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PROBLEMS IN THE WORKPLACE PRESENTED BY MARIJUANA USE

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PROBLEMS IN THE WORKPLACE PRESENTED BY MARIJUANA USE

I. OVERVIEW OF CONNECTICUT DRUG TESTING LAWS AND REGULATIONS

(Conn. Gen. Stat. §31-51u et seq.)

A. Drug testing of Prospective Employees

1. Under Connecticut law (C.G.S. §31-51v), no employer may require a prospective employee to submit to a urinalysis drug test as part of the application procedure, unless:
 - a. The applicant is informed in writing at the time of application of the employer's intent to conduct such a drug test;
 - b. The test is conducted in accordance with statutory procedures which mandate methodology; and
 - c. The applicant is given a copy of results of any positive drug test.
2. The results of any drug test must be kept confidential and not disclosed by the employer or its employees to any person other than any such employee to whom disclosure is necessary. Drug tests should be treated the same as employee medical records and kept separately from personnel records.
3. It is a good idea to have the applicant sign a consent form for the drug testing which also authorizes the laboratory to release the results to the employer.
4. Individuals who were previously employed by the employer and who are applying for re-employment within twelve months of their termination are treated like current employees for purposes of drug testing, rather than as prospective employees. They cannot be tested unless the requirement of reasonable suspicion is met, or unless they are covered by another law that requires testing.

B. Drug Testing of Current Employees – Reasonable Suspicion

1. Connecticut law prohibits drug testing of current employees unless the employer has "reasonable suspicion" that the employee is under the influence of drugs or alcohol which adversely affects or could adversely affect such employee's job performance.
2. The law expressly states that the Department of Labor shall adopt regulations to specify circumstances that shall be presumed to give rise to reasonable suspicion. Although regulations have been drafted, they have not yet been finalized.

C. Drug Testing of Current Employees – Random Drug Screening

1. An employer generally may not require employees to submit to a drug test on a random basis unless one of the following exceptions applies:
 - a. Such test is authorized under federal law (discussed below);
 - b. The employee serves in an occupation which has been designated as high-risk or safety-sensitive or operates a school bus or student transportation vehicle; or
 - c. The test is conducted as part of an employee assistance program sponsored or authorized by the employer in which the employee voluntarily participates.
2. **High-risk or safety-sensitive occupations:** High-risk or safety-sensitive occupations are defined by regulation as those that: (1) inherently involve a significant life-threatening danger to the employee, fellow employees, or the general public; (2) require the use of judgment or a high degree of care or caution; and (3) are such that the employer could not evaluate the employee's performance by personal observation.
 - a. Employees and employers may make written requests to the Commissioner of Labor that an occupation be designated (or not be designated) as high-risk or safety-sensitive.
 - b. Employers who intend to institute drug testing of current employees and who are not acting under reasonable suspicion or federal mandate must first submit a request to the Commissioner for certification that the occupation is high-risk or safety-sensitive. The Commissioner maintains a list of occupations designated as high-risk or safety-sensitive; however, this list is only a guideline for future determinations.
 - c. An employer cannot rely on the fact that an occupation is on the list to justify implementing a random testing program. Rather, each employer who intends to undertake random drug testing must inform the Commissioner of its intention so that the Commissioner can make a separate certification for that employer.
 - d. The request to have an occupation designated as high-risk or safety-sensitive must be made in writing, and should explain how the occupation meets each of the above criteria. The request should be sent to:

Director, Wage & Workplace Standards
Connecticut Department of Labor
200 Folly Brook Blvd.
Wethersfield, CT 06109

