



### Employment Law Seminar 2018

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Tuesday, August 14, 2018  
Hawaii Convention Center

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### Opioids, Medical Marijuana & Rx Drugs in the Workplace

Afternoon Breakout Session 1:00 – 1:50 p.m.  
Hawaii Convention Center, Room 304

Download session handouts at: <http://www.coohawaii.org/elhandouts2018/>



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### Opioids, Medical Marijuana, and Prescription Drugs in the Workplace

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## The Opioid Epidemic

- Drug distribution through the pharmaceutical supply chain has steadily increased in the last 20 years.
  - Drug distribution through the pharmaceutical supply chain was the equivalent of 96 mg of morphine per person in 1997.
  - In 2007, that number jumped 600% to 700 mg per person.
- Per capita, the U.S. has one of the highest rates of opioid use in the world.

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- In 2010, more than 38,000 people died of drug overdoses
  - 13% Heroin – down from 20% in 1999
  - 17% Cocaine – down from 39% in 1999
  - 70% opioids – up from 41% in 1999

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## Not Just for Junkies

- Studies have show that more than 50% of chronic abusers of opioids – those that took pills for at least 200 days in a year – received their pills from a prescription written for them or friends and family.

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### Why Does This Matter To You?

- Opioid abuse leads to health and safety issues in the workplace.
  - Been found to profoundly increase:
    - Workers' compensation costs
      - Number of painkillers per claim increasing
      - Accordingly the cost of painkillers per claim increasing
      - 3 of 4 claims longer than 7 days with no surgery took
      - Employees prescribed even one painkiller had 3x the total cost
    - Length of employee disability
    - Increase work time lost

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### Why Does This Matter To You?

- Increases your SAP costs
  - Drug treatment admission went from 20,000 in 1998 to 157,000 in 2010.
- Increases risk of workplace accidents, errors, and injury
- Increases medical costs because of the increased use of emergency room services, hospitalization, etc.
  - These costs are passed on to you as higher premiums.

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### What About Drug Tests

- Have a well written, properly distributed substance abuse testing policy.
  - Cover the different types of testing – pre-employment, reasonable suspicion, random, post-accident, return to work, etc.
    - No limitation under Hawai'i law
    - Limitations in dealing with federally mandated testing (e.g., DOT)
    - Limitations if there is a CBA

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## What About Drug Tests

- Have a well written, properly distributed substance abuse testing policy.
  - Pick the correct panel
    - Employers often have a five-panel test – opiates/heroin, cocaine, marijuana, PCP, and amphetamines. This misses semi-synthetic and synthetic opioids like oxycodone and methadone.
    - Can have 7 or 10 panel (or custom)
      - Adds things like benzodiazepines, oxycodone, and methadone
      - Can also add Dilaudid or Fentanyl or Ketamine

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## Overdose Antidote?

- SHRM urged employers in April 2018 to stock Narcan (naloxone) – a nasal spray to treat opioid overdose
  - Came after the Surgeon General publically said that workplaces should stock and train employees on how to administer

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## Medical Marijuana Background

- As of June 2018
  - 30 Legal Medical Marijuana States plus D.C. (only 9 allow recreational)
    - Includes California, Alaska, Oregon, and Washington
    - Even more states allow drugs with CBD
    - Became legal in Hawai'i in 2000
    - Regulated dispensary system began in 2016
      - Protections also added for registered patients and caregivers for schools, medical care, custody, and housing

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## ADA Overview

- Prohibits disability discrimination in:
  - The workplace
  - Public entities/transportation
  - Public accommodations

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## What is a disability?

- Mental or physical impairment that substantially limits a major life activity
- Record of such impairment
- Being regarded as having such impairment

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### What isn't a disability?

- Current use of illegal drugs when the employer takes action based on such use
- Psychoactive substance use disorders resulting from current illegal use of drugs

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### What is a reasonable accommodation?

- A change in the workplace or in the way things are customarily done that provides an individual with a disability with equal employment opportunities
- Accommodations are available for the application process, to enable an individual with a disability to perform essential job functions, and to provide equal benefits and privileges of employment

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### It's legal, right? Why are we still talking about it?

- If an applicant or employee tests positive for marijuana use and discloses that they have a medical marijuana card, they are protected, right?

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### No... Probably not...

- Federal law has not changed at all despite ongoing changes in state law
- Marijuana, regardless of use, is still listed as a Schedule I Drug under the Federal Controlled Substances Act and illegal
- Because it is illegal under federal law, the ADA does not offer any protection

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### What about Hawai'i law?

- Likewise, Hawai'i employment law has not recognized the use of medical marijuana as a protected status
- While disability discrimination is illegal under state law, adverse employment action because of medical marijuana use is not illegal

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### Isn't the EEOC aggressive?

- Yes, however, the EEOC has not officially taken a position on whether medical marijuana is a disability
- It is unlikely that the EEOC can allege a claim under the ADA because the use of marijuana, regardless of state law, is a violation of the Federal Controlled Substances Act, and expressly not protected under the ADA

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### Sigh of relief...

- Not so quick - the EEOC is aggressive and could still pursue a claim
- The EEOC pursued a claim by a Michigan nurse fired after disclosing she used medical marijuana and failing a drug test. She told her supervisors it was used to treat epilepsy.
- The EEOC maintained that her termination was due to her epilepsy and not the medical marijuana use, and, therefore, violated the ADA.
- The assisted living facility agreed to a consent decree to resolve the matter and paid \$45,000.

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### What about the HCRC?

