



ARIZONA AFFIRMATIVE ACTION ASSOCIATION

May 17, 2011

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THE ARIZONA MEDICAL MARIJUANA ACT



Federal Law (Pre-emption?)

- Controlled Substances Act
 - Sch. 1 Controlled Substance
 - Illegal to Grow, Distribute, Possess
 - Doctors Can't Prescribe
 - CSA Trumps State Law Regarding MMJ.
Gonzales v. Raich,
545 U.S. 1 (2005)



DOJ *Policy*

- May 2, 2011 Letter Dennis Burke,
U.S. Attorney, District of Arizona





DOJ *Policy*

➤ 10.19.09 – DOJ Memo

- “committed to the enforcement of [CSA] in all States.”
- MJ “is a dangerous drug, and the illegal distribution & sale ... is a serious crime....”
- DOJ committed to “efficient and rational use of its limited investigative and prosecutorial resources.”
- Core DOJ Priorities



DOJ *Policy (cont'd)*

“As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”

DOJ *Policy (cont'd)*



- Doesn't Legalize Marijuana
- Doesn't Forbid Prosecution
- Doesn't Let States Run Wild
- Doesn't Provide a Defense



Department of Transportation
(DOT) Pre-emption for Safety

DOT

SENSITIVE POSITIONS



States with Medical Marijuana Laws

- Alaska
- Arizona
- California
- Colorado
- Delaware (last week)
- Hawaii
- Maine
- Maryland
- Michigan
- Montana
- New Jersey
- New Mexico
- Nevada
- Oregon
- Rhode Island
- Vermont
- Washington



Medical Marijuana

- Passed by slim 50.13% to 49.87 margin
- Radically changes criminal penalties for possession for cardholders
- Has employment protections
- Department of Health Services is currently issuing cards
- Applications for dispensaries in June 2011

Medical Marijuana

- No right to possession, use or impairment at work
- Reasonable accommodation required
 - how to treat prescription drugs that may cause impairment





Medical Marijuana

- No discrimination against cardholders
- No action based on positive test unless the patient used, possessed or was impaired at work or during hours of employment
- Not considered to be impaired solely because of positive test if metabolites in insufficient concentration to cause impairment
- Exception: If an employer will lose a federal monetary or licensing-related benefit

Overview



- Legalizes marijuana for medicinal purposes
 - Permits a qualifying patient with a debilitating medical condition to obtain marijuana from a medical marijuana dispensary and use it to treat and alleviate the condition
- Impact on employers across industries



Key AMMA Definitions

- “Cardholder”
 - Qualifying patient, designated caregiver, or nonprofit medical marijuana dispensary agent who has been issued and possesses a valid registry identification card
- “Registry Identification Card”
 - Document issued by the DHS identifying a person as a registered qualifying patient, registered designated caregiver, or a registered nonprofit medical marijuana dispensary agent



Workplace Implications

- No employer may be penalized or denied any benefit under state law for employing a registered qualifying patient or a registered designated caregiver
- Prohibits employers from discriminating in:
 - Hiring
 - Discharging
 - Imposing employment conditions
 - Otherwise penalizing
- Because of:
 - A person's status as a cardholder
 - A registered qualifying patient's positive drug test for marijuana components or metabolites



Workplace Implications

- The AMMA includes an exception for employers that would lose a monetary or licensing related benefit under federal law or regulations.
- Examples
 - Those employing drivers who hold commercial driver licenses
 - Those employing workers in other federally regulated industries (e.g., air travel or nuclear power)
- Critical to review pertinent funding, contracts and licensing materials and confer with legal counsel

Recommendations




- Maintain policies regarding drug-free workplace that expressly prohibit the use or possession of marijuana at work.
- Specify that no employee may be under the influence of any controlled substance, including marijuana, that may interfere with the employee's duties or pose a danger to the employee or others.

