

Strategies and Defenses for Hospitals to Address Marijuana Impairment and Workplace Safety



Presenter



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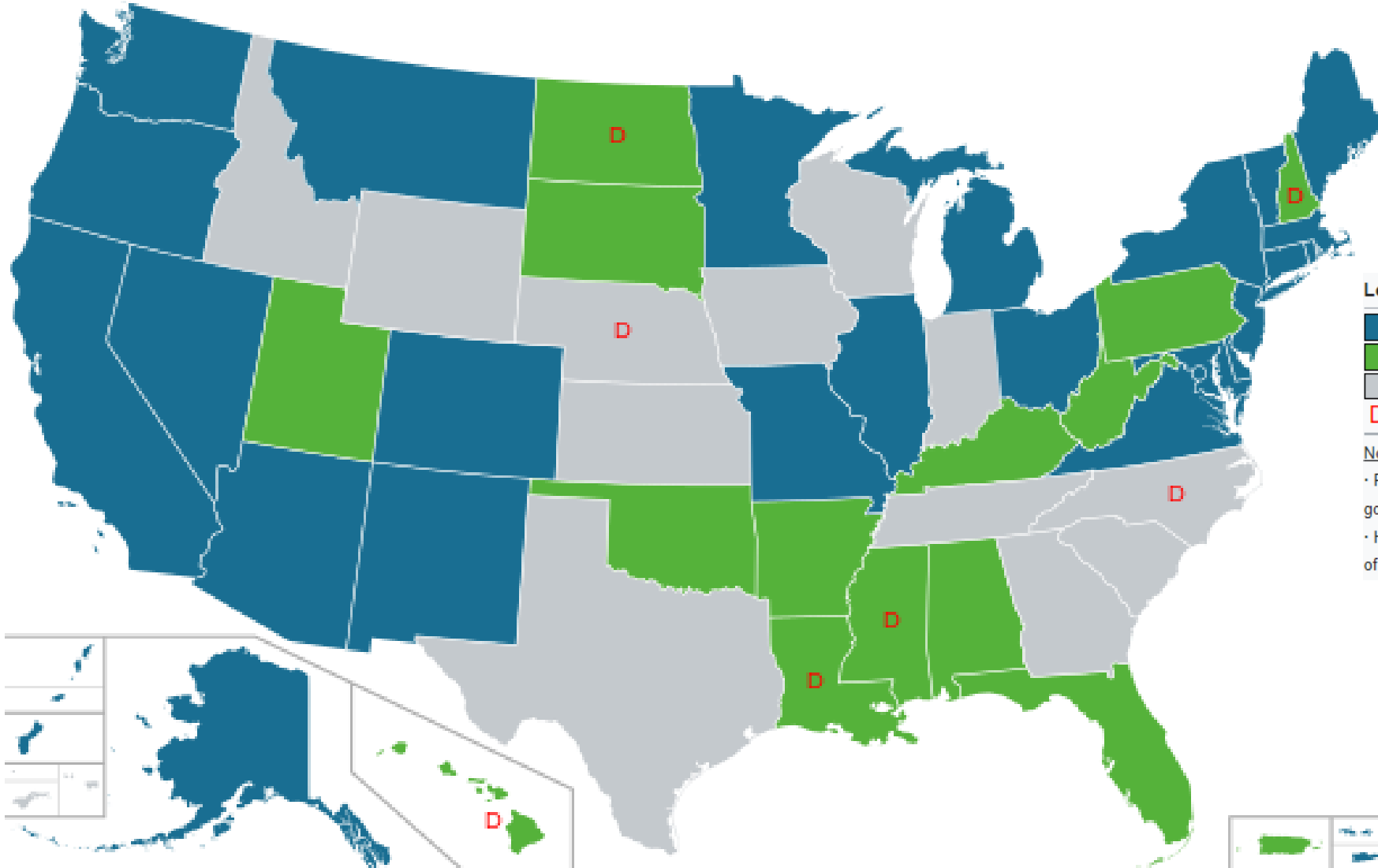
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Presentation Objectives

- Review Current Status of Adult Use Recreational Marijuana in Ohio.
- Describe Marijuana Testing Procedures and Limitations.
- Explain Employer Protections under Ohio Law.
- Review Implications for Healthcare Facilities.
- Provide Best Practices and Defense Strategies in Workers' Compensation Claims.

