

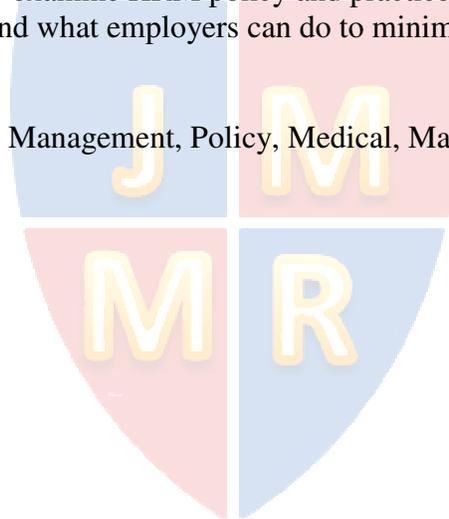
# **Human resource management policy and practice issues and medical marijuana**

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## **ABSTRACT**

The long running “war on drugs” being waged by government at the federal, state and local levels has been impacting employers’ Human Resource Management (HRM) policy and practice for a number of years. Employer involvement in the war is related to what some have described as “overwhelming evidence that drug use by employees creates unnecessary risks and costs” (Blumberg, 2004). The complex legal and employee relations issues associated with workplace drug testing has been further complicated in recent years by the enactment of medical marijuana laws that permit individuals under the care of a physician to use medical marijuana. The purpose of this paper is to examine HRM policy and practice issues associated with medical marijuana, current case law, and what employers can do to minimize the complexity associated with the issue.

Keywords: Human, Resource, Management, Policy, Medical, Marijuana



## INTRODUCTION

The long running “war on drugs” being waged by government at the federal, state and local levels has been impacting employers’ Human Resource Management (HRM) policy and practice for a number of years. Employer involvement in the war is related to what some have described as “overwhelming evidence that drug use by employees creates unnecessary risks and costs” (Blumberg, 2004). According to the American Council for Drug Education, substance abusers, compared to non-abusing coworkers, are “ten times more likely to miss work, 3.6 times more likely to be involved in on-the-job accidents, (and 5 times more likely to injure themselves or another in the process), five times more likely to file a worker’s compensation claim, 33% less productive, and responsible for health care costs that are three times as high” (American Council for Drug Education, 2009). Employee relations issues for employers associated with the negative effects of drug abuse on the workplace revolve primarily around the use of drug testing as a tool to screen applicants and to promote safety in the workplace either through random or post-accident testing. Faced with the widely circulated statistics noted earlier with respect to the negative impact of substance abusers on the workplace, it is estimated that a majority of employers have developed policies and procedures designed to create and maintain “drug free workplaces”. While most private sector employers are “not required to test for illicit drug use” estimates are that a clear majority of employers are screening job applicants for illicit drug use and majority also test current employees as key aspects of their efforts. (Blumberg, 2004).

Often cited issues with respect to drug testing include employee concerns with respect to privacy, accuracy, and the impact of testing positive for illegal drugs. All three of the employee relations issues may create legal issues for employers, including compliance with federal statutes like the Drug Free Workplace Act and the Americans with Disability Act (ADA) and a wide variety of state laws. Additionally, Department of Transportation regulations for airline employees, interstate motor carrier drivers and railroad engineers, and regulations for safety sensitive positions established by the Department of Defense and the Nuclear Regulatory Commission may also impact employer drug testing policies and procedures. An additional legal issue for employers is associated with all employers’ general duty under the Federal Occupational Safety and Health Act to provide a work place free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees. To that end, the Occupational Safety and Health Administration (OSHA)...

“recognizes that impairment by drug or alcohol use can constitute an avoidable workplace hazard and that drug-free workplace programs can help improve worker safety and health and add value to American businesses. OSHA strongly supports comprehensive drug-free workforce programs, especially within certain workplace environments, such as those involving safety-sensitive duties like operating machinery” (OSHA,2009).

