

SMOKE GETS IN YOUR EYES

Cutting Through the Haze of Changing
Marijuana Laws and Attitudes



With Jose Klein, Barran Liebman LLP

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Changing Norms and New Laws



Changing Norms



Americans' Views on Legalizing Marijuana

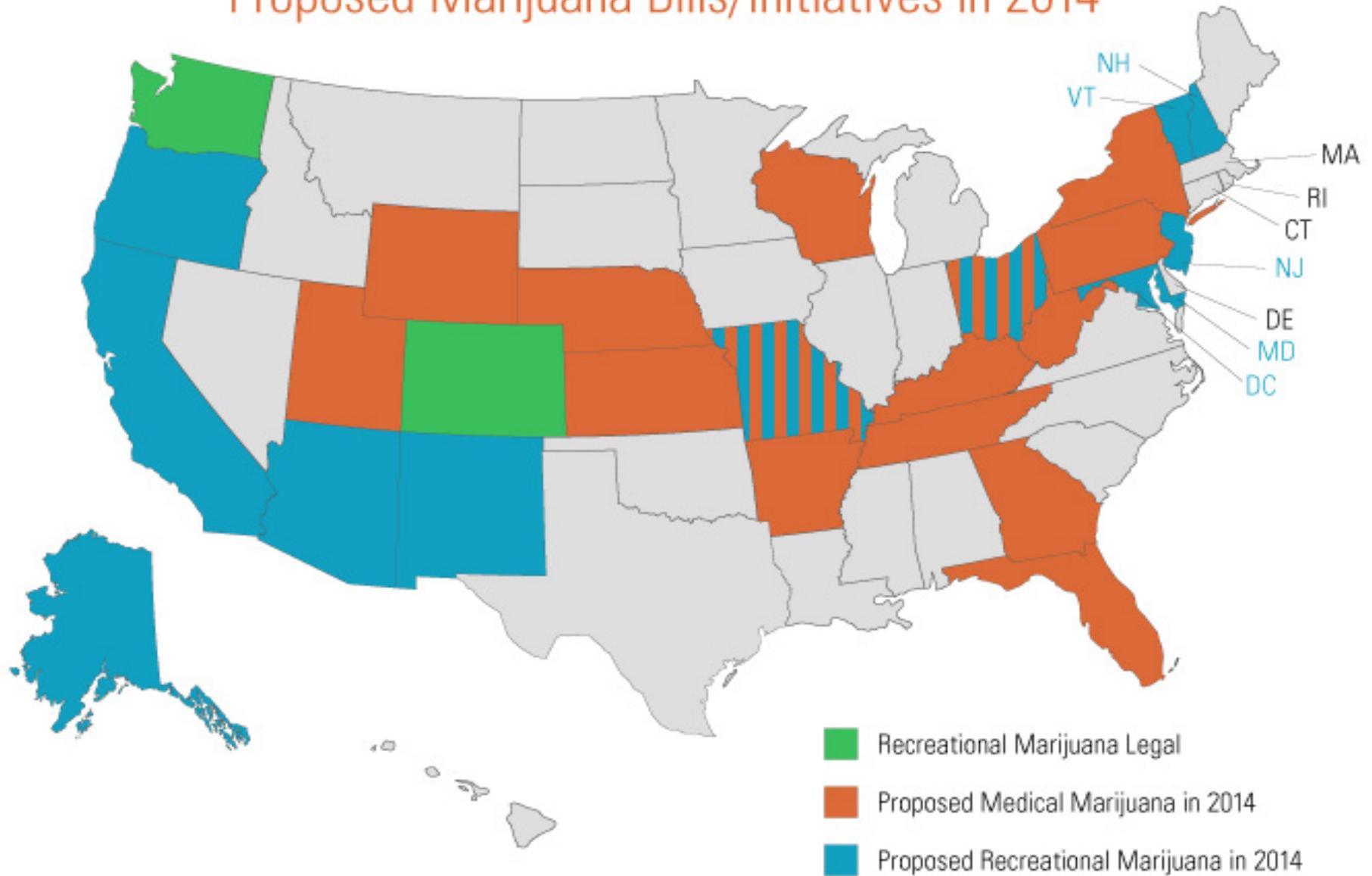
Do you think the use of marijuana should be made legal, or not?