Recommendations



- Employers may take adverse action against an employee who is impaired at work.
- Modify policies to state employer will not discriminate against an employee based on the person's status as a card holder

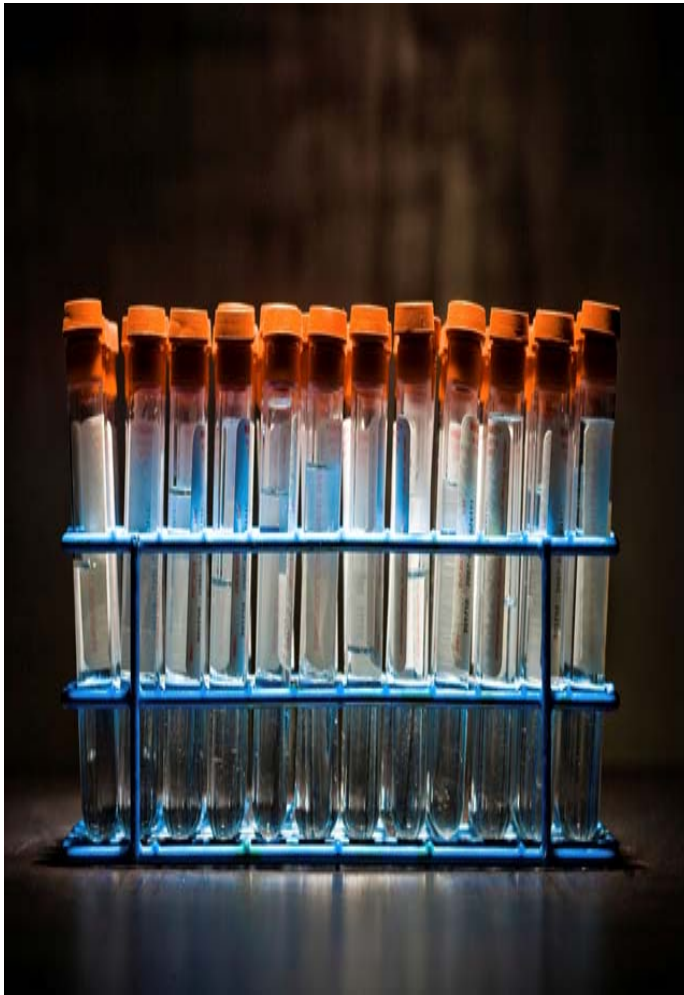


The Drug Testing of Employees Act H.B. 2541

April 29, 2011

The new law allows employers to refuse to place medical marijuana users in safety-sensitive jobs, and allows them to discipline individuals when there is a good faith belief that the employee was impaired by or improperly possessed marijuana while at work or during work hours. Nonetheless, the new law does not strip away the continuing general duty to reasonably accommodate and not discriminate against medical marijuana users.

Drug Testing of Employees Act



- Passed by Legislature on April 19, 2011
- Signed by Governor on April 29, 2011
- Expands safe harbor provisions of the Drug Testing of Employees Act



Drug Testing of Employees Act

- Allows an employer to take disciplinary action against an employee based on its good faith belief of the following:
 - an employee used or possessed any drug while on the employer's premises or during hours of employment; or
 - an employee was impaired while working while on the employer's premises or during hours of employment.



Good Faith Suspicion

- Outlines criteria that can serve as the basis of *good faith*, which includes the following:
- observed conduct, behavior or appearance;
- information reported by a person believed to be reliable, including a report by a person who witnessed the use or possession of drugs or drug paraphernalia at work;
- written, electronic, or verbal statements;
- lawful video surveillance;
- records of government agencies, law enforcement agencies or courts;
- results of a test for the use of alcohol or drugs; or
- other information reasonably believed to be reliable or accurate.

Safety-Sensitive Job Accommodation Restrictions

Specifies that an employer's options for safety-sensitive jobs includes reassigning the employee to another position or placing the employee on paid or unpaid leave.





