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**Today's webinar will  
begin shortly. We are  
waiting for attendees  
to log on.**

*Presented by:*

**Theresa M. Gallion**

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# The Employer's "Must Know" Employment Law Webinar Series

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# In a Daze About Medical Marijuana?

*Let's Focus on Best Practices  
Involving Employee Impairment  
Challenges*

**Tuesday, December 9, 2014**

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# How Did We Get Here?



- Criminalization of marijuana at federal level under The Controlled Substances Act
- Decriminalizing medical use at state level, lead states legalized recreational use
- Relaxed enforcement at federal level
- Confusion over workplace impact

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# Unique Properties of Marijuana

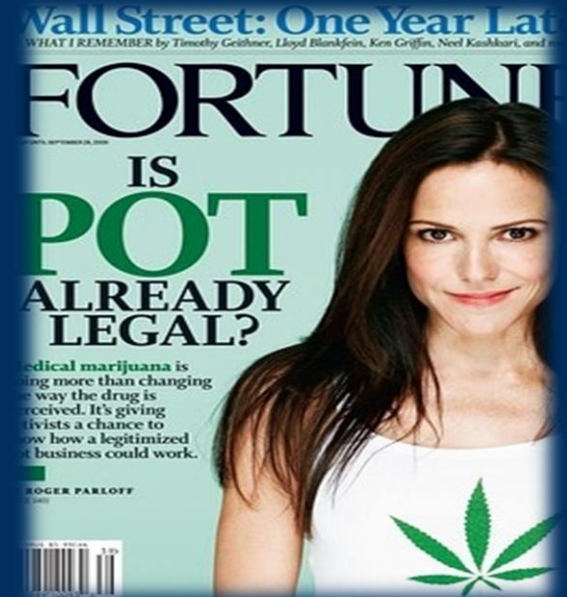
- Carry-over impairment effect
- Slow rate of metabolization
- Remains in system for extended period
- Easily accessible
- Pervasive unlawful use
- High rates of chronic and habitual use

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# Business of Pot . . .



*“Pot entrepreneurs have high expectations for a future market in*

# Business of Pot . . .



- Hemp, Inc. is a publicly traded company (Stock Symbol HEMP) that is working to expand its infrastructure while investing in profitable, legal, and diversified ventures, bringing reward and value to its shareholders
- Marijuana, Inc. foresees and recognizes the possible benefits that may be derived from the many uses for industrial hemp and recognizing the profits that could be made

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# Marijuana Laws in the United States of America as of December 1, 2014

Conditional



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# Marijuana Laws in the United States of America as of December 1, 2014

## Decriminalized



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# Marijuana Laws in the United States of America as of December 1, 2014

## Medical



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# States That Have Legalized Marijuana

- The following four states have passed laws allowing for the personal possession and consumption of marijuana by adults, typically through a controlled marketplace:
  - Alaska, Colorado, Oregon, Washington, District of Columbia

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# States That Have Decriminalized

- Seventeen States and the District of Columbia have decriminalized marijuana use:
  - Alaska, California, Colorado, Connecticut, District of Columbia, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Rhode Island, and Vermont
- Typically, decriminalization equates to no prison time and/or no criminal record for first-time possession of a small amount for personal consumption only

# Why Does It Matter?



1. Impaired forklift operator misgauges distance and injures fellow employee;
2. HR opens the mail and employee (who was about to be fired) files complaint under state medical marijuana law;
3. Impaired painter using propane torch to remove paint forgets to turn off flame and burns down the factory;
4. Company is notified by a state EEOC agency that it has been served with an ADA Charge for failure to reasonably accommodate;
5. Worker with Medical Marijuana permit feels empowered and smokes during lunch break to “ease the pain,” etc;
6. Employee claims unlawful termination because he “utilized” marijuana in a state that was “legal;” or
7. Possible increase in number of employees being referred to EAP.

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# Can An Employer Discipline/Term?

- Alaska (Probably Yes)
- Arizona (Generally No)\*
- California (Yes)
- Colorado (Yes, even if not medicinally based)
- Connecticut (Maybe)
- District of Columbia (Unclear, no prohibition)
- Delaware (Generally No)\*
- Hawaii (Yes)\*\*
- Illinois (Yes)
- Maine (Unclear, no prohibition)
- Maryland (Unclear, no prohibition)
- Massachusetts (Yes)\*\*
- Michigan (Yes)
- Montana (Yes)
- Nevada (Maybe)
- New Hampshire (Probably Yes)\*\*
- New Jersey (Yes)
- New Mexico (Unclear, lawsuit pending)
- New York (Probably Not)\*\*\*
- Oregon (Yes)\*\*
- Rhode Island (Probably Yes, no prohibition)\*\*
- Vermont (Unclear)\*\*
- Washington (Yes, even if not medicinally based)



\*No “merit” challenges ruled upon in court as of yet.

\*\*Legalization on horizon.

\*\*\*New York law automatically deems a “qualifying patient” as “disabled.”