D. Testing Procedures and Notice Requirements

1. Connecticut law imposes restrictions on the procedures and methodology for drug testing. First, the Connecticut drug testing law authorizes urinalysis drug testing. It does not address other types of tests (such as hair analysis, breath alcohol tests, or blood tests). The Connecticut Department of Labor has taken the position (in letter opinions) that such testing is not regulated by any statutes or regulations within its jurisdiction. In other words, an employer is not precluded from using alternative tests, but does so at its own risk.
 - a. In Schofield v. Loureiro Engineering Associates, Inc., Superior Court, Judicial District of Hartford, Docket No. CV146024702S (Mar. 9, 2017), the court held that an employer did not need to have “reasonable suspicion” to compel an employee to submit to a hair drug test, one day after being hired, noting that “to date the legislature has chosen only to subject private employers to specific drug testing protocols in cases where the employer seeks to compel an employee to submit to a urinalysis drug test.”
2. Second, the Connecticut law provides that no employer may determine an employee’s eligibility for promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action solely on the basis of a positive urinalysis drug test result unless:
 - a. The employer has given the employee a urinalysis drug test, utilizing a reliable methodology, which produced a positive result and
 - b. Such positive result was confirmed by a second urinalysis drug test, which was separate and independent from the initial test, utilizing a gas chromatography and mass spectrometry methodology or a methodology determined by the Department of Health to be equally or more reliable.
 - c. Reputable commercial labs are aware of the requirements and generally will split the sample and run an appropriate confirming test if necessary.
3. The law further provides that no employer, employer representative, agent or designee engaged in a urinalysis drug testing program shall directly observe an applicant or employee in the process of producing their urine specimen.
4. Connecticut’s law does not preclude an employer from conducting medical screenings, with the written consent of its employees, to monitor exposure to toxic or other unhealthy substances in the workplace. Further, it does not restrict an employer’s ability to prohibit the use of intoxicating substances during work hours or to discipline an employee for being under the influence of intoxicating substances during work hours.

II. PALLIATIVE USE OF MARIJUANA ACT (“PUMA”) – Conn. Gen. Stat. §21a-408a et seq.

A. **Employer Obligations Under Connecticut’s Medical Marijuana Law**

1. Connecticut’s Medical Marijuana Law

- a. Under Connecticut’s medical marijuana law (“PUMA”), Connecticut residents who are least 18 years of age and have been diagnosed by a Connecticut-licensed physician with a “debilitating medical condition,” defined as cancer, glaucoma, HIV, AIDS, Parkinson’s disease, multiple sclerosis, damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, cachexia, wasting syndrome, Crohn’s disease, or post-traumatic stress disorder, may, after obtaining a physician’s written certification for the palliative use of marijuana, register as “qualifying patients” with the Department of Consumer Protection. Conn. Gen. Stat. §21a-408a-q.
- b. PUMA allows “qualifying patients” to engage in the palliative use of marijuana without being “subject to arrest or prosecution, penalized in any manner, including, but not limited to, being subject to any disciplinary action by a professional licensing board...” C.G.S. §21a-408a.

2. Marijuana Prohibited in the Workplace

- a. The law explicitly protects “an employer’s ability to prohibit the use of intoxicating substances during work hours [and] an employer’s ability to discipline an employee for being under the influence of intoxicating substances during work hours.” C.G.S. §21a-408p(3).
 - i. Furthermore, the law does not allow the ingestion of marijuana in a moving vehicle, in the workplace, on any school grounds, in any public place, or in the presence of a person under the age of eighteen. C.G.S. §21a-408a(b)(2).
 - ii. **NOTE:** *The law does not define “workplace,” so it will be up to the courts to determine whether the workplace includes areas such as the parking lot or other outdoor spaces, as well as employees working from their home or at a patient’s or customer’s home (i.e., home care agencies, especially companion agencies) or on business trips.*
- b. The palliative use of marijuana is also prohibited when it “endangers the health or wellbeing of a person other than the qualifying patient.” C.G.S. §21a-408a(b)(2).