Impairment

Symptoms that a prospective employee or employee while working may be under the influence of drugs or alcohol, including diminished capacity for: speech, walking, standing, physical dexterity, agility, coordination, actions, movement; as well as an employee's demeanor, appearance, clothing, body odor, irrational or unusual behavior, negligence or carelessness in operating equipment, machinery or production or manufacturing processes, disregard for the safety of the employee or others, involvement in an accident that results in serious damage to equipment, machinery or property, disruption of a production or manufacturing process, any injury to the employee or others or other symptoms causing a reasonable suspicion of the use of drugs or alcohol.



Safety-Sensitive Position

- Any job reasonably designated by an employer as a safety-sensitive position or any job that includes tasks or duties that the employer in good faith believes could affect the safety or health of the employee performing the task or others, including any of the following:
 - Operating a motor vehicle, other vehicle, equipment, machinery or power tools.
 - Repairing, maintaining or monitoring the performance or operation of any equipment, machinery or manufacturing process, the malfunction or disruption of which could result in injury or property damage.
 - Performing duties in the residential or commercial premises of a customer or vendor.
 - Preparing or handling food or medicine.
 - Working in any occupation regulated under Arizona Revised Statutes Title 32 (generally medical, engineering, pharmacy, security).

“Current use of any drug”



- Current use of any drug means drug use that has occurred recently enough to justify an employer's reasonable belief that involvement with drugs is ongoing. Current use of any drug is not limited to any specific time frame and depends on the facts of each individual case.



The Safe Harbors

- When disciplining an employee due to the good faith suspicion of impairment or possession, the following employer actions are immune from litigation:
- implementing, monitoring or measures to assess, supervise or control the job performance of the employee;
- reassignment of an employee to a different position or job duties; or
- suspension or termination of employment.

PRACTICAL CONSIDERATIONS

- Drug Free Workplace Act is not a total shield based on the language of the AMMA
- MRO's - how will they report test results with THC metabolites with a valid card
- Post/Offer - pre-employment testing will garner the most attention for employment disputes (applicants versus current employees)



PRACTICAL CONSIDERATIONS

(Cont'd)

- Safety Sensitive positions
- Debates regarding evidence of impairment
- Post Accident/Reasonable Suspicion/ Random Testing





Marijuana-e-verify

Additionally, H.B. 2541 modifies A.R.S. section 36-2807, which addresses verification systems under AMMA. The Arizona Department of Health Services is going to establish a verification system for certain persons, including employers, to verify registry identification cards. Based on H.B. 2541, an employer may use the verification system only to verify a registry identification card that is provided to the employer by a current employee or by an applicant who has received a conditional offer of employment.

Recommendations

- Employers should take maximum advantage of the safe harbor provisions of the Arizona drug testing laws by adopting written drug testing policies that clearly articulate when, how, and why employees are subject to drug testing as well as its approach to the use of medical marijuana.

