

Business Better (Episode 30): Marijuana Use in the Workplace: What Employers Need to Know

Speakers: Emily Daher, Jay Zweig, Joseph Wiltse

John Wright:

Welcome to Business Better, a podcast designed to help businesses navigate the new normal. I'm your host, John Wright. After serving nearly 15 years as senior vice president and general counsel at Triumph Group, Incorporated, our global aerospace components supplier, I'm now a member of the securities and M&A groups at Ballard Spahr, a national law firm with clients across industries and across the country.

John Wright:

Today's episode features a discussion of the impact on the workplace of the legalization of marijuana in some states. Among the topics discussed are what employers can and can't do in regulating marijuana use by their employees, guidelines for the implementation of drug testing policies, how to deal with so-called safety-sensitive positions, and the interplay of state and federal law. Initiating the discussion is Emily Daher, an attorney in Ballard's New Jersey office who concentrates her practice on representing businesses in all aspects of labor, unemployment law. Joining Emily are Jay Zweig, a partner in Ballard's Phoenix, Arizona office who also represents businesses and avoiding and resolving employment law disputes, and Joseph Wiltse an associate in the firm's, Sioux Falls, South Dakota office, who practices in the areas of corporate and business law, mergers and acquisitions, and real estate. With that, I will turn the episode over to Emily Daher.

Emily Daher:

Good afternoon and good morning, whichever applies to our listeners to today's podcast. My name is Emily Daher, and I'm an attorney in Ballard Spahr's New Jersey office. I practice labor and employment law and represent employers locally, nationally, with respect to all aspects of employment law. I'm joined today by my colleagues Jay Zweig, a partner in our Phoenix office who also practices employment law, and Joe Wiltse in our Sioux Falls, South Dakota office. I'll let each of them give a little intro of themselves as well. But I wanted to kick off today's conversation, which is focusing on the impacts of the legalization of marijuana in the workplace. Many states have had medical marijuana legalized for some time now. And the legalization of recreational marijuana is kicking off lately with resolutions by voters in November in all of our states, South Dakota, Arizona, New Jersey having legalized marijuana in some form, and particularly recreational marijuana in New Jersey and Arizona.

Emily Daher:

So I'd like to start our conversation today with a 30,000-foot view or question on the issue of as an employer, how does this impact your workplace? Does this mean I have to allow my employees to use or be under the influence of marijuana because now it's legal under our state law? And the answer is absolutely not in terms of use or possession of marijuana in your workplace. That issue, employers have the right to regulate what goes on in their workplace, on their property, and how their employees are acting while they're performing the performance of their duties. So as far as it concerns issues in the workplace, conduct that impacts an employee's performance of their duties, legalization of marijuana does not mean that employers have to allow their employees to act in a way or to engage in conduct that that interferes with or impairs their ability to do their job. Joe, I'm going to kick it over to you to see if you have any thoughts to add on sort of the broad issues that are impacting employers with the legalization of marijuana.

Joseph Wiltse:

Thank you. And as she said, my name is Joseph Wiltse. I'm out of Ballard Spahr's Sioux Falls, South Dakota office. And this fall, South Dakota passed voter initiatives to not only legalize medical marijuana, but also recreational marijuana. Both of those provisions are currently being challenged by our state's governor and various groups due to constitutionality concerns of the ballot initiatives. So we shall see. They were originally scheduled to go into place July 1, but it looks like that will likely be delayed.

Joseph Wiltse:

From the overall landscape, as was pointed out, employers don't have to allow this use of marijuana within their workplace. But for example, under South Dakota's ballot initiative that was passed, employers have to treat medical marijuana as if it's any other prescribed medication. So they're unable to discriminate based upon the use of medical marijuana versus something like some prescribed pain medication.

Joseph Wiltse:

And so that kind of creates some issues with employers, especially employers that are doing drug testing and how they can handle that. So I think in today's conversation, we're going to be talking about the types of drug testing, accommodations for employees that might qualify for the use of medical marijuana, and then particularly determining whether those employees are in situations that there are safety concerns and how those are going to be handled. So I think you're spot on the nose as far as the major issues. And it's going to be a fun world for employers in these new states where it's been passed to navigate.

Jay Zweig:

Joseph, thank you, and Emily, thank you. I'm Jay Zweig with the Ballard Spahr Phoenix, Arizona office. We have had medical marijuana legal in Arizona if you have a special card for almost the last decade, but come April and Arizona, recreational marijuana is going to hit the streets. From an employer's perspective, how do we get people to show up, productively do their jobs, and not be impaired? More importantly, when they're returning to the actual workforce versus remote working, how do we get employees to be safe on the job, not injure themselves or others, or bring liability to the company?

Jay Zweig:

The simple fact is that statistics are once marijuana is legalized for recreational use, its use increases, some say by more than 25%. It's going to be very significant for employers. Employers have already dealt with issues about alcohol in the workplace, drug testing, classifying certain positions that you cannot be in that position. If you're on a prescription medication that impairs your ability to operate a forklift or drive a company vehicle, why would marijuana use be any different? And I think that brings us to our first question, Emily, that I'll pose to you. What kind of drug testing policy should an employer consider in light of medical and recreational marijuana in their jurisdiction?

Emily Daher:

Jay, so I think that raises two questions, or at least there's a threshold question employers may need to answer if they don't already have a drug testing policy in place. And that is, should my company have a drug testing policy in place? And that's a decision that's made based on a variety of factors to the business. And that includes the nature of the industry. Are there safety-sensitive positions held by employees that it's important to monitor and regulate the potential for dangerous activity or conduct that could impair their ability to perform their jobs? Is there a risk of harm to employees, to the public if an employee is potentially impaired on the job? Another consideration for employers when determining whether or not to have a drug testing policy is that there could be an adverse impact when conducting preemployment drug tests to the pool of applicants available. And you don't want to unintentionally weed out otherwise qualified workers by narrowing the applicant pool if applicants can be excluded or denied employment based on positive drug tests.

Emily Daher:

But once an employer gets beyond that threshold issue and determines that they want to maintain or they currently maintain a drug testing policy, it's important that that policy really spell out all of the procedures that apply in terms of how employees will be tested, what category of employees will be tested. Again, specifically, it's important that employers focus on those positions for which it's important to evaluate and maintain safety in execution of an employee's job duties. Drug testing policy should spell out the substances that will be tested for, the collection procedures, the consequences for a positive test.

Emily Daher:

And here's where employers have to be careful and proceed with caution in terms of positive drug tests for marijuana specifically. Some employers have asked whether they should remove marijuana entirely from their drug testing panel. And that is an option that might work for some employers, but it may not work for others. And if there are positive drug tests for marijuana, some states' laws, particularly New Jersey now, the recreational marijuana statute explicitly prohibits an employer from taking an adverse action employment action, whether it be discipline or termination, against an employee simply because they tested positive for marijuana. There needs to be some other evidence of impairment, specifically a physical evaluation of the employee, to determine outward signs of impairment. And that should be encompassed in a drug testing policy. In addition to the positive drug test, what evaluation would there be to determine impairment?

Emily Daher:

Employees should also be given the right to explain a positive test result, of course, the primary reason being that if an employee has a lawfully prescribed medical marijuana card and is using medical marijuana to treat a health condition, some states, I believe Jay, and correct me if I'm wrong, but I think Arizona law is that employees who hold a medical marijuana card are deemed disabled, essentially, for discrimination claims. In other words, they don't have to meet the definition of disability that might otherwise apply under the disability discrimination statute. Simply holding the medical marijuana card is a presumption that they have a disability. So employers need to be prepared to accommodate medical marijuana users because of a potential for disability discrimination claims.

Jay Zweig:

That's absolutely correct, Emily, that you cannot look at medical marijuana in a vacuum. In fact, some of the statistics, quite interesting nationally, are that where there has been medical marijuana, workers' compensation claims have actually gone down. Go figure. Joseph, on the issue of drug testing in the workplace, what are people talking about in South Dakota now that these legal and recreational medical marijuana are coming into space at the same time?

Joseph Wiltse:

Yeah, Jay, it's a whole new world in South Dakota as we are passing not only medical marijuana, but recreational marijuana simultaneously. So employers haven't had the ramp up in some states where they've been dealing with how to handle medical marijuana for a few years and now are jumping into how to handle recreational. It's all happening simultaneously. So truthfully, most employers are lost and slightly in panic mode on how to handle this situation.

Joseph Wiltse:

So under South Dakota laws, I had stated previously they cannot treat somebody prescribed medical marijuana any differently than somebody prescribed other prescription medication. So employers are figuring out essentially whether or not... The big hurdle question is whether or not they are going to allow for recreational use of marijuana outside of the workplace because if they pass that threshold and say, "No, we're not going to allow employees to use recreational marijuana," then that really limits the amount of individuals that can have a positive test within their company and essentially be subject to potential actions if they test positive.

Joseph Wiltse:

So I think most employers are, from the conversations I've been having, that didn't previously have any sort of testing policy, a lot of them are actually planning to implement policies specifically because they are going to have policies that don't allow marijuana use outside of the workplace. And now that it's going to be more accessible, it's something that they feel that they need to do in order to enforce their employees to follow those guidelines. So it's a strange dynamic with other states that seem to have had it implemented for a while that might be relaxing their policies. There's going to be, I think, some employers that are going to follow that here, but there's also going to be a significant amount that are going to increase their testing from what they did previously.

