



Medical Marijuana and The ADA

Hashing Out How States and Employers Cope with Medical Marijuana Use

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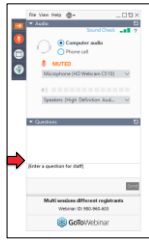
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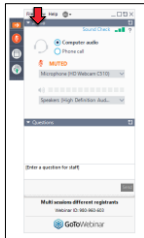
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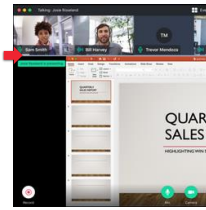
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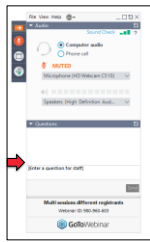


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TransCen, Inc.

- Improving the lives of people with disabilities through meaningful work and community inclusion

• Mid-Atlantic ADA Center, a project of TransCen, Inc.

- Funded by National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR), Administration for Community Living, U.S. Department of Health and Human Services



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Medical Marijuana and the ADA

HASHING OUT HOW STATES AND EMPLOYERS COPE WITH MEDICAL MARIJUANA USE

Presented by: Monika Taliaferro

Disclaimer

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Topics

- Key Terms
- History
 - Medicinal Cannabis
 - Cannabis and the ADA
- Medicinal Cannabis in the Workplace
 - ADA
 - State Laws

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Objectives (1-3)

- Explain the history behind the “illegal drug provision” of the ADA.
- Interpret the ADA’s definition of “illegal drug” to support the argument that marijuana is an illegal drug under the ADA.
- Interpret the ADA’s definition of “illegal drug” to support the argument that marijuana is not an illegal drug under the ADA.

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Objectives (4-7)

- Discuss court cases that have addressed medical marijuana use and the ADA.
- Identify reasonable accommodations for applicants and employees who are users of medical marijuana.
- Describe examples of states that protect users of medical marijuana in the workplace.
- Differentiate between when reasonable accommodations are required for medical cannabis

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Terms to Know



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Marijuana / Cannabis

"Marijuana, which can also be called weed, pot, dope, or cannabis, is the dried flowers and leaves of the cannabis plant. It contains mind-altering (e.g., psychoactive) compounds like tetrahydrocannabinol, or **THC**, as well as other active compounds like cannabidiol, or **CBD**, that are not mind-altering." – Centers for Disease Control and Prevention (CDC)

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Possible Uses

- Alzheimer's disease
- Appetite loss
- Cancer
- Crohn's disease
- Eating disorders such as anorexia
- Epilepsy
- Glaucoma
- Mental health conditions like schizophrenia and posttraumatic stress disorder (PTSD)
- Multiple sclerosis
- Muscle spasms
- Nausea
- Pain
- Wasting syndrome (cachexia)
- Inflammation

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CBD

- Anxiety
- Depression
- Inflammation
- Inflammatory bowel disease
- Migraines
- Nausea
- Pain
- Psychosis or mental disorders
- Seizures

Medical Benefits

THC

- Anxiety
- Glaucoma
- Insomnia
- Low appetite
- Muscle spasticity
- Nausea
- Pain

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How is Medical Cannabis Used?

- Smoke/vaporize
- Mixed with food (AKA edibles)
- Brewed as tea
- Oil
- Tinctures
- Capsules
- Lotions

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Health Risks

- Addiction
 - 1 in 10 become addicted. If under the age of 18, 1 in 6 will become addicted.
- Heavy users of marijuana can have short-term problems with attention, memory, and learning, which can affect relationships and mood.
- Smoking can damage lung tissue.
- Frequent use in high doses may lead to disorientation, anxiety and paranoia.
- Temporary psychosis (hallucinations or paranoia)

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Cannabis History



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- Cannabis was grown in the US by settlers for hemp.
- Cannabis was used grown by settlers for hemp and used for medicinal purposes.

Before the 1900's

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- Mexicans began to legally immigrate to USA.
- Cannabis smoking becomes popular.
- "Marijuana" becomes negative connotation associated with immigrants.
- States began to regulate marijuana to control immigrants.

