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***I See Heffalumps and Woozles:
Navigating Medical Marijuana In the Workplace –
Must an Injured Worker’s Use be Accommodated?***


PRESENTED BY:
TROY W. SLATEN, ESQ., PARTNER AT FLOYD SKEREN MANUKIAN LANGEVIN, LLP
DANIELLE HULTENIUS MOORE, ESQ., PARTNER AT FISHER & PHILLIPS, LLP.

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OVERVIEW

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OVERVIEW OF THE PRESENTATION

- California versus federal laws covering marijuana use;
- The impact of these laws on workplace policies in California;
- Trends regarding drug testing for marijuana in the workplace;
- Employer substance abuse policies;
- Employer best practices.

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QUESTIONS


Since marijuana is now legal in California:

- Should employers screen applicants for marijuana use?
- Can employers test current employees for marijuana use?
- Must employers accommodate the use of medical marijuana?
- Can employers conduct post-workplace accident drug testing, including screening for marijuana?

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A REVIEW OF FEDERAL AND CALIFORNIA LAWS ON MARIJUANA USE


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FEDERAL REGULATIONS

- The Controlled Substance Act (CSA) is the federal U.S. drug policy under which the manufacture, importation, possession, use and distribution of certain narcotics, stimulants, depressants, hallucinogens, anabolic steroids and other chemicals is regulated. The CSA was signed into law in 1970.
- The DEA implements the CSA and may prosecute violators of these laws at both the domestic and international level. Within the CSA there are five schedules (I-V) that are used to classify drugs based upon their abuse potential, medical applications, and safety. Schedule 1 is the highest classification.


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MARIJUANA AND THE CONTROLLED SUBSTANCE ACT

- Marijuana remains a "Schedule I" drug under the CSA. What does this mean? Such drugs "have high abuse potential, no medical use, and severe safety concerns; for example, narcotics such as Heroin, LSD, and cocaine."
- **BOTTOM LINE:** marijuana use is still illegal federally. However, that could change.

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CALIFORNIA MARIJUANA LAWS AND ROSS v. RAGING WIRE

- California Control, Regulate and Tax Adult Use of Marijuana Initiative (“Adult Use of Marijuana Act”-Proposition 64)-November 8, 2016.
- Compassionate Use Act (Proposition 215) – 1996;
- Ross v. Raging Wire Telecommunications, Inc. (2008) 42 Cal.4th 920.

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FEDERAL GOVERNMENT’S ENFORCEMENT APPROACH TO CALIFORNIA’S LAWS

- Even though marijuana remains illegal under federal law, the approach the federal government so far has been taking is to defer to states and their marijuana laws.
- CONSIDER: Will the Trump Administration continue with this approach?

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“ADULT USE OF MARIJUANA ACT” PROP 64

Key provisions in effect as of November 9, 2016


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**“ADULT USE OF MARIJUANA ACT”
KEY PROVISIONS**

- Adults may possess, process, transport, purchase, obtain or give away to adults age 21 or over up to one ounce (28.5 grams) of marijuana or up to 8 grams of concentrated cannabis.


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**“ADULT USE OF MARIJUANA ACT”
KEY PROVISIONS**

- Adults may possess, plant, cultivate, harvest, dry or process up to six living marijuana plants for recreational use.

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**“ADULT USE OF MARIJUANA ACT”
KEY PROVISIONS**

The Act shall not be construed or interpreted to:

- restrict the rights and obligations of public and private employers to maintain a drug and alcohol-free workplace;
- require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace;
- affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees; or
- prevent employers from complying with state or federal law (i.e. the “Controlled Substances Act”).

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COMPASSIONATE USE ACT OF 1996 PROP 215

Provides a person who uses marijuana for medical purposes on a physician's recommendation a defense to certain state criminal charges involving the drug, including possession. Therefore, marijuana is legal in California for medicinal purposes provided:

- Recommendation from licensed physician;
- Dispensary/Collective;
- Limited quantity.

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KEY DISABILITY RELATED STATUTES FOR EMPLOYERS TO CONSIDER

1. Fair Employment and Housing Act (FEHA)
2. Government Code section 12900 et seq.
3. Americans with Disabilities Act (ADA) 42 U.S.C. § 12101 et seq

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FEHA AND MEDICAL MARIJUANA

- FEHA: Does not require an accommodation for medical marijuana use;
- The *Compassionate Use Act* only protects from state criminal prosecution; The Act cannot circumvent legitimate business interests involving drugs that are banned under federal law.

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ROSS V. RAGINGWIRE TELECOMMUNICATIONS, INC.

- In 2008, the California Supreme Court upheld the right of an employer **not to hire** an applicant who tested positive for medical marijuana.
- The Court held employers could rely on federal law (the *Controlled Substances Act*) to enforce their workplace substance abuse policies prohibiting the use of marijuana, including medical marijuana.

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WHAT DID THE CALIFORNIA SUPREME COURT SAY IN ROSS V. RAGINGWIRE?

- “Plaintiff’s position might have merit if the Compassionate Use Act gave marijuana the same status as any legal prescription drug. But the act’s effect is not so broad.
- No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law (21 U.S.C. §§ 812, 844(a)), even for medical users.”

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COATS V. DISH NETWORK, LLC (COLORADO)

- On June 7, 2010 Dish Networks LLC fired Brandon Coats for violating the company’s drug policy after a random drug test showed Coats was using marijuana.
- Coats is a quadriplegic who has been confined to a wheelchair since he was a teenager. He started working at Dish in 2007 as a telephone customer service representative. In 2009, Coats obtained a state-issued license for medical marijuana. He had informed the company he was a medical marijuana patient and planned to continue using marijuana.
- It was undisputed that Coats was a model worker in every respect and that his termination had nothing to do with his performance

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COATS V. DISH NETWORK, LLC

- The Colorado Supreme Court reviewed the question of whether medical marijuana use prohibited by federal law was a “lawful activity” for purposes of the statute. The court determined that the definition of “lawful” was not confined just to what was lawful under state law.
- The court then stated that marijuana use was unequivocally illegal under federal law and there was no recognized exception for medical marijuana under federal law. The court held that because Coats’ medical marijuana use was unlawful under federal law, it was not a “lawful activity.”
- The Colorado Supreme Court affirmed the court of appeals and found that Coats was not wrongfully terminated as a result of his medical marijuana use.

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WHAT COULD CHANGE?

- A California court could determine that medical marijuana does have the same status as other prescription drugs and/or that FEHA does require accommodation of medical marijuana use because it no longer constitutes illegal drug use;
- Under the Trump Administration, federal law could be enforced at the state level;
- FEDERAL LAW COULD CHANGE – **GAME CHANGER.**

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GAME CHANGER – IF FEDERAL LAW CHANGED

- In 2019, numerous bills pertaining to marijuana were introduced in Congress.
- The proposed legislation pertains to taxes, banking restrictions and de-scheduling of marijuana.

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PROPOSED LEGISLATION

- The *Marijuana Revenue and Regulation Act* would remove marijuana from its federal classification as a “Schedule 1” drug and end federal prohibition in the *Controlled Substances Act*.
- The bill permits states to establish their own marijuana regulatory policies free from federal interference. In addition to removing marijuana from the United States Controlled Substances Act, this legislation also removes enforcement power from the US Drug Enforcement Administration in matters concerning marijuana possession, production, and sales — thus permitting state governments to regulate these activities as they see fit.

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NEW CA LEGISLATION:

FAILED 2018- There was a bill before the CA legislature during the 2018 term that would have required accommodation and made medical marijuana users a protected class. The bill failed, but there are several similar bills in the works and we will likely see it again in the near future.

NOVEMBER VOTE - On 2/20/19 a bill was proposed which adds the following provision to the CA Labor Code: *“No private employer, regardless of the number of employees, shall terminate the employment of an employee if the sole reason for termination is that the employee tested positive on a drug test for a drug that is being used as a medication-assisted treatment under the care of a physician or pursuant to a licensed narcotics treatment program.”*

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CONNECTICUT

In 2012, the Connecticut legislature passed the Palliative Use of Marijuana Act (PUMA). PUMA permits the use of medical marijuana by “qualifying patients” with certain debilitating medical conditions. PUMA is one of the few state statutes (there are 9- California is not one of them) that contains an express non-discrimination provision, which protects employees from adverse employment actions taken based upon the employee’s status as a “qualifying patient” of medical marijuana.

In *Noffsinger v. SSC Niantic Operating Company, LLC*, No. 3:16-cv-01938 (August 8, 2017), a Connecticut nursing home rescinded a job offer to a prospective employee, Katelin Noffsinger, after she tested positive for marijuana in a routine pre-employment drug screening. Noffsinger was legally prescribed marijuana to treat PTSD. Noffsinger sued, alleging that the nursing home violated the non-discrimination protections of PUMA. The nursing home moved to dismiss the suit, arguing that the anti-discrimination provision of PUMA was preempted from enforcement by the federal Controlled Substances Act (CSA).

Federal district court in Connecticut held that there is no conflict between federal and Connecticut marijuana regulation and held that **federal law does not preempt** Connecticut law.

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RHODE ISLAND AND DELAWARE

The Rhode Island Superior Court held that the CSA does not preempt the anti-discrimination-in-employment provision of Rhode Island's medical marijuana statute. The court held that refusing to hire someone because she could not pass a drug test, due to medical marijuana use outside the workplace, violated RI state law. Callaghan v. Darlington Fabrics Corp., 2017 WL 2321181

Chance v. Kraft Heinz Foods Co., (Del. Super. Ct. Dec. 17, 2018). A Delaware state court allowed a medical marijuana user to proceed with a lawsuit against his former employer after his employment was terminated due to a positive drug test result for marijuana. The court held that the Delaware Medical Marijuana Act ("DMMA") **includes an implied private right of action.**

The court also held that the DMMA is **not preempted by federal law** because the Controlled Substances Act "does not make it illegal to employ someone who uses marijuana, nor does it purport to regulate employment matters within this context." This case is ongoing.

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ARIZONA AND MASSACHUSETTS

Whitmore v. Wal-Mart Stores Inc., in February 2019, an Arizona federal judge ruled that Walmart was liable for damages after it suspended and fired an employee for testing positive for marijuana, even though she was a legal user of medical marijuana. The judge noted in his ruling awarding partial summary judgment to the former employee, that the AMMA protects medical marijuana users who test positive for marijuana as long as they didn't use or possess the drug at work and weren't impaired by it while on duty. In this case, Walmart failed to meet its burden in showing that the former employee was impaired while at work.

Barbuto v. Advantage Sales & Marketing, LLC (MASS, July 17, 2017) – Court held that a sales and marketing firm discriminated against an employee who used marijuana to treat Crohn's disease when it fired her for failing a drug test. "Employers can't use blanket anti-marijuana policies to dismiss workers whose doctors have prescribed the drug to treat their illnesses." An employer may still refuse to accommodate if use "would cause an undue hardship to the employer's business."

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DRUG TESTING

- Employers **may not** administer a drug test before making an offer of employment;
- However, once a job offer is made, employers may administer a drug test, when passing a drug test is a condition of employment, if:
 - Candidates are given notice that drug and alcohol testing will be part of the application process;
 - Testing will be minimally intrusive;
 - There are safeguards to restrict access to testing results.
- Question– In light of Prop 64, will there be difficulty finding qualified workers?

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PROP 64 AND DRUG TESTING JOB APPLICANTS

- Prop 64 does not prohibit employers from conducting pre-employment drug testing of job applicants.
- However, employers should advise job applicants prior to a pre-employment drug test that marijuana will be tested and whether employment will be denied if the test is positive.
- Employers should also consider whether marijuana will be part of the pre-employment drug testing of job applicants, and if so whether an exception should be made for medical marijuana use due to disability.

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CURRENT EMPLOYEES

- A higher standard exists for conducting a drug test for current employees;
- Constitutional rights to privacy;
 - Employer's interests must outweigh employee's reasonable expectation of privacy.

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CURRENT EMPLOYEES

- Reasonable suspicion basis for testing current employees;
- **Balancing Test:**
 - Amount of intrusion into the employee's privacy;
 - Importance of safety in the workplace;
 - Type of work performed by employee;
 - Other employer considerations pertaining to business necessity.

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CURRENT EMPLOYEES

- Reasonable suspicion and marijuana:
 - Unique challenge for marijuana;
 - No uniformity of effect;
 - Looking "high"- what does that mean?
- Training management on "reasonable suspicion" is paramount.
- Consider a "reasonable suspicion" checklist for managers and supervisors to complete documenting their observations.

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MAY AN EMPLOYER CONDUCT RANDOM DRUG TESTING OF CURRENT EMPLOYEES?

- In general-*no*. Random drug testing may only be conducted for employees in safety sensitive positions, where public safety or the protection of life, property or national security is at issue;
- For example, truck drivers, airline pilots, and certain correctional officers;
- Employers must still comply with DOT standards.

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WORKPLACE SUBSTANCE ABUSE POLICIES

Employers should:

- Decide whether to keep existing substance abuse policies in place, and continue testing applicants for marijuana/marijuana derivative products **or** discontinue testing for marijuana/marijuana derivative products;
- Decide whether to accommodate the use of medical marijuana for applicants/current employees-consult with legal counsel on this before agreeing to or denying an accommodation;
- Update substance abuse policy with any changes, and if applicable, specify that marijuana use is prohibited and will be included in pre-employment drug screening.

