

Medical Marