

# Update on Marijuana in the EMS Workplace

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## How did we get to where we are?

- ▶ United States first began regulating Marijuana in 1937, with the Marijuana Tax Act because Congress believed a taxing act was less likely to be struck down by the United States Supreme Court.
- ▶ Since 1970, Congress had classified Marijuana as Schedule 1 drug (with no medical benefits), along with heroin & LSD.
  - ▶ States began decriminalization efforts in the 1970's.
- ▶ In 2018, Missouri voters approved a ballot measure for Medical Marijuana in the November election (1 of 3 on the ballot).
  - ▶ No protections for medical marijuana users.



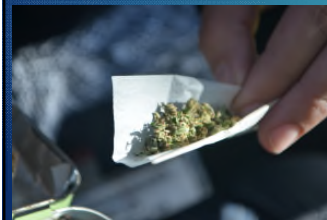
## Topics to Cover

- ▶ An Overview of Amendment 3 & Medical Marijuana
  - ▶ 2018 Amendment & Changes with Amendment 3
  - ▶ Interaction of the Federal Drug Free Workplace Act
- ▶ New protections for Medical Marijuana under Amendment 3
  - ▶ Qualifying Conditions & Possible Effects
- ▶ How Courts are Looking at Marijuana
  - ▶ City of Buffalo, New York
- ▶ Developing Methods for Testing Marijuana
- ▶ Questions



## Recreational Marijuana comes to Missouri with Amendment 3 (November 2022)

- ▶ Missouri voters adopted Amendment 3, which established a **Right to Access Medical Marijuana** and a licensing program for recreational marijuana dispensaries. This Amendment became Article XIV.
  - ▶ Employers are prohibited from discriminating against medical marijuana users in some cases.
    - ▶ Any employee may still be terminated for working under the influence of marijuana. **Art. XIV, Sec 1.7.**
  - ▶ Recreational use becomes legal for adults over 21 years of age.
  - ▶ Automatic expungement of past marijuana crimes from court records.



## Mo. Const. Article XIV, Section 1.7(1)(d)

Nothing in this section permits a person to: Bring a claim against any employer, former employer, or prospective employer for wrongful discharge, discrimination, or any similar cause of action or remedy, based on the employer, former employer, or prospective employer prohibiting the employee, former employee, or prospective employee from **being under the influence of marijuana while at work** or disciplining the employee or former employee, up to and including termination from employment, **for working or attempting to work while under the influence of marijuana.**



### The Drug Free Workplace Act of 1988

... a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance **is prohibited in the person's workplace...**

41 U.S.C. § 8103(a)(1)(A)

## Summary (so far...)

- ▶ Article XIV allows recreational marijuana to adults over 21, but gives no protections against employment actions (**employer may still prohibit recreational use** – and may discipline recreational users for positive drug tests)
- ▶ Article XIV allows employers to **prohibit any marijuana use in the workplace** (consistent with the federal Drug Free Workplace Act of 1988)
- ▶ The new provision now protects medical marijuana users, as long as they do not use marijuana or possess it while at work
- ▶ Employers may not use a positive drug test result to discriminate against medical marijuana users **unless they used, possessed or were under the influence of marijuana while at work**

## New Protections for Medical Users

### Mo. Const. Article XIV, Section 1.7(15)

Unless a failure to do so would cause an employer to lose a monetary or licensing-related benefit under federal law, an employer may not discriminate against a person in hiring, termination or any term or condition of employment or otherwise penalize a person, if the discrimination is based upon either of the following:

- The person's status as a qualifying patient or primary caregiver who has a valid identification card, including the person's legal use of a lawful marijuana product off the employer's premises during nonworking hours, **unless the person was under the influence of medical marijuana on the premises of the place of employment or during the hours of employment;** or
- A positive drug test for marijuana components or metabolites of a person who has a valid qualifying patient identification card, **unless the person used, possessed, or was under the influence of medical marijuana on the premises of the place of employment or during the hours of employment.**

## Possible exemption for Certain Employers

**Nothing in this subdivision shall apply** to an employee in a position in which legal use of a lawful marijuana product affects in any manner a person's ability to perform job-related employment responsibilities or the safety of others, or conflicts with a bona fide occupational qualification that is reasonably related to the person's employment.



Does off-duty marijuana **affect** an employee's ability to perform job-related responsibilities?

OR

Does off-duty marijuana use **affect** the safety of others?



## Qualifying Medical Conditions

- ▶ Cancer, Epilepsy, Glaucoma
- ▶ Migraines, Muscle spasms, PTSD
- ▶ Other terminal or chronic conditions...

## The Effects of Medical Marijuana

- ▶ Increased heart rate
- ▶ Dizziness
- ▶ Impaired concentration and memory
- ▶ Slower reaction times
- ▶ Increased risk of heart attack or stroke
- ▶ Increased appetite



## A case settlement...

### Martin v. City of Buffalo (Dec. 2022)

- ▶ Martin, an Air Force veteran and EMT for the Buffalo Fire Department for 12 years, was suspended following a positive test for marijuana
- ▶ Martin was reinstated, maintaining his rank, seniority and salary, with \$242,000 in back pay.