The purpose of this paper is to examine HRM policy and practice issues associated with medical marijuana, current case law, and what employers can do to minimize the complexity associated with the issue.

## **MEDICAL MARIJUANA ISSUES**

The complex legal and employee relations issues associated with workplace drug use has been further complicated in recent years by the enactment of medical marijuana laws that permit individuals under the care of a physician to use medical marijuana. The legislation has sparked an often contentious debate between supporters and opponents in this area. Fourteen states have enacted legislation legalizing medical marijuana (See Exhibit 1). In fourteen additional states, legislation has been introduced and is awaiting action at various levels of the states' legislative review processes (See Exhibit 2). Two other states have enacted legislation "favorable" to medical marijuana but have not legalized it, and in two more states there are petition drives to initiate ballot initiatives legalizing medical marijuana (ProCon.org, 2009). The divide between advocates for and against the legalization of medical marijuana is evident in two recent Forbes Magazine articles. In the first Rachel Ehrenfeld, director of the American Center for Democracy, is sharply critical of a National Institute on Drug Abuse (NIDA) program which Ehrenfeld alleges is an effort to "venture into the distribution and production of marijuana cigarettes" (Ehrenfeld, 2009). Ehrenfeld's allegations are related to a NIDA solicitation looking for "organizations that can grow marijuana on a "large scale", with the capability to "prepare marijuana cigarettes and related products"...not only for research, but for other government programs" (Ehrenfeld, 2009). Ehrenfeld also reiterates the long standing criticism that opponents to the legalization of drugs have made that "evidence about the harm caused by marijuana to the individual user and society is overwhelming" (Ehrenfeld, 2009). One week after Ehrenfeld's article appeared in Forbes, Bruce Mirken, director of communications for the Marijuana Policy Project and an advocate for expanded legalization of medical marijuana, is highly critical of Ehrenfeld's assertions and presents a number of short quotes from a number of health industry related organizations citing research that Mirken alleges "documents marijuana's medical efficacy and safety, and a vast array of medical and public health organizations that have recognized marijuana's medical potential" (Mirken, 2009). (See Exhibits 1 & 2 in appendix)

Medical Marijuana statutes enacted at the state level have been characterized as "decriminalization" statutes that protect "patients, caregivers and physicians from criminal and civil penalties for using, assisting the use of, or recommending the use of medical marijuana" (Deschenaux, 2009). Issues that employers have had to deal with since the enactment of Medical Marijuana statutes include whether an employer can refuse to hire job applicants that fail pre-employment drug test in states where medical marijuana may be legal and whether employers must accommodate the medical use of marijuana in the workplace.

## **RECENT COURT CASES**

With respect to employers refusing to hire applicants who fail a pre-employment drug test, the most important court case is *Gonzales v. Raich* decided June 6, 2005 (*Gonzales v. Raich*, 2005). The Supreme Court in *Raich* upheld the federal government's right to enforce the "Controlled Substances Act's prohibition on the use of marijuana for medical reasons against persons who use marijuana under state medical marijuana laws (Kenney, 2006). As a result of this decision, "in most states with medical marijuana laws, an employer may safely refuse to accept medical marijuana as a reasonable medical explanation for a positive drug test result" (Kenney, 2006).

