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**NAVIGATING MARIJUANA AND THE WORKPLACE:  
AN EMPLOYMENT LAW PERSPECTIVE**

PRESENTED BY  
**SEAN RAY,**  
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**CHARTING THE COURSE**

- Understand laws related to marijuana & the workplace
- Identify key components of a policy on drug use
- Learn how to detect/document impairment
- Explore the drug testing process
- Discuss the changing norms, new challenges and options for employers



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**LAWS RELATED TO  
MARIJUANA & THE WORKPLACE**

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## FEDERAL CONTROLLED SUBSTANCE ACT

- Controlled Substance Act (21 U.S.C. §801)
  - Regulates the manufacture, possession, use and distribution of substances
  - Classification by Schedule
  - Schedule I drug: High potential for abuse **and** no accepted medical use
- Cannabis is a Scheduled I Substance
  - Possession and use of marijuana is illegal under federal law
  - Federal law trumps state laws “legalizing” marijuana
- Reclassification of cannabis?
  - DEA (with consultation of says no, but...)
- Current federal government will not interfere with state laws on use of marijuana

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## OREGON'S RECREATIONAL MARIJUANA

- In November 2014, Measure 91 passed by a 56% to 44% majority
  - Allows the possession, manufacture, sale of marijuana by/to adults subject to OLCC licensing, regulation, and taxation
- Limits
  - Must be over 21 years of age to use/possess marijuana
  - Possession in public up to 1 oz. of useable marijuana
  - Possession in home (outside of public view) up to 8 oz. and 4 plants, per household
  - Use not permitted in a public place (e.g. bar, restaurant, port-a-potty)
- OLCC website ([www.oregon.gov/olcc/marijuana](http://www.oregon.gov/olcc/marijuana))
  - Q: Can I lose my job for using marijuana?
    - A: Passage of measure 91 does not impact employment law in Oregon.
  - Q: What if an employer requires drug testing?
    - A: Measure 91 does not affect existing employment law. Employers who require drug testing can continue to do so.
- Timelines
  - July 1, 2015, personal use and possession permitted
  - October 1, 2015, medical dispensaries selling recreational marijuana
  - January 4, 2016, OLCC regulations implemented
  - 3rd quarter 2016, dispensaries open for business

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## WASHINGTON'S RECREATIONAL MARIJUANA

- Initiative 502 (passed by a 56% to 44% majority)
  - Washington's LCB has authority to license and regulate marijuana production, distribution, and possession
  - Establishes DUII intoxication standard at 5 ng THC/ml of blood
- Limits
  - Must be over 21 years of age to use/possess marijuana
  - Possession of up to 1 oz. of useable marijuana
  - Public use and display of marijuana is not permitted
  - Home cultivation is not permitted

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## OCCUPATIONAL HEALTH AND SAFETY ACT

- The General Duty Clause
  - Employers must furnish a place free from recognized hazards that cause or are likely to cause death or serious physical harm
- Injury from impaired workers is a recognized hazard
- Failure to implement measures to protect employees is a violation
- WAC 298-800-11025:
  - “You must ... Prohibit employees under the influence of alcohol or narcotics from the worksite.”
- OAR 437-001-0760:
  - “Anyone whose ability to work safely is impaired by alcohol, drugs, or medication must not be allowed on the job while in that condition.”

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## OSHA’S ANTI-RETALIATION RULE

- Employers must have a reasonable procedure to report work injuries
  - A procedure is unreasonable if it would discourage an employee from reporting an injury
- Employers are prohibited from retaliating against workers who report injuries
- According to OSHA, a “blanket post-injury drug testing policies deter proper reporting,” leading to a citation
  - Post-accident testing is reasonable if there was a “reasonable possibility” that drugs were a contributing factor.
  - What does “reasonable possibility” mean?

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## WORKERS’ COMPENSATION

- On the job injury to employee who is under the influence
- Is it a compensable injury?
- Yes, unless...  
The major contributing cause, by a preponderance of the evidence, was the workers’ consumption of alcohol or the unlawful consumption of any controlled substance  
ORS 656.005(7)(b)(C)



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## AMERICANS WITH DISABILITIES ACT

- Employer has obligation to accommodate the underlying condition if it is a disability
- Addition is a disability
- ADA excludes *active* illegal drug users from protection
  - Federal CSA
- No duty to accommodate or to engage in the interactive process
  - *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Or. 159, 230 P.3d 518 (2010)



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## COMMON LAW TORT LIABILITY

- Negligent retention
  - Failure to remove an impaired employee
  - Prior incidents of impairment without adequate corrective measures
- Post-accident testing is focus