- ▶ New York Public Law 3369:

**Medical marijuana users are protected from any discrimination based upon their use of medical marijuana.**

**The law includes a prohibition of on-the-job use is permitted.**

- ▶ New York law does not have the "safety of others" exemption in Missouri's Article XIV.

## Buffalo's failed arguments...

- ▶ ... our children are caught in attics during fires, desperately needing the timely, un-slowed responses of physically fit and qualified firefighters...
- ▶ ... our parents, suffering cardiac arrest, desperately need the quick and un-slowed ministrations of department members...

## Safety-Sensitive Positions

- ▶ Those positions with job responsibilities that put the safety of themselves or others at risk

- ▶ ... even a momentary lapse of attention can have disastrous consequences... *Skinner v. Ry. Labor Executives' Assoc.*, 489 US 602 (1989)
- ▶ ...operation, loading/unloading, or repairing of a commercial motor vehicle... 49 CFR § 382.107
- ▶ ... one whose employment poses a threat to the safety and welfare of others... *Landon v. Northwest Airlines, Inc.*, 72 F.3d 620 (8<sup>th</sup> Cir. 1995)

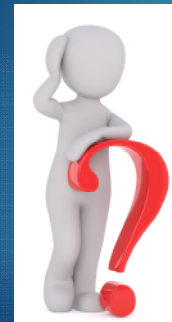


The State of Nevada has specifically exempted EMT's & Firefighters from protections against termination for positive drug tests.

Oklahoma has included "direct patient care" among the duties that are exempted as "safety-sensitive."

Arkansas allows employers to define themselves as "safety-sensitive." *Prinsen et al. v. Damtar Paper Co, LLC*, Case No. 4:22-cv-4076 (US Dist. Ct. Ark. W.D. 2023)

## How will off-the-job use of medical marijuana **affect** an employee?



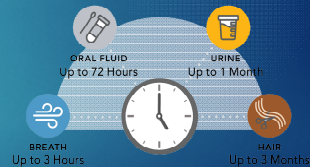
- ▶ **Review & update job descriptions** to ensure they reference the "safety-sensitive" nature of EMS
- ▶ **Be clear in policies** that on-the-job use or possession of marijuana will not be tolerated by anyone
- ▶ **Develop an appropriate testing program** for suspected under the influence cases (impairment & fluid)
- ▶ **Outline procedures for a failed drug test** (you may differentiate between medical and recreational users – some accommodations)

## Field Sobriety Tests & THC Levels

Unreliable indicators of Marijuana Intoxication

- ▶ Like many states, Missouri's law does not have a "per se" level of intoxication for Marijuana (like we have for alcohol – 0.08 BAC)
- ▶ Research confirms marijuana negatively impacts brain areas that control movement, balance, coordination, memory & judgment
- ▶ According to the National Institute of Justice, biofluids are not a reliable indicator of marijuana intoxication
- ▶ **Hound Labs** and **ElectraTect, Inc.** are both developing breath-based THC detection tests.

### HOW LONG IS CANNABIS DETECTED IN THE BODY?



*Testing methods are still in development and have not passed the scientific rigor that may be required by courts.*

## Getting beyond biofluid testing...



- ▶ **Gaize** uses a virtual reality headset with AI technology to examine eye movements, pupil size and other indicators over a six minute test.
- ▶ Impairment Science, Inc. launched their **Druid app** in 2018 to create an app for four game-like tests to test reaction time and cognitive/motor impairment

## 2-Step Approach for Determining Intoxication

- ▶ **Establish impairment** through a standardized form of testing
  - ▶ Slurred speech, bloodshot eyes, physical dexterity, agility, coordination, demeanor, unusual behavior, carelessness
  - ▶ Reasonable Suspicion Observation Report (New Jersey)
- ▶ **Verify presence of cannabis** through a medical testing of breath, blood or urine
  - ▶ Remember, a biofluid test alone will not be sufficient to take action against a medical marijuana user

## Reviewing the Hiring Process

- ▶ **Article XIV, Section 2 provides for automatic expungement of some past marijuana related offenses** (including some felonies)
  - ▶ While automatic, it will take some time for the courts to process all of those records (and some may be missed)
  - ▶ The new law allows employees to refuse to acknowledge the past crime, and so you should avoid asking potential employees about such offenses
- ▶ **Review your applications and interview questions to ensure that you are not asking about past marijuana-related crimes.**



## Moving Forward...

- ▶ All employers may still **prohibit recreational** marijuana use, both on & off duty
- ▶ Employers, including EMS, should consider allowing medical marijuana users to use off-duty
- ▶ **Review policies** for proper testing procedures (define what happens with a positive test)
- ▶ Ensure applications/interviews do not inquire about expunged activity

## Questions?

EMS Legal Services has a model marijuana policy available to share.

Please email us to obtain a copy of these slides and/or the model policy.



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