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SEX, DRUGS AND ROCK & ROLL –
IS THIS VH1’S “BEHIND THE MUSIC”
OR MY OFFICE?

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Medical Marijuana and Employment Law

Marijuana is legal in 24 jurisdictions and more are expected to join those ranks. The federal government hasn’t budged. Your company is in a state where employees can lawfully use marijuana either recreationally or when prescribed by a doctor. You have a drug-free workplace policy. Now what? While the specifics will be the subject of the panel discussion, this paper summarizes the landscape in which these questions will be considered.

I. Background

A. Medical Marijuana

Presently 23 states and the District of Columbia permit marijuana either for recreational use (Colorado, Washington, Oregon, Alaska, District of Columbia) or to treat designated medical conditions like cancer and Parkinson’s Disease.

Statutes differ, but to make sure the relevant states don’t become Amsterdam-equivalent tourist draws among other reasons, there are certain common registration requirements for a potential user to obtain a license or identification card for medical use:

1 Materials prepared by Deborah Kelly and Lyndsay Gorton of the ALFA Washington DC firm Dickstein Shapiro LLP; Jane Brown and Anne Schroeder of the ALFA Spokane, WA firm Paine Hamblen LLP.

○ The applicant must be a resident of the state and have proof of such in the form of a driver’s license or passport and recent electric/cable/ gas bill.

○ The applicant must be over the age of 18.

○ The applicant must pay an annual fee for the license.

○ The applicant must reapply on an annual basis.

○ The applicant’s physician must provide confirmation that the applicant has a “debilitating medical condition” the effects of which would be eased by marijuana.

○ But, most states do not require a “prescription” for medical marijuana.\(^3\)

### B. Recreational Marijuana

Currently, four “states” allow people to use “recreational marijuana”.\(^4\) In 2014, the District of Columbia voted to permit the use of “recreational marijuana,” but when it goes into effect is anyone’s guess since Congress seems hell-bent on making sure cannabis does not come to the nation’s capital (though it has already been decriminalized there).

What these statutes have in common is that:

1. User must be over 21 years old.

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\(^3\) E.g. [http://dhss.delaware.gov/dph/hsp/medmarhome.html](http://dhss.delaware.gov/dph/hsp/medmarhome.html)

2. The amounts that a user may possess or grow are small.
   ○ For example, under the DC recreational marijuana bill, a user may possess up to 2 ounces and grow up to six plants.\(^5\)
   ○ In Colorado, a user may possess up to one ounce of recreational marijuana.\(^6\)
   ○ In Washington, a user may possess up to one ounce of useable marijuana; or 16 ounces of marijuana infused product in solid form; or 72 ounces of marijuana infused product in liquid form.\(^7\)

II. Conflicts Between Federal and State Laws

Marijuana regulation began in the United States with the passage of the 1937 Marijuana Tax Act.\(^8\) It is speculated that this tax act was spearheaded by Andrew Mellon, William Randolf Hearst, and the Du Pont family who did not want the hemp business to encroach upon the timber, paper pulp, or nylon industries respectively.\(^9\) In 1969, the Act


\(^{6}\) [https://www.colorado.gov/pacific/marijuanainfodenver/residents-visited](https://www.colorado.gov/pacific/marijuanainfodenver/residents-visited).

\(^{7}\) RCW 69.50.360

\(^{8}\) Under the 1937 Marijuana Tax Act, a $1 levy tax existed for those who dealt with marijuana commercially, possessed, or prescribed marijuana.

was called into question by *Leary v. United States*. The following year the Act was repealed and replaced with the 1970 Controlled Substance Act (CSA).

States’ approval of marijuana use is going to run into the buzz saw of the federal government’s disapproval of marijuana use. The feds will argue that, under the doctrine of preemption, in a battle with the states, the federal government wins because a state may not pass a law in direct opposition to a federal law if the federal legislature intended to regulate that area. Based on this doctrine of preemption, no state law may require a federal contractor or grantee to accommodate state-legal medical marijuana use.

In 2005, this conflict came to a head in *Gonzales v. Raich*. There, the Supreme Court held that the Commerce Clause of the Constitution includes the power to prohibit marijuana from being cultivated and used even though it was in compliance with California law. In *Gonzales*, the petitioners argued that the “CSA’s categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law” exceeded Congressional authority under the Commerce Clause. The Court disagreed and stated,

[L]imiting the activity to marijuana possession and cultivation “in accordance with state law” cannot serve to place respondents’ activities beyond congressional reach. The Supremacy Clause unambiguously

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11 *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 2196 (2005).

12 Id. at 15.
provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is ‘superior to that of the States to provide for the welfare or necessities of their inhabitants,’ however legitimate or dire those necessities may be."\(^{13}\)

As demonstrated by\textit{ Gonzales}, the federal government’s preemptive authority remains, and employers that expect to be in the clear when abiding by state laws, should instead remain vigilant about federal regulatory authority.