Mexican Revolution of 1910

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- "They are a very undesirable lot and the habit is growing in California very fast; the fear is now that it is not being confined to the Hindoos alone but that they are initiating our whites into this habit."
- Henry J. Finger, California's State Board of Pharmacy 1911

- *Mexican, Crazyed by Marihuana, Runs Amuck With Butcher Knife.* The New York Times 1925

The Stigma

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1930

- Harry Anslinger appointed First Director of Federal Bureau of Narcotics



"MARIJUANA
IS THE MOST VIOLENCE-
CAUSING DRUG
IN THE HISTORY
OF MANKIND"
- HARRY J. ANSLINGER -

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- "I wish I could show you what a small marihuana cigaret can do to one of our degenerate Spanish-speaking residents. That's why our problem is so great; the greatest percentage of our population is composed of Spanish-speaking persons, most of who are low mentally, because of social and racial conditions."
- Letter from journalist read by Anslinger during hearings

Anslinger Hearing Testimony

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Regulations

- 1937
 - The first federal law regulating Marijuana use and possession is the Marijuana Tax Act of 1937. (MTA). Taxed Marijuana sales and cultivation.
- 1969
 - MTA held unconstitutional.
- 1970
 - Control Substance Act - marijuana listed as a Schedule I drug which means it has no medical use and high potential for abuse

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“We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.”

– John Erlichman, a senior advisor to Nixon

Erlichman Quote

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- How did these early depictions impact how we view cannabis today?
- What are your perceptions about cannabis? Where do your perceptions stem from?
- Do you believe there are medicinal benefits of cannabis?

Discussion

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Cannabis and the ADA



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ADA and Drug Use History

- The draft of the ADA did not have an illegal drug use provision
- Under Rehabilitation Act of 1973, drug users received benefits by claiming that drug use is a disability
- Congress wanted to avoid providing protections under the ADA for illegal drug users

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ADA “illegal drug” exemption

“For purposes of this chapter, the term “individual with a disability” does not include an individual who is currently engaging in the *illegal use of drugs*, when the covered entity acts on the basis of such use.”

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ADA Illegal Drug Definition

“The term “illegal use of drugs” means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.”

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"The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term **does not include the use of a drug taken under supervision by a licensed health care professional**, or other uses authorized by the Controlled Substances Act or other provisions of Federal law."

Employee Interpretation

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"The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is **unlawful under the Controlled Substances Act**. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or **other** uses authorized by the Controlled Substances Act or **other** provisions of Federal law."

Employer Interpretation

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ADA Does not Protect Marijuana Users

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Cannabis approved Under Federal Law

- one cannabis-derived drug product:
 - Epidiolex (cannabidiol/CBD)
 - Approved by FDA to treat seizures.
 - Schedule V drug
 - Legal in all states.

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Synthetic Cannabis Approved Under Federal Law

- Three synthetic cannabis-related drug products :
 - Marinol (dronabinol/ THC) - approved as Schedule III drug to treat nausea associated with chemotherapy. May cause positive drug test.
 - Syndros (dronabinol/THC) - approved as Schedule II drug to treat nausea associated with chemotherapy.
 - Cesamet (nabilone) - approved as Schedule II drug to treat nausea associated with chemotherapy and weight loss associated with AIDS.

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EEOC v. Pines of Clarkston

- Employee terminated after testing positive for marijuana.
- Employee admitted using marijuana to treat epilepsy in accordance with state law.
- Employer questioned employee about her disability and expressed concerns about employee being able to handle the stress of the job due to her epilepsy.

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Settlement

- Employer motioned for summary judgement
- Court denied the request holding that there was a genuine issue of fact as to whether the Employer terminated Employee because of her disability and not her marijuana use.
- The case settled for \$42,500.

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Cannabis and States

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State Approaches

- Protect medicinal use through Anti-discrimination laws
- Law explicitly states accommodation not required.
- Law explicitly requires accommodation
- Silent as to whether accommodation required

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States That Require an Accommodation

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Nevada

- The only state that explicitly requires an accommodation by law ...employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of cannabis if the employee holds a valid registry identification card, provided that such reasonable accommodation would not:
 - (1) pose a threat of harm or danger to persons or property;"
 - (2) impose an undue hardship on the employer;" or
 - (3) prohibit the employee from fulfilling any and all of his or her job responsibilities."

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States That Protect Medicinal Use

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States with Ant-Discrimination Laws

- Arizona
- Arkansas
- Connecticut
- Delaware
- District of Columbia* • Nevada
- Illinois
- Maine
- Minnesota
- New York
- Oklahoma
- Pennsylvania
- Rhode Island
- West Virginia

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District of Columbia

- Private Employers
 - May refuse to hire an employee who tests positive for marijuana (DC Code 32-931).
- District Government Employers
 - Positive marijuana test does not disqualify employee unless the employee works in safety sensitive position or if there is reasonable suspicion that the employee is under the influence.
 - Safety sensitive employee is permitted to take a second drug test.

