


**Marijuana and the Workplace:  
What's the Buzz?**

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**OVERVIEW**

- Washington's New Law (I-502)
- Federal Law
- Medical Marijuana and the Workplace
- Unionized Workforce Issues
- Drug Testing Policy Considerations
- Alternatives to Zero Tolerance?
- Prescription Drugs

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**I-502 "Recreational Use"  
Highlights**

- Voter Initiative Passed November 2012
- Age 21 and Over
- One Ounce or Less
- No Public Use
- Purchased From Authorized Retailer
- Regulatory Scheme By 12/1/13
- DUI = 0.05 Nanograms or Higher

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### Ironic Timing . . . Days Later



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### Marijuana Remains Illegal Under Federal Law

- Illegal for All Purposes Under Federal CSA
- Schedule I Drug (with Heroin, LSD etc.), Meaning:
  - High Potential for Abuse;
  - No Accepted Medical Use; and
  - Cannot Be Safely Used Even Under Medical Supervision

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### Federal Law Trumps State Law

- *Gonzalez v. Raich* (2005 U.S. S.Ct):  
Regardless of any State's Laws, Federal Government May Regulate Marijuana Grown, Sold, and Consumed Within State
- In Other Words, You Can Still Get Busted No Matter What Washington State Does

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### Will the Feds Stop I-502?

- Mixed Signals
- Bigger Fish to Fry?
- Administrations and Philosophies Change
- Bottom Line: If Anyone Tells You They Know What the Feds Will Do This Year, They Are Blowing Smoke at You

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### What About Medical Marijuana?

- Momentum at State Level to Decriminalize or Authorize Medical Marijuana Use
- Some States Offer Medical Marijuana Employment Protections (Not WA)
- A Few States Protect Off-Duty Conduct
- Employers and Employees are Left Dazed and Confused

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### Jurisdictions with Medical Marijuana Laws

<ul style="list-style-type: none"><li>• Alaska</li><li>• *Arizona</li><li>• California</li><li>• Colorado</li><li>• Connecticut</li><li>• *Delaware</li><li>• Hawaii</li><li>• *Maine</li><li>• Maryland</li><li>• Michigan</li></ul>	<ul style="list-style-type: none"><li>• Montana</li><li>• Nevada</li><li>• New Jersey</li><li>• New Mexico</li><li>• Oregon</li><li>• *Rhode Island</li><li>• Vermont</li><li>• Washington</li><li>• Washington, D.C.</li></ul>
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\* Legislation expressly includes employment protections

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## The Feds' Mixed Signals

- 10/19/2009 Ogden memo: Deputy AG advised prosecutors should not focus federal resources on individuals whose actions are in clear and unambiguous compliance with existing state medical marijuana laws
- On 10/22/09, DOT issued a statement that the DOJ's position does not impact its regulations. Reaffirms in 2012 in the wake of I-502
- 11/11/2009: AMA urges federal government to reconsider marijuana's Schedule I classification (a reversal of its 72-year stance)
- 2011: Federal government prosecutes dispensaries in Washington and Montana; sends warning letters to several states, including Washington
- June 2011: Members of Congress urge the AG to clarify DOJ's position
- 6/30/2011 Cole memo: Deputy AG wrote that "marijuana cultivation centers" not shielded from prosecution
- 2012 public silence (mostly) from DOJ. DOT has reaffirmed its position

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## Medical Use of Marijuana Act (MUMA): RCW 69.51A

- Passed via voter initiative in 1998
- Allows health care professionals to "authorize" marijuana use in limited circumstances (not a prescription)
- Defense to a State criminal charge
- Did not "legalize" medical marijuana
- Legislature amended in 2007, 2010, 2011

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## Qualifying Patients

- Patient of a health care professional
- Has been diagnosed with a terminal or debilitating medical condition
- Is a Washington resident
- Has been advised by the health care professional about the risks and benefits of marijuana
- Has been advised by the health care professional that they may benefit from the medical use of marijuana

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### “Terminal or Debilitating Medical Conditions” include

- Nausea, vomiting, and cachexia associated with cancer, HIV/AIDS, and Hepatitis C
- Severe muscle spasms caused by spasticity disorders (e.g., MS, epilepsy)
- Glaucoma
- Crohn’s disease
- Intractable pain unrelieved by standard medical treatments and medications

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### Sounds Like . . .

- Employees who qualify to use medical marijuana would have underlying medical conditions that qualify as disabilities under the ADA and WLAD?

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### Disability Accommodation?

- Until recently, an employer’s duty to accommodate medical marijuana was unclear in Washington
- Accommodation issues arose when employee failed drug test or voluntarily disclosed use of medical marijuana

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### MUMA's Pre-2011 Amendments

- 1998 – “Nothing in this chapter requires any accommodation of any medical use of marijuana in any place of employment”
- 2007 – “Nothing in this chapter requires any accommodation of any **on site** medical use of marijuana in any place of employment”

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### *Roe v. TeleTech*, 171 Wn.2d 736 (June 9, 2011)

- 8-1 Decision in Employer's Favor
- MUMA provides criminal affirmative defense
- MUMA does not confer employment protections
- No cause of action for wrongful discharge
- Backdoor federal preemption analysis
- Probably no cause of action under RCW 49.60
  - ADA
  - WLAD and discussion of HRC

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### 2011 MUMA Amendments

- Post-*Roe v. Teletech*
- Attempts to add employment protections rejected
- Added: “Employers may establish drug-free work policies. Nothing in this chapter requires an accommodation for the medical use of cannabis if an employer has a drug-free workplace.”
- Incentive for an employer to have such a policy!

