



Marijuana and the Workplace:

ISSUES AND BEST PRACTICES FOR SENIOR LIVING EMPLOYERS

PRESENTED TO:

SOUTH DAKOTA ASSOCIATION OF HEALTHCARE ORGANIZATIONS (SDAHO)

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Marijuana Issues for Senior Living Employers



- Costs and Risks
- Recreational MJ
- Medical MJ
- ADA & Reasonable Accommodations
- Drug Testing
- Off-Duty Use
- Recommended Practices



Costs of Drug Use (not limited to MJ) in the Workplace

A. Lost Time

- Workers with substance use disorders miss 50% more work than their colleagues

B. Job Turnover and Retraining

- Average cost of recruiting and retraining replacement worker: 21% of annual salary / wages
- General workforce population: 25% have had more than one employer in past year

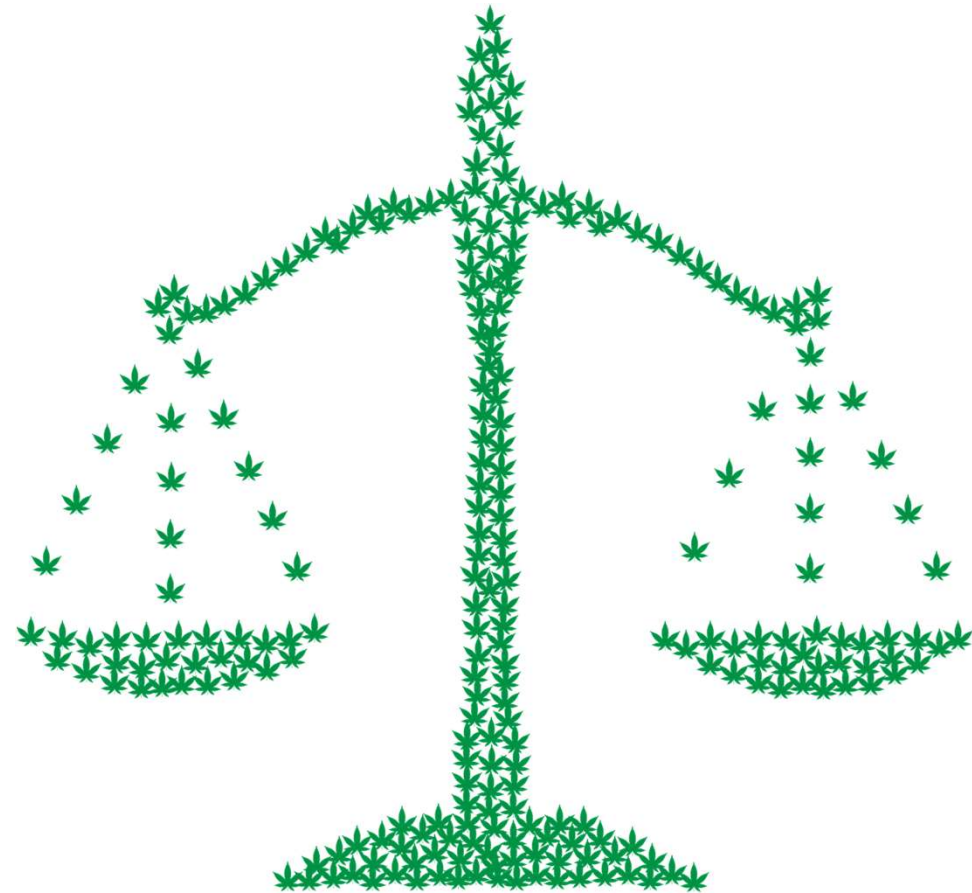
C. Healthcare

- Results in increased healthcare premiums

Source: National Safety Council

South Dakota Marijuana Law is in Flux

- Constitutional amendment and voter-initiated measure legalizing medical and recreational drugs effective July 1, 2021
- Legal challenges are pending and more are expected
- Related regulations are in flux
- Related enforcement is unknown



Recreational MJ

Under Constitutional “Amendment A”:

- SD Employers are **NOT REQUIRED** to accommodate **recreational** MJ use, possession, transfer, display, manufacturing, or sale



Medical MJ

Under Initiated Measure 26:



- Medical MJ must be treated like any other prescription medication with respect to drug testing and interactions with employers
- Employers may prohibit and discipline employees for:
 - Ingesting MJ in the workplace
 - Working under the influence of MJ

Senior Living Employers That Participate in Medicare

- Requirements/Conditions of participation include compliance with Federal laws
- Marijuana-Related Risks at your participating community:
 - Loss of Medicare/Medicaid provider status
 - Federal prosecution
- Rights under IM 26 do not apply where they conflict with an employer's obligations under federal law or would disqualify an employer from receiving a monetary or licensing-related benefit under federal law



The “ADA” and Reasonable Accommodations

- The term “qualified individual with a disability” shall not include any employee or applicant who is currently engaging in the illegal use of drugs. 42 USC § 12114
 - “The term 'reasonable accommodation' used in the ADA does not mean protracted accommodation which merely enables an addicted employee to continue abusing substances.” See *City of Sioux Falls v. Miller*, 555 N.W.2d 368, 376 (S.D. 1996)

Senior Living Employers Should Consider Accommodations for Employees Using Medical MJ

ADA, Reasonable Accommodations (cont.)

- Even though employers generally need not accommodate illegal drug use, **an employee's underlying disability may require accommodation**
 - CAUTION: Michigan ALF fired nursing administrator because of medical MJ use to treat epilepsy; she failed drug test 2nd day on job. Court held that firing employee for testing positive for an illegal drug was a pretext.
- Recovering and recovered drug addicts may be disabled

The “Doobie Made Me Do It” Defense

EEOC says...

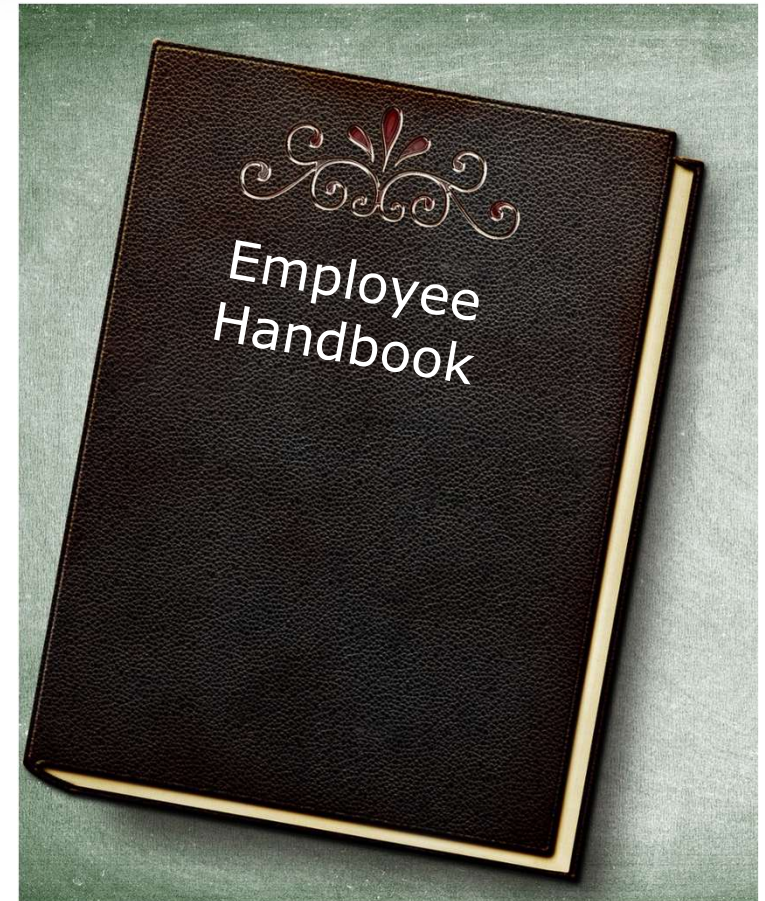
- Discipline for misconduct related to a disability is allowed
- If the rule is job-related and consistent with business necessity
- Other employees held to the same standard
- BUT some cases hold that conduct resulting from a disability is part of the disability and not a separate basis for termination

Suggested Employer Practice:

- Engage in interactive process to determine whether reasonable accommodations will deter future misconduct

Drug Free Workplace Policy

- Prohibit use, possession, sale, distribution or manufacture of illegal drugs and drug paraphernalia at work
- Forbid employees from working while under the influence of illegal drugs
- Define “illegal drug” to include MJ
- Address prescription drug use
- Specifically address MJ use, possession, and testing
- Address substance abuse treatment
- Reserve the right to search
- State consequences for policy violation



To Test or Not to Test



Under Initiative Measure 26:

- An employer may not consider a registered, qualifying medical marijuana patient (employee) to be under the influence of MJ **solely because of the presence of metabolites or components of MJ that appear in insufficient concentration to cause impairment**

Testing Technology Challenges

How much THC signals impairment?



