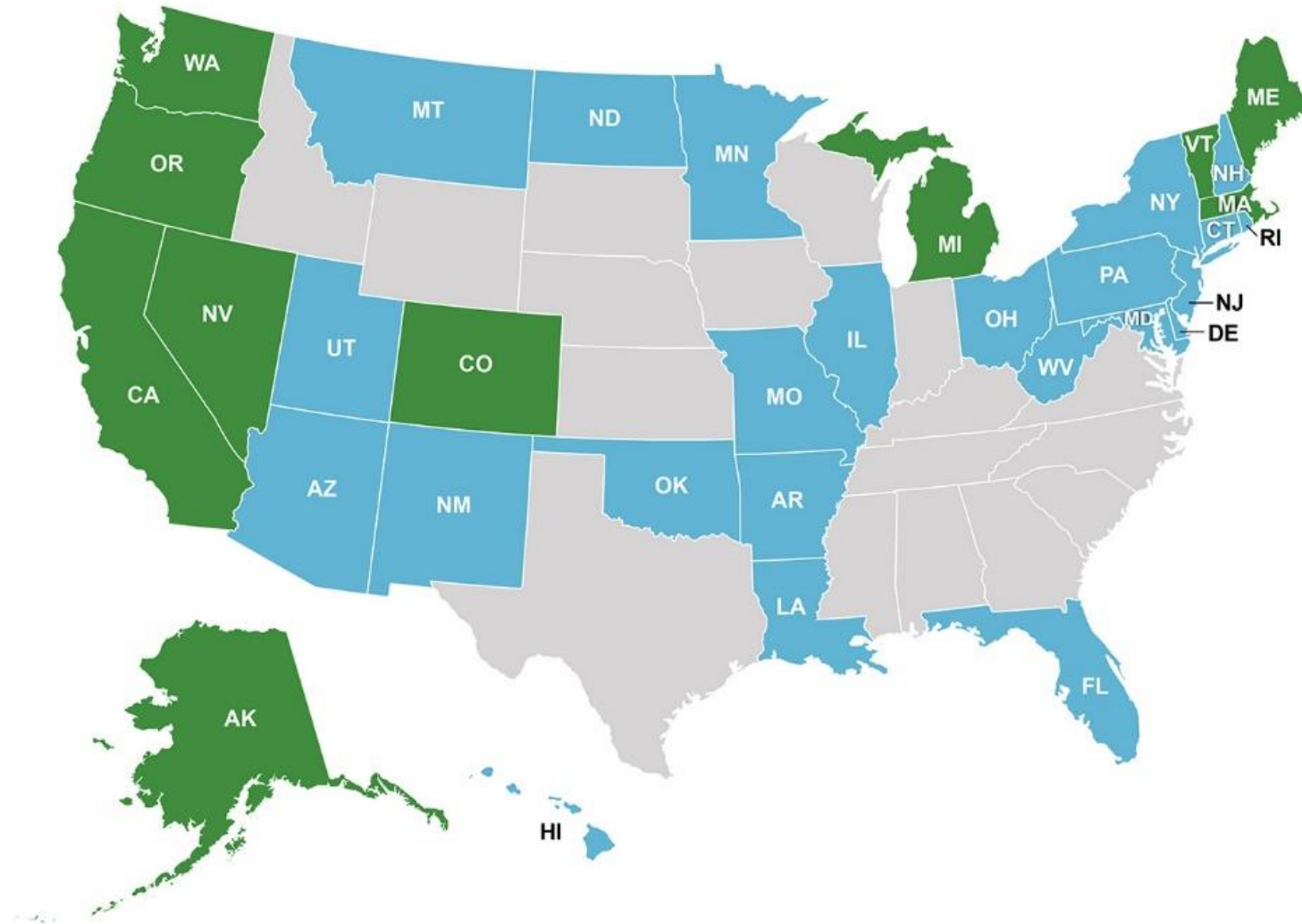
History of State Marijuana Legalization

- Medical Marijuana
 - California is the first (1996)
 - Currently legal in 30+ states and the D.C.
- Recreational or “Adult Use”
 - Colorado and Washington are the first (2012)
 - Currently legal in 10 states
- Steady trend towards legalization via both legislation and ballot initiatives



States Where Marijuana is Legal

■ Legalized recreational and medical marijuana ■ Legalized medical marijuana



How does the product move?



