

MARIJUANA IN THE PUBLIC WORKPLACE



PHILIP A. TOOMEY

ROADMAP



- Current Legal Issues
- Current Medical Research
- Drug and Alcohol Policies
- Practical Considerations
- Enforcement and Reasonable Suspicion
- Questions

PERSPECTIVE 1- SUBSTANCE ABUSE- NIH/NIDA

- 2016- 12th graders: 35.6 percent had used marijuana during the year prior and 22.5 percent used in the past month; 6.0 percent said they used marijuana daily or near-daily basis
- Perceptions of risks associated with use have steadily declined, possibly related to increasing public debate about legalizing or loosening restrictions on marijuana for medicinal and recreational use
- Medical emergencies possibly related to marijuana use have also increased
- The Drug Abuse Warning Network (DAWN), a system for monitoring the health impact of drugs, estimated that in 2011, there were nearly 456,000 drug-related emergency department visits in which marijuana use was mentioned in the medical record (a 21% increase)

PERSPECTIVE 2 – SOCIAL MORES



- 3/31/92- Presidential candidate Bill Clinton at a New York candidates forum: “I’ve never broken a state law. But when I was in England I experimented with marijuana a time or two, and I didn’t like it. I didn’t inhale it, and never tried it again.”



PERSPECTIVE 3 - LEGALITY



- Is the cultivation, possession or use of small amounts of marijuana (not considering the level of influence or intoxication (i.e., DUI)) now legal?

- No
- Marijuana (and any substance containing THC) remains a Schedule 1 Controlled Substance (“...drugs with no currently accepted medical use and a high potential for abuse”)
- Schedule 1 drugs cannot be “prescribed”

CONTROLLING LAW

- The *Supremacy Clause* of the United States Constitution establishes that the Constitution and federal laws made pursuant to it constitute the supreme law of the land.
 - Therefore, state constitutions and state laws are subordinate to federal law.
 - A state may not override, or conflict with, federal criminal law- even by a vote of its citizens
- *Preemption*- Because of the Supremacy Clause, any state law that conflicts with a federal law is preempted. [Gibbons v. Ogden](#), 22 U.S. 1 (1824).
 - *Conflict preemption* arises when it is impossible to comply with both the state and federal regulations, or when the state law interposes an obstacle to the achievement of Congress's discernible objectives.

CURRENT FEDERAL GOVERNMENT POSITION

- **8/11/16**- DEA denied two petitions to reschedule marijuana under the Controlled Substances Act (CSA)
- **8/11/16**- DEA and HHS position- marijuana remains a S1CS because it does not meet the criteria for currently accepted medical use in treatment in the United States, there is a lack of accepted safety for its use under medical supervision, and it has a high potential for abuse
- **8/29/13**- *Cole Memo* DOJ policy of deferring criminal prosecution for cultivation, possession and use of small amounts; but it reaffirmed S1CS status.
- **1/14/18**- *Session Memorandum* Cole Memo (and similar deferral memos) rescinded.
- Summary- under current federal law, cultivation, possession or use of even small amounts of marijuana is illegal

PERSPECTIVE 4 – MEDICAL EVIDENCE



- January 2017- National Academies of Sciences Engineering Medicine
- There is ***conclusive or substantial evidence*** that oral cannabis or cannabinoids are effective:
 - For the treatment for certain chronic pain in adults
 - Antiemetics in the treatment of chemotherapy-induced nausea and vomiting
 - For improving patient-reported MS symptoms
- There is ***limited evidence of effectiveness*** for
 - Improving anxiety symptoms
 - Improving symptoms of posttraumatic stress disorder
- There is ***limited evidence of ineffectiveness*** for
 - Dementia
 - General chronic pain
 - Glaucoma
- Recommendation?
 - More research

PERSPECTIVE 5 – SYNTHETIC CANNABINOIDS



- **Synthetic THC**
 - Synthetic THC has a similar chemical structure to natural THC. It binds to the brain's CB1 receptors
 - FDA has approved three cannabinoid-based medications for medical use
 - Marinol
 - Syndros
 - Cesamet
 - User will test positive for THC (even though they are not using a S1CS)



PERSPECTIVE 6 - THEN WHAT HAPPENED ?



- As of 1/1/18
- 9 states "permit" recreational use
- 29 states "permit" medical use
- 15 states "permit" low TCH use, such as CBD oil
- 64% of people polled support "legalization"
- State laws permitting use, even if illegal under federal law



PERSPECTIVE 6 – STATE LAW CONFLICT

- At the most, a state can only say “California has no *state* law that prohibits cultivation, sale, use or possession of marijuana” (exception DIU, etc.)
- A state cannot “legalize” marijuana since
 - the US Supreme Court has held the CSA shows Congressional to preempt the area
 - States cannot make legal something the federal law declares illegal
- But... can state law be used in a manner that imposes an obstacle to the enforcement of federal law?
 - Drug free workplace requirements (i.e., DOT, DOD, Drug Free Workplace Act of 1988 (SAMHSA) for federal contractors or recipients of federal funds)
 - Can a state impose obligations on employers under state disability laws to force the employer to permit use of marijuana as a reasonable accommodation?
 - *Ross v. Ragingwire* (CA Supreme Court)- No
 - *Barbuto v. Advantage Sales and Marketing* (MA Supreme Court)- Yes
 - *Callaghan v. Darlington Fabrics Co* (RI trial court)- yes
 - *Noffsinger v. SSC Niantic Operating Company* (USDC CT)- yes

STEP 1 – WHAT AND WHY FOR POLICY

- Mandatory subject of bargaining
- Zero-tolerance (Drug Free) Policies
 - Scope- what is included or excluded
 - Reason- what is a drug free workplace required?
 - Nexus between off-duty use and on-duty test
 - Enforcement
 - A – B - C
 - Reasonable Suspicion / Random

- If policy is to permit
 - Nexus
 - Reliability and time sensitivity
 - Impact on policy related to alcohol and other drugs
 - Compliance
 - Safety sensitive
- Liability carrier / risk management pool sign-off

STEP 2 – KNOW YOUR STATE LAW



■ Probably **have** a duty to accommodate:

- Arizona
- Connecticut
- Delaware
- Illinois
- Maine
- Massachusetts*
- Minnesota
- Nevada
- New York
- Rhode Island

■ Probably ***do not have*** a duty to accommodate:

- Alaska
- California
- Colorado
- District of Columbia
- Georgia
- Hawaii
- Maryland
- Michigan
- Montana
- New Hampshire
- New Jersey
- New Mexico
- Oregon
- Vermont
- Washington

STEP 3 – REVIEW, EDIT & TRAIN



- Not a one-and-done project
- Individualized assessments
- Ability to train and detect prior to the accident or workplace incident



SUMMARY AND QUESTIONS



Philip Toomey

ptoomey@leechtishman.com

Direct Dial: (424) 218-3903

LEECHTISHMAN

841 Apollo Street
El Segundo, California 90245

Pittsburgh | Chicago | Los Angeles | New York | Sarasota | Wilmington