Drug Testing Options

Pre-employment

- Consistently applied within job categories
- Alcohol testing requires conditional job offer and testing to be job-related and consistent with business necessity
- Recommend drug testing after conditional offer of employment
- Can notify of testing requirement pre-offer, but don't ask if they will pass or use medical MJ
- Notify employees of the process and consequences of a positive test





Drug Testing Options

Reasonable Suspicion

- Based on objective, factual observations of appearance, and behavior
 - Unsteady gait
 - Bloodshot eyes
 - Slurred speech
- Document observations on standard form (two witnesses, if possible)

Drug Testing Options

Post-Accident

- Blanket post-accident drug testing policies can suppress injury reporting
- Two requirements for valid test:
 - Reasonable belief that substance use could have caused or contributed to workplace incident
 - Only where “the drug test can accurately identify impairment caused by drug use”
- Exception: when post-accident testing is required by law





Drug Testing Options

Random

- Recommend avoiding unless high risk, safety sensitive position
- Random means random
- Test at least 50% of workforce each year
- Note: Random testing is not generally shown to be effective in reducing injuries or accidents

Drug Testing Policies

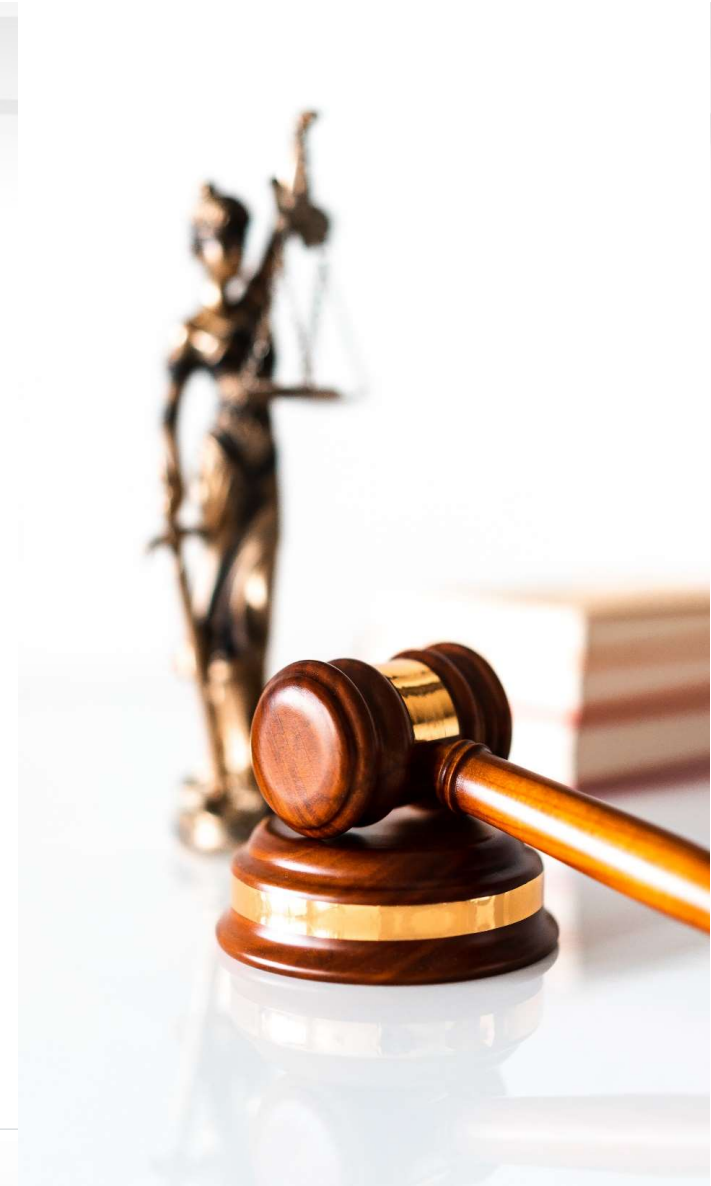
- Who is subject to testing
- When testing might occur
- Consequences for refusing or obstructing testing
- What constitutes a positive test
- Options for confirmation testing and to explain a positive test
- Confidentiality
- Consequences for positive test
 - Zero tolerance policy or last chance agreements?
- Costs and wages