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### Decisions From Other States

- *Ross v. RagingWire Telecommunications* (CA)
- *Emerald Steel Fabricators v. BOLI* (OR)
- *Johnson v Columbia Falls Aluminum* (MT)
- *Casias v. Walmart* (6<sup>th</sup> Cir., out of MI)
- *James v. City of Costa Mesa* (9th Cir., out of CA)

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### Bottom Line in WA

- Employers should not have to accommodate medical marijuana use
- Employers can make disability accommodations if they want to, but there are risks in doing so (We will get to those)

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### Potential Causes of Action For Discipline Based on Medical Marijuana

- Wrongful discharge/public policy (Not in WA)
- Wrongful discharge/contract or policies
- Limitations on discipline for off-duty conduct (California, Colorado, North Dakota. Not in WA)
- Disability discrimination (Not in WA, if done right)
- FMLA (Not in WA, if done right)
- Union contract rights (just cause standard)

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### Unionized Employers

- *Seafreeze Cold Storage* (Dec. 2011) No just cause to terminate when home use and work impairment nexus not proven
- *BASF Catalysts*, (June 2012) employer terminated 30-year employee with good record caught with 1/2 ounce marijuana at work and who smoked right before work. No just cause to terminate.

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### Negotiate That Risk Away

- Zero tolerance policy
- Any detectable amount, not an impairment standard
- No exceptions for medical marijuana
- Consider LCAs if you have/want to do that

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### Oft-Cited Reasons to Prohibit Marijuana Use

- Federal Drug-Free Workplace Act
- DOT/CDL Positions
- OSHA/WISHA (Safe workplace duty)
- WAC 296-800-11025
- Workers' compensation programs
- Common law liability (negligent hire, negligent retention, vicarious liability)
- Customer Contracts

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### Of-Cited Reasons to Prohibit Marijuana Use (Cont.)

- Productivity and efficiency
- Absenteeism
- “Science”/Difficult interactive process
- Opening the gates
- Public perception
- Company philosophy

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### Scientific Evidence Adverse Effects

- American Medical Association (AMA) report lists the following adverse effects:
  - Increased heart rate
  - Impairment of short term memory, attention, motor skills, reaction time, organizational skills
  - Increased talking
  - Distortion in time sense
  - Lethargy and drowsiness
  - Anxiety, panic attacks, confusion, paranoia

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### Some Factors to Consider When Crafting Policies

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| <ul style="list-style-type: none"><li>• Safety</li><li>• Liability</li><li>• Contracts</li><li>• Absenteeism/Health</li><li>• Productivity</li><li>• Company culture</li><li>• Publicity</li></ul> | <ul style="list-style-type: none"><li>• Compassion</li><li>• Morale</li><li>• Loss of valued employees</li><li>• Company culture</li><li>• Publicity</li></ul> |
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### Types of Drug Testing Policies

- Pre-Employment
- Reasonable Suspicion
- Post-Accident (can be a form of reasonable suspicion)
- Random

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### Drug Policy Checklist

- Written policy (careful if multi-state)
- Use plain English
- Union issues (negotiability)
- Types of testing (reserve all rights)
- Cover Illegal Drugs (state or federal)
- Any detectable amount vs. impairment

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### Drug Policy Checklist (cont.)

- Exclude medical marijuana
- Prescription drugs: Reporting/Abuse
- Cover knockoffs (spice, K2, etc.)
- Specified discipline
- Consequences for refusal or interference
- EAP? LCA?
- Chain of custody (split samples?)

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### Drug Policy Checklist (cont.)

- Confidentiality (Privacy Issues)
- Government certified lab
- Disseminate policy
- Train all supervisors/Be consistent
- Coordinate with other policies (search rights, etc.)
- Have it reviewed

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### Some Sample Language

The Company prohibits employees from working with any detectable amount of any drug in their body that is illegal under state or federal law (this includes medical marijuana). We enforce this policy consistently with respect to all such drugs.

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### Signs of Marijuana Impairment

- Marijuana odor (on clothes, hair, etc.)
- Excessive hunger or thirst
- Lack of motivation
- Red eyes
- Dry mouth
- Lapse in short term memory
- Difficulty judging time and distance

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### Some Options Other Than Termination

- Allow use, prohibit impairment
- Alternative medication (marinol)
- Lesser forms of discipline
- Remember you are assuming risk with all

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### Least Risky Alternative?

- Maintain zero tolerance policy by placing employee on indefinite leave with conditions
- Enforce drug policy by requiring employee return to work drug free and under a LCA
- More compassionate, but precedent setting?

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### Accommodation Challenges

- Insufficient research on the effects of marijuana use
- Not FDA regulated - cannot be prescribed
- Stays in the system for a long time
- Can be addictive per some research
- Interactive process challenges ("Hi Feelgood, M.D.")

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## Prescription Drugs

- Marinol?
- Possible duty to accommodate
- Safety considerations
- Privacy considerations
- Increase in prescription drug abuse
- Have a reporting requirement re safety

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## QUESTIONS?

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## Thank You

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