- Hawai'i employment law is unaffected by the creation of a dispensary system and protections granted in other contexts.
- Accordingly, it should be unlikely that the HCRC would pursue a disability claim based on medical marijuana use.

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### Will that stop the HCRC?

- Who knows?
- There are no cases currently pending in state court to explore the issue
- There is always a risk that an employee may disclose a qualified disability when they provide information about their medical marijuana use. That DOES create a possible claim.

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### What about *Lambdin v. Marriott Resorts Hospitality Corp.* (2017)?

- Lambdin was a pesticide applicator at Kaua'i Lagoons in Kaua'i.
- In 2007, he was severely injured while spraying on grounds.
- Lambdin had his hip replaced in 2010 and 2013.
- In January 2014, Lambdin's doctor recommended a medical marijuana certificate.

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### What about *Lambdin*?

- In February 2014, his supervisor's comments in his logbook caused him to have a panic attack and he was transported by ambulance to the hospital.
- Per the Drug and Alcohol Policy, Lambdin was given a post-accident test.
- Lambdin tested positive for marijuana.
- Lambdin was suspended, then fired.

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### What about *Lambdin*?

- Lambdin claimed he was protected because he was using "medical" marijuana.
- Court disagreed. It noted that at the time of the test, Lambdin did not have a valid medical marijuana card.
- The court made note that it is a violation of federal law to use marijuana, even in cases where a state law allows medical marijuana.

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### What about cases in other states?

- Case law generally supports the idea that legal medical marijuana consumption does not prevent an employer from taking adverse action
- Colorado – disabled employee properly terminated after testing positive for marijuana use and disclosing possession of a valid medical marijuana card because still illegal federally. *Coats v. Dish Network, LLC* (2015)

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### What about cases in other states?

- Oregon – no duty to accommodate employee use of medical marijuana because still illegal federally. *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries* (2010)
- Oregon – employee properly terminated because no state law requiring employers to accommodate the use of medical marijuana and still illegal under federal law. *Swaw v. Safeway, Inc.* (2015)

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### What about cases in other states?

- California – employee properly discharged after positive drug test. California anti-discrimination statute and public policy did not require employer accommodations. *Ross v. RagingWire Telecommunications, Inc.* (2008)

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## But Wait!

- Massachusetts – employee has right to use medical marijuana, and her employer must engage in the interactive process prior to terminating for a positive drug test result or face a disability discrimination lawsuit.
  - *Barbuto v. Advantage Sales and Marketing, LLC* (2017)

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## But Wait!

- Connecticut – court dismissed federal law argument. Said that federal law's prohibition does not address employment or prohibit employment. Therefore, no federal preemption of state medical marijuana law protecting users.
  - *Noffsinger v. SSC Niantic Operating Company, LLC* (2017)

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## What should you do?

- Ensure you have an updated written drug testing policy.
  - Extra care is needed if you must comply with DOT regulations
- Include express provision dealing with medical marijuana
- Treat everyone the same
  - Don't make exceptions for some employees and not others
- Make sure to do confirmatory testing
- Make sure you use a licensed lab to test

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## What should you do...

... when someone tests positive and claims use of medical marijuana?

- Take appropriate and consistent disciplinary action up to and including termination and hope for the best; or

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## What should you do...

- Request further information
  - Do they have a valid card?
    - If no, take action.
    - If yes, consider advising that medical marijuana is still illegal under federal law. Request that they change their treatment to no longer include marijuana/use another medication. Explain that they are subject to retest. Document.
    - If they agree, give an opportunity to change medication and retest.

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## Pot Breathalyzer?!

- Hound Labs has created a breathalyzer that can supposedly detect if a person has smoked marijuana in the last 2 hours (peak impairment time frame).
- Game changer since THC is fat-soluble and can stay in an employee's system for up to a month.
- Can detect THC presence, but not amount
  - THC is about a billion times less concentrated than alcohol, so THC is parts per trillion (alcohol is parts per million)

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## Pot Breathalyzer?!

- 7 states, including Washington and Montana, have set legal guidelines on how much THC in your systems makes you "impaired."
- Scientists and police can't agree on the amount
- Colorado studies indicate fatal car crashes with drivers that tested positive has significantly increased since legalization
  - Same danger in workplace?

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## Do you have to test for marijuana?

- We know that the use of medical marijuana is still illegal under federal law. Do you have to test for it?




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## Do you have to test for marijuana?

- That depends.
  - Are you subject to any DOT regulations or related federal guidelines? If yes, then you must test.
  - If you are not subject to any DOT regulations or related federal guidelines, you do not have to test for marijuana.

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## What should you do if you don't test for marijuana?

- Don't test for marijuana!
- You cannot selectively decide to enforce a "no marijuana" rule when it suits your fancy.
- If you change your mind, you should revise the policy in writing and notify all employees.

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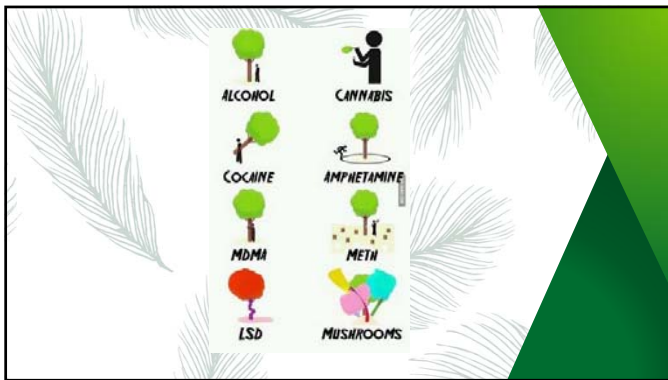
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## Mahalo!

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