Licensed cultivation facility



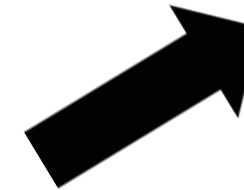
State-licensed dispensary



Clinical Registrant



Registered patient (Medical) or Consumer (Recreational)



State of the Legal Cannabis Industry

- “Legit” where it’s legal
 - Cannabis Industry “by the numbers”
- M&A Activity in the industry
- Operational and Regulatory Issues
 - Highly regulated by the states
 - Banking, Financial, and Taxation



What Now?

- How do employers deal with the federal v. state law conflict and manage the potential use of marijuana by employees?
- Major Issues
 - Federal contractors/grantees
 - Drug Testing & “Zero Tolerance”
 - Hiring/Firing & Reasonable Accommodations
 - Workplace Safety and Employee Behavior
 - Workers’ Compensation and Unemployment Insurance



Federal and State Laws

Relevant Federal Laws

- Controlled Substances Act
- Americans with Disabilities Act
- Federal Drug Free Workplace Act
- DOT Trucking Regulations
- OSHA

Relevant State Laws

- State medical marijuana statutes
- State anti-discrimination and disability statutes
- Workers' Compensation and Unemployment Compensation laws



Federal Contractors and Grantees

- Drug Free Workplace Act
 - Who is covered?
 - What are the requirements?
 - Penalties for noncompliance
- How to maintain compliance with both state and federal marijuana laws



Employment Compliance: Drug Free Workplace Act

- Who is covered?
 - The Drug Free Workplace Act (DFWA) applies to federal contractors that receive federal contracts of more than \$100,000 and all federal grantees other than individuals.

See 41 U.S.C. §§ 8102(a)(1), 8103(a)(1)



Employment Compliance: Drug Free Workplace Act

- What is required?

1. Publishing and giving a statement to all covered employees that “the unlawful manufacture, distribution dispensation, possession, or use of a controlled substance”, including marijuana, is prohibited in the workplace;
2. Notifying employees that they must abide by the drug-free workplace statement as a condition of employment;
3. Establishing a drug-free awareness program;
4. Timely alerting the contracting or granting federal agency after the contractor or grantee becomes aware that a covered employee has been convicted under a criminal drug statute;
5. Penalizing, or requiring participation in a drug abuse assistance or rehabilitation program, any employee convicted of a reportable drug offense; and
6. Making a good faith attempt to comply with these requirements.

See 41 U.S.C. §§ 8102(a)(1), 8103(a)(1)



Employment Compliance: Drug Free Workplace Act

- Maintaining compliance – federal contractors and grantees should err on the side of complying with federal law
- Remind employees and supervisors that impairment on the premises is prohibited
- Many state statutes contain “carve outs” for employers to comply with federal law



Employment Compliance: Drug Free Workplace Act

- DOT Regulations on the Transportation Industry.
See 49 CFR Part 40
 - employees in “safety sensitive” jobs are subject to drug testing and a “zero tolerance” standard for controlled substances, including marijuana
- DOT "Medical Marijuana" Notice (Oct. 30, 2017)
 - “The Department of Transportation’s Drug and Alcohol Testing Regulation – 49 CFR Part 40, at 40.151(e) – does not authorize “medical marijuana” under a state law to be a valid medical explanation for a transportation employee’s positive drug test result.”



Employment Compliance: Drug Testing and “Zero Tolerance”

- Examples of marijuana-specific testing laws
 - District of Columbia
 - Nevada
 - New York City
- Are we seeing a trend?
 - State and local laws
 - Business community



Employment Compliance: Drug Testing and “Zero Tolerance”

- Difficult Issues and Unanswered Questions
 - What does it mean to be “impaired” or “under the influence?”
 - Can a positive drug test show impairment?
- How does state law answer these questions?



Safety First

People under the influence of cannabis can experience:

- Poor coordination
- Carelessness
- Panic/anxiety/Paranoia
- Delayed reaction times and abilities
- Distorted speech or perception
- Confusion
- Lack of focus/motivation



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Addressing Employee Behavior/Reasonable Suspicion Testing

- Know what to look for
 - Possession of marijuana or related paraphernalia
 - Red eyes
 - Smell like marijuana smoke
 - Increased appetite
 - Loss of focus/easily distracted
 - Missing time from work
 - Decreased motivation or job performance



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Employment Compliance: Drug Testing and Zero Tolerance

- How to maintain compliance
 - Examine current policy and determine if it needs updating. Do not immediately tear up your Zero Tolerance policy.
 - Maintain compliance with generally applicable drug testing laws in your state
 - Apply your policy equally to all employees. Treating medical marijuana users differently than non-users or users of prescription drugs could lead to a claim of discrimination.



