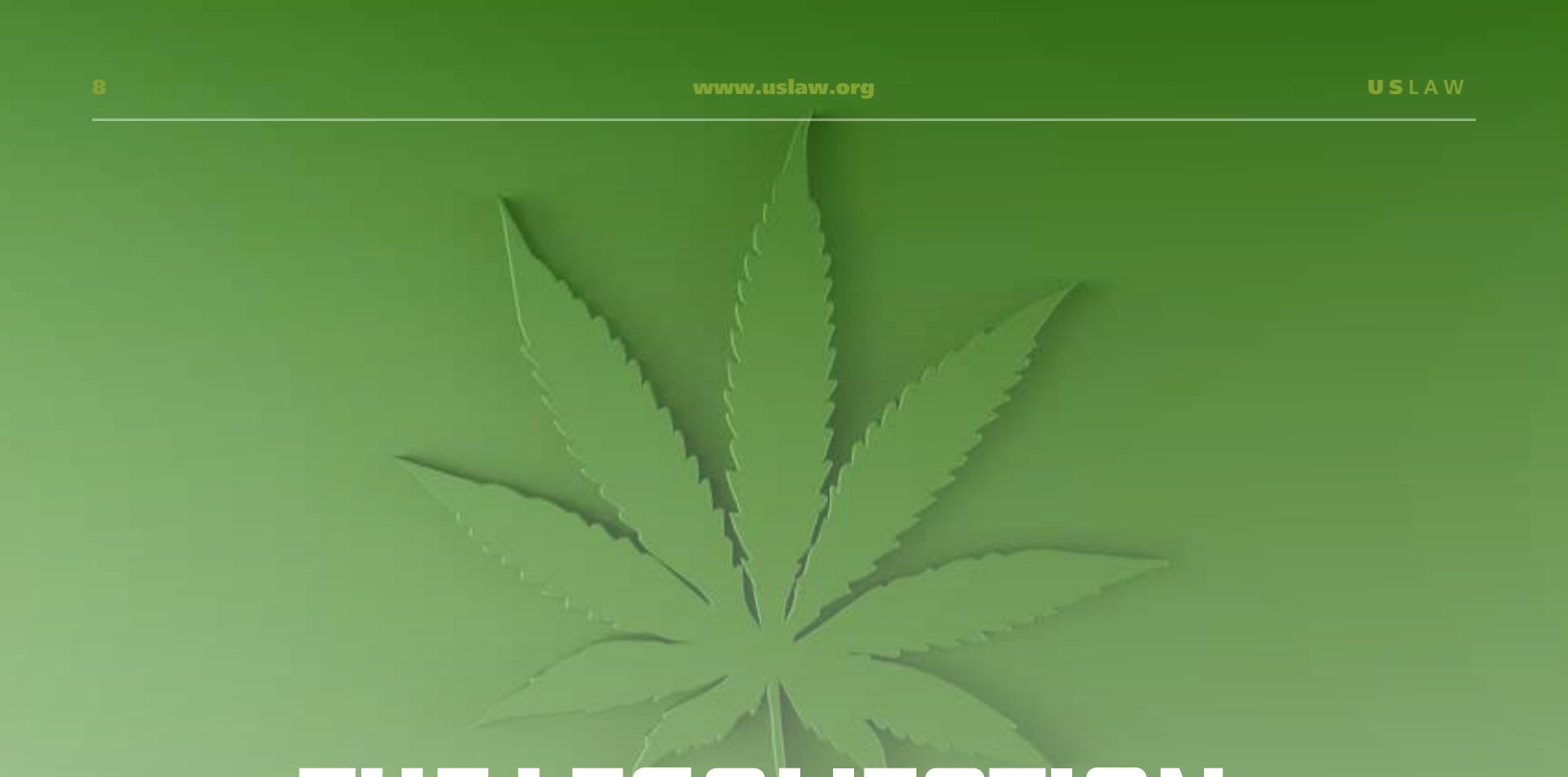

THE LEGALIZATION OF CANNABIS

and its Impact on the Workplace

By Michael D. Wong SmithAmundsen

The legalization of cannabis is not a fad that will be going quietly into the night anytime soon. If anything the fact that the legal sales of cannabis in Illinois during the first twelve (12) days reached $20 million and that the legal cannabis industry in 2018 was a $10.4 billion industry, demonstrates that it is here to stay. Currently there are 11 states that legally allow the sale of recreational cannabis, including Illinois, California, Colorado, Alaska, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont and Washington, and 33 states that have approved medical marijuana programs. In Washington D.C., possession of up to two ounces of recreational cannabis is legal (but sales remain illegal).

What makes these issues so difficult for employers though is that each of those states have their own laws and provisions, which create headaches and confusion for multi-state employers. To add to the headache, despite cannabis being a Schedule I illegal drug under federal law, the federal legislature did legalize a type of cannabis, hemp.

Hemp was legalized in the 2018 Farm Bill and is defined as the marijuana/cannabis plant with less than 0.3% concentration of delta-9 tetrahydrocannabinol (THC). This means that now employers are struggling with understanding not only the legality of cannabis, but also hemp and legal products such as CBD oils, balms, flower and derivatives, which are now technically legal under both state and federal law.

What does all of this mean for employers though? Does it mean the death knell of drug testing? Quite simply, no, employers will still be able to have drug testing policies and drug test employees. However, it has brought into focus (and scrutiny) drug testing policies and practices, as well as disability accommodations. Just like law enforcement, who are now having to re-evaluate their drug tests and behavioral tests in order to determine when a driver is impaired, employers are also faced with the same issue identifying impairment, rather than use.

In understanding this new world, it should go without stating, that employers MUST understand the "new" cannabis drug. The cannabis being sold at dispensaries currently is much different than the street drug of the '70s and even '90s and much like with texting comes with what may seem at times to be a different language. The cannabis plant itself that used to be referred to as "bud" or "weed" is now called "flower." In addition to "flower" with the prevalence of research and money, many different products have been derived from "flower" that can be used by an individual, including edibles (hard candy, baked goods, sodas, teas, tinctures). Another derivative is concentrates that can be used with vape pens and are called "shatter," "wax," "oil," "butter," and "sugar." The terms used to describe cannabis are not the only difference. The strength of the products has greatly increased. In the '70s, street-level cannabis had a THC potency of approximately 1%. In the '90s, the THC potency of street-level cannabis increased to approximately 3-4%. Currently, dispensaries are selling cannabis flower that has THC potencies higher than 35% and concentrates that are as high as 98% THC.

DIFFERENT STATE LAWS

Next, is understanding the different state laws where your facilities are located. Each state has implemented different laws regarding cannabis. Even though some may be similar, most if not all, have significant differences. For example, the states on the west coast, which generally were the first states to legalize, primarily have laws that do not include any employment protections. However, the states on the east coast, which legalized later on, primarily have laws that do include employment protections. As such, in many of the older legal cases, which were issued by courts on the west coast, the courts found in favor of the employer. In many of the newer legal decisions, issued by courts on the east coast, the findings have shifted to being in favor of employees. In recent cases, courts in Arizona, Massachusetts, Connecticut and New Jersey, have held that a positive drug test alone is not sufficient to terminate an employee or revoke a job offer – especially if it is in relations to an individual who is a registered medical marijuana user.