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## DEPARTMENT OF TRANSPORTATION



- US DOT regulations
  - Applies to employees with CDLs
- Drug and alcohol testing for:
  - Pre-employment
  - Random
  - Post-accident
  - Reasonable suspicion
  - Return to duty
  - Follow up testing
- Good guide for drug testing procedures

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## LABOR LAWS ON DRUG TESTING

- Duty to Bargain
  - Drug testing is germane to the working environment
  - Drug testing is a mandatory subject of bargaining
    - *Johnson-Bateman Co.*, 295 NLRB 180 (1989)
- *Weingarten* rights
  - Order to submit to drug and alcohol test as part of investigation into employee conduct triggers right to *Weingarten* representation
  - Refusal without benefit of representation cannot be used against employee
    - *Ralphs Grocery Company*, 361 NLRB No. 6 (2014)

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## CONSTITUTIONAL ISSUES

- Drug testing is defined as a “search”
  - Fourth Amendment to US Constitution
  - Article I, Section 9 of Oregon Constitution
- Warrantless searches must be justified
  - Suspicionless testing, must show “special need”
    - Balancing test between employee’s liberty and privacy and employer’s interest
  - Safety-sensitive positions
    - Random testing permitted
    - “Momentary lapse of attention could result in disastrous consequences”



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## KEY COMPONENTS TO SUBSTANCE ABUSE POLICY

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## NO ONE SIZE FITS ALL

- Each workplace presents its own challenges
- So, employers must first identify the goal
  - Ensure workplace safety
  - Comply with state and federal laws
  - Maintain required certifications
  - Performance, productivity and efficiency
  - Avoid third-party liability

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## COMPONENTS OF A SUBSTANCE ABUSE POLICY

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



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## EMPLOYER'S POLICY STATEMENT



- Commitment to a drug-free workplace
  - Improved safety
  - Increased productivity
  - Decreased absenteeism
- Required for compliance with the Drug Free Workplace Act

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## 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 (unreasonable delay)
- Consequences:
  - Decline offer of employment
  - Discipline/termination
  - Treatment
  - Last chance agreement
- Definitions:
  - “Under the influence” means having any detectable level of alcohol or controlled substance 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 listed on the federal Controlled Substances Act, to include marijuana and drugs not approved for use by the U.S. Food and Drug Administration, regardless of the form of the drug

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## DRUG TESTING PROCEDURES

- Who is required to test?
- Where will testing occur?
- What constitutes a positive result?
- What specimens will be collected?
- What are the bases for testing?



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## COMMON BASIS FOR DRUG TESTING

- Pre-employment
  - Use a “conditional offer”
- Random Testing
  - Establish a protocol for randomly selecting employees
- Reasonable Suspicion
  - Watch for signs of impairment
- Post-accident testing
  - Do it immediately; do not let the employee continue working
  - Watch out for OSHA’s final rule to Improve Tracking of Workplace Injuries and Illness – delayed to November 1

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## HOW TO DETECT & DOCUMENT IMPAIRMENT

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## IMPAIRMENT FROM MARIJUANA

- Users do not know when they are impaired
- Stanford Pilot study
  - Moderate dose of marijuana; one joint
  - Used aircraft simulator
  - 7/9 participants were still impaired 24 hours later
  - Only 1 participant was aware of marijuana's effect 24 hours later



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## IMPAIRMENT = REASONABLE SUSPICION

- “Reasonable suspicion” is defined in relation to searches under the Fourth Amendment
- Application to the private sector is a bit of a misnomer (alternative is “reasonable grounds”)
- No violation if you make a non-discriminatory mistake
- Have a protocol to identify and document
  - More than a hunch or an unparticularized suspicion
  - Based on specific and articulable facts
  - May consider all information available

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### 3 STEPS TO ESTABLISH REASONABLE SUSPICION

1. Make the observation
  - Individually list signs of impairment
  - Get a second opinion
  - Have a baseline knowledge of the employee
2. Document the observation
  - Include all observations
    - Paraphernalia
    - Glass pipes
  - Get witness statements
  - Take notes
  - Use your smart phone
3. Interview the employee
  - Note time at the beginning
  - Continue to make and document observations
  - Explain observations, without stating judgment
  - State observations that are consistent with someone under the influence
  - Provide the opportunity for the employee to share his side of the story
  - Ask "how long have we been talking?" note the answer

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### SIGNS OF IMPAIRMENT: MARIJUANA

- Emotional
  - Euphoria
  - Mood changes
  - Drowsiness/Sedation
- Mental
  - Disorientation/Inability to focus
  - Altered time and distance perception
- Physical
  - Slurred speech
  - Eyes, reddening
  - Dry mouth
  - Green or brown tongue
- Source: DOT, NHTSA – DRE manual
- Signs of impairment:
  - Redding of Conjunctiva
  - Eyelid tremors
  - Dilated pupils
- Eye-cross test?
  - "Most people with cannabis in their system can't [cross their eyes]."
    - Michael Iwai, Drug Recognition Expert, Oregon State Police

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### FACT OF FICTION?