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Rhode Island

"[a] qualifying patient cardholder who has in his or her possession a registry identification card shall not be . . . denied any right or privilege . . . for the medical use of marijuana."

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Rhode Island Court reasoning

- Employer's policy only prohibited drug use at work.
- Law required Employer to accommodate marijuana use outside of the workplace.
- Employer's burden is minimal – did not need to change policy, restructure change, modify shifts.
- It is not a violation of CSA to hire someone uses medical marijuana outside the workplace.

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Connecticut

"[U]nless required by federal law or required to obtain funding: ... (3) No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver under [the law]. Nothing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours."

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Court Reasoning

- Drug Free Workplace Act (DFWA) does not require drug testing.
- DFWA does not prevent hiring a person who uses illegal drugs outside the workplace.

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Drug Free Workplace Act

- publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the workplace and specifying the actions that will be taken against employees for violations of the prohibition;
- establishing a drug-free awareness program to inform employees about--
 - the dangers of drug abuse in the workplace;
 - policy of maintaining a drug-free workplace;
 - available drug counseling, rehabilitation, and employee assistance programs; and
 - the penalties that may be imposed on employees for drug abuse violations.

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Delaware

- 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:
 - a. The person's status as a cardholder; or
 - b. A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment.

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Pennsylvania

- No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana.
- Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment.
- This act shall in no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position.

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West Virginia Law

- No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical cannabis.
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- Nothing in this act shall require an employer to commit any act that would put the employer or any person acting on its behalf in violation of federal law.

W.Va. Code Ann. § 16A-15-4 (West)

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West Virginia

- Prohibits termination based on medicinal cannabis use
- Employers must publish written drug testing policy
- Not required to accommodate cannabis use at work
- Limits types of work an employee can perform while under the influence (more than three nanograms of active tetrahydrocannabinol per milliliter of blood in serum) of cannabis

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Maryland

- ...may not be subject to arrest, prosecution, or any civil or administrative penalty, including a civil penalty or disciplinary action by a professional licensing board, or be denied any right or privilege, for the medical use of or possession of medical cannabis.
- Employer may terminate employee who tests positive for marijuana.

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States Not Required to Accommodate

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Not Required to Accommodate In the Workplace

- Alaska
- California
- Colorado
- Florida
- Georgia
- Maine
- Massachusetts
- Michigan
- Missouri
- Montana
- New Hampshire
- New Jersey
- New Mexico
- Oregon
- Ohio
- Pennsylvania
- Rhode Island
- Vermont
- Washington
- West Virginia

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West Virginia Accommodation Law

- No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical cannabis.
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W.Va. Code Ann. § 16A-15-4 (West)

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BEST PRACTICES

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- Determine whether medicinal cannabis is legal under state law.
 - If the medical cannabis is illegal under state law?
 - An accommodation is likely not required.
 - If the medical cannabis is legal under state law?
 - Is there a law that prohibits termination for medicinal marijuana use?
 - Is there a law that requires the employer to accommodate medicinal use of the drug?

Analysis

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REASONABLE ACCOMMODATIONS



- Modify drug testing policy
- Permit offsite drug-use
- Adjusting shift times to avoid impairment.

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Disadvantages of Accommodation

- "Employees who tested positive for marijuana had 55% more industrial accidents, 85% more injuries and 75% greater absenteeism compared to those who tested negative, according to a study published by the National Institute on Drug Abuse."
 - LA Times

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UNDERSTAND DRUG TESTING

- Urine tests generally don't measure the amount of THC in a person's system
- Unable to tell when the person last used.
- Unable to tell whether the person is under the influence.



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- Develop written cannabis policy and provide notice to employees
- Treat cannabis like alcohol
- Avoid pre-employment testing for cannabis unless the position requires it (See Nevada)
- Provide accommodations for medicinal cannabis users
- Prohibit cannabis use at work
- Prohibit working under the influence

Best Practices

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Additional Information

- Stephen M. Scannell, Medical Marijuana and the ADA: Following the Path Blazed by State Courts to Extend Protection, 12 St. Louis U.J. Health L. & Pol'y (2019). Available at: [Saint Louis University School of Law](#)
- [National Conference of State Legislators](#)

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ADA National Network

- Ten regional centers provide guidance, training, and materials on the ADA
- **1-800-949-4232**
- ADAta.org



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Mid-Atlantic ADA Center

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