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**Lehigh Valley Business Coalition
on Healthcare
Medical Marijuana and the Workplace**

UNBLURRING THE LINES FOR EMPLOYERS

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Who We Are Drug Free Workplace PA



Nonprofit organization funded by PA Commission on Crime & Delinquency



Established to create and implement Drug Free Workplace programs for PA businesses and educate all community members



Provides tools, resources, and expertise in-person and online training



All services provided FREE OF CHARGE due to state grant funding



Have worked with over 1,000 organizations, assisting with policy development, conducting workplace and family education trainings



NOTICE

**THIS IS A
DRUG-FREE
WORKPLACE**

What We Do Drug Free Workplace PA

**Educate Using the Five Components of a Drug Free Workplace
Based on the US Department of Labor Guidelines**

1. Establishing a Drug Free Workplace Policy
2. Supervisor Training
3. Employee Education
4. Employee Assistance Program (EAP)
5. Alcohol and Drug Testing





Overview

Medical Marijuana Training

- What is Marijuana
- Medical Marijuana in Pennsylvania
- Predictors of What is to Come
- Drug Testing
- What employers need to know

What is Marijuana?



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Depressant, Stimulant, and Hallucinogenic

- ✱ It is a greenish-gray mixture of dried flowers of cannabis sativa.
- ✱ Medical marijuana is legal in 33 states—including PA—and D.C.
- ✱ Recreational marijuana is legal in 11 states and D.C.—not including PA.
- ✱ Under federal law, marijuana remains a Schedule I controlled substance.
- ✱ Under Federal law it is considered to have no medicinal value.
- ✱ THC—produces the “high,” and is legal in PA with a doctor’s recommendation.





Methods of Use: Recreational Marijuana

- Usually smoked—joint, rolled cigarettes, can be smoked w/pipe or bong
- It can be ingested through food (brownies, candy, soft drinks)
- Vaping—“dabbing” 80-90% THC

Marijuana

Common Side Effects of Marijuana

THC acts on specific brain cell receptors that ordinarily react to THC-like chemicals. These natural chemicals play a role in normal brain development and function.

Marijuana over-activates parts of the brain that contain the highest number of these receptors. This causes the "high" that people feel. Other effects include:

- ✦ altered senses (for example, seeing brighter colors)
- ✦ altered sense of time
- ✦ changes in mood
- ✦ impaired body movement
- ✦ difficulty with thinking and problem-solving
- ✦ impaired memory
- ✦ hallucinations (when taken in high doses)
- ✦ delusions (when taken in high doses)
- ✦ psychosis (when taken in high doses)





Medical Marijuana in Pennsylvania



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Medical Marijuana is Recognized as Legal by the State; while it is NOT approved Federally

- ✿ The federal government cannot force states to criminalize conduct that is illegal under federal law; nor can the federal government force state and local police to enforce federal laws.
- ✿ In all of the 33 states that have authorized the use of medical marijuana there are no know cases of the federal government prosecuting an individual for a small amount of marijuana.



Graphic: Tracy's Journey Online, 2016

What is Medical Marijuana

- ✿ A form of the marijuana plant that contains more than 80 active cannabinoids, which may help treat a range of illnesses or symptoms.
- ✿ Medical marijuana is a physician recommended legal medication for the treatment of a serious medical condition.
- ✿ A PA resident who wishes to use medical marijuana must possess a valid Medical Marijuana Card.



Graphic: Associated Press; Harrisburg, PA

Who Qualifies for a PA Medical Marijuana?

- ✿ Under Act 16 of 2016, “medical marijuana” refers to marijuana obtained for a certified medical use by a Pennsylvania resident with a serious medical condition.
- ✿ Under the MMA, the Pennsylvania Department of Health considers 21 serious medical conditions as qualifying conditions for the use of Medical Marijuana.



The PA Department of Health's Explanation: Serious Medical Conditions

A "serious medical condition" under the law is any one of the following:

- Amyotrophic lateral sclerosis;
- Autism;
- Cancer, including remission therapy;
- Crohn's disease;
- Damage to the nervous tissue of the central nervous system (brain-spinal cord) with objective neurological indication of intractable spasticity, and other associated neuropathies;
- Dyskinetic and spastic movement disorders;
- Epilepsy;
- Glaucoma;
- HIV / AIDS;
- Huntington's disease;
- Inflammatory bowel disease
- Intractable seizures;
- Multiple sclerosis;
- Neurodegenerative diseases;
- Neuropathies;
- Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions;
- Parkinson's disease;
- Post-traumatic stress disorder;
- Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain;
- Sickle cell anemia; and/or
- Terminal illness.

WHAT FORMS OF MEDICAL MARIJUANA ARE PERMITTED IN PA UNDER ACT 16?

In Pennsylvania, approved forms of medical marijuana include:

- Pill;
- Oil;
- Topical forms, including gel, creams, or ointments;
- Tincture;
- Liquid; and
- A form medically appropriate for administration by vaporization or nebulization, including dry leaf or plant form for administration by vaporization.

PA Residents are Using Medical Marijuana

July 1, 2018 updates

- As of July 1, 2018 More than 37,000 Pennsylvanian residents were registered to participate in the medical marijuana program.
- 23 additional dispensaries and 12 “growers” are set to begin operations



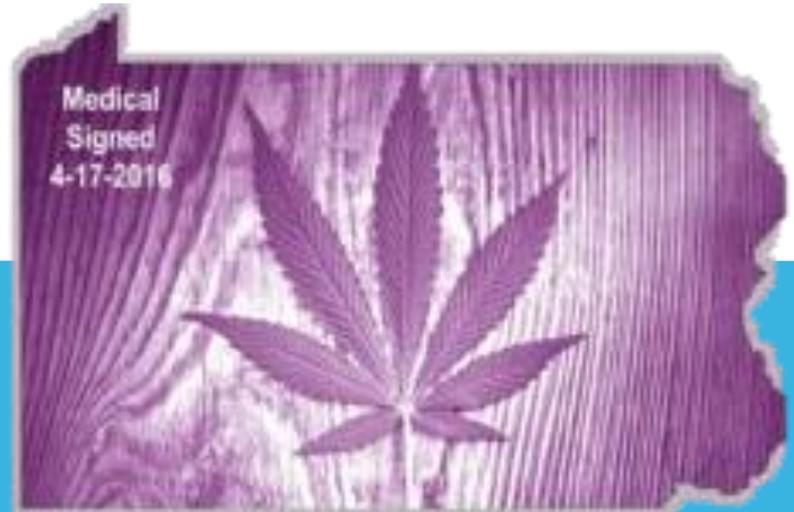
Medical Marijuana and the Workplace



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The Workplace and Act 16

- ✿ Discrimination against an employee certified to use medical marijuana is prohibited.
- ✿ MMA provides that no employer “may discharge, threaten, refuse to hire or otherwise discriminate or retaliate” against an employee solely on the basis of that employee’s status as an individual who is certified to use medical marijuana.
- ✿ MMA states that an employer is not required to accommodate the use of medical marijuana “on the property or premises of any place of employment.”



Medical Marijuana Act 16 Limitations

- ✿ A patient may be prohibited by an employer from performing any task which the employer deems life-threatening—to either the employee or any of the employees of the employer—while under the influence of medical marijuana.
- ✿ A patient may be prohibited by an employer from performing any duty which could result in a public health or safety risk while under the influence of medical marijuana.
- ✿ The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.



Graphic: State-Capitals.org



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The Workplace and Act 16

- ✿ Under the MMA, an employer can discipline an employee for the following reasons:
 - 1) Being under the influence of **medical marijuana** in the workplace
 - 2) Working while under the influence of **medical marijuana** when the employee's conduct and/or performance falls below the standard considered normally acceptable for their position.
- ✿ In order to discipline an employee pursuant to this provision, the employee must both be under the influence of medical marijuana while at work and have their job performance fall below an acceptable level.



The Workplace and Act 16

- ✱ If your business is subject to federal laws or regulations mandating a marijuana-free workplace, continue to abide by those requirements.
- ✱ MMA does not require employers to violate federal law that prohibits marijuana use by employees.
- ✱ Certain safety-sensitive duties and positions are specifically addressed.
- ✱ The MMA provides that no one under the influence of medical marijuana may engage in the following job tasks: control of chemicals, which require a permit issued by federal/state government operation; control of high voltage electricity; any other public utility employment duties at heights or in confined spaces including mining.
- ✱ Under the federal law, some healthcare, all transportation, and all federally regulated employees, are banned from the use of medical marijuana.



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The Workplace and Act 16

What EXACTLY qualifies an employee as falling below expected job performance or the standard of care for their position?

- ✿ The standard of care for a particular position is unclear. MMA is new, so PA employers should anticipate this issue to be raised as a defense by employees facing disciplinary action for being under the influence of MM.
- ✿ The ability to prove the facts of medical marijuana use while on duty is difficult.



Predictors of What is to Come



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Predictors of What is to Come

Medical Marijuana Employment Litigation in other States

- ✱ In States that have made medical marijuana legal, employees are finding protection under the state disability laws. The courts were initially in favor of the employer; however, the courts are quickly shifting decisions in favor of the employee.
- ✱ In 2015, the Colorado Supreme Court decided that the termination of an employee using medical marijuana was justified because marijuana is still illegal under Federal Law.
- ✱ In May of 2017, in Rhode Island, a job candidate was not hired because she disclosed to her potential employer that she was a legal MM cardholder. She informed the employer that she would not pass a pre-employment drug screen. When she was not hired, she sued the employer for discrimination. The court found in favor of the potential employee.



