

The title of the webinar series, 'Welcome to Our Webinar Series: Marijuana in the Workplace', displayed in a white serif font over a teal and blue geometric background. The background features a photograph of two people, a woman and a man, looking at a laptop screen together in an office setting.

Welcome to Our Webinar Series: Marijuana in the Workplace

Doug Desmarais, Esq. | *Smith & Downey*

May 11, 2023

During the Webinar if You
Have Any Questions, Please
Feel Free to:

- Enter questions via the “Chat” feature in the Zoom meeting

Have Questions?

Reminders

Complete our 2-minute post webinar [SURVEY](#). All completed surveys will be entered to win a \$100 Goldbelly Gift Card!



Webinars

The Mindful Workplace: Addressing Employees' Mental Health

May 18th, 2 PM - 3 PM EST

Untangling the HR Tech Market - The Disruption Never Stops

May 24th, 2 PM - 3 PM EST

Quarterly Compliance Update

June 6th, 2 PM - 3 PM EST

Health Plan Transparency and General Compliance Update

June 7th, 2 PM - 3 PM EST

Upcoming Events

Download our Toolkit for Mental Health Awareness Month

The Mental Health Awareness Toolkit includes:

- Resources designed to help you create a robust mental health program for your organization
- Templates, tools, and expansive resources to support you in raising awareness about how much mental health matters
 - Sample emails, email signatures, virtual meeting backgrounds, videos and other sourced resources
- Click [Here to Download the Toolkit!](#)

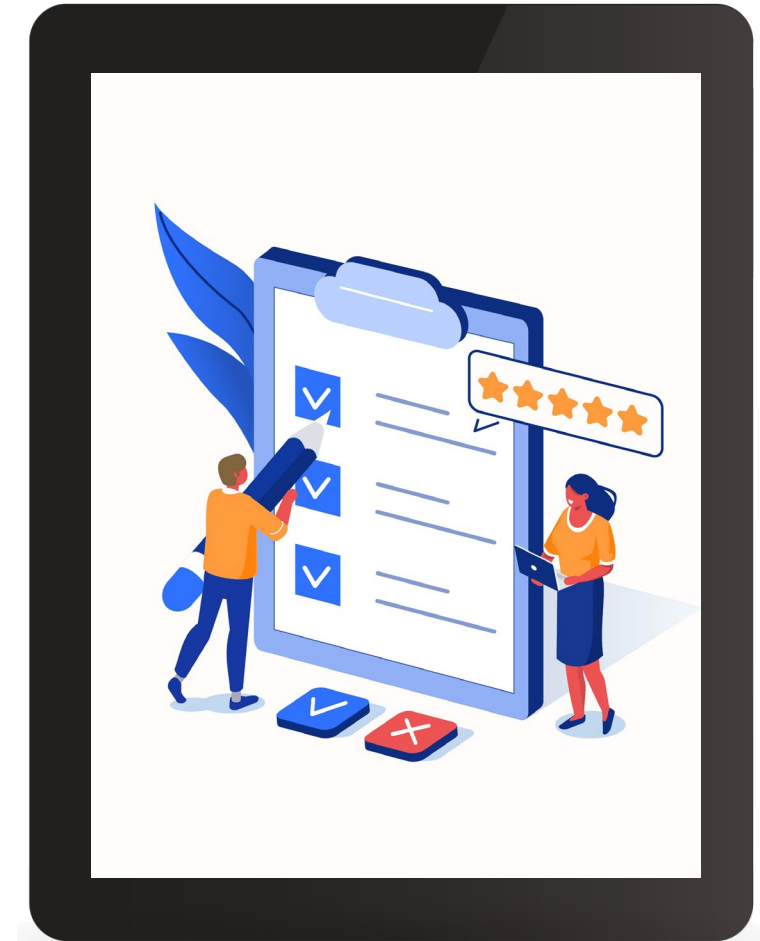


2023 Mid-Atlantic Benchmarking Survey

If you are a Mid-Atlantic employer with 50 or more employees, then you are invited to participate in the 2023 Mid-Atlantic Benchmarking Survey

Our survey provides companies with comparable benchmarking data for:

- Medical Plans
- Dental, Life, and Disability Benefits
- Innovative Benefits & Strategies
- Wellness & Vision
- Other Specialty Benefits
- Click [Here for More Information!](#)



Welcome

Doug Desmarais, Esq., *Smith & Downey*

In the Weeds: Marijuana in the Workplace

May 11, 2023



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Disclaimer

Note that this presentation is intended as a general discussion of the law and is not intended as legal advice for any particular situation.

Fast Facts

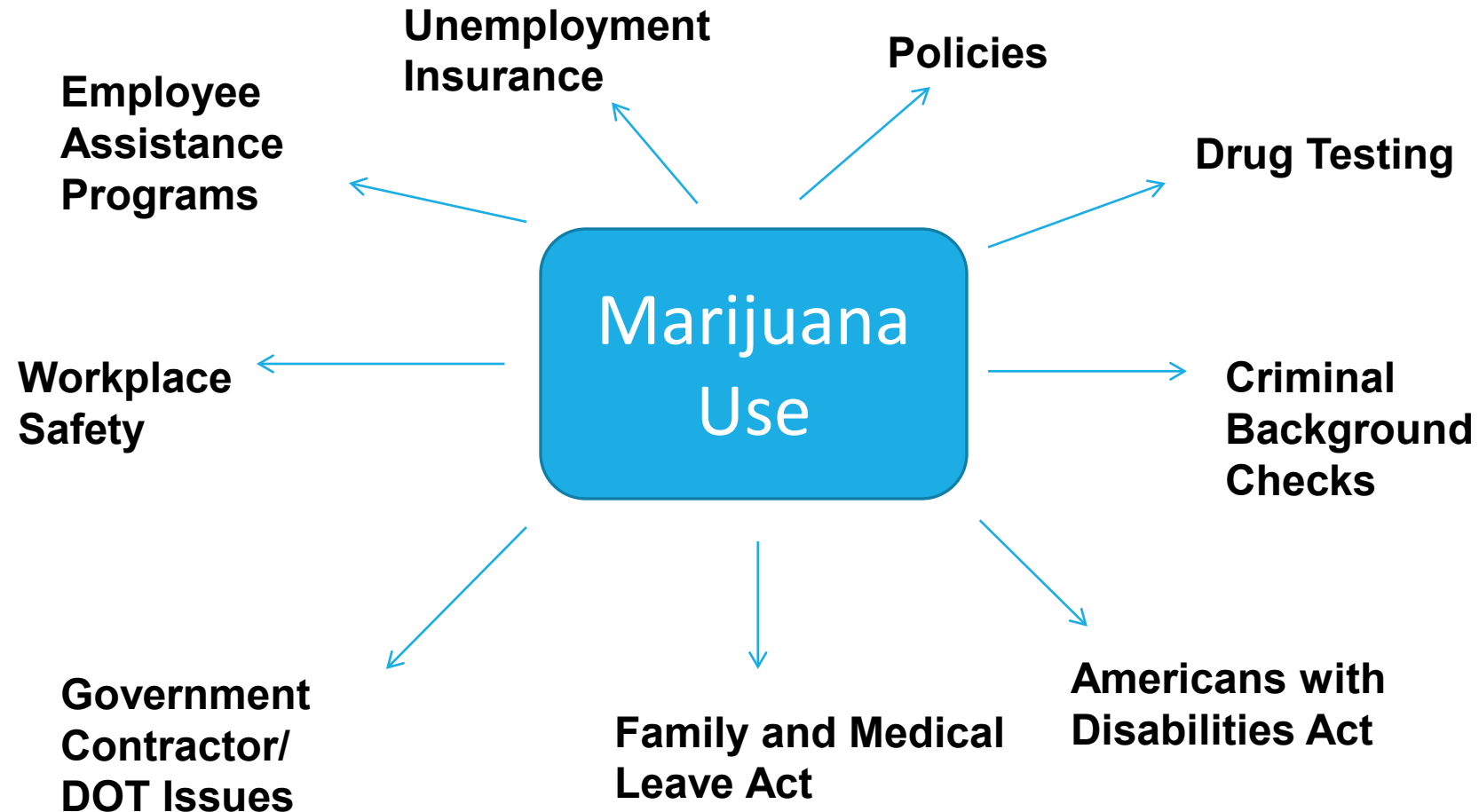
- Marijuana is the most commonly used federally illegal drug in the U.S. – app. 48.2 million Americans used at least once in 2019
- Medical marijuana is legal in 37 states + D.C.
- Recreational marijuana is legal in 21 states + D.C.
- According to Columbia University, legalization of marijuana led to rise in cannabis use, although the study showed that cannabis use disorder rates generally remained the same

In Maryland...

TRUE
 FALSE

- Medical marijuana is legal?
- Recreational marijuana is legal?
- Employers have to accommodate employees who use medical marijuana?
- Employers can ask about marijuana convictions in a job interview?

Marijuana in the Workplace



Medical Marijuana in Maryland

Background:

- Law passed in 2013, Overhauled in 2014; first dispensary licensed 2017

Patient Access:

- Certifying physicians/providers approved by State Commission
- Licensed dispensaries distribute medical marijuana; limited licensed cultivators
- “Qualified patients” may possess up to a “30-day supply” – no more than 4 oz dried
- Shields qualifying patients from “arrest, prosecution, or any civil or administrative penalty” associated with compliant use*
 - **Has no impact on federal law*

Approved Diagnoses:

- List of approved medical conditions; plus a “catch-all”

Do we have to accommodate medical marijuana use?

- Qualifying patient may not be “denied any right or privilege” because of compliant medical marijuana use
- **BUT...**
- Maryland Commission website – law does not prevent employers from testing for cannabis or taking any action against employee who tests positive (for any reason) – see https://mmcc.maryland.gov/Pages/patients_faq.aspx
- **Untested in Maryland courts!**
 - Whatever your approach, be consistent!

What about accommodations under the ADA?

- Under ADA (federal law), courts follow federal view, which treats marijuana as illegal drug
- ADA protects people in recovery – no longer engaging in illegal use of drugs
- Does not require accommodation of ongoing use of illegal drugs
- **BUT** employee who uses medical marijuana still has standing to try to show they were discriminated against on the basis of disability (as opposed to on the basis of medical marijuana use)
 - *Eccleston v. City of Waterbury* (D. Conn. March 22, 2021)

Substance Abuse and the Americans with Disabilities Act

Drug Addiction

- Current use of illegal drugs is not a protected disability

Alcoholism

- Current alcoholism *is* a protected disability
- May hold alcoholic EEs to the same standards and work conduct rules as other EEs

Prescription Drug Use

- No requirement to allow EE use of prescription medication to interfere with job performance

ADA Interactive Process

- Reasonable accommodation: Modified work schedule to attend AA meeting vs. NO right to modified work schedule because hung over

How would you respond?

- Zach works in Maryland. He asks to speak with HR about an accommodation request.
 - “I have chronic pain and I just got a medical marijuana card. I will never use at work or report to work intoxicated, but I’d like to take some time off when my condition flares up to treat the pain.”

How would you respond?

- 1. What does your policy say?** Do you allow employees to use medical marijuana off-site and during non-working hours?
- 2. Move into interactive dialogue mode!**
 - *Don't shut down the conversation, even if your policy prohibits off-duty use of marijuana*
 - *May also be an FMLA event!*
- 3. Dig deeper to understand what Zach is actually requesting.**

Medical Marijuana in Surrounding States

	Washington, D.C.	Virginia	Pennsylvania
Allowed?	Yes	Yes	Yes
Have to accommodate use?	Yes (see next slide)	Cannot take adverse action against EE for lawful use of medical marijuana	Cannot take adverse action against EE for lawful use of medical marijuana
Qualifying Conditions	Persons at least 21 years of age may self-certify their application in lieu of producing referral from healthcare provider	Any diagnosed condition or disease determined by qualifying healthcare provider to benefit from such use	Long list of specific qualifying conditions – see https://www.pa.gov/guides/pennsylvania-medical-marijuana-program/#HowtoGetMedicalMarijuana