GALLUP®

Available at: <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx>

Proposed Marijuana Bills/Initiatives in 2014



Current Laws Relating to Marijuana and the Workplace



Federal Controlled Substance Act



- Marijuana is a Schedule I Drug
 - High potential for abuse
 - No currently accepted medical use in treatment in the United States
 - A lack of accepted safe use of the drug under medical supervision
- Possession and use of marijuana is illegal under federal law
- Federal government will not interfere with state laws on use of marijuana

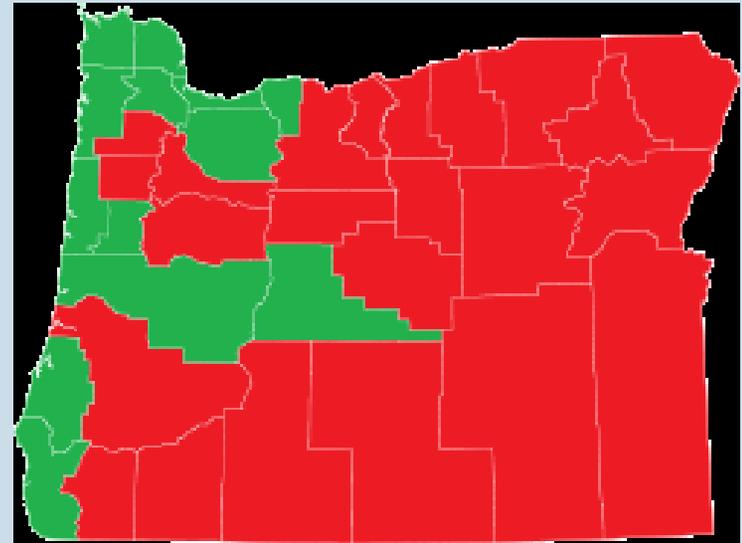
Other Federal Laws

- Drug Free Workplace Act
 - Applies to employers who receive federal funds
 - No requirement to drug test
- Occupational Safety and Health Act
 - General duty clause
- Omnibus Transportation Testing Act
 - Applies to trucking industry and generally to those industries involving commercial driver licenses
 - Requires drug testing and alcohol testing

Oregon Medical Marijuana Act (OMMA)

Medical Marijuana Act

- Maintained by Oregon Health Authority
- Health care professional “recommends” use
- Patient must register
- Decriminalizes possession of small quantities of marijuana
- Use must be limited to private place



Measure 67, passed in 1998.

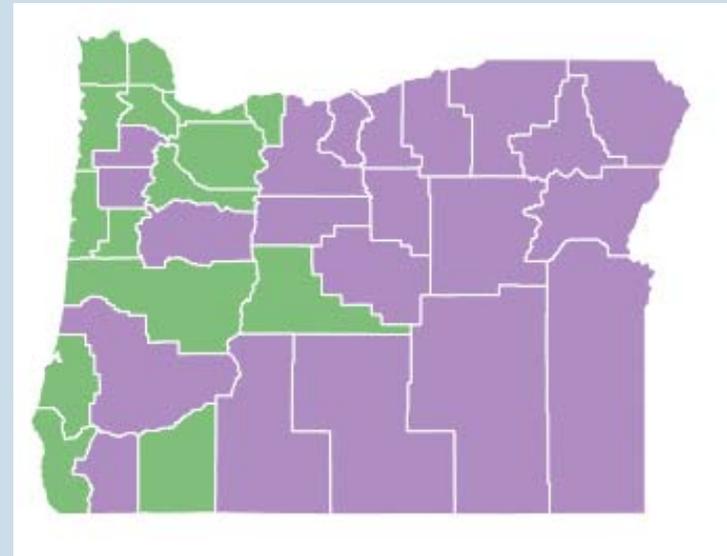
OMMA Continued



- **Dispensaries:**
 - Issues Licenses for marijuana dispensaries.
 - As of December 3, 2014, OHA received 593 applications to operate dispensaries.
 - ✦ 206 Approved
 - ✦ 292 Rejected
 - **Moratoria on Dispensaries:**
 - ✦ 146 Cities
 - ✦ 26 Counties