Occupational Safety and Health Administration

- Neither prohibits nor requires post-accident drug testing
 - BUT, Workers' Compensation Discount
- OSHA "General Duty Clause"
 - 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 employees"
- Changes to Post-Accident Testing Rules



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Employment Compliance: Hiring and Firing

- What does state law say?
 - Are you in an “employer friendly” or “employee friendly” state?
 - Where is your business located?
- What does your job description say?
 - Is the job considered “safety sensitive?”



Employment Compliance: Reasonable Accommodations

- Americans with Disabilities Act - generally prohibits employers from discriminating against employees with disabilities and requires employers to make accommodations for employees with a disability, so long as the accommodation does not impose an “undue hardship” on the employer.

See 42 U.S.C. § 12112

- But, does it apply? Generally, no, because an individual who is currently using “illegal drugs” does not qualify as “disabled.”

See 42 U.S.C. § 12114



Employment Compliance: Reasonable Accommodations

- Although the ADA may not apply, state anti-discrimination statutes and/or state medical marijuana statutes may require an accommodation.
 - Pennsylvania: 35 P.S. § 10231.2103(b)1) (No employer may...”discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana.”)



Can An Employer Terminate Off-The-Clock Marijuana Use? Some States Say Yes!

- Cases from the early 2010s: federal prohibition “trumps” state-legal medical marijuana
 - CA: *Ross v. RagingWire Telecommunications, Inc.*
 - CO: *Coats v. Dish Network*
 - OR: *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*



Employment Compliance: Reasonable Accommodations

- How to maintain compliance
 - Engage in the interactive process – best practice is to determine if an accommodation is feasible without imposing an undue hardship.
 - Examine job descriptions (for applicants and currently employees). If the position is or can be defined as “safety sensitive,” it is likely that the employer need not accommodate.
 - Need a **job-related** reason for your decision.
 - Train supervisors and HR on established policies.



Workers' Compensation and Unemployment Benefits – Another “Toss-Up”

- Workers' Compensation Issues
 - Intoxication as a bar to receiving benefits
 - Reimbursement for costs prescribed medical marijuana
- Unemployment Compensation
 - Is an employee terminated for off-site marijuana use entitled to benefits?



Employment Compliance: Takeaways

- “Legal” Cannabis is here to stay
- Know the state law(s)
- Where necessary, prioritize compliance with federal law
- Review employment policies and train relevant employees
- Review job descriptions
- Have a Plan



Implementing Policies

- Update drug-free workplace policies and drug-testing procedures to comply with applicable law
- Clearly inform employees that on the job impairment will not be tolerated
- Current and accurate job descriptions (note which positions are safety-sensitive)
- Explain to workers what conduct is permitted/prohibited, e.g. use, possession



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Implementing Policies (continued)

- Train managers how to identify impaired individuals, when to test, how to respond to requests for accommodation, and what steps to take
- Identify resources for employees dealing with addiction issues
- Document and give job-related reasons for your employment decisions
- Different laws mean you'll need different policies in different jurisdictions and to update them as laws change



Sources of Further Information

- [National Survey on Marijuana in the Workplace and Drug Testing Laws](#)
- [Employment Compliance in the Age of Legalized Marijuana White Paper](#)
- [In the Weeds Blog](#)
- [National Survey on Marijuana Laws and Regulations](#)



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Questions / Follow up?



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Up next...



CHRO Today Executive Network

Tuesday, February 11th | 3pm ET/12am PT
Shared Problem-Solving Discussion (Member-to-Member Zoom Video Conference)

Discussion topics:

- ▶ Driving down turnover of associates during year one. Three issues associated with this:
Cultural issue
Onboarding issue
Pre-employment assessment issue. OR, is it intentional attrition?? Hire 10 plan to keep 3.
- ▶ Alternate communications
Saturation of email and social media
What tools are left or need to be developed to communicate?
Technology enabled communication

Tuesday, March 10th 3pm ET/12am PT
Content Presentation (Zoom Video Conference)

- ▶ GDPR Compliance and International Privacy
Guest Speaker: Odia Kagan, Partner, Chair of GDPR Compliance and International Privacy, Fox Rothschild