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# Legal Obligations to Maintain Safe Work Environment

- Drug-Free Workplace Act



- OSHA



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# Drug-Free Workplace Act



- To maintain eligibility for federal contracts or grants, employers must certify that they will meet specified requirements to ensure a workplace free of illegal drugs
- Establish a drug-free awareness program
- Require employees to report criminal convictions for drug-related offenses in the workplace within five days from conviction
  - Employers must impose penalty or require satisfactory participation in EAP

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# OSHA



- Each employer shall furnish a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees
- Catch-all provision designed to require employers to assure that all workplaces are reasonably safe and free from known hazards

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# FEDERAL VS. STATE



# The Supreme Court



- Gonzales v. Raich, 541 U.S. 1 (2005)
  - Congress may ban use of cannabis even where approved by states for medicinal use
  - Controlled Substances Act trumps California law (Prop. 215) pursuant to Commerce clause
  - Banning marijuana growth for medical use is a permissible way of limiting its access for other uses
  - As a result, employers in most states may safely refuse to accept medical marijuana as a reasonable explanation for a positive test result

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# ***Gonzales v. Raich***



“For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon us sooner than expected.”

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# DOJ Relaxes Enforcement



On October 19, 2009, the U.S. Dept. of Justice (“DOJ”) issued a statement that it will not “focus federal resources in your states on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the use of medical marijuana.”

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# D.O.T. Does Not Relax



- The DOT motor carrier regulations cover “safety-sensitive” transportation employees
- Pilots, bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire armed security personnel, ship captains and pipeline emergency response personnel, among others
- No driver may report for or remain on safety-sensitive duty while using any controlled substance
- No driver shall report for or remain on safety-sensitive duty after testing positive for unlawful drugs

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# D.O.T. Does Not Relax . . .



- On 10/22/09, DOT issued a statement asserting that its regulated drug testing program will not change based upon the DOJ's 10/19 statement.
- DOT regs do not authorize 'medical marijuana' under state law to be a valid medical explanation for a transportation employee's positive drug test result.
- "Therefore, Medical Review Officers will not verify a drug test as negative based upon information that a physician recommended that the employee use 'medical marijuana...' It remains unacceptable for any safety-sensitive employee subject to drug testing under the Dept. of Transportation's drug testing regulations to use marijuana."

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# Recent Developments



- Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 431-436 (6th Cir. 2012) (holding that the Montana Medical Marijuana Act does not regulate private employment)
- Roe v. Teletech Customer Care, 171 Wn. 2d 736, 753-760 (Wash. 2011) (holding that the Medical Use of Marijuana Act does not create a private cause of action against an employer who discharges an employee for authorized medical marijuana use, nor does it create a clear public policy that would support a claim for wrongful discharge in violation of such a policy)

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# Recent Developments



- Beinor v. Indus. Claim Appeals Office, 262 P.3d 970, 972-73 (Colo. Ct. App. 2011) (affirming the denial of unemployment benefits where an employee was terminated for testing positive for marijuana in violation of an employer's zero tolerance drug policy, even though the employee's use of marijuana was medicinal)
- Wilson v. California Dept. of Corrections and Rehab., H-37281, at \*7-10 (Cal. Ct. App. Sept. 20, 2012) (affirming the State Personnel Board's decision to revoke an employee's termination for failing a random drug test where the employee used marijuana pursuant to a valid prescription, never received a memo regarding her employer's drug-free workplace policy, competently performed the essential functions of her position, and conducted research reading the legality of medicinal marijuana)

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A yellow circular graphic with a sunburst pattern. The word "NEWS" is written in large, bold, blue capital letters, and "FLASH!" is written below it in red, italicized capital letters.

# FMLA AND THE ADA:



# The Family and Medical Leave Act

- Marijuana is not deemed addictive
- Absence tied to medical use (as opposed to underlying impairment) is not likely to be deemed a serious health condition

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# The Americans With Disabilities Act

- (1) Employers may prohibit current illegal use of drugs and alcohol in the workplace and require that employees report for duty without engaging in the unlawful use of drugs
- (2) A positive test result establishes “current” use
- (3) Under federal law, medical marijuana use is considered illegal drug use

# State Disability Laws



- To the extent state laws are modeled on the ADA, such laws may **not** protect employees using medical marijuana
- Recent cases have almost universally upheld the employer's right **not** to accommodate medical marijuana use

*Ross v. Ragingwire Telecomm., Inc. (California)*  
*Roe v. Teletech Cust. Care Mgmt., 152 Wash. App 3d (Wash. App 2009)*  
*Washburn v. Columbia Forest Prod., Inc., All6664 (Jan. 12, 2005)*

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# Medical Necessity Defense in Criminal Matters

- Defense allowed in California, Florida, Hawaii, Idaho, Washington, and District of Columbia
- Defense not allowed in Alabama, Georgia, Massachusetts, Minnesota, New Jersey

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# Colorado *Legalization*



- As of January 1, 2014, Colorado Amendment 64 allows adults aged 21 and older to grow and/or possess marijuana for recreational use
- Actually the second state in the United States to legalize recreational marijuana – Washington
- Why **LEGALIZATION**? It is estimated that Colorado's law will net the state an additional \$67 million per year in tax revenue
  - Sales surpassed \$5 million in the first week of legalization
- Can only smoke in private residences

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# What's Next?



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# Final Questions?

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# Thank You

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