Oregon's Measure 91

- Allows possession, manufacture, sale of marijuana by/to adults, subject to state licensing, regulation and taxation
- Charges the Oregon Liquor Control Commission with regulation
- Allocates tax revenues to education, mental health and addiction services, and law enforcement



No Duty to Accommodate Medical Marijuana



- No duty to accommodate or to engage in the interactive process
 - *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Or. 159 (2010)
 - *Roe v. TeleTech Customer Care Mgmt. LLC*, 152 Wash. App. 388 (2009)
- Employer has obligation to accommodate the underlying condition if it is a disability

Signs of Changing Judicial Attitudes



- *Vialpando v. Ben's Auto. Servs.*, --- P.3d ---, (N.M. Ct. App., May 2014)
 - New Mexico Workers' Compensation Act authorizes reimbursement for medical marijuana
- *Coats v. Dish Network, L.L.C.*, 303 P.3d 147, appeal to Colorado supreme court pending
 - At issue is application of statute that prohibits employers from disciplining employees for lawful off-duty conduct of medical marijuana usage
- *Burger v. Unemployment Comp Bd. of Review*, 801 A.2d 487 (Pa. 2002)
 - Denial of unemployment benefits for employee terminated for medical marijuana reversed.

Changes in Federal Law



- 2014 “Cromnibus” Bill
 - Defunding federal prosecutions of medical marijuana programs legal under state law:
 - ✦ SEC. 538.
 - ✦ None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

2014 “Cromnibus” Bill Continued



- Defunding Washington D.C.’s recreational marijuana program:
 - ✦ SEC. 809.
 - ✦ (a) None of the Federal funds contained in this Act may be used to enact or carry out any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act (21 U.S.C. 801 et seq.) or any tetrahydrocannabinols derivative.
 - ✦ (b) None of the funds contained in this Act may be used to enact any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act (21 U.S.C. 801 et seq.) or any tetrahydrocannabinols derivative for recreational purposes.

Drug Testing Basics for Public Sector Employers



Constitutional Issues for Public Employers



- Drug testing is defined as a “search”
 - Under Fourth Amendment to US Constitution
 - Art. I section 9 of Oregon Constitution
- Warrantless searches must be justified
 - In case of suspicionless testing, must show “special need”
 - Usually this comes in form of substantial risk to public safety.
 - ✦ Can’t simply define the position as “Safety sensitive”
- Some religious observance may involve controlled substances

Drug Testing and Collective Bargaining



- Employer has the right to insist on a drug-free workplace.
- Employer has right to insist on reasonable suspicion testing (at least with respect to safety-sensitive positions)
- Procedures and methods relating to drug/ alcohol testing is a mandatory subject for bargaining.
 - FOPPO v. State of Oregon, 14 PECBR 693 (1993); Klamath County Fire District, 19 PECBR 533 (2001).

Key Aspects of Drug Testing Policies



Components of a Substance Abuse Policy

- Employer's policy statement
- Prohibited conduct and consequences for violations
- Basis for drug testing
- Drug testing procedures



Statement of Principle/ Policy Statement



- Employer Commitment to a drug-free workplace
 - Improved safety
 - Increased productivity
 - Decreased absenteeism
- Collective Bargaining Agreement
 - Union recognition of importance of drug-free workplace

Basis for Drug Testing

- Reasonable Suspicion

- Watch for signs of impairment
- Check with others about their observations
- Document observations immediately

- After accident testing

- Do it immediately; do not let the employee continue working



Prohibited Conduct & Consequences

- Identify the prohibited conduct:

- “Under the influence” while on the job
- Possession of any “controlled substance”
- Subverting the test
- Refusing to test

- Consequences:

- Decline offer of employment
- Discipline/termination
- Treatment
- Last chance agreement

- Definitions:

- “Under the influence” means having any detectable level of alcohol or illegal drugs in an employee’s body, or any noticeable or perceptible impairment of the employee’s mental or physical faculties
- “Controlled substance” means all controlled substances on the federal Controlled Substances Act, to include marijuana and designer drugs not approved for use by the U.S. Food and Drug Administration

Basis for Drug Testing

• Pre-employment

- Do not test prior to offer
- Testing should be post-offer, pre-placement
- Use a “conditional offer”
- Keep medical records confidential
 - ✦ Need-to-know basis
 - ✦ Separate from personnel file

• Random Testing

- Establish a protocol for randomly selecting employees
- Notify employees of selection protocol
- Don't let supervisors abuse the policy
- Selective enforcement will be evidence of pretext and retaliation

Employer Drug Testing Laws



- Oregon law:
 - ORS 438.010 to 438.510
 - Requires testing to be conducted by certified laboratory
 - Public employers: Pre-employment testing for safety-sensitive positions only
 - Breathalyzer tests as employment practice prohibited absent reasonable suspicion or employee consent.
ORS 659A.300

DOT Cutoff Levels



Initial test analyte	Initial test cutoff concentration	Confirmatory test analyte	Confirmatory test cutoff concentration
Marijuana metabolites	50 ng/mL	THCA ₁	15 ng/mL.
Cocaine metabolites	150 ng/mL	Benzoylcegonine	100 ng/mL.
Opiate metabolites			
Codeine/Morphine ₂	2000 ng/mL	Codeine	2000 ng/mL.
		Morphine	2000 ng/mL.
6-Acetylmorphine	10 ng/mL	6-Acetylmorphine	10 ng/mL.
Phencyclidine	25 ng/mL	Phencyclidine	25 ng/mL.
Amphetamines ₃			
AMP/MAMP ₄	500 ng/mL	Amphetamine	250 ng/mL.
		Methamphetamines ₅	250 ng/mL.
MDMA ₆	500 ng/mL	MDMA	250 ng/mL.
		MDA ₇	250 ng/mL.
		MDEA ₈	250 ng/mL.

The Science of Testing for Marijuana Use



Type of Specimens Collected

- Urine
 - Subject provides specimen into a cup
 - 45 ml of specimen
- Blood
 - Specimen collected by trained professional
- Other fluids
- Hair



Laboratory Testing: Procedures



- Chain of custody continues throughout the handling of the specimens
- Initial Testing
 - Immunoassay by automated chemistry analyzer
- Confirmation
 - Separate aliquot tested by a more specific and sensitive procedure

Laboratory Testing: Safeguards

- Initially positive, but confirms negative:
 - Reported as negative
 - Initially positive, and confirms positive:
 - Reported as positive
 - “Not consistent with human urine”
- Medical Review Officer
 - Determine if there is a medical reason (prescription) for the reported result
 - Not necessary for marijuana

Positive Test for Marijuana: Urine Specimen

- Detected as its carboxylic acid metabolite = THCA
- Confirmed positive
 - Usage within 4 hours to 3 days
 - Up to several weeks for a heavy user
- Cannot establish impairment
 - The psychoactive effects of marijuana and hashish do not correlate with urinary metabolite levels obtained by any method.
- Test may contain evidence of use long after effects have dissipated

Positive Result for Marijuana: Blood Specimen



- Initial test screens for the parent drug (THC), not the metabolite. Confirmation is for THC, 11-Hydroxy-THC and 11-nor-9-carboxy-THC (THCA). Both THC and 11-Hydroxy THC are psychoactive. THCA is inactive.
- Only detectable within 3-4 hours after use
- Further study needed to establish limits for blood and oral fluid testing for impairment