3. Employers May Not Discriminate Against Medical Marijuana Users

- a. Connecticut’s law, unlike some other states, also explicitly protects “qualifying patients” from adverse employment action. “No employer may refuse to hire a person or may discharge, penalize, or threaten an employee solely on the basis of such person’s or such employee’s status as a qualifying patient . . .” C.G.S. §21a-408p(3).
 - b. Employer is defined as “a person engaged in business who has one or more employees, including the state and any political subdivision of the state.”
 - c. Employees claiming employment discrimination related to medical marijuana use are able to file a complaint with the Connecticut Commission on Human Rights and Opportunities (“CHRO”).
4. Employers May Refuse to Hire or Discharge a “Qualifying Patient” if Required by Federal Law or Funding Requirements
- a. Under PUMA, a Connecticut employer may not refuse to hire or discharge an employee based on the person’s status as a “qualifying patient,” “unless required by federal law or required to obtain federal funding.” These exceptions to Connecticut law are premised on the fact that marijuana use (including the palliative use of the drug) remains illegal under federal law.
 - b. However, unless an employee is a “covered employee” under a federal drug testing program (see Overview of Federal Laws and Regulations below) it is possible that an employer may be held liable for damages in discharging a Qualifying Patient on the basis of a positive drug test if there is no indication that the employee was intoxicated at the workplace, even in safety sensitive occupations.
5. ADA Issues – Is Allowing an Employee to Use Medical Marijuana a Reasonable Accommodation?
- a. The Federal Controlled Substances Act, 21 U.S.C. §811, provides that marijuana is illegal and has “no accepted medical use.”
 - b. Sec. 12114(a) of the ADA states that a qualified individual with a disability shall not include any employee who is currently engaging in the illegal use of drugs. There is a defense under federal law that the employee filing an ADA claim, who is discharged due to smoking marijuana, is not protected by the ADA. However, the employee maybe protected under Connecticut’s Fair Employment Practices Act (“CFEPA”).
 - c. The ADA defines “illegal use of drugs” as the use of drugs that are prohibited under the Controlled Substances Act, but excludes the use of a drug taken under supervision by a licensed healthcare professional as authorized by federal law (e.g., OxyContin or Percocet).

- d. The federal courts have not yet addressed whether the use of medical marijuana is protected by the ADA in the employment context, but, the employee-friendly Ninth Circuit Court of Appeals, which covers California, did address this issue under Title II of the ADA, which deals with state and local governments in the provision of public services. In James v. City of Costa Mesa, the Court held that the ADA's exception for use of drugs taken under the supervision of a licensed healthcare profession does not apply to medical marijuana because the drug is not authorized by federal law, even though it was authorized by California law.
- e. The ADA reasonable accommodation investigation and interactive process requirement should be conducted in cases of medical marijuana or opioids.

B. Connecticut District Court Holds that PUMA's Employment Discrimination Provision is Not Preempted by Federal Law

1. In its first legal challenge in Noffsinger v. SCC Niantic Operating Co., 273 F.Supp.3d 326 (D.Conn. 2017), PUMA withstood an employer's claim that the state law is preempted by federal law, and therefore, the employer cannot be held liable for allegedly refusing to hire a qualifying patient who tested positive for marijuana on a pre-employment drug screen.
2. After accepting a job offer from the employer, the Plaintiff disclosed that she uses medical marijuana to treat PTSD at night, so she would never be impaired during the work day. The employer continued to process the Plaintiff's pre-employment paperwork and submitted her urine sample to a third-party lab for drug screening, as it does with all new hires. The day before the Plaintiff was scheduled to begin her orientation, the employer rescinded her job offer because she had tested positive for marijuana on the drug screen.
3. The Plaintiff sued pursuant to PUMA's employment discrimination provision, and the employer, a nursing home, argued that PUMA is unenforceable because it is preempted by three federal statutes: (1) the Controlled Substances Act; (2) the ADA; and, (3) the Food, Drug, and Cosmetic Act. The Court disagreed on all three, holding that:
 - a. The Controlled Substances Act does not preempt the employment discrimination provision of Connecticut's law because it does not prohibit employers from hiring applicants who may be engaged in illicit drug use;
 - b. The ADA only authorizes an employer to prohibit the use of illegal drugs and alcohol at the workplace, not outside of the workplace; and
 - c. The Food, Drug and Cosmetic Act does not purport to regulate employment, so the antidiscrimination provision in Connecticut's medical marijuana law cannot be preempted by it.
4. The employer also argued that it is exempt from PUMA because it receives federal funding and is subject to federal regulations that require compliance with federal, state, and local laws generally, and because marijuana use violates the federal Controlled Substances Act, it would be violating federal law (and federal nursing home regulations that require compliance with federal law) by hiring Plaintiff. The Court disagreed, stating, "This argument borders on the absurd.