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WORKPLACE SUBSTANCE ABUSE POLICIES

- Employers must uniformly and consistently apply substance abuse policies to all employees;
- Substance abuse policies should be in writing, and include notice to all employees of drug testing policies and consequences for violations of the policy.

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WORKPLACE SUBSTANCE ABUSE POLICIES

- Clear, written policy that no use, possession, or sale of marijuana, or marijuana derivative products, is allowed; OR, clear, written policy that treats the use of marijuana or marijuana derivative products the same as the use of alcohol; OR, written policy that address drug use and abuse, but is silent as to marijuana?
- May not report to work under the influence of marijuana (even medical marijuana) or marijuana derivative products
- Policy violations can lead to disciplinary measures including termination.

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TRAIN MANAGERS AND SUPERVISORS

- Employer's policies and procedures;
- Reasonable suspicion versus random testing;
- Signs of intoxication/substance abuse;
- Steps to take if suspicion of on duty alcohol/illegal substance;
- Designate managers/supervisors to receive specialized training on detection and response.

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INFORM EMPLOYEES

- Inform all employees about the workplace substance abuse policy;
- Consistently and uniformly enforce the policy;
- All employees sign and acknowledge the policy or an employee handbook which contains the policy.

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REASONABLE SUSPICION BASED DRUG TESTING

- Use "reasonable suspicion based" drug testing; this is particularly important for marijuana as the employee may claim, if there is a positive result on a post-hire drug test, that although they used marijuana, it was "weeks ago."
- No random testing unless applicable exception for public safety positions;
- Supervisors and managers:
 - Must have reasonable suspicion prior to testing;
 - Clearly document neutral observations (forms);
 - Must be trained on reasonable suspicion criteria.
- The courts have upheld testing after a serious accident.

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CONCLUSION

- Create and enforce appropriate workplace policies- consider-what will your company's policy be on medical marijuana use?
- Consider your accommodation process – even if you can't accommodate, include it in the discussion;
- Consider treating marijuana like alcohol in company substance abuse policies;
- Train managers and supervisors, especially on reasonable suspicion criteria;
- Educate employees on the required policies;
- Incorporate EAP services;
- Document observations and facts when drug testing;
- Stay up to date!

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SPEAKER BIOS



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TROY W. SLATEN, ESQ.

Troy Slaten is a Partner with the Law Offices of Floyd Skeren Manukian Langevin, LLP.

Mr. Slaten earned his bachelor's degree, with honors, in English Literature from the University of California, Los Angeles (UCLA). He went on to earn his Juris Doctor degree at Pepperdine University School of Law. While in law school, Mr. Slaten actively participated on the honors Trial Team, winning awards at various trial competitions.

Licensed to practice law in all courts in California and the District of Columbia, Mr. Slaten is also a sought-after legal analyst for major media outlets including CNN, Fox News and HLN. After a successful 25-year career as an actor in television, feature films and radio, he smoothly segued from teen star to fearless legal counsel. For the last 12 years, Mr. Slaten has conducted dozens of jury trials and represented individuals, celebrities, major businesses and insurance companies in employment defense and criminal defense, workers' compensation defense, risk & crisis management, media relations and internal investigations. He is also a lecturer on constitutional law, post-accident workplace investigations, drug-testing, and risk management best practices.

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DANIELLE HULTENIUS MOORE, ESQ.

Danielle Moore is a partner in the Fisher Phillips San Diego office, chairs the firm's Development Committee and is a former co-chair of the firm-wide Women's Initiative and Leadership Council and current steering committee member.

She represents and counsels employers in all aspects of labor and employment law, including defending employers in state and federal court as well as employment handbook and policy preparation, and general preventive advice. Danielle graduated from the University of Southern California (USC) with honors and obtained her law degree from George Washington University Law School in Washington D.C.

Danielle regularly conducts management training and lectures on employment issues. She also teaches an employment law course at San Diego State University and serves on the Human Resources Advisory Board for the University.

Danielle is "AV" Peer Review Rated Preeminent by Martindale-Hubbell and was recently recognized in the 2020 edition of "Best Lawyers in America," one of San Diego's 2014, 2015, 2016, and 2018 "Top Attorneys," one of 2014 and 2015's "Best of the Bar," as well as one of the "Top 40 under 40 Best and Brightest Minds of San Diego." Danielle was also a 2016 finalist for San Diego Magazine's "Woman of the Year."

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