State courts have also ruled favorably for employers in regard to pre-employment drug testing and requiring employers to make reasonable accommodations for medical marijuana users. The California State Supreme held in a 2008 decision, *Ross v. RagingWire Telecommunications, Inc.*, that employers in California “may refuse to hire applicants who use marijuana in violation of federal law, even if that use would not violate state criminal law” (Deschenaux, 2008). The California Supreme Court in the *Ross* decision concluded that a “company could take illegal drug use into consideration in making employment decisions” and that “no state law can completely legalize marijuana for medical purposes because the drug remains illegal under federal law even for medical users” (*Ross v. Ragingwire Telecommunications, 2008*). In this case the plaintiff, Gary Ross, suffered from strain and muscle spasms in his back as a result of injuries he sustained while serving in the United States Air Force. The court concluded that Ross was a qualified individual with a disability under California’s Fair Employment and Housing Act (FEHA). FEHA does require employers in their hiring decisions to take into account the feasibility of making reasonable accommodations, but it does not require employers to accommodate the use of illegal drugs (*Ross v. Ragingwire Telecommunications, 2009*). Ross was hired by Ragingwire and as a condition of employment was required to take a drug test. When the employer was informed by the testing clinic that Ross had tested positive for tetrahydrocannabinol (THC), a chemical found in marijuana, he was suspended and eventually terminated because of his marijuana use (*Ross v. Ragingwire Telecommunications, 2009*). The termination decision was made even though Ross had worked in the field while using marijuana and had performed his job satisfactorily without complaints about his job performance (*Ross v. Ragingwire Telecommunications, 2009*). In ruling to up-hold Ross’s termination, the court noted that the plaintiff’s position may have had merit if the Compassionate Use Act, California’s Medical Marijuana statute, had given marijuana the same status as any legal prescription drug. The court, citing *Gonzales v. Raich*, went on to note that no state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law even for medical users (*Ross v. Ragingwire Telecommunications, 2009*).

Montana’s State Supreme Court in affirming a lower court’s decision that Montana’s Medical Marijuana statute does not protect employees from being fired for using marijuana also concluded that the state’s Medical Marijuana statute or the ADA does not require employers to accommodate the medical use of marijuana (*Johnson v. Columbia Falls Aluminum (2009)*). In this case the plaintiff, Mike Johnson, was terminated after he failed a drug test and declined to sign a “last chance” agreement that would subject him to discipline up to and including discharge if he tested positive for certain controlled substances including marijuana ((*Johnson v. Columbia Falls Aluminum (2009)*). Johnson suffered injuries related to his work and under the supervision of a physician, began treating his injuries with medical marijuana. He received no adverse job performance evaluation during the time he treated his condition with medical marijuana. After a fitness for duty evaluation, which included a drug test, reported he tested positive for marijuana Johnson was terminated (*Johnson v. Columbia Falls Aluminum (2009)*). The Montana State Supreme Court in supporting the termination decision noted that the Montana’s Medical Marijuana Act (MMA) specifically provides that it cannot be construed to require employers “to accommodate the medical use of marijuana in any workplace” (Section 50-46-205(2)(b), MCA (*Johnson v. Columbia Falls Aluminum (2009)*).

## SUGGESTIONS FOR EMPLOYERS

Courts at both the federal and state level have for the most part supported employers in cases involving drug testing and accommodation with respect to medical marijuana. As more states enact legislation enabling the use of medical marijuana, advocacy groups' reactions to court decisions, and the focus of federal leadership signaling some change in the war on drugs, employers should not be complacent with respect to these issues. In Oregon, a state with a ten year history with respect to its medical marijuana statute, employers are concerned with inconsistent enforcement of state and federal statutes regarding medical marijuana use. Some employers claim that it is difficult to comply with federal regulations and Oregon's medical marijuana law (Associated Press, 2009). Legislators on both sides of the issue in Oregon are lining up proposals. One enabling employers to fire or punish workers who use medical marijuana, and others that would prohibit employers from discriminating against medical marijuana patients (Associated Press, 2009). At the Federal level U.S. Attorney General Eric Holder, citing limited resources, is reported to have stated that the Federal Drug Enforcement Administration (DEA) would only target marijuana distributors who violate both federal and state laws, an indication that the DEA will end raids on medical marijuana dispensaries (Childress, 2009). President Obama supported the right of states to legalize medical marijuana during his campaign and also supported the end of DEA raids on medical marijuana dispensaries (Childress, 2009).