Because the act of merely hiring a medical marijuana user does not itself constitute a violation of the CSA or any other federal, state, or local law, defendant is not exempt.”

- *Caveat: We do not have all of the details about the type of federal funding this employer receives, but clearly this judge rejected the notion that simply receiving federal funding (e.g. Medicare) is not sufficient to exempt an employer from PUMA.*
5. Interestingly, the employer did not appeal this decision denying its motion to dismiss. Instead, in a highly unusual move, the employer filed a counterclaim against the Plaintiff based on a “detrimental reliance” theory. We will continue to follow this case.
 6. **Take Away for Employers:** *This decision reinforces the existing principle in employment law that if state law is more favorable to the employee, it will usually be followed and not preempted by federal law, with the exception of ERISA.*
 7. See Also – Bulerin v. City of Bridgeport, Superior Court, Judicial District of Bridgeport, Docket No. CV196083042S (Mar. 8, 2019)(Holding there is an implied private right of action to enforce rights under PUMA; denying defendant’s motion to dismiss); Smith v. Jensen Fabricating Engineers, Inc., Superior Court, Judicial District of Hartford, Docket No. CV186086419 (Mar. 4, 2019)(Holding that PUMA is not preempted by Controlled Substance Act or ADA and creates a private right of action; denying defendant’s motion to strike); *cf.* Rivera v. University of Connecticut, Superior Court, Judicial District of Hartford, Docket No. CV176076224S (June 29, 2018)(Plaintiff could not establish that the legislature in passing PUMA waived the State’s sovereign immunity.)

C. Massachusetts Supreme Court Holds that Employer Must Engage in the Interactive Process to Determine if Reasonable Accommodations Can be Made for Medical Marijuana User.

1. Unlike PUMA, Massachusetts’ medical marijuana law does not include a provision protecting qualified patients from employment discrimination. However, in Barbuto v. Advantage Sales & Marketing, LLC, 477 Mass. 456 (2017) the Massachusetts Supreme Court held that a qualifying patient can sue for “handicap discrimination” under the Massachusetts Fair Employment Practices Act (“MFEPA”), which is similar to CFEPAs disability discrimination protection and the ADA.
2. Like the Noffsinger case, after the Plaintiff accepted the employer’s job offer, she was told she would have to submit to a mandatory pre-employment drug screen. The Plaintiff disclosed that she uses medical marijuana to treat Crohn’s disease, but does not use it daily and would not use at, during, or before work. After completing her first day of orientation, the employer told the Plaintiff that her employment was terminated because she tested positive for marijuana on the drug screen.
3. The Plaintiff argued that she was a qualified handicapped person under MFEPA because she was able to perform the essential functions of her job with a reasonable accommodation – i.e., waiver of the employer’s policy barring anyone from employment who tests positive for marijuana.