Predictors of What is to Come

Medical Marijuana Employment Litigation in other States

- ✦ In July of 2017, the Massachusetts High Court heard the case of an employee who sued her employer for discrimination under the states discrimination laws. She had been fired for failing a drug test while being legally registered as a medical marijuana user. In turn, the employer argued that this was an unreasonable accommodation request as all marijuana use is illegal under federal law and is, therefore, a federal crime. The court disagreed with the employer and sided with the employee. The court held that under the states disability discrimination law, employees have the right to seek a reasonable accommodation for MM use. The employer did not appeal the decision.
- ✦ In August 2017, in Connecticut, a similar situation was heard. The employer appealed the decision of State Court to Federal Court. The Federal District Court rejected the employers Federal Pre-Emption Argument. The Court said the Federal Controlled Substance Act does not regulate employment and therefore does not make it illegal to employ a Medical Marijuana User.



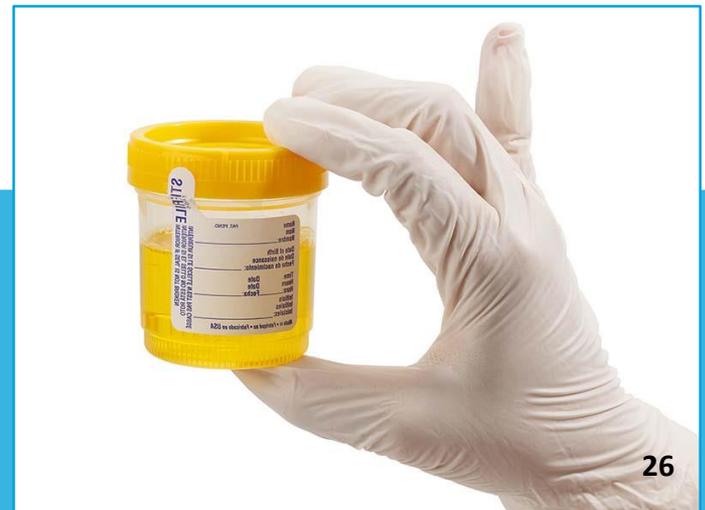
Drug Testing



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Most Reliable Workplace Drug Tests

- ✿ Urinalysis is the most widely used and accepted form of testing. The testing is preformed at an approved laboratory, or through a mobile lab service. The tests may be performed monitored or observed. The lab works with the employer to develop the preferred drug testing method.
- ✿ It is the employee's responsibility to notify the lab if they are taking any prescription drugs.
- ✿ Employers are given a lab report with a simple pass fail result next to the indicated drug. If there is a positive THC result, and the employee has a valid Medical Marijuana Card, the process varies from lab to lab. Because, marijuana is still federally illegal, many labs only use the clinical information box for FDA approved drugs and do not take into consideration medical marijuana. Marijuana can be detected in system for up to 30 days.
- ✿ THC levels are insufficient in proving the time of use (work hours vs. non-work hours).
- ✿ Hair follicle tests show drug use for a longer period of time but are more costly.
- ✿ Mouth Swab testing is also an option, but not as reliable.



Employee Drug Screening Results

		SALIVA		URINE		HAIR	
		Appears Within	Disappears After	Appears Within	Disappears After	Appears Within	Test Cutoff*
Amphetamine	AMP	5-10 min	72 hours	2-5 hours	2-4 days	5-7 days	90 days
Methamphetamine	mAMP	5-10 min	72 hours	2-5 hours	3-5 days	5-7 days	90 days
Cocaine	COC	5-10 min	24 hours	2-5 hours	2-4 days	5-7 days	90 days
Opiates	OPI	1 hour	7-21 hours	2-5 hours	2-4 days	5-7 days	90 days
Marijuana	THC	1 hour	12 hours	2-5 hours	15-30 days	5-7 days	90 days
Phencyclidine	PCP	-	1-3 days	2-5 hours	7-14 days	5-7 days	90 days
Oxycodone	OXY	-	-	2-5 hours	2-4 days	5-7 days	90 days
Ecstasy	MDMA	-	-	2-5 hours	1-3 days	5-7 days	90 days
Benzodiazepines	BZO	-	-	2-5 hours	3-7 days	-	-
Buprenorphine	BUP	-	-	2-5 hours	2-3 days	-	-
Barbiturates	BAR	-	-	2-5 hours	4-7 days	-	-
Methadone	MTD	-	-	2-5 hours	3-5 days	-	-

Source: RDI Rapid Detect, Inc. 2017

Sample Urinalysis Test Results



Background Screening Report

Name: John Sample
Address: Berea, OH
Date: 07/12/2012 - 01/22/2013
DOB: 05/20/1982
File #: CA76453

DRUG TEST

DOT/Non-DOT: DOT
Testing Reason: Pre-Employment
Amphetamines: Negative
Opiates: Negative
Phencyclidine: Negative
Cocaine: Negative
Marijuana: Negative
Methadone: Negative
Barbiturates: Negative
Propoxyphene: Negative
Methaqualone: Negative
Benzodiazepines: Negative
Comments: The applicant returned negative results for all substances.