The United States of Weed



Medical: Legal in 39 States and D.C.
Recreational: Legal in 24 States and D.C.

Legality of cannabis in the United States

- Legal for recreational use
- Legal for medical use
- Illegal
- Decriminalized

Notes:

- Reflects law of states and territories, including laws which have not yet gone into effect. Does not reflect federal, tribal, or local laws.
- Hemp and hemp-derived products have been legal since the enactment of the 2018 Farm Bill.

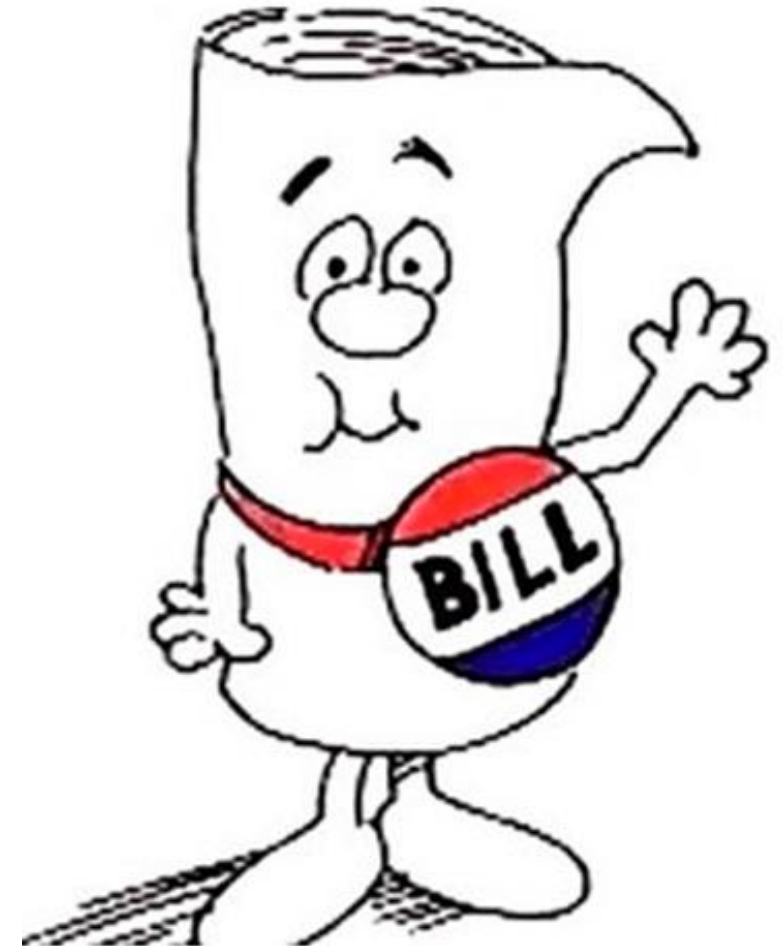
V · T · E

Medical & Recreational Marijuana in Ohio



Sub. H.B. 523 was signed May 8, 2016 Took effect September 8, 2016

- According to Crain's Cleveland Business, Ohio recorded about \$179 million in marijuana sales at midyear 2022.
- State of Ohio MCP reported \$1.2 BILLION in product sales in 2022.
- Medical marijuana cardholders purchase their medication through licensed medical marijuana dispensaries.



