



WEED IN THE WORKPLACE



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WEED IN THE WORKPLACE/ IMPACT OF MARIJUANA IN THE WORKPLACE

KRISTINE E. KWONG, ESQ



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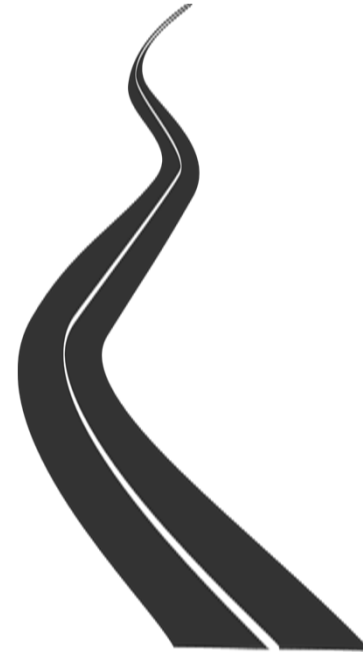
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Roadmap of Marijuana

- Legal history of marijuana
- Criminalization of marijuana
- Decriminalizing medical use at state level
- Relaxed enforcement at federal level
- Confusion over the impact
- Legalization of recreational marijuana



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Marijuana at Work

- Medical marijuana
- Recreational marijuana
- Effects of marijuana
- Legal implication of marijuana
 - Americans with Disabilities Act
 - Drug and alcohol testing
 - Family and Medical Leave Act



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Medical Marijuana

- First states legalize medicinal use of marijuana
 - California 1996
 - Alaska 1998
 - Oregon 1998
 - Washington 1998



CURRENTLY
More than 20 states



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Recreational Marijuana

Colorado

- January 1, 2014
 - Over 21 can grow/posses for recreational use
- Second state legalize marijuana
 - Washington first
- Fiscal impact – tax revenue



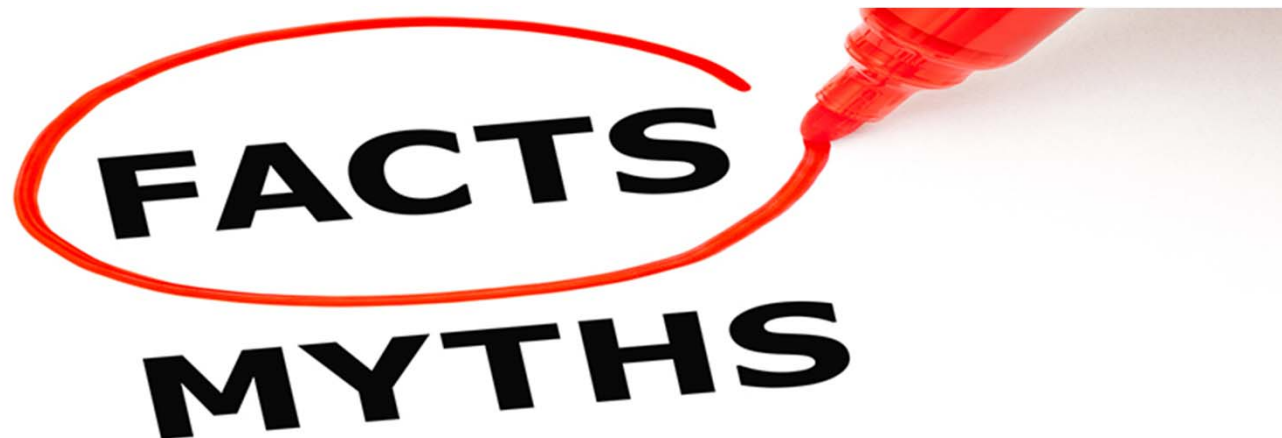
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Marijuana Myths

- Constitutional right to privacy
- Prohibition of random drug testing
- Right to report to duty under impairment
- Right to use on duty



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Effects of Marijuana

- Short term memory problems
- Impaired thinking
- Loss of balance and control
- Decreased concentration
- Changes in sensory perception
- Impaired ability to perform complex tasks
- Decreased alertness
- Decreased reaction times



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Effects of Marijuana

- Effects can last 2-6 hours
- Can be found in urine for 1-5 days or up to 6 weeks if regular user



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Why should employers care about marijuana use?

- Impaired motor performance
- Inability maintain attention, estimate time and distance, demonstrate coordination on divided tasks
- Increase in absenteeism
- Employee claims reasonable accommodation right before termination
- Employee uses at work with prescription



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Evolution of California

- Proposition 215/Compassionate Use Act of 1996
- H&S Code 11362.5 et seq



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Department of Justice

- Federal DOJ relaxes enforcement
- October 19, 2009: DOJ issues statement it will not focus federal resources in states whose actions are in compliance with state laws providing for use of medical marijuana



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Proposition 64



- 21 and older – may purchase at state-licensed businesses
- Use
 - In private home or licensed on-site business
- Prohibitions on use
 - Not while driving
 - Not in a public place
 - Not on school grounds, daycare center, youth center



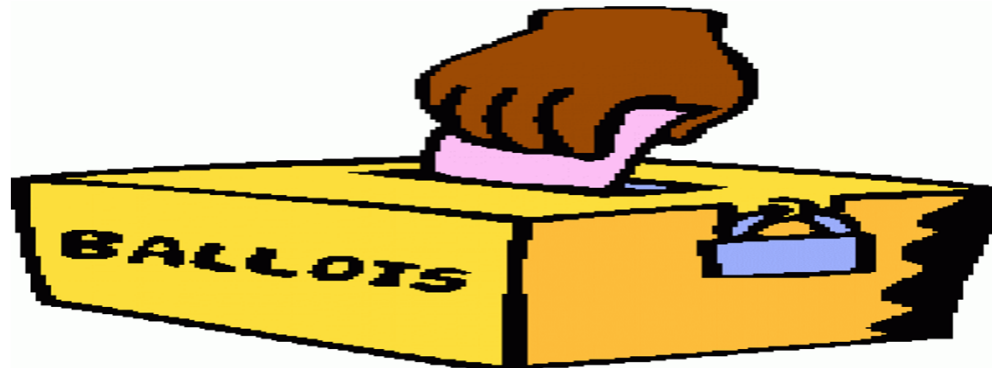
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Proposition 64

- Possession
 - Up to 28.5 grams of marijuana
 - Up to 8 grams of concentrated marijuana
 - May grow up to 6 plants in private home but may not grow in area that is unlocked or visible from public place



Federal Laws



- Controlled Substances Act
 - Marijuana listed as Schedule 1 drug under federal law for highest potential for abuse and no acceptable medical use
 - Marijuana still illegal under CSA
- Drug Free Workplace Act of 1988
 - Federal grantees: Must provide drug free workplace as condition of receiving grants
 - DFWA requires employer have a policy regarding consequences of illegal drug use at work
 - Employee must notify employer if convicted of criminal drug violation
- Department of Transportation Drug and Alcohol Testing Regulations
 - Marijuana use illegal for safety sensitive positions



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Federal Laws/Transportation Across State Lines

US Transportation Safety Administration

Enforces federal rules on commercial airlines

Illegal to transport marijuana on airplane

Leads to federal drug transportation charges



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Americans with Disabilities Act

- Employee has prescription that requires use of marijuana for treatment of a medical condition
- ADA does not protect users of marijuana for medical reasons
- *James v Costa Mesa* (9th Cir.) 700 F.3d 394
 - ADA expressly excludes individuals who currently engage in illegal use of drugs and marijuana remains illegal under federal CSA.



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Fair Employment Housing Act

- *Ross v Raging Wire Telecommunications* (Cal. S. Ct)
- Employee tested positive for medical marijuana – employer terminated employee for violating drug policy
 - S. Ct. examined California’s medical marijuana statute and the fair employment laws
 - No violation of FEHA based on employer’s refusal to accommodate use of marijuana to relieve back pain
 - S. Ct. stated FEHA does not require employers to accommodate use of illegal drugs



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Take away

- Include marijuana as a prohibited substance and revise drug and alcohol policy
- Notify all applicants and employees of drug and alcohol policy
- Train all supervisors on policy and symptoms of marijuana impairment
- Ensure practices to protect confidentiality of employee testing positive
- Consistent enforcement



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How Will JPAs Revise Coverage Docs?

- Employee Benefit Plans
- Workers' Compensation
- Liability Coverage
- Property Coverage



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Employee Benefits Coverages

- Currently, California law does not require coverage of medical marijuana. Health & Safety Code § 11362.785(d): “This article does not require a governmental, private, or any other health insurance provider or health care service plan to be liable for a claim for reimbursement for the medicinal use of cannabis.”
- If law changes, or is read to allow but not require coverage, may be preferable to have specific exclusion



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Workers' Compensation - Elsewhere

- In 2014, a New Mexico appellate court ordered a workers' compensation insurer to reimburse injured worker for medical marijuana. New Mexico Workers' Compensation Administrator included marijuana reimbursement in the healthcare provider fee schedule that took effect Jan. 1, 2016.
- Maine (*Bourgoin v. Twin Rivers Paper Co.* and *Noll v. Lepage Bakeries*, both administrative law judge decisions): covered
- New Jersey (*Watson v. 84 Lumber* – ALJ decision): covered



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California Workers Compensation

- *Pedro de Dios v. Carroll's Tire Warehouse* (ADJ528481; ADJ602408, 2013) WCAB held that workers' compensation insurer not obligated to reimburse cost of medical marijuana under Health and Safety Code exemption.
- Labor Code section 3600: Workers' compensation does not apply to worker injury caused by worker intoxication by alcohol or by unlawful use of controlled substance



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Workers' Compensation – Exclusions for Medical Marijuana?

- JPA has no option whether to cover medical—if state law requires, workers' compensation insurers (and self-insured employers) will pay
- Specific excess workers' compensation is not "workers' compensation insurance" under Labor Code, so such policies could exclude costs of medical marijuana. Review policies to make sure no gaps in coverage. Also, excess insurer might argue no coverage, regardless of exclusion, due to federal illegality.



Liability Coverage

- Some JPAs currently exclude coverage for employees who were under influence of alcohol or other drugs. Others could add similar exclusions.
- Does leaving employee undefended impair defense of employer?
- Need for products liability exclusion?
- Exposure for negligently allowing use on property? Exclusion? Special event coverage?



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Property Coverage

- Unlikely that most public entities would possess, but law enforcement, university research facilities, etc., might under some circumstances
- Many property coverages apply to outdoor plants
- *Tracy v. USAA*, 2012 WL 928186, 2012 U.S. Dist. LEXIS 35913 (Hawaii)
- *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821 (D. Colo. 2016)
- Add specific exclusion?



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