The level of confusion and apprehension among employers with respect to this issue continues to grow. With an additional 14 states possibly legalizing medical marijuana use looming on the horizon, state legislatures looking to possibly enhance legal protection to medical marijuana users in the workplace, and signals of support from the highest level of the Federal Government, employers must take these events into consideration as they attempt to provide a safe working environment for all employees and minimize the legal risk that come with those efforts. ADA compliance has never been easy for many employers. With new regulations coming on line associated with the 2008 amendments to the ADA, employers should pay close attention how these changes may impact how they deal with request for accommodation from those with disabilities. It is generally regarded that the 2008 amendments to the ADA will make it easier for individuals to establish that they meet the act's definition of a person with a disability. Currently under the ADA, an employer may discipline an employee who violates an employer policy that prohibits the illegal use of drugs in the workplace. In fact, the ADA specifically permits employers to prohibit the use of alcohol or the illegal use of drugs in the workplace (42 U.S.C. § 12114© (1) (2000) (EEOC, 2009). A consistent dilemma for a number of employers since the inception of the ADA has been how to accommodate current employees with a disability. With potentially more employees being able to garner coverage under the ADA, employers in those states where medical marijuana is legal must continually examine their efforts to reasonably accommodate employees claiming disability status. There is currently no legal compulsion for employers to make accommodations for the use of marijuana in the workplace. Many employers though, according to employment lawyer Richard Meneghello, "remain uncertain about whether they can fire or deny employment to users of medical marijuana, or whether to accommodate them by allowing use only at home or in an area at work where they can smoke" (Armour, 2007).

Employers are advised to approach accommodation request involving medical marijuana on a cautious case by case basis (Deschenaux, 2008). Employers should also remember that an

accommodation request from an employees is not a one sided proposition. Michael McClory, a Portland Oregon attorney advises employers to utilize an “interactive process” to assess how to best accommodate a particular employee’s situation when medical marijuana is involved (Deschenaux, 2008). According to McClory, if an employer determines that “medical marijuana usage renders the employee unable to safely perform the job and no reasonable accommodation would eliminate the safety threat, the employer would not be required to allow the employee to remain in that job” (Deschenaux, 2008). With respect to drug testing, employers are well advised to follow the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) guidelines with respect to workplace drug testing. Private employers are not required to follow the SAMHSA guidelines, but court decisions have supported following them (D.O.L., 2009). These [Mandatory Guidelines for Federal Workplace Drug Testing](#) (also called SAMHSA’s guidelines) include having a Medical Review Officer (MRO) evaluate tests. They also identify the five substances tested for in Federal drug-testing programs and require the use of [drug labs certified by SAMHSA](#) (D.O.L., 2009). If employers decide to utilize drug testing as part of their effort to promote a drug free workplace, they should also have policies and practices in place to comply with Health Insurance Portability and Accountability Act (HIPAA). The results of a drug test may be considered personal health information and there may be restrictions on how and whether information regarding the results of drug test information may be released (D.O.L., 2009). Detailed information on this issue may be found on the Office of Civil Rights HIPAA Web page. As more states enact medical marijuana legislation and courts and politicians weigh in on the issue, employers must stay in tune just what direction the issue is headed to make sure their policies and procedures will facilitate not only compliance but a safe and healthy work environment for all employees.

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**Appendix**

Exhibit 1 – Legal Medical Marijuana States

State	Year Passed	State	Year Passed
Alaska	1988	California	1996
Colorado	2000	Hawaii	2000
Maine	1999	Michigan	2008
Montana	2004	Nevada	2000
New Jersey	2010	New Mexico	2007
Oregon	1998	Rhode Island	2006
Washington	1998	Vermont	2004

Two states have passed laws that, although favorable towards medical marijuana, did not legalize its use:

Arizona	1996
Maryland	2003

Source: Medical Marijuana – ProCon.org (2010).

Exhibit 2 – States with Pending Legislation or Ballot Measures to Legalize Medical Marijuana

Alabama	Delaware
Illinois	Iowa
Kansas	Maryland
Massachusetts	Missouri
Missouri	New York
North Carolina	Pennsylvania
Tennessee	Wisconsin

Source: Medical Marijuana – ProCon.org (2010).