Adult Use Recreational Marijuana in Ohio

Current Status

- On November 8, 2023, Ohio voters passed Issue 2, 57% to 43%, making Ohio the 24th state to legalize some form of recreational marijuana use.
- Chapter 3780 of the Ohio Revised Code.
- Effective on December 7, 2023.
- Created Division of Cannabis Control.
- Issue 2 was a citizen-initiated law – not a constitutional amendment. The Ohio legislature can revise the language.

Adult Use Recreational Marijuana in Ohio

Current Status – Pending Legislation

- HB96 – Operating Budget
- HB160 – Revise Adult Use Laws
- HB198 – Inhalable/Ingestible Hemp Regulations
- SB56 – Revise Adult Use Laws
- SB86 – Regulate Intoxicating Hemp Products

Adult Use Recreational Marijuana in Ohio

Current Status

- The statute legalizes the “cultivation, processing, sale, purchase, possession, home grow, and use of cannabis by adults at least twenty-one years of age.”
- A person is permitted to possess, transfer, or purchase 2.5 ounces of cannabis in any form, and 15 grams of cannabis extract (gummies).
- Any possession, transfer, or sale in excess of that threshold is still illegal under Ohio law.

Adult Use Recreational Marijuana in Ohio

Current Status

- The statute also permits adults to grow marijuana at home.
- No more than six plants (twelve if two or more eligible adults live at the same residence), and the plants are secured and hidden from public view.
- Marijuana cannot be legally purchased unless purchased through a dispensary.
- As of April 30, 2025, 119 cities, towns, villages, and townships have passed local moratoriums.

Adult Use Recreational Marijuana in Ohio

Current Status

- Medical marijuana licensees qualified to participate in recreational sales. Dual-use provisional license.
- Dispensaries, cultivators, and testing labs must obtain a certificate of operation.
- The Ohio Division of Cannabis Control issues certificates of operation to medical dispensaries for recreational retail sales.

Adult Use Recreational Marijuana in Ohio

Current Status

- Marijuana is currently still illegal at the federal level under the Controlled Substances Act.
- **Schedule 1:** no currently acceptable medical use, lack of accepted safety for use under medical supervision, and a high potential for abuse (currently marijuana, LSD, ecstasy, heroin). Research highly regulated and limited.
- **Schedule 2:** high potential for abuse (cocaine, opium, oxycodone, methamphetamines (i.e. Adderall)).
- **Schedule 3:** less potential for abuse (low grade morphine, Tylenol with codeine....possibly marijuana).

Adult Use Recreational Marijuana in Ohio

Current Status

- On April 30, 2024 the U.S. DEA announced a plan to reclassify marijuana to Schedule III - Ketamine and some anabolic steroids.
- Schedule III drugs are still controlled substances and subject to rules and regulations.
- Affects banking, taxes, scientific study, medical treatment.

Re-Scheduling: What to Expect/Not Expect

- Few FDA approved marijuana/THC drugs for medical use
 - Would be able to be prescribed, but not clear what product could be prescribed
 - Re-Scheduling will open research pathways, but expect long time between rescheduling and more FDA approved drugs
- Could then be stocked by inpatient pharmacies
 - Not clear what product could be stocked – could not stock Ohio “recreational” or “medical” products. Would be separate systems.

Re-Scheduling: What to Expect/Not Expect

- Malpractice insurance policies will dictate most use moving forward.
- Likely not much conflict on Ohio's recreational/medical laws, but will need to be monitored.
- More flexibility in banking for medical and recreational dispensaries.

Increase in Injuries

- A study from Canada, which legalized recreational marijuana in 2018, showed a 233% increase in emergency room visits due to documented marijuana-related traffic accidents.
- A 2023 study found that legalization of recreational marijuana resulted in 1,000 excess traffic fatalities on annual basis for all states that have legalized recreational marijuana.