Employers...

What you need to know



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Review and/or Create Specific Job Descriptions

- ✦ Specific job descriptions are especially imperative for safety sensitive positions.
- ✦ An employee's job description is pertinent to the issue of the "standard of care" or expectation of performance for their position.
- ✦ Out-of-date or inaccurate descriptions will not help an employer's efforts to establish that an employee's conduct fell below the expected standard of care.
- ✦ It is apparent that some tasks and/or duties are potentially life-threatening or pose a public health or safety risk; whereas, others may not be so clear-cut. Identifying such tasks in a job description will help an employer support the imposition of such restrictions if the need arises.



Review and/or Create Company Policies

- ✿ Review current or create new drug and alcohol policies ensuring reasons regarding when and why a drug test will be performed are clearly outlined, as well as how consequences for failed tests will be enforced.
- ✿ Create a written substance abuse policy that spells out your rules and expectations.
- ✿ Clearly state that medical marijuana use while working is NOT acceptable behavior.
- ✿ Develop a process to review reasonable accommodation requests for medical marijuana cardholders.
- ✿ Update equal employment opportunity policies to include potential employee's who are medical marijuana cardholders.
- ✿ Have a policy securely in place for handling workplace violations keeping detailed records of such violations.
- ✿ Educate employees on new policies by providing updated policies using a signature acknowledgement form.
- ✿ Raise awareness toward D&A policies on an ongoing basis by including such policies in company newsletters as well as safety, team, supervisor, and staff meetings.



Stigma: Watch Your Policy's Language

- ✿ Inform all employees that name calling or any other form of workplace bullying or retaliation by fellow employees will not be tolerated.
- ✿ Do not use stigmatizing or judgmental names (pot head, druggie, “Oh you’re one of those” ...) when referring to an employee with a medical marijuana status.
- ✿ Inform supervisors that under no circumstance are they to breach confidentiality by identifying an employee as a participant in the medical marijuana program.
- ✿ Reinforce to supervisors that if there is a valid concern regarding an employee’s possible substance abuse, they must speak with the employee privately. It is always a good idea to have a second supervisor present when dealing with a possible workplace violation.

- ✿ **DO NOT** ask employment applicants if they are certified to use medical marijuana. MM is a protected demographic similar to age, disability, and religion.



Important Reminders

- ✿ An employee with a medical marijuana card should be treated like any other employee using prescription medication that could affect their ability to execute duties of employment.
- ✿ The regular guidelines regarding an employer's requirement to accommodate apply.
- ✿ An accommodation does not mean an employer is forced to permit an employee to carryout duties at work while impaired.
- ✿ An employer must exercise due diligence regarding health and safety laws while accommodating an employee.
- ✿ MM cardholders in safety-sensitive positions may need to be reassigned to a non-safety-sensitive position.
- ✿ Require an employee to disclose prescription drug if using the drug might impair their safe work performance.



Important Reminders

- ✿ Setup a process for gathering medical information to facilitate accommodation.
- ✿ Identify restrictions on use of medical marijuana in the workplace.
- ✿ Highlight breach of the policy and consequences.

- ✿ Employers should advise employees and job candidates that medical clearances will be required before safety sensitive job can be considered.
- ✿ Employees with federally regulated jobs can be terminated (or never hired) for failing a drug test even if they are legal medical marijuana users.

- ✿ Under the MMA, disciplining an employee who is under the influence of medical marijuana requires the employee be functioning below a “standard of care” or expectation for their specific position.
- ✿ Tests for marijuana do not measure current impairment.



DFWPA Recognizes the Controversy

Medical Marijuana is a highly debated national issue. This presentation is for educational purposes only and should in no way be construed as an opinion for or against the legalization of marijuana from Drug Free Workplace PA. Our primary goal is to provide you with the facts as readily as they become available.



DFWPA Strives to Represent Best Practices

Information provided by **Drug Free Workplace PA** is based on industry's best practices and in no way should be perceived as legal advice.

If procedures are questionable please contact an employment law practice in your area.



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Questions & Answers



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