Washington, D.C. – Cannabis Employment Protections Amendment Act of 2022

- **Cannot take adverse action against employees for:**
 - (1) legal use of cannabis (off-duty);
 - (2) status as medical marijuana program patient; or
 - (3) having presence of cannabinoid metabolites in system without additional factors indicating impairment
- **Must treat medical marijuana same as any other prescribed medication – unless:**
 - (1) employee in “safety-sensitive position” (as defined by law) or
 - (2) it would place employer in position of violating federal law, regulation, contract, or funding agreement
- **Will go into effect on **July 13, 2023** (or shortly thereafter)**

Recreational Marijuana in Maryland

- November 2022 – Maryland voters approved ballot measure to legalize recreational marijuana
- **Starting July 1, 2023** – recreational use permitted (**ages 21+**)
 - Up to 1.5 oz.
 - Possession more than 1.5 oz., up to 2.5 oz. = civil offense
- Can grow up to 2 plants/household, can share cannabis with other adults without payment or trade
- State will set up highly-regulated cultivation and distribution system – **can only buy marijuana legally through this system**

Recreational Marijuana in Maryland, Cont.

- Cannabis Public Health Advisory Council and a Cannabis Public Health Fund will be established
- Past convictions for conduct that is now legal will automatically be expunged

Recreational Marijuana in Maryland, Cont.

- Maryland lawmakers set up Cannabis Referendum and Legalization workgroup
- Recent meeting - recognized limits of drug testing – difficult to determine impairment level from THC levels – metabolites can remain present in person's system for weeks after consumption
- Legislature may revise drug testing laws in the future to protect employees who test positive for cannabis but are not impaired at work

What does this mean for employers?

- Maryland law does not directly address employee use of recreational marijuana - **Can continue to prohibit use/impairment on job AND off-duty use (even if legal)**
- Cannabis or hemp products must be added to the existing ban on smoking in any indoor place of employment under the Clean Air Act - **Revise no smoking policies**
- No one is allowed to smoke marijuana—and drivers cannot consume any edible form of marijuana—in a vehicle on any public road - **Revise employee driving policies**

Best Practices for Drug Policies

- **Explain expectations** regarding marijuana use during non-working hours, outside of the workplace
 - Different standards medical marijuana vs. recreational?
 - Different standards for different employees (e.g., subject to DOT regs?)
- **Describe potential consequences for positive test & refusal to submit to testing**
- **Drug “use” vs. “impairment”** – THC levels for regular vs. casual user

Drug Testing in Maryland: Special Rules for Job Applicants

- **Can't test before conditional offer** of employment!
- **Preliminary screening procedure:**
 - Uses single test device that can be administered at worksite
 - Meets federal FDA requirements for commercial distribution
 - Meets generally accepted cutoff levels
- **Required retesting** for positive results
- **Provisional employment** pending test results
- **Required training** – privacy and integrity

Drug Testing: Random v. Reasonable Suspicion

- Random = Truly random
- Reasonable Suspicion
 - Objective and reasonable suspicion that employee is intoxicated or has ingested drugs while working
 - Work-related accident or injury – *only if some reason to suspect drugs/alcohol might have played role!*
 - Importance of documentation

Drug Testing in Maryland: Procedures

Must be performed by **State-certified lab**

- No breathalyzer tests!
- No hair samples!

Provide notice of name and address of testing lab at time of test, upon request

**Procedures outline in Md. Code Health Gen. § 17-214*

Drug Testing in Maryland: Procedures, Cont.

Post-test notice to employee after confirmation of positive drug test **must include:**

- Lab report
- Written policy on drugs/alcohol
- Written notice of intent to take negative employment action
- Provision in the law that permits an employee to request independent testing of the same sample

Verification of test results

Consequences for refusal to submit to testing

Prescription Drugs

- **Confidentiality:** Testing lab may not disclose info. regarding EE use of: (1) **legal non-prescription drugs** (excluding alcohol); or (2) **medically prescribed drugs**, unless EE unable to demonstrate lawfully prescribed
- ERs may have zero-tolerance policy prohibiting EEs from reporting to work impaired (even if caused by a prescription drug)
- May not terminate EE for prescription drug use without evidence of **actual impairment**

Unique Considerations for Drug Testing

HEALTH CARE FACILITIES AND HIPAA

- Increased risk of converting information to PHI

UNIONIZED WORKFORCE

Drug testing = mandatory
subject of bargaining

Unionized employee may
have right to consult union
rep. before taking drug test

Criminal Background Checks

EEOC: All criminal background checks must be “*job-related*” for the position in question and *consistent with business necessity*”

Ban-the-Box Laws:

- Baltimore City
- Montgomery County
- Prince George’s County
- Washington, D.C.

Family and Medical Leave Act

- **“Serious health condition”** under the FMLA may include substance abuse
- May take leave under FMLA for substance abuse treatment referred by or administered by health care provider
- Qualified treatment may include stay in rehab facility
- DOL Rule – **Need for established policy for discipline based on substance abuse**

Government Contractor Issues, Cont.

Drug-Free Workplace Act of 1988 requires covered federal contractors to:

- **Publish and provide** drug-free workplace policy statement;
- **Notify employees** that as a condition of employment must comply with drug-free workplace policy and must notify employer of conviction of workplace drug crime
- **Establish a drug-free awareness program**
- **Impose penalty on** – or require satisfactory participation in drug rehab program by – any employee who is convicted of workplace drug crime

If we're subject to DFWA do we have to...

- Drug test?
 - **No!**
- Fire an employee who uses marijuana outside of work?
 - **No!**
- Fire an employee who uses marijuana at work?
 - **Not necessarily!**

Department of Transportation

- DOT has strict mandatory drug testing program for safety-sensitive transportation employees
- **Does not** authorize medical marijuana under state law as valid medical explanation for positive drug test!

Workplace Safety

Occupational Safety and Health Act (“OSHA”) and Maryland OSHA (“MOSHA”):

- General duty to provide safe work environment

Dram Shop Laws:

- Under MD law, ERs generally not responsible for actions of EEs who leave work intoxicated
- But proceed cautiously!

Workers’ Compensation:

- General disqualification for injury caused by EE’s own improper drug use or intoxication
- Injury caused by another person’s use of marijuana likely covered

Employee Assistance Programs, Cont.

What are the legal concerns?

- **ADA** - Mandatory referral could give rise to ADA claims (e.g., perceived disability)
- **EEOC** – ER may not force EE with disability to choose between EAP participation or discipline in situations where other EEs would not be disciplined
- **Other Legal Concerns**
 - ERISA
 - HIPAA
 - Affordable Care Act

Unemployment Insurance

On-the-Job Drug/Alcohol Abuse:

- Employees fired for drug/alcohol abuse on the job have engaged in misconduct
- Examples:
 - Claimant drove the employer's truck while under the influence of alcohol. This was gross misconduct. *Howard v. Ray Sears and Son*, 517-SE-87.
 - Claimant took and gave another employee controlled dangerous substances while on dinner break. Both reported back to work, and other employee behaved in crazed manner. This was gross misconduct. *Hadaway v. Convention Complex*, 98-BR-88.

Unemployment Insurance, Cont.

Drug Abuse/Alcoholism as Diseases:

- Maryland DLLR takes position that drug abuse and alcoholism are diseases
- Where alcoholism results in “irresistible compulsion to drink,” resulting absenteeism and performance problems not misconduct for UI purposes
- Does not excuse conduct where employee refused chance to get treatment, deliberately failed to complete treatment, and/or has not shown urge to drink is irresistible compulsion

Unemployment Insurance, Cont.

Refusal to Submit to Drug Testing may be grounds for gross misconduct

- But ER must follow all legal drug testing procedures
- **Example**: Claimant appeared impaired, smelled of marijuana, and refused drug test against ER's policy, direct order, and warnings. Claimant could have taken drug test in private. Claimant's actions were gross misconduct. *Conney v. Fort Howard Cup Corporation*, 552-BH-88.

Test your knowledge!

- Can employers discipline for off-duty recreational marijuana use in Maryland?
- Can employers discipline for off-duty medical marijuana use in Maryland?
- Is there any impact on workplace testing?
- Can employers consider marijuana-related convictions during pre-employment background checks?

QUESTIONS?

THANK YOU!

Your Presenter

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