Increase in Injuries

- Marijuana-related fatal crashes have increased 52% in Ohio since 2019.
- Marijuana influenced drivers caused about 24% of Ohio's fatal crashes in 2023.
- Drug-only cases made up 40% of all OVI-related fatal crashes and cannabinoids were present in 40% of drug-related fatal crashes.
- Drug-impaired driving in fatal crashes rose by 4% from 2022 to 2023, even as overall fatal crashes dropped by 3%. State troopers made 3,319 drug-impaired driving arrests in 2023. Of these, 739 cases linked directly to marijuana impairment.

Increase in Injuries

- A 2018 study from Colorado noted an increase in ER visits for patients between 13 and 21 years of age from 2005 to 2015.
- In 2021, nearly 10 years after Colorado legalized recreational marijuana, the state recorded 79 deaths involving a driver who tested above the state's legal limit for THC.
- A study conducted at two Boston medical centers from 2012 to 2019 showed an increase in both positive THC IA results and cannabis-related ICD-10 codes in the ED.

Increase in Injuries

- Studies show a 55% increase in workplace accidents in states that have legalized recreational marijuana, an 85% higher injury rate for workers who tested positive for marijuana, and a 78% increase in absenteeism.
- A recent study of cannabis positivity rates in 17 ER's across the US showed most states experienced a significant increase in cannabis positivity rates as legalization progressed.
- A 2023 study found that individuals that consumed marijuana on the job, were nearly twice as likely to experience some form of workplace injury.

Increase in Injuries

- Quest Diagnostics found the number of marijuana-positive drug tests performed after workplace accidents increased 204% from 2012 to 2022 coinciding with the trend of more states legalizing recreational marijuana.
- In 2022, post-accident marijuana positivity of urine drug tests in the general U.S. workforce was 7.3% compared to 6.7% in 2021. - The highest level in 25 years.

Remember: drug testing identifies presence,
not impairment



Testing Procedures and Limitations

- The psychoactive chemical in marijuana is Delta-9-THC, a fat-soluble chemical that quickly enters the bloodstream when inhaled, taking effect in just a few minutes
- Delta-9-THC is either metabolized in the liver and expelled through the kidneys, or it gets stored in fatty tissues, where it slowly releases for up to 10 days (for chronic users - 30 days or more).
- THC metabolites show up on drug tests.
- Delta-8 THC, synthetic conversion from hemp-derived CBD.

Testing Procedures and Limitations

- Most drug testing for marijuana focuses on THC's metabolites carboxy-THC and 11-hydroxy-THC.
- Testing for active Delta-9 is more reliable for impairment than testing for metabolites.
- But strict time constraints
 - Blood and saliva. Accurate for approximately 12 to 48 hours.
 - Standard urine tests can't detect Delta-9-THC between 3-6 hours after consumption. This happens to be when a person is most impaired.

Testing Procedures and Limitations

- There is no scientific test for impairment – Only test for use.
- Urine testing most common.
- Blood and oral fluid (saliva) testing.
- On May 2, 2023, the Department of Transportation authorized oral testing.
- Employers may not use oral testing until at least two laboratories are certified by Health and Human Services to perform testing.
- As of December 2024, HHS has not certified any laboratories.

Testing Procedures and Limitations – Oral Testing

- A mouth swab is rubbed around the mouth's interior for up to four minutes collecting oral fluid with traces of active substances from the bloodstream.
- Collection happens quickly with minimal invasion and staff can observe samples easily regardless of gender.
- THC mouth swabs can detect delta-9-THC, the psychoactive component that causes intoxication in marijuana. The test will not detect inactive THC metabolites.

Testing Procedures and Limitations – Oral Testing

- Passive diffusion from blood into saliva makes oral fluid testing possible right after drug use. Delta-9-THC shows up in oral fluid as the parent compound instead of metabolites. Mouth swabs can detect active, recent use rather than past consumption.
- The detection method works by collecting saliva that contains oral fluid, gingival fluid, and cellular debris where drugs build up. Oral fluid relates directly to blood concentrations, unlike urine tests that measure metabolites.

Testing Procedures and Limitations – Oral Testing

- Studies show oral fluid tests achieve about 80% accuracy for THC detection.
- Some prescription medications can trigger positive results.
- Research from Sydney University shows mobile oral fluid tests are 20% inaccurate.
- False positive results with very low levels of THC, including use of a placebo.

Adult Use Recreational Marijuana in Ohio

Testing Procedures and Limitations-CBD use?

- What happens if an employee uses CBD products?
 - CBD oil is legal to possess and use in Ohio.
 - CBD products must contain less than 0.3% THC.
 - Continual use of CBD products over time may create a buildup of THC metabolites in a person's body causing a positive test result.
 - CBD products are unregulated. FDA has issued numerous letters regarding misstated THC levels or inaccurate dosing instructions.

Adult Use Recreational Marijuana in Ohio

Testing Procedures and Limitations

- Initial Screen and Confirmatory Cutoff Concentrations in Testing.

Initial Test Analyte	Initial test Cutoff Concentration	Confirmatory Test Analyte	Confirmatory Test Cutoff Concentration
Marijuana metabolites	50 ng/mL	THCA	15 ng/mL

Adult Use Recreational Marijuana in Ohio

Testing Procedures and Limitations – Half Life

Date	ng/ml per Use	Smokes 30 ng/ml	ng/ml In System
Sat, May 1	0	Yes	30
Sat, May 7	15	Yes	45
Sat, May 14	$(7.5) + (15) = \mathbf{22.5}$	Yes	52.5
Sat, May 21	$(3.75) + (7.5) + (15) = \mathbf{26.25}$	Yes	56.25
Sat, May 28	$(1.875) + (3.75) + (7.5) + (15) = \mathbf{28.125}$	No	28.125
Mon, May 30	Injured	No	24.15*

- *I wasn't high. The last time I smoked was 11 days ago. May 21st.

Employer Protections Under Ohio Law

R.C. 3780.35 “Rights of Employer”

- An employer is not required to permit or accommodate an employee’s use, possession, or distribution of marijuana.

Employer Protections Under Ohio Law

R.C. 3780.35 “Rights of Employer”

- An employer is not prohibited from refusing to hire, discharging, disciplining, discriminating, retaliating, or taking any other adverse employment action with respect to hire, tenure, terms, conditions, or privileges because of the employee’s use of marijuana.

Employer Protections Under Ohio Law

R.C. 3780.35 “Rights of Employer”

- An employer is not prohibited from establishing and enforcing a drug testing policy, drug-free workplace policy, or zero-tolerance drug policy.

Employer Protections Under Ohio Law

R.C. 3780.35 “Rights of Employer”

- Federal restrictions on employment still apply.
 - Title 49 CFR. - Department of Transportation testing

Employer Protections Under Ohio Law

R.C. 3780.35 “Rights of Employer”

- An employee cannot commence any cause of action against an employer for refusing to hire, discharging, disciplining, discriminating, retaliating, or taking any other adverse employment action with respect to hire, tenure, terms, conditions, or privileges because of the employee’s use of marijuana.

Employer Protections Under Ohio Law

R.C. 3780.35 “Rights of Employer”

- BWC can grant rebates or discounts on premium rates to employers that participate in a drug-free workplace program.

R.C. 3780.35 “Rights of Employer”

- An employee discharged from employment because of the use of marijuana is considered a discharge for just cause for unemployment compensation purposes if that employee’s use was in violation of the employer’s drug testing policy, drug-free workplace policy, or zero-tolerance drug policy.