Jay Zweig:

Joseph, and I really appreciate you sharing that. In Arizona, there is a specific statute on drug testing for employers. If the employer follows that statute, and as Emily mentioned before, goes through the steps of allowing an employee who tests positive to contest the results and otherwise following the prescribed formula from the state legislature, then the employer has no liability for conducting testing. If the employer though grabs a policy from another state, or heaven forbid, off the internet, there can be significant employer liability.

Jay Zweig:

What we see is that employers want to test in four areas: preemployment testing of applicants, reasonable suspicion testing; you look high, let's test you; post-accident testing, especially if they have Department of Transportation positions or insurance requirements that they have to do post-accident testing; and then the biggest bugaboo of all, random testing. Employers who want to random test really need to think that through because random really means random, and there needs to be a system usually set up with an accredited lab as to who is selected to be tested, when.

Jay Zweig:

The next question that I have really is why do we care about an employee's off-duty conduct? Why are employers interested in that? And many, many of my clients are. Emily, any thoughts on that?

Emily Daher:

I mean, I think the primary response to that question is that the employer's concern with the off-duty conduct relates to the impact that that conduct could have on the employee's performance of their job duties. So if there is potential that the employee's off-duty use of a legalized substance, I mean, whether it's marijuana or alcohol or prescription drugs, if there's a potential for impairment while at work and while performing job duties, an employer certainly has an interest in the off-duty conduct. It's no different than if an employee were to get drunk right before his or her shift and show up to work impaired. So the focus for the employers really needs to be on the employee conduct as opposed to the reason for why their performance of their duties may be impaired or a lack of production. And that's the conduct that needs to be the focus of the employer's attention and documentation of any employment action that's taken, as opposed to the cause of that conduct.

Jay Zweig:

I think that's a great point. And often, we as lawyers, I'll admit it, and sometimes clients, we want to know the reason why. Why are you late for work? Why do you look disheveled? Why is your work product poor? And we think, "A-ha, you must be on drugs. Let's test you," versus directly approaching the employee and saying, "Your attendance, your performance, your production is not adequate. And if it doesn't change, we're going to have to take an employment action." Once you start testing and trying to figure out the why, you run into some murky areas. Joseph, have you had some experience with that?

Joseph Wiltse:

I've had some, yes. One of the questions I actually wanted to pose based upon this discussion relates to... In some employment situations, employers may need to focus a little bit more on the why when it's very safety... or when the positions

have a lot of risk or are very dangerous positions where there can't be that room for margin of disciplining for conduct after the fact, because the conduct based upon that influence could be deadly. So how do employers in those situations where workers' lives could literally be on the line due to a fellow employee's being under the influence or themselves being under the influence, how do they handle that situation compared to a front desk employee who is not in those situations?

Jay Zweig:

Excellent point, Joseph, and you're talking about safety-sensitive positions. And in those positions, drugs and alcohol don't work even if you have a disability or a proclivity. What the employer really needs to focus on is identifying those positions. And you gave an excellent example. Hard to justify that the switchboard operator's a safety-sensitive position, but a forklift driver or a heavy equipment operator, or even someone who does deliveries for the company and is on the road with the public, that's a safety-sensitive position. What we like to see are employers think those things through, designate those positions upfront, and then determine how they're going to approach them in light of things such as medical or recreational marijuana. Emily, your thoughts?

Emily Daher:

And I agree that an employer needs to carefully consider the aspects and the functions of each employee's position or category of employee's position before designating a category of employees as safety-sensitive. For instance, our healthcare clients certainly might be inclined to designate all employees in the hospital as safety-sensitive. But as Joe pointed out, it's hard to justify somebody who's sitting behind a desk being designated safety-sensitive versus the direct care workers and the nurses who are administering medications, for example. Interestingly, in New Jersey, so first of all, the recreational marijuana statute did not carve out any safety-sensitive considerations, did not identify safety-sensitive positions to which the legalization of recreational marijuana doesn't apply. However, a lawmaker within the last few weeks and only shortly after the recreational statute was enacted, introduced legislation to specifically address safety-sensitive positions.

Emily Daher:

And the proposed bill here in New Jersey actually takes the guesswork out of the game here for employers by requiring employers to make an application to the Regulatory Cannabis Commission in order to deem a position as safety-sensitive. And even then, it applies very narrowly only to certain construction and infrastructure industry jobs in terms of applying to the Commission for designation as safety-sensitive. So that's an example of one state that's really taking a hard line on carving out these safety-sensitive positions, which I think demonstrates the difficulty employers may face in the future in other states should they follow the lead in New Jersey in terms of making sure that employers aren't being overly broad in that designation.