Marijuana is governed primarily under two federal statutes:

1. Federal Controlled Substances Act.\(^{14}\)

The Federal Controlled Substances Act (CSA) considers marijuana a Schedule I controlled substance because it has three characteristics: (1) a high potential for abuse; (2) no currently accepted medical use in treatment in the United States (although that isn’t true anymore); and (3) there is a lack of accepted safety for use of the drug or other substance under medical supervision (again, no longer true).

As a Schedule I controlled substance, the CSA prohibits “manufacture, sale, dispensation, and possession” of marijuana even if state law permits its use for recreational or medical reasons.

In 2009, The Deputy Attorney General addressed the issue of the enforcement of the CSA in states that allow for medical marijuana. The memorandum stated that the

\(^{13}\)\textit{Id.} at 29.

\(^{14}\)21 U.S.C. § 801 \textit{et seq.}
priority was to prosecute traffickers of illegal drugs as opposed to those sick with cancer. This stance was later reaffirmed in another memorandum by Deputy Attorney General Cole.

In 2012 both Colorado and Washington State voted to allow the use of recreational marijuana. The Department of Justice issued two memorandums regarding marijuana enforcement. In 2013, the first “Cole Memo” stressed that the federal government’s guidance for marijuana enforcements entails eight priorities:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;

15 “Ogden Memo” 10/19/2009
• preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana on public lands; and

• preventing marijuana possession or use on federal property. The guidance emphasized that it expected states who authorize marijuana to have “strong and effective regulatory and enforcement systems.” They must be effective in practice in addition to the procedural and regulatory effect. The second memorandum, issued in February 2014, highlighted the federal government’s priorities on financial crimes associate with recreational marijuana.

Finally, in October 2014, the Department of Justice issued a guidance for tribal lands. Enforcement would be determined on a case by case basis with consultation with tribal partners and will focus upon the eight priorities from the “Cole Memo.”


The Federal Drug Free Workplace Act requires all federal grantees and some federal contractors to implement a “zero tolerance” drug policy. This means that once an

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16 “Cole Memo” 06/29/2013
17 “Cole Memo” 06/29/2013
18 “Cole Memo” 06/29/2013
19 “Cole Memo” 02/14/2014
20 Policy Statement Regarding Marijuana Issues in Indian Country. 10/28/2014
21 41 U.S.C. § 8101 et seq.
employer learns that an employee has been convicted of possessing or using an illegal drug (including marijuana) in the workplace, the employer has two options:

- Take an adverse employment action up to termination; or
- Referral to a rehabilitation facility.24

Keep in mind, however, that which options the employer chooses, and the severity of the employee's punishment, are left to the employer's discretion.

III. So Now What: Tough Questions for Employers

Can an employer give a pre-conditional offer of employment drug test?25

- NO. An employer may only give a drug test following a conditional offer of employment.

Can an employer fire an employee or take any other negative employment action if an employee fails a drug test?

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22 A federal contract valued at over $100,000 is subject to the Act.


24 The regulation requires only that, in case of a conviction for a criminal drug offense resulting from a violation occurring in the workplace, the employer take one of two types of action. The employer may take disciplinary action (which may be termination or a less severe penalty) or may refer the employee for rehabilitation or drug abuse assistance program. The choice of which basic course to choose, as well as the specific discipline or treatment option, is left to the employer's discretion and may be on a case-by-case basis—provided all state and local laws are followed.

25 http://www.sapaa.com/page/wp_dfwp_dt
Generally, the answer is yes. However, because medical marijuana use laws are still new, stay tuned to see if this is found to violate the Americans with Disabilities Act (“ADA”).

Can an employer institute a zero tolerance drug policy in states where medical or recreational marijuana use is decriminalized?

- Generally, yes, if it is enforced without discrimination across the board.
- Some states, including Arizona, Delaware, Maine, and New York, include carve outs to exempt federal contractors from any requirement to accommodate employees’ medical marijuana use.

Can an employer terminate an employee who possesses medical marijuana legally if that employee (1) uses medical marijuana on duty, (2) in the workplace, or (3) is intoxicated in the workplace?

- Probably yes. In fact, some states have included express clauses to allow employers to discharge employees who are intoxicated or use marijuana in the workplace but again some will argue this may violate the ADA.

Can an employer terminate an employee who tests positive for drugs if that employee has a valid medical marijuana registration card?

- There are no clear answers.
Some states, including Arizona, Delaware, and Minnesota, expressly prohibit an employer from terminating an employee for a positive marijuana drug test if the employee holds a valid registration card.

But, other states, including California, Montana, Oregon, and Washington allow employers to have a zero tolerance drug policy if an employee tests positive for marijuana even if that employee holds a valid registration card.

Can an employer terminate an employee who receives accommodation under the ADA for non-work hour, off-site medical marijuana use?

For now, the answer appears to be, YES.