- **Medical Marijuana and ADA.**
 - ADA is a federal law.
 - Marijuana still illegal at the federal level – Schedule I v. Schedule III.
 - Employers do not have to accommodate illegal marijuana use under federal law, even if permitted under state law
- **What is the underlying disability?**

Family Medical Leave Act (FMLA)



- **Medical Marijuana and FMLA.**

- FMLA is a federal law.
- Marijuana still illegal at the federal level – Schedule I v. Schedule III.
- Employers do not have to accommodate illegal marijuana use under federal law, even if permitted under state law
- **What is the underlying medical condition being treated?**
- **Is it a serious health condition?**

Best Practices and Defense Strategies

First Steps

- Ohio's marijuana laws do not change any federal law, including any federal employment laws, regarding recreational or medical marijuana use.

Best Practices and Defense Strategies

First Steps

- Review and analyze employer operations and employee job descriptions for any federal application or overlap.
 - DOT regulations
 - Federal contracts
 - Federal suppliers
 - Federal work sites
 - Medicare
 - Medicaid
 - Insurance policies

Best Practices and Defense Strategies

First Steps

- Update or enact, and publish a formal, written, drug testing policy, drug-free workplace policy, or zero-tolerance drug policy.
 - Employer policies must be consistent with or more strict than federal policies.
 - Identify safety sensitive positions.
 - Can employees use marijuana at home or outside of work?
 - Drug Free v. Zero Tolerance
 - Drug testing procedures.
 - Hire, Random, Reasonable Suspicion, Post-accident

First Steps

- Update or enact, and publish a formal, written, drug testing policy, drug-free workplace policy, or zero-tolerance drug policy.
 - Identify what drugs are tested for
 - Define what constitutes a refusal to test
 - Explain consequences for violation of policy.
 - Termination of employment.
 - Possible Denial of BWC claim.
 - Include intent to seek disallowance of BWC claim for positive test or refusal to test.

Best Practices and Defense Strategies

First Steps

- Update or enact, and publish a formal, written, drug testing policy, drug-free workplace policy, or zero-tolerance drug policy.
 - Obtain employee's signature on policy.
 - Document uniform and consistent enforcement of policy to avoid discrimination claims.
- Update collective bargaining agreement.
- Update other employer forms and documents.

Best Practices and Defense Strategies

First Steps

- Post the BWC Drug Testing/Refusal Notice next to the BWC Certificate of Coverage or Self-Insurance.
- Take a photo of the posting.

Best Practices and Defense Strategies

First Steps

Ohio Bureau of Workers' Compensation
Required Posting

Effective Oct. 13, 2004, Section 4123.54 of the Ohio Revised Code requires notice of rebuttable presumption. Rebuttable presumption means an employee may dispute or prove untrue the presumption (or belief) that alcohol or a controlled substance not prescribed by the employee's physician is the proximate cause (main reason) of the work-related injury.

The burden of proof is on the employee to prove the presence of alcohol or a controlled substance was not the proximate cause of the work-related injury. An employee who tests positive or refuses to submit to chemical testing may be disqualified for compensation and benefits under the Workers' Compensation Act.

Ohio | Bureau of Workers' Compensation

You must post this language with the Certificate of Ohio Workers' Compensation.

DP-29 BWC-1629 (Rev. April 11, 2016)

Best Practices and Defense Strategies

First Steps

- Post the BWC Drug Testing/Refusal Notice next to the BWC Certificate of Coverage or Self-Insurance.
- Take a photo of the posting.
- Draft and sign a written witness statement about posting.

Best Practices and Defense Strategies

Next Steps

- Educate Employees on drug policy and consequences for violation.
 - Safety Meetings
 - Training Sessions
 - New Hire Onboarding

Best Practices and Defense Strategies

Next Steps

- Establish a drug-testing protocol.
 - In-house or third party testing
 - Breath, urine, saliva
 - Determine what substances to test for (panel)
 - Use BWC's drug-free program as a model

Best Practices and Defense Strategies

Next Steps

- Ensure third-party lab follows federal testing guidelines, timely collects specimens, uses a certified medical review officer, and is certified by US Dept. of H&HS, or meets or exceeds standards of US Dept. of H&HS.