4. The employer argued that the only accommodation the Plaintiff sought is a federal crime, and therefore, it is facially unreasonable, and because such accommodation is facially unreasonable, the employer was not required to participate in the interactive process to identify a reasonable accommodation before terminating her employment.
5. The Court held that accommodation of the use of medical marijuana is *not facially unreasonable*, and the employer was obligated to engage in an interactive process with the Plaintiff to explore whether there was an alternative, equally effective medication she could use that was not prohibited by the employer's drug policy, and its failure to do so alone is sufficient to support a claim of handicap discrimination provided that the Plaintiff proves that a reasonable accommodation exists that would have enabled her to be a qualified handicapped person.
 - The same analysis would need to be applied for any opioid use or even possibly an abuse situation.
6. *However, the Court stated that that the employer may be able to defeat the employee's claim by showing the allowing that Plaintiff to use medical marijuana is not a reasonable accommodation because it would impose an undue hardship on the employer's business, and even listed possible examples of undue hardship, including:*
 - a. Continued use of medical marijuana would impair the employee's performance of her work;
 - b. Continued use of medical marijuana would pose an "unacceptably significant" safety risk to the public, the employee, or her fellow employees;
 - c. Use of marijuana by an employee would violate an employer's contractual or statutory obligation, thereby jeopardizing its ability to perform its business;
 - d. Transportation employers are subject to the US DOT regulations that prohibit any safety-sensitive employee subject to drug testing from using marijuana;
 - e. Federal government contractors and the recipients of Federal grants are obligated to comply with the Drug Free Workplace Act, which requires them to make "a good faith effort . . . to maintain a drug-free workplace" and prohibits any employee from using a controlled substance in the work place.
7. **Take Away Points**
 - a. The Massachusetts court treated this case like an ADA case, requiring the employer to at least engage in an interactive process with the employee to determine whether there is a reasonable accommodation.
 - b. However, because the Massachusetts medical marijuana law does not bar employers for discriminating against an employee for use of medical marijuana, the employee had to bring her claim under the Massachusetts version of the ADA. On the other hand, Connecticut's medical marijuana law does include a provision barring employers from discriminating against a qualifying patient "solely on the basis" of her status as a qualifying patient, so it is

not clear that the Connecticut courts will necessarily use the ADA framework to analyze claims brought under the medical marijuana law (though it would be logical to do so).

- c. *The fact that this Court went out of its way to provide the employer with examples of possible defenses may be an indication that the Court would look more favorably at an undue burden defense, which traditionally is very difficult to prove.*

D. Connecticut Supreme Court Reinstates Employee Discharged for Smoking Marijuana

1. The Connecticut Supreme Court's decision in State of Connecticut v. Connecticut Employees Union Independent et al., 322 Conn. 713 (2016), involved a State employee who was terminated for violating UCONN Health Centers' drug-free workplace policy and the smoke-free workplace policy. The employee was found smoking marijuana in a State van parked in a secluded area of the health center's campus. The employee was smoking approximately two hours into his shift at 5:50 p.m. The employee was scheduled to work from 4:00 p.m. to 12:00 a.m. on the evening of the incident. The employee had a positive work history and was not on a progressive disciplinary path.
 - *Note: While the employee claimed he was smoking marijuana to ease his anxiety, there is no indication that he was a "qualifying patient" under PUMA, and employment discrimination provision of PUMA was not at issue here.*
2. The employee contested his termination and subject to the collective bargaining agreement it eventually proceeded to arbitration. The arbitrator found that the employer had met its burden of proving misconduct, and that the employee's explanation was disingenuous. Regardless, the arbitrator found that termination was not for just cause in accordance with the union contract.
3. The arbitrator reasoned that the employee's conduct was not such a breach of trust, or lack of character to create a danger to persons on the property, or be unable to return to a satisfactory employee. The arbitrator overturned the termination, and found that a six-month suspension without pay was sufficient.
4. On appeal, the Connecticut Supreme Court has upheld the finding of the arbitrator, that a six-month suspension was a sufficient penalty. In upholding this decision, the Court found that public policy based second guessing an arbitrator's award to reinstate an employee is very uncommon, and reserved for extraordinary situations. The Court went on to state that the deference given to the arbitration process is essential to preserve the effectiveness, and efficiency of this forum for employment disputes.
5. Although, this Connecticut case made headlines because the employee was terminated in part for smoking marijuana, the Connecticut Supreme Court decision does not address whether the termination due to marijuana should be treated differently, rather it just reinforced the deference given to the arbitration process.