Behavioral Indications of Marijuana Use

• Behavioral effects

- Euphoria;
- Relaxation, drowsiness, sedation;
- Disorientation, mood changes, inability to focus;
- Altered time and distance perception;
- Appetite stimulant;
- Dry mouth; or
- Green or brown coating on tongue

• Duration of effects

- Effects reach peak within 10-30 minutes after use;
- Effects generally continue for 2-3 hours;
- Typical user feels “normal” within 3-6 hours after use;
- Impairment may continue long after feeling “normal”

Impact of New Laws and Changing Attitudes on Old Policies



Challenges Facing Employers



- Safety violations
 - OSHA general duty clause
 - Tort claims – negligent supervision
- Productivity standards and QA
- Recruitment
- Public Image
- Potential legal challenges to punishing off-duty conduct
 - ORS 659A.315 – unlawful to require employee to refrain from using tobacco products during nonworking hours

OSHA General Duty Clause



- Each employer --

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this Act.

Negligent Hiring and Retention



- Employee causes injury to another
- Employer knew, or should have known, that employee was unfit in a way that caused the injury
- Employer was negligent in the hiring or retention of employee
- Employer can be liable even for acts outside the course and scope of employment

Avoiding Negligent Hiring Claims



- Hire responsibly
 - Obtain reliable background information
 - ✦ Formal background checks
 - ✦ Employer references
 - ✦ Criminal record checks
 - ✦ Check educational credentials and licensure
 - Interview to fill in the blanks
 - Clarify any inconsistencies
 - ✦ Different names used in prior application for employment
 - ✦ Learn the reason for gaps in employment history
 - Consider substance abuse testing

Avoiding Negligent Retention Claims



- Introduce proper policies
 - Safety
 - Drug and alcohol use
- Train employees
- Enforce policies even-handedly
- Drug/alcohol test where appropriate
 - Safety sensitive positions
 - Positions through which employee could harm another person

Arbitrator Handling of Marijuana



- City of Portland and Portland Police Association, December 2012 (Michelstetter)
 - Police officer suffering from PTSD and work-related injuries uses marijuana for self-medication and to wean himself off of vicodin.
 - Termination reduced to 90-day suspension.
- City of Oakland Park, 133 LA 929 (Wood, 2014)
 - Reversal of termination for off-duty marijuana use of Florida fire-fighter.
- Monterey County, 123 LA 677 (Wren, 2010)
 - Employer found .6 grams of marijuana in employee's work desk while employee was on leave. Employee had medical marijuana card; termination reversed.
- County of Solano, 129 LA 1703 (Staudohar, 2011)
 - Deputy probation officer admitted to off-duty use of marijuana; juveniles reported seeing employee purchase marijuana; termination reversed. Employee reinstated without back-pay after completion of drug treatment.

Arbitrator Handling of Marijuana Cont.



- BASF Catalysts, 130 LA 1124 (Hoffman, 2012)
 - While at the workplace employee found with a joint on his person and less than an ounce in his car. Termination reversed. Mitigating factor was employee's forthrightness re prior intoxication at work. Thirty day suspension.
- Dakota County, 131 LA 1776 (Jacobs, 2013)
 - County had just cause to discharge probation officer whose husband was growing, selling and using marijuana. Employee claimed ignorance re husband's activity, despite that she had 8.5 pounds of marijuana in her bedroom dresser.

Responding to the Challenges



- Options for employers:
 - Implement/maintain zero tolerance policy
 - Maintain current policies
 - Develop different sets of policies relative to job duties and safety concerns
 - Modify policies to only prohibit being under the influence while at work or representing the employer
 - ✦ Document signs of impairment
 - ✦ Observations made by regular supervisor

Impairment Testing



- There are a number of valid psychomotor tests that reliably measure impulsivity, sensation-seeking, and self-control.

Thank You!



Jose Klein
Barran Liebman LLP
jklein@barran.com
503-276-2199

BARRAN LIEBMAN_{LLP}

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Employment | Labor | Benefits | Compliance
www.barran.com | 503.228.0500