

# Marijuana and the Workplace

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# Marijuana Legalization



Recreational  
Marijuana



Medical  
Marijuana



# Recreational Marijuana

- Currently found under Title 28-B: Adult Use Marijuana within Maine's Revised Statutes
- Amendment effective as of 5/2/2018
  - Public Law Chapter 409: amended employer provision as well as retail sales oversight and personal use cultivation
  - Changes have been incorporated into existing law.



# Recreational Marijuana

## Title 28-B, Chapter 1: Marijuana Legalization Act

### §112. Employment Policies

*Except as otherwise provided in the Maine Medical Use of Marijuana Act, an employer:*

- 1. Marijuana in workplace.** Is not required to permit or accommodate the use, consumption, possession, trade, display, transportation, sale or cultivation of marijuana or marijuana products in the workplace;
- 2. Workplace policies regarding marijuana use.** May enact and enforce workplace policies restricting the use of marijuana and marijuana products by employees in the workplace or while otherwise engaged in activities within the course and scope of employment; and
- 3. Discipline of employees.** May discipline employees who are under the influence of marijuana in the workplace or while otherwise engaged in activities within the course and scope of employment in accordance with the employer's workplace policies regarding the use of marijuana and marijuana products by employees.



# Medical Marijuana

- Currently found under Title 22, Ch 558-C of Maine's Revised Statutes
- 2 Amendments approved and incorporated into current law:
  - Public Law Chapter 447: oversight of dispensaries and caregivers updated
  - Public Law Chapter 452: amends laws governing cultivation, possession and use of medical marijuana



# Medical Marijuana

## **22 MRS, Chapter 558-C, §2426. Scope**

2. Construction. This chapter may not be construed to require:

B. An employer to accommodate the ingestion of marijuana in any workplace or any employee working while under the influence of marijuana.



# Medical Marijuana

## **22 MRS, Chapter 558-C, §2430-C. Protections for Authorized Activity**

2. School, employer or landlord may not discriminate. A school, employer or landlord may not refuse to enroll or employ or lease to or otherwise penalize a person **solely** for that person's status as a qualifying patient or a primary caregiver unless failing to do so would put the school, employer or landlord in violation of federal law or cause it to lose a federal contract or funding. This subsection does not prohibit a restriction on the administration or cultivation of marijuana on premises when that administration or cultivation would be inconsistent with the general use of the premises. A landlord or business owner may prohibit the smoking of marijuana for medical purposes on the premises of the landlord or business if the landlord or business owner prohibits all smoking on the premises and posts notice to that effect on the premises.



# CBD (Cannabidiol )

- Current Trend:
  - CBD derived from **HEMP** is federally legal and legal in Maine but it must contain  $<0.3\%$  THC.
  - CBD derived from the marijuana plant is not legal because it can contain much higher levels of THC.
- People are using CBD products thinking that they will pass a drug test – this is not always the case!



# Are the marijuana laws set in stone?

- No aspect of either law has yet been tested in Maine Courts nor clarified by Legislature\*
  - There have been several cases decided in New England (MA, RI, CT)
    - All dealt with medical marijuana
    - All cases were won by the defendant (not the employer)
- The laws can change at any time
  - both laws have recently been amended

# Maine Department of Labor Recommendation:



- **Contact your own legal counsel for advice on testing for marijuana and how to proceed with medical marijuana positives**

# Questions?



# What does this mean for employers?

## 1. Review your policies

- ✓ Drug-Free Workplace policies
- ✓ Substance Use Testing policies
- ✓ Safety policies
- ✓ Employee Handbooks
- ✓ Other relevant policies

## 2. Learn how to detect impairment

# Policies

## Make sure policies address:

- ✓ Prescription drug use in the workplace
  - Are they okay to use?
- ✓ Medical marijuana and other “legal” substances in the workplace, including alcohol and recreational marijuana
  - Will your company accept medical marijuana cards for positive results?
  - Does your company host events where alcohol may be served?
- ✓ Impairment in the workplace
  - How will impairment be determined and handled?
- ✓ What is the company’s definition of “in the course and scope of employment”?