UNDERSTANDING POLICIES AND PROCEDURES

After you understand the drug and the applicable state law, the next step is reviewing and understanding your drug testing policies and procedures. In doing such, you must evaluate when and how you are drug testing (i.e. pre-employment, reasonable suspicion, post-accident/incident, return to work and follow-up). For example, with reasonable suspicion, are you using a reasonable suspicion checklist and have you trained your managers and supervisor in how to identify drug and alcohol impairment. Similarly, do you understand the drug testing procedures? For example, it used to be standard that if an employee tested positive for a drug, but had a legitimate prescription, that the Medical Review Officer (MRO) would report it as a negative test. Now, especially for employees in safety sensitive positions, your MRO should qualify a positive drug test (for any drug, not just cannabis) where the individual has a prescription or is a legal registered user, by stating that the employee may need to provide a note from his or her treating physician clearing him or her to work or identifying any work restrictions.

Likewise, do you know what your testing levels are and are they in line with the state laws? In many of the states where recreational cannabis has been legalized, much like with alcohol having a blood alcohol content "BAC" level, the state has set a level for cannabis which indicates when an individual is impaired for purposes of driving while impaired (DWI) charges. This is helpful for employers as it provides a state-determined testing level for when an individual is impaired. For example, in Illinois the legislature amended the vehicle code to provide that an individual with 10 nanograms or more of THC in his or her bodily fluid is impaired by cannabis. For Illinois employers, this means that if they set their testing level at 10 nanograms or more and a person tests positive, then they can use that as a good faith basis of impairment while at work. However, there are still questions on how to address drug testing that is done when the individual is not at work, such as pre-employment drug testing.

After reviewing how you are drug testing, the next step is evaluating what you do with the results of a drug test. Before taking any action, again it is important to understand the applicable state law and case law. For example, in Illinois the recreational cannabis law and medical cannabis law provide that before an employer terminates an employee, the employee must be provided an opportunity to explain. While this is a simple step, it is important step that employers in Illinois must now take. Additionally, before disciplining an employee or applicant who has tested positive, it is important to review whether a medical condition was involved. Court cases out of Massachusetts, Connecticut and New Jersey have all held that employers should engage in the interactive process before taking steps to discipline, terminate or revoke a job offer to a candidate who has tested positive for marijuana, but advised that they use it due to a serious medical condition or disability.

EMPLOYEE EDUCATION

It is also vitally important to educate all employees on the company policy, as well as the reason for the company's policy. Education is especially important if the company is prohibiting employees from possessing it on company property. There is no better example of this than the city attorney for the city of Seattle. When Washington legalized cannabis in 2014, the city attorney of Seattle, who was a proponent of cannabis, was one of those in line to purchase cannabis on the first day. After purchasing cannabis, the city attorney walked right back into his office with the cannabis still in his possession. By returning to work with the cannabis in his possession, even though he had not used it, it was a violation of the city's drug free workplace policy, a policy that he had probably reviewed and approved. As such, it is important to recognize that if an attorney who likely wrote the drug free workplace policy forgot about the policy, it will likely be easy for employees without a legal background to forget. Thus, it is vitally important for employers to remind employees of the policies that are in place and compliance with such.

Finally, it should be recognized that being a federal contractor or receiving federal funding based upon a requirement that you have a drug free workplace policy, does not automatically exempt you from updating your policies and procedures. Many federal contracts or funding simply require that the employer implement a drug free workplace policy in compliance with the Federal Drug Free Workplace Act. The problem with the Federal Drug Free Workplace Act is that it does not have any requirements regarding drug testing. In fact, a court in Connecticut recently held that compliance with the Federal Drug Free Workplace Act simply requires employers to have a drug free workplace policy and does not require drug testing or prohibit federal contractors from employing someone who uses illegal drugs or medical marijuana outside of the workplace.

While many questions still remain and medicinal usage requires a different analysis from recreational use (for now), employers can still take steps to limit their exposure and to maintain a safe and healthy workplace through reasonable drug testing policies. That being said, employers must continue to carefully examine their own unique industry, risks and risk tolerances, together with their geographic footprint and applicant pool. In doing so, it is strongly recommended that employers engage competent legal counsel, who is well versed in labor and employment law, as well as cannabis laws, to assist you in the reviewing process and in addressing difficult situations before they lead to costly and time-consuming litigation.

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