Jay Zweig:

We've talked a lot about drug testing policies, how they can differ from state to state. Are there other policies that we recommend employers put into place and keep an eye on?

Emily Daher:

Good question, Jay, and I'm glad you asked it. So regardless of whether or not an employer maintains a drug testing policy, all employers should have a policy that addresses substance abuse in the workplace, a drug-free workplace policy that clearly prohibits use, consumption, possession, transfer, sale of drugs, including marijuana, in the workplace, and that further prohibits employees from being under the influence or impaired at work or while performing work duties. This will make it clear to employees what conduct is and is not permitted in the workplace.

Jay Zweig:

Don't have it in your car. Don't have it in your desk. Don't put it in your locker. Don't take your lunch break to go to the dispensary. Don't drive a buddy over to the dispensary during work hours. Don't make a detour when you're making a delivery. All these things are things that we have dealt with. Employers ought to make it clear.

Emily Daher:

That's right, Jay. And that kind of a will support any adverse employment action that an employer may want to take based on use or possession at work or impairment at work.

Jay Zweig:

Part of what we're seeing from an economic point of view is that recreational marijuana as well as medical marijuana is here to stay. The voters have enacted these proposals in several states. And in somewhere like Arizona, if the voters have voted it in, the legislature can't take it away. Additionally, what we see from the cannabis industry is it's a growing industry. It's a powerful industry. It is consolidating in many ways. The most recent estimate is that it has created almost 400,000 new jobs since the advent of legalization of recreational marijuana, and revenues for states, significant in this time of budget crunches. Colorado is collecting \$20 million a month in revenue from recreational marijuana in that state. What we're finding is that this is here to stay. Employers are going to need to figure out how to address the kinds of issues we've been talking about today. There are no easy answers it's continuing to change as it has in South Dakota on a rapid response basis. What else should we be covering?

Joseph Wiltse:

Well, Jay, I've had a lot of clients that are in the manufacturing space or have contracts with the federal government where they rely on either a DOT designation or specifically in their contract with the federal government provides that the company's employees cannot be under the use of any illegal substance. And so while marijuana is becoming legalized in our states, all three of our states, it's still classified as an illegal Schedule 1 drug at the federal level and under the Controlled Substance Act. So what have you two seen in regards to either federal enforcement... Or maybe this is a question more directed towards Emily. What have you seen from a federal enforcement perspective based upon states that have either legalized medical or recreational marijuana, and how employers that have these provisions in their contracts, how they should handle them?

Emily Daher:

Joe, I think there's... At least in New Jersey, the guidance that we've been seeing is that there's no dispute that positions regulated by the federal government... And when I say that I'm specifically referring to the Department of Transportation. For instance, CDL drivers and FAA-regulated positions, pilots and flight crew, pipeline, railway, and public transportation workers. These are employees that are subject to Department of Transportation regulations, which specifically require drug testing and also specifically require testing of marijuana as one of the drugs on the panel that's tested for.

Emily Daher:

So there's been no question as far as the guidance and advice that the legal community in New Jersey has been providing that employees holding those positions remain subject to the drug testing requirements of the DOT regulations. There may be some question with respect to employers who have federal contracts, who are subject to the Drug-Free Workplace Act, which prohibits the use of controlled substances in the workplace as a condition of employment. So employers who are federal contractors must maintain those drug-free workplace policies in compliance with the Drug-Free Workplace Act. But the Drug-Free Workplace Act does not itself require drug testing. So again, those federal contractors should make sure they're maintaining a substance abuse or a substance-free workplace policy, but they're not necessarily required to have drug testing policies.

Jay Zweig:

One thing we know for sure is that the law on marijuana as it impacts the workplace is going to be changing. I cannot but believe that the federal government at some point is going to want some of that tax money. In the meantime, the state laws are being updated, challenged in court, and battled in the state legislatures. So we're going to continue to watch this topic. One place that we do regularly post on is hrlawwatch.com. That's HR like human resources, lawwatch.com. Our listeners are welcome to subscribe to that, get some updates on marijuana law, other employment law updates. But I suspect the three of us

will be back in a few months to provide an update as to what's happening with the cannabis world around the country and how employers are coping. Really appreciate the chance to talk with you, Joseph, and you, Emily. Great to get together on this.

Emily Daher:

Thank you both.

Joseph Wiltse:

Great speaking with everybody.

John Wright:

Thanks again to Emily Daher, Jay Zweig, and Joseph Wiltse. Make sure to visit our website, www.ballardspahr.com, where you can find the latest news and guidance from our attorneys. Subscribe to the show in Apple Podcasts, Google Play, Spotify, or your favorite podcast platform. If you have any questions or suggestions for the show, please email podcast@ballardspahr.com. Stay tuned for a new episode coming soon. Thank you for listening.