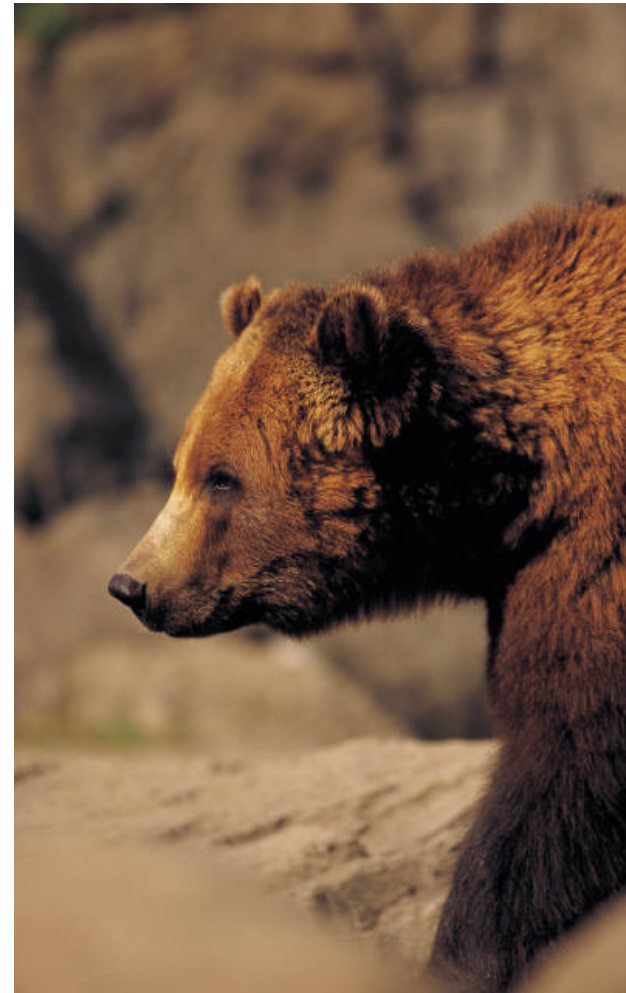




Littler's "Case of the Year"

Barely Believable

- The setting: a private Bear Park in West Glacier, Montana
- Customers drive through the park in their cars, observing the bears
- Generally open from about Memorial Day to Labor Day
- Closed to the public in “the shoulder season,” because the bears are in hibernation.





Barely Believable

- Park operates on a cash only basis
- Several individuals (including a one Mr. Hopkins) perform tasks at the park, such as maintenance, and feeding the bears.
- They are paid cash at the end of the day
- Most of the tasks are completed between Memorial Day and Labor Day, but there is still some activity during the “shoulder season.”

Barely Believable



- November 1, 2007, Kilpatrick (owner) asks Hopkins to cut some firewood at the park and deliver it to the home of another. Hopkins does so, and is paid in cash. Kilpatrick asks Hopkins to come back the next day.
- November 2, 2007: Hopkins wakes up, smokes some pot, and then goes to the park.



Barely Believable

- Kilpatrick asks Hopkins to lift some boards on a gate, so that the gate does not freeze to the ground. Hopkins completes this task.
- Hopkins then finds Kilpatrick asleep on a couch.
- He loads bear food into a bucket, and proceeds to a grizzly bear pen.

Barely Believable

- Hopkins enters the bear pen, and is attacked by a Grizzly bear
- He is severely injured
- He crawls under an electrified fence and escapes
- Kilpatrick eventually finds Hopkins, calls for help, and Hopkins is airlifted by a medical helicopter to a hospital
- After he is released from the hospital, Kilpatrick gives Hopkins \$300 in cash





Unbearable

- Hopkins files a claim for workers' compensation benefits
- Kilpatrick's response:
 - I was asleep and I didn't ask him to feed the bears!
 - He was stoned!
 - He was a volunteer, not an employee!
 - The \$300 was not wages, but rather, this was given to determine whether Hopkins was dealing marijuana.
 - In fact, he was dealing marijuana, because he provided me with one ounce of "skunk bud," which I threw away.



The Judge Concludes:

- Kirkpatrick's testimony that he gave Hopkins money on multiple occasions, 'out of my heart' coincidentally while Hopkins was performing 'favors' for Kilpatrick at the bear park is not credible ...
- There is a team of art used to describe the regular exchange of money for favors - it is called 'employment.'”



But What About the Pot?

- The Judge's conclusions:
 - Hopkins' use of marijuana to kick off a day of working around grizzly bears was ill-advised to say the least and mind-bogglingly stupid to say the most."
 - "However, this was not a major contributing cause of the grizzly bear attack"
 - It is not as if this attack occurred when Hopkins inexplicably wandered into the grizzly pen while searching for the nearest White Castle. .. When it comes to attacking humans, grizzlies are equal



Result

- Hopkins is an employee and entitled to workers' compensation benefits



Lessons Learned

- Keep your workers' compensation insurance current!
- Don't let your supervisors sleep on the job!
- The diversity of the U.S. economy is its greatest strength!
- P.S.: The case is currently on appeal to the Montana Supreme Court

A decorative graphic on the left side of the slide, consisting of two overlapping semi-circles. The top one is a dark teal color, and the bottom one is a lighter teal color.

And One More Lesson Learned

**DON'T
FEED
THE
BEARS!**





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THANK YOU!

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