III. OVERVIEW OF FEDERAL DRUG TESTING LAWS AND REGULATIONS

A. DOT Testing Requirements (49 CFR Part 40)

1. The DOT drug testing regulations apply to “service agents and to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State, and are subject to the CDL requirements of the United States, Mexico, and/or Canada.
2. Under DOT drug testing regulations, a covered employee is “a person who **operates** a Commercial Motor Vehicle (CMV) with a gross vehicle weight rating of 26,001 or more pounds; or is designed to transport 16 or more occupants (to include the driver); or is of any size and used in the transport of hazardous materials that require the vehicle to be placarded.
3. Federally mandated testing programs generally require testing for five classes of drugs: marijuana, cocaine, amphetamines, opiates, and phencyclidine (PCP); the DOT regulations also require alcohol testing.
4. Urine is the authorized specimen except for alcohol testing, where breath or saliva may be used. A two-step testing procedure is required, utilizing a screening test and a confirmation test.
5. Further, only laboratories certified by the U.S. Department of Health and Human Services may be used to test specimens for federally mandated testing. Specimens testing positive on both tests must undergo a “medical review” by a licensed physician, who is commonly referred to as a “medical review officer” or “MRO.”
6. Under Federal DOT Regulations, the following kinds of drug tests are required:
 - a. Pre-Employment – an Employer must receive a negative test result prior to hiring or using an employee in a safety sensitive position for the first time; this also applied when a current employee is transferring from a non-safety sensitive position to a safety-sensitive job for the first time
 - b. Random – In order to deter drug use, the DOT requires that random drug and alcohol tests be conducted on an unannounced basis so that employees cannot predict when they may be selected for testing. Using a random selection process, the employer chooses individuals from the employee population included in the substance abuse program; the Federal Motor Carrier Safety Administration 2019 drug testing rate is 25% and the alcohol testing rate is 10%.
 - c. Reasonable Suspicion/ Reasonable Cause – DOT regulations also require drug testing where a supervisor or company official, trained to recognize the signs and symptoms of drug and

alcohol use, believes or suspects an employee is under the influence of drugs or alcohol. The suspicion must be based on specific observations concerning the employee's current appearance, behavior, speech and smell that are usually associated with drug or alcohol use.

- d. Post-Accident – Under DOT/FMCSA regulations, covered employees must be tested for drug use up to 32 hours from the time of event and for alcohol within 2 hours (but not to exceed 8 hours) from the time of event. If testing cannot be completed within the required time, the supervisor must document the reasons.
- e. Return-to-Duty – When an employee tests positive, refuses a test, or violates any provisions or the testing regulations, the employee cannot work again in a DOT safety-sensitive position until successfully completing the Substance Abuse Professional (SAP) return-to-duty requirements. This includes a clinical evaluation by an SAP who makes recommendations for treatment and/or education, compliance with the recommended treatment and/or education, a follow-up evaluation, and a negative test prior to returning to safety sensitive duty.
- f. Follow-Up – An employee is also subject to unannounced follow up testing for a period of 1 to 5 years according to the plan determined by the SAP.

B. The Occupational Safety and Health Act (29 USC 651 et seq; 29 CFR Part 1910)

1. The Occupational Safety and Health Act (OSHA) is a comprehensive statute that governs workplace health and safety. OSHA does not specifically address drug and alcohol testing nor does it have any standards concerning such testing in the workplace.
2. OSHA does, however, have a “general duty clause” intended to cover hazardous situations for which there are no specific OSHA standards. This clause requires every employer to furnish its employees with employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious harm.