# To Test or Not to Test: that is the question...

	Drug-Free Workplace Policy (DFWP)	Substance Use Testing Policy
<b>What is it?</b>	A document that lays out an employer's expectations and consequences for substance use/impairment in the workplace	A document that lays out an employer's drug testing procedures, what to expect and potential outcomes of testing
<b>Is it required?</b>	Not in Maine, may be required under a federal contract	Yes, if the employer is going to drug test employees or applicants
<b>Who writes it?</b>	Employer	Employer
<b>Employee Participation?</b>	Recommended	Required by the Substance Use Testing Law
<b>Review and Approval?</b>	None required, but MDOL will review, advise and provide recommendations, if requested	MDOL approval is <u>required</u> before any employee drug testing is done
<b>Are any of its contents legally required?</b>	None required, but employers ought to seek legal counsel when preparing DFWRPs	Content must meet the provisions of the Maine Substance Use Testing Law
<b>Where is there more guidance?</b>	<ul style="list-style-type: none"> <li>• Maine CDCP Staff</li> <li>• Maine DOL Staff</li> <li>• SAMHSA Policy toolkit</li> </ul> <a href="https://www.samhsa.gov/workplace/toolkit">https://www.samhsa.gov/workplace/toolkit</a>	<ul style="list-style-type: none"> <li>• Maine DOL Staff and website</li> </ul> <a href="http://www.maine.gov/labor/labor_laws/substance_abuse_testing/index.html">http://www.maine.gov/labor/labor_laws/substance_abuse_testing/index.html</a>

# Testing

The Law: *No employer may require, request or suggest that any employee or applicant submit to a substance use test without a written substance use testing policy approved by the Maine Department of Labor.*

## **\*\*Exemption:**

- *Employers with employees that are federally mandated to be tested under federal testing requirements (i.e. CDL drivers, etc.).*

# Testing

## Allowable Substances

- Alcohol\*
- 6-Acetylmorphine (heroin)
- Amphetamine, Methamphetamine
  - MDA, MDEA, MDMA (Ecstasy)
- Barbiturates
- Benzodiazepines
- Cocaine and/or metabolites
- Marijuana and/or metabolites
- Methadone
- Methaqualone
- Opiates and/or metabolites
  - Morphine
  - Codeine
- Phencyclidine (PCP)

## Allowable Specimen Types

- Urine
- Oral Fluids / Saliva
- Hair
- Sweat
- Blood \*

\*Blood samples can only be requested by the employee at the time of drug test



# Testing

*Maine Law allows for the following types of testing:*

- Applicant or Pre-Employment: Applicant policies are used to screen job candidates who have been offered a position contingent upon passing a drug test.
- Probable Cause (Reasonable Suspicion): is based on a determination by a qualified observer that the employee may be impaired or under the influence of a substance.
- Random: is based on randomly selecting individuals from a pool.
- Arbitrary: is based on an event. This may be an employment anniversary, a contract obligation, or other non-cause related occurrence.

# Testing

Things to know about employee testing policy types:

## ***Probable Cause:***

- The determination cannot be based on any of the following exclusively –
  - Information received from an anonymous informant
  - Any information tending to indicate that an employee may have possessed or used a substance off duty, except when the employee is observed possessing or ingesting any substance either while on the employer's premises or in the proximity of the employer's premises during or immediately before the employee's working hours; or
  - A single work-related accident

# Testing

Things to know about employee testing policy types:

## **Random:**

- Employers can conduct random testing for employees in safety-sensitive positions **ONLY**

OR

- Employers can test **ALL** of their employees randomly under the following conditions:
  - **Must have more than 50 full-time employees *company-wide*, and**
  - **A committee of at least 10 of the employees who will be subject to testing must assist in the random policy development**

# Testing

Things to know about employee testing policy types:

## ***Arbitrary:***

- Employers can only conduct arbitrary testing for employees in safety-sensitive positions or they will need to follow the same requirements as random if testing all employees.
- Typically, employers that test using an Arbitrary policy are those that have clients requiring that they test certain employees before they are allowed to work for that client.
  - For example, service technicians that work on appliances with manufacturer's warranties and go into customer's homes will often be subject to arbitrary testing.
- Some employers do test annually on an employee's hire date.