Best Practices and Defense Strategies

Next Steps

- Train supervisors and managers
 - Recognition of signs of intoxication or impairment.
 - Erratic behavior
 - Discipline issues
 - Attendance or production issues
 - Odor, slurred speech, dilated, glassy, bloodshot eyes
 - Clumsy, lethargic, uncoordinated actions
 - Repeat violations of rules or multiple accidents

Best Practices and Defense Strategies

Next Steps

- Train supervisors and managers
 - Post-accident Investigations
 - Time delay from injury to test results
 - Identification and interview of witnesses
 - Specific details- time of injury
 - Unbiased questioning
 - Written statements
 - Photos, drawings, diagrams
- Is there reasonable cause to test?

What will this mean for HC facilities?



FDA Approved Medical Applications

- Epidiolex
 - Used to treat Lennox-Gastaut syndrome and Dravet syndrome
 - CBD extracted from hemp, contains little THC
- Marinol/Syndros
 - FDA schedule II drug
 - Synthetic THC
 - Combats nausea and vomiting from chemo
 - Treats weight loss in HIV infections



In Your Facility?

- Ohio's MM/Rec law does not address this issue
- But it does not specifically restrict it
 - However, Ohio regulations state that facilities cannot administer medications unless ordered/prescribed by a physician or other HC professional
 - Ohio MM law does not allow physicians to “prescribe”, only “recommend”
 - Would have to be self-administered or administered by non-staff
- Federal law issue
 - Still illegal under federal law
 - **May** violate HC facility's conditions of participation (i.e. follow all laws)
 - Not FDA approved – cannot stock as drug
 - CMS or HHS has issued no guidance
 - Malpractice insurance concern for providers

- Will patients and caregivers be allowed to possess medical marijuana in your facility?
 - Separate issue from use.
- Do you want to constrain how they possess it?
 - If the answer is no, how will you enforce?
 - Staff security
 - HR

- Consider your stance on:
 - Recommendations by employed/affiliated physicians
 - Possession
 - Use/Ban/Compassionate Use
 - Documentation
 - Security
 - Smoking Policy – address vaping/marijuana use
- How will you handle these?

Work-Related Injuries and Impairment



Workers' Compensation – Challenging a Claim

- Two Ways to Challenge a Workers' Compensation Claim.
 - R.C. 4123.54(A)(2) – Proximate Cause
 - Injury caused by employee being:
 - Intoxicated, or
 - Under the influence of a controlled substance not prescribed by a physician, or
 - Under the influence of marijuana.
 - If being intoxicated or under the influence was the proximate cause of the injury.
 - Expert medical opinion required.

Workers' Compensation – Challenging a Claim

- Two Ways to Challenge a Workers' Compensation Claim.
 - R.C. 4123.54(B) – Rebuttable Presumption
 - The employee is presumed to be intoxicated or under the influence.
 - The employee's intoxication or being under the influence is presumed to be the proximate cause of the injury.
 - Notice required to be posted that positive test results or refusal to test may result in denial of BWC claim.
 - Same size or larger than BWC Certificate of Coverage.
 - Posted in the same location as BWC Certificate of Coverage or Certificate of Self-Insurance.

Workers' Compensation – Challenging a Claim

- Rebuttable Presumption
 - Qualifying Test Results - Timing:
 - Alcohol – 8 hours from injury.
 - Same as OVI limits.
 - Marijuana – 32 hours from injury.
 - Same as 49 CFR 40.87 – DOT Testing
 - Barbiturates, benzodiazepines, methadone - 32 hours from injury.
 - Same as US DOH levels.

Workers' Compensation – Challenging a Claim

- Rebuttable Presumption
 - Qualifying Test
 - Employer had reasonable cause to suspect employee was intoxicated or under the influence.
 - Requested by a police officer – not by the employer.
 - Requested by license physician not employed by employer.

Workers' Compensation – Challenging a Claim

- Rebuttable Presumption
 - Qualifying Test-Reasonable Cause
 - Evidence employee was intoxicated or under the influence drawn from:
 - Specific, objective facts.
 - Reasonable inferences in light of experience and training.

Best Practices and Defense Strategies

Workers' Compensation – Challenging a Claim

- Rebuttable Presumption
 - Qualifying Test-Reasonable Cause - Reasonable inferences
 - Observable phenomena
 - Direct observation of use
 - Possession or distribution
 - Physical symptoms
 - Abnormal behavior

Workers' Compensation – Challenging a Claim

- Rebuttable Presumption
 - Qualifying Test-Reasonable Cause - Reasonable inferences
 - Deteriorating work product.
 - Absenteeism, excessive tardiness or recurrent accidents that appear related to use and not other factors.
 - Criminal investigation.
 - Report of use by a reliable source.
 - Repeated and flagrant violations of safety or work rules that pose a substantial risk of physical injury or property damages that appear related to use and not other factors.

Workers' Compensation – Challenging a Claim

- Rebuttable Presumption
 - Qualifying Test
 - Testing Lab
 - Certified by US Dept. of Health and Human Services, or
 - Meets or exceeds standards of US Dept. of Health and Human Services.

Workers' Compensation – Challenging a Claim

- Rebuttable Presumption
 - Refusal to Test
 - Employer must post BWC Notice of Refusal.
 - Employee must have notice of consequences of refusal.
 - What defines a refusal?
 - Written employer policy signed by employee

Workers' Compensation – Challenging a Claim

- Presenting Evidence at the Industrial Commission Hearing.
 - Employer representative present to testify.
 - Written policy with signature of employee.
 - Photo of Drug Testing/Refusal Notice posted next to BWC certificate.
 - Written statement from HR described posting of Notice.

Workers' Compensation – Challenging a Claim

- Presenting Evidence at the Industrial Commission Hearing.
 - Post-Accident Investigation report with time of injury, photos and diagrams.
 - Investigator's statement describing reasonable cause to test.
 - Written witness statements.
 - Employee discipline history, if relevant.
 - Employee's qualifying test results or refusal of test

Workers' Compensation – Challenging a Claim

- Presenting Evidence at the Industrial Commission Hearing.
 - Qualifying test results
 - Identification of employee
 - Date and time of sample collection and test
 - Cut off levels.
 - Confirmatory tests.
 - Specific levels of breath or urine (not oral).
 - Signed by medical review officer.
 - Certification of lab.

Workers' Compensation – Challenging a Claim

- Presenting Evidence at the Industrial Commission Hearing.
 - Refusal of test
 - Written policy with definition and consequences of refusal signed by employee
 - Photo of BWC Notice with consequences posted next to BWC certificate
 - Written statement from HR describing posting
 - Specific facts of refusal.

Workers' Compensation – Challenging a Claim

- Presenting Evidence at the Industrial Commission Hearing.
 - Independent medical examination or medical file review opining that:
 - Employee was under the influence of marijuana at the time of the injury, and
 - The employee's being under the influence of marijuana was the proximate cause of the injury.

Workers' Compensation – Challenging a Claim

- Presenting Evidence at the Industrial Commission Hearing.
 - Burden of proof switches to employee to demonstrate:
 - They were not under the influence at the time of the injury, or
 - That their being under the influence was not the proximate cause of their injury.
- Industrial Commission will deny BWC claim.

Adult Use Recreational Marijuana in Ohio

Summary

- Adult use recreational marijuana in Ohio creates a greater risk of injury in the workplace.
- Current marijuana testing shows recent use – not impairment.
- Employers have statutory protections under Ohio law.
- Draft, update, and publish written drug testing policy.
- Train and educate employees and management on policy and reasonable suspicion.
- Be prepared in order to challenge workers' compensation claim.

Questions?



Thank You
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