C. Federal Drug Free Workplace Act (41 USC 8101 et seq)

1. Under the Drug-Free Workplace Act of 1988 (DFWA), a drug-free workplace policy is required for:
 - a. Any organization that received a federal contract of \$100,000 or more
 - b. Any organizations receiving a federal grant of any size
2. At a minimum, such organizations must:

- a. Prepare and distribute a formal drug-free workplace policy statement. This statement should clearly prohibit the manufacture, use, and distribution of controlled substances in the workplace and spell out the specific consequences for violating this policy.
 - b. Establish a drug-free awareness program. This program should inform employees of the dangers of workplace substance use; review the requirements of the organizations drug-free workplace policy; and offer information about any counseling, rehabilitation, or employee assistance programs that may be available.
 - c. Ensure that all employees working on the federal contract understand their personal reporting obligations. Under the terms of the Act, an employee must notify the employer within 5 calendar days if he or she is convicted of a criminal drug violation.
 - d. Notify the federal contracting agency of any covered violation. Under the terms of the Act, the employer has 10 days to report that a covered employee has been convicted of a criminal drug violation.
 - e. Take direct action against an employee convicted of a workplace drug violation. This action may involve imposing a penalty or requiring the offender to participate in an appropriate rehabilitation or counseling program.
 - f. Maintain an ongoing good faith effort to meet all the requirements of the Drug-free Workplace Act throughout the life of the contract. Covered organizations must demonstrate their intentions and actions toward maintaining a drug-free workplace. Their failure to comply with the terms of the Act may result in a variety of penalties, including suspension or termination of their grants/contracts and being prohibited from applying for future government funding.
3. According to the U.S. Department of Labor, everyone on the grantee's payroll who works on any activity under the grant is covered by the Act. A Medicare third party reimbursement contract is not subject to the Act because funds are not paid to the provider through a procurement contract or a grant.

D. Tensions between Federal and State Laws

1. According to the United States Attorney's Office, "growing, distributing and possessing marijuana in any capacity, other than as part of a federally authorized research program, is a violation of federal law, regardless of state laws permitting such activities." Moreover, the United States Supreme Court has upheld federal marijuana penalties even where state laws authorize marijuana use for medical purposes. Gonzalez v. Raich, 545 U.S. 1, 29 (2005). The "federal law" exception applies when there are federal laws that restrict the use of marijuana in a particular industry (e.g., Department of Transportation).

2. Additionally a DOT Office Compliance Notice confirmed that “state initiatives will have **no** bearing on DOT’s **regulated** drug-testing program. The DOT’s Drug and Alcohol Testing Regulation – 49 CFR Part 40 – does **not** authorize the use of Schedule I drugs, including marijuana, for any reason ... An MRO will **not** verify a drug test negative based upon information that a physician recommended that the employee use ‘medical marijuana.’”
3. While Connecticut employers may mandate random drug-testing for safety-sensitive occupations, the Noffsinger case suggests that Connecticut employers must accommodate medical marijuana use, in compliance with state law, outside of the workplace for employees that are not covered by DOT or other federal drug testing regulations.
4. The Federal Drug Free Workplace Act and OSHA only addresses an employer’s obligation to provide a drug-free and safe workplace, it does not require or authorize any specific type drug testing program.

IV. Practical Considerations for Employers

- A. At this point it time it is nearly impossible to assess a marijuana user’s level of impairment.
 1. A urinalysis test is unable to discern recent use from weeks earlier and cannot capture use that happened within the last few hours.
 2. Oral fluid testing can detect recent marijuana use and exclude long-past use but cannot determine the level of impairment.
 3. While a simple and noninvasive breath and saliva test can tell an employer how impaired an employee is due to alcohol use, there is currently no test on the market that can assess the level of marijuana impairment and little information as to the specific effects on a person’s functioning a certain concentration of THC will have.
- B. Employer’s policies should restrict marijuana use to the extent permitted by law, at the very least prohibiting marijuana use in the workplace and marijuana impairment during work hours or in the workplace.

V. Questions from Attendants