The ADA,\(^{26}\) requires that employers make “reasonable accommodations” for qualifying individuals.

However, currently, because marijuana is a Schedule I substance under the federal CSA, and the ADA is a federal statute, an employer may terminate an employee for a positive marijuana drug test for off-site, off-duty medical marijuana use.

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\(^{26}\) 42 U.S.C. § 12101 \textit{et seq.}
On January 27, 2014, the Colorado Supreme Court granted certiorari to hear *Brandon Coats v. Dish Network, LLC*. Oral arguments took place in September, 2014, but no decision has been issued.

In *Coats v. Dish Network, LLC*, Brendan Coats was fired after testing positive for marijuana even though he is a quadriplegic with a valid medical marijuana card. The Colorado Court of Appeals affirmed the trial court’s determination that the termination was not discriminatory under Colorado law because, “[T]he term “lawful activity” in section 24-34-402.5, means that the activity – here, plaintiff’s medical marijuana use – must comply with both state and federal law.”

On May 21, 2014, the state of Colorado submitted an amicus brief to the Colorado Supreme Court in support of Dish Network, LLC. The State cites to the Drug Free Workplace Act of 1988 and argued that the petitioner’s argument, that the State lawful activities statute covers conduct illegal under federal law, would undercut zero tolerance workplace drug policies. The State’s amicus brief concludes, “The State of Colorado and other employers should not be put in the burdensome position [of] having to litigate a prohibition of the use of marijuana resulting in job impairment caused by an employee’s choice to consume marijuana.

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in violation of a contract with an employer that they entered into voluntarily.”

Examples of Washington State Regulations for Recreational Marijuana

1. Marijuana licenses are divided into three categories: 1) producer; 2) processor; and 3) retailer. Each category is taxed at a 25% excise tax.

2. A license will not be issued if the premises is within one thousand feet of an “elementary or secondary school, playground, recreation center or facility, child care center, public park, public transit center, or library, or game arcade admission to which is not restricted to persons age twenty-one or older”

3. The applicant and financier must undergo a criminal history and background check. The Liquor Control Board will investigate the funds used to finance the start-up business and verify its source.

4. Changes to a business or ownership must meet the Liquor Control Board approval before continuing.

28 State of Colorado Amicus Br., Case No. 2013SC394 at 6 (May 21, 2014).
29 RCW 69.50.325 - 545
30 RCW 69.50.331(8)
31 WAC 314-55-020
32 WAC 314-55-120 - 135
5. Marijuana products are tracked from seed to sale. The Licensee must provide information to the Liquor Control board from the seed of the marijuana to marijuana waste. All products and sales should be traceable.\(^{33}\)

**Issues and Hypotheticals**

1. **Insurance:** In Washington, all marijuana licensees are required to provide commercial general liability insurance.\(^{34}\) Oftentimes, insurance policies will have exclusions for criminal acts. This creates a problem when the marijuana business is legal in a state but illegal federally.

2. **Transportation:** What happens if there is an accident while transporting marijuana between a producer, processor, or retailer? Would the insurance not cover the transportation if it is considered a criminal act federally?

3. **Real Estate:** Buying, selling, or renting properties where marijuana was produced or processed.

4. **Contracts:** Would a contract be enforceable between a marijuana business in a state where recreational marijuana is legal and a business in another state? A likely outcome would be the state court would enforce the contract but not the federal court.

\(^{33}\) WAC 314-55-083

\(^{34}\) WAC 314-55-082
5. **Setting Up Companies:** Can attorney advise in the creation of a company or LLC doing marijuana business when it might violate the ethics code?

6. **Advertising:** In Washington, there are strict regulations on advertising marijuana products. The Washington State Liquor Control Board FAQ page directs interested parties to obtain advice from their attorney. Can an attorney advise the client when the business is illegal federally?

7. **Immigration:** How do you advise a client who is an immigrant and working legally in the marijuana business?

8. **Immigration:** How would you advise a client who is investing money in the legal marijuana business and would like to use that investment to reach the threshold for immigration?

9. **Vetting Process:** How do you vet potential clients who are in the marijuana business to be assured that the funds are not tied to organized crime?

10. **IOLTA:** How do you handle clients who can only pay in cash?

11. **IP:** Brand protection is not eligible for federal trademark protection because it is an illegal drug. Could possibly register ancillary products that contain no marijuana. Can apply for State only protection. No patent protection exists for marijuana products.

12. **Tax:** May not consider drugs a legitimate business expense. Could possibly deduct cost of goods sold but not deduct includables.

13. **Ethics:** MRPC 1.2(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may
discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

MRPC 8.4(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects. Would this MRPC not be violated if is legal in the state and is not reflecting adversely on the lawyer’s honesty?

14. Oath of Attorney: In Washington, the oath of attorney states that you are subject to both state and federal law. Check all applicable and ethics opinions for guidance.

In short, caution is the rule. Land mines are everywhere until this area of the law develops further.