- A positive drug test, from a urine specimen, can establish on-the-job impairment?
- The psychoactive effects of do not correlate with urinary metabolite levels obtained by any method

FICTION



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## DRUG TESTING MECHANICS

- Urine specimen
  - Collect 45 ml
  - Detects the metabolite; not the parent drug
- Blood/oral fluid specimen
  - Blood - Phlebotomists draw
  - Detects the parent drug; not the metabolite
- Washington and Colorado have set 5 ng/ML as *per se* impairment
- Chain of custody
  - Different from a medical test
- Initial Testing
  - Immunoassay by automated chemistry analyzer
  - Established "cut off level"
- Confirmation
  - Separate aliquot tested by a more specific and sensitive procedure
- Medical Review Officer
  - Determine if there is a medical reason (prescription) for the reported result

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## FACT OF FICTION?

- If I smoke out on Saturday night, I will pass a drug test on Monday morning?
- The detection window for drug use varies based on the specimen collected

IT DEPENDS



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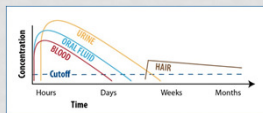
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## DETECTION WINDOWS



- Urine:
  - 2-5 hours after use, and continues for 24-72 hours
  - Chronic use may be 30 days
- Blood:
  - Within minutes after use, and continues for 3-4 hours
  - Chronic use may be 12 hours
- Oral Fluid:
  - Within minutes after use, and continues for 24 hours

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## CHANGING NORMS, CHALLENGES, AND OPTIONS

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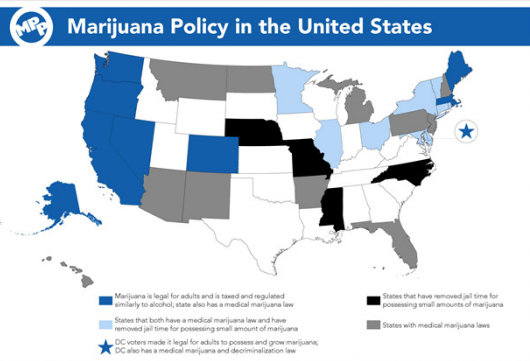
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## SIGNS OF CHANGING JUDICIAL ATTITUDES?

- *Vialpando v. Ben's Auto. Servs.*, 331 P.3d 975 (N.M. Court of Appeals, 2014)
  - Employee suffered on-the-job injury
  - Employee received approval for use of medical marijuana for the injury
  - Employee claimed medical marijuana was medical treatment under workers' compensation
  - Under NM law, employer must provide "reasonable and necessary health care services"
  - Court held medical marijuana was a "reasonable and necessary health care service" under workers' compensation

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## CHALLENGES FACING EMPLOYERS

- Recruitment and retention
  - Required pre-employment/random testing
- Workplace accidents
  - More workplace injuries = More workers' compensation claims
  - OR-OSHA violations
- Productivity and quality standards
  - Decrease productivity
  - Increased mistakes
- Public image/reputation
  - Hear about ABC's firing of the on-air reporter in Eugene?

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## RESPONDING TO THE CHALLENGES

### Strict Policy

- Covered employees
  - All employees
- Prohibited conduct
  - Off duty use of illegal drugs, including marijuana
- Consequences
  - No second chances
- Basis for testing
  - Pre-employment
  - Random
  - Others
- Specimen collected
  - Urine for pre-employment and random
  - Oral fluids for others

### Tolerant Policy

- Covered employees
  - Safety sensitive positions only
- Prohibited conduct
  - Only impairment on the job
- Consequences
  - Last Chance Agreements
- Basis for testing
  - Reasonable grounds
  - Post-accident
- Specimen collected
  - Oral fluid only

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## KEY TAKE AWAY POINTS

- The laws and your policies are not the same
- There is no one size fits all policy on substance abuse
- Be strategic about specimens collected
- Republish your drug and alcohol policy to the employees, regardless of state law

**Educate employees on your workplace rules**

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THANK YOU!



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