# What is “Safety-Sensitive”?

## Recommended definition:

- A “**safety-sensitive task or occupation**” means a work task or an employee occupation that based on its nature, machinery, location, surroundings, or its influence upon other operations could potentially pose a threat to the safety of that worker, a co-worker, or others.
- **Employers may limit impairment detection activities to what they consider “safety-sensitive” positions. While the DOT “safety-sensitive” positions are limited to a certain list of occupations, MDOL recommends a broader definition if employers wish to determine safety-sensitive positions at their worksites.**

# Testing

Table 1: Results by Test Type

Maine, 2018

	Applicant Tests	Applicant Percent Positive	Probable Cause Tests	Probable Cause Percent Positive	Random/Arbitrary Tests	Random/Arbitrary Percent Positive
Total Tests	23,999		35		1,079	
Total Invalid Tests*	72	0.3%	0	0.0%	2	0.2%
Total Positive Results	1,399	5.8%	18	51.4%	38	3.5%
<b>Cannabinoids</b>	<b>1,275</b>	<b>91.1%</b>	<b>10</b>	<b>55.6%</b>	<b>24</b>	<b>63.2%</b>
Amphetamines	51	3.6%	2	11.1%	4	10.5%
Cocaine	34	2.4%	3	16.7%	5	13.2%
Methadone	13	1.0%	0	0.0%	0	0.0%
Opiates	8	0.6%	2	11.1%	0	0.0%
Alcohol	5	0.4%	1	5.6%	3	7.9%
Benzodiazepines	6	0.4%	0	0.0%	1	2.6%
Phencyclidine	5	0.4%	0	0.0%	0	0.0%
Barbiturates	2	0.1%	0	0.0%	1	2.6%
Methaqualone	0	0.0%	0	0.0%	0	0.0%

# Testing Process

This is what **should** be happening\*:

1. Individual is sent for testing, sample is taken
2. Sample is screened and is found either negative or non-negative
3. All non-negative results are sent for confirmation testing
  - a. If result is still non-negative/positive, lab representative or Medical Review Officer (MRO) will try to reach the individual to discuss the result
  - b. Individual may provide a valid medical explanation for result – they have a prescription written by a doctor for the substance
    - i. **This should include a valid medical marijuana card\*\***
4. If explanation is valid, lab will report results back as NEGATIVE
5. If explanation is not valid, lab will report results back as POSITIVE

# Questions?





What can employers do:  
Train managers/supervisors to detect and respond to  
impairment

*If supervisors and managers are able to detect employee impairment when it happens:*

- *Accidents can be avoided*
- *Help/treatment can be initiated*

# But remember...

❖ Impairment is not only caused by drugs or alcohol – it is caused by many things, including:

- Health issues
- Mental health issues
- Fatigue, sleep-deprivation
- Personal issues the individual is going through

# So...

*Determining the CAUSE of impairment is not the most important objective - the focus of impairment detection should always be on **SAFETY** and **PERFORMANCE***

- *Is the employee unable do the job adequately or unable to do the work safely?*

# Next Steps: what to do after detecting impairment

- First, and most importantly, if you suspect someone is impaired – remove them from any potential safety hazards
- Document the observable behaviors that led to your impairment detection
- Have a discussion with the individual to confirm that he/she is really impaired. Always have another supervisory person with you for safety and validation, ideally an HR representative
- Develop a plan for immediate action ( hopefully following your already-established protocols)
- Then, as appropriate, develop a plan for returning the individual to work including treatment options and other such resources.

# In Summary

- ✓ Be Prepared BEFORE a situation arises... because it will
- ✓ Seek the guidance of a professional employment attorney as you establish and implement substance use policies
- ✓ Focus on handling impairment that effects SAFETY and employee PERFORMANCE
- ✓ Determining the cause of impairment is less important than knowing if the employee can safely and adequately perform the job
- ✓ For additional information or assistance – contact MDOL and/or a lawyer who is knowledgeable in employment law

# MDOL Impairment Detection Training for Employers

The class is designed to help supervisors be more comfortable and confident in detecting when an employee is impaired at work and handling that impairment appropriately. At the end of the course, participants will:

- ✓ Understand the purpose and benefits of a drug-free workplace program
- ✓ Have a greater ability to recognize signs and/or symptoms of impairment in the workplace
- ✓ Be able to respond affirmatively to employee impairment when it is discovered
- ✓ Understand the options for treatment and recovery as well as the processes that lead to the employee's return to work

<http://www.maine.gov/tools/whatsnew/v3/index.php> : link to MDOL's class registration site for the new "Impairment Detection Training for Employers" course.

# Final Questions?