Drug Testing

Potential Claims Arising from Testing

- Employees and applicants may have legal claims based on how a test
 - Was conducted
 - Who was tested
 - How the results were used
- Violation of state laws and procedures
 - Legal right to test
 - But must follow the **state's** requirements (Monitor SD law carefully)



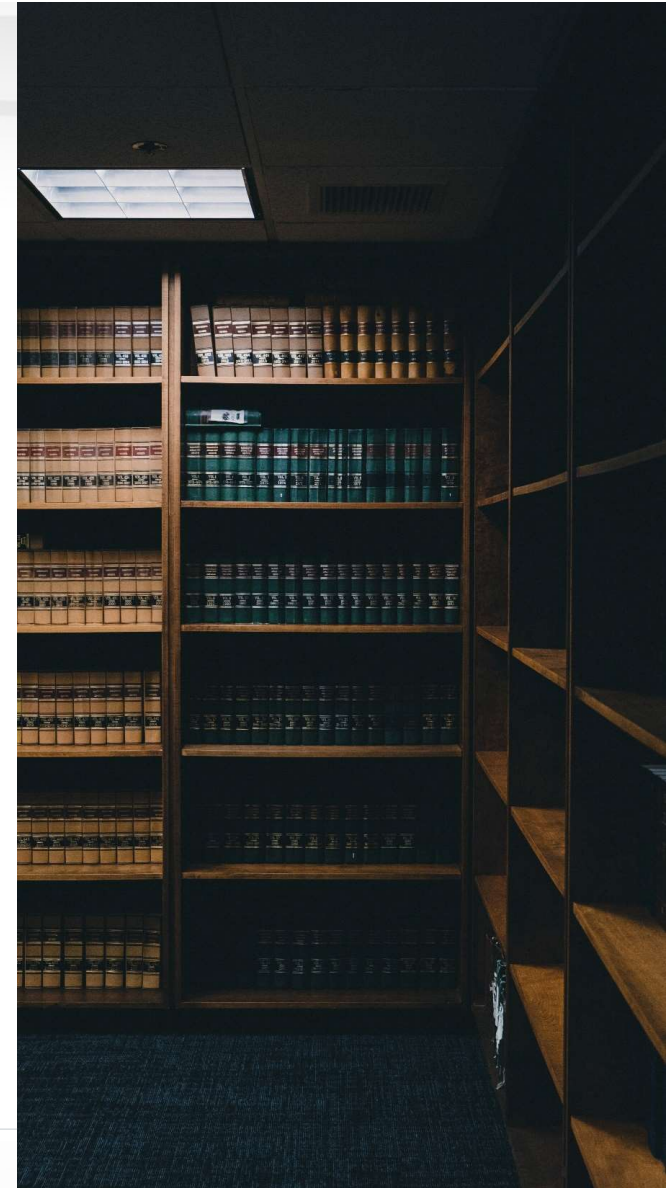


More Potential Claims Arising from Testing

- Disability discrimination
 - Medication use for disability is protected by the ADA
 - Some prescribed medications turn up on drug tests
 - Some otherwise illegal drugs are legitimately prescribed
- Other discrimination claims
 - Singling out certain groups of employees for testing
 - Such as by race, age, or gender

Even More Potential Claims from Testing

- Invasion of privacy
- Possible violation of employee privacy in the way test is conducted (e.g., disrobing or providing a urine sample in front of others)
- Defamation
- If employer publicizes that employee tested positive
- If employer knew test result was in error
- If employer did not act in good faith



What about Off-Duty MJ Conduct?



- Recreational use = No protection
- Medical use not by registered, qualifying medical marijuana patient = Likely not protected under SD law, but reasonable accommodations may be necessary
- Medical use by registered, qualifying medical marijuana patient = Protected by SD law

Key Takeaways for Senior Living Employers

- **Maintain and enforce a drug-free workplace policy**
 - **Specifically include reference to MJ**
 - **Include appropriate drug testing policy and practice**
 - **Focus on testing employees who look impaired or cannot fulfill work responsibilities**
 - **Address accommodation of medical MJ**
 - **Emphasize that the safety of your residents (patients) is your number one priority (along with compliance with employment laws)**

Key Takeaways for Senior Living Employers

- **Train supervisors and managers on your MJ-related policies**
- **Train supervisors and managers (and staff) how to spot the signs of MJ impairment in the workplace (“If you see something, say something”)**
- **Exercise care before taking adverse action against employee who is not visibly impaired, but tests positive for MJ**
- **Monitor and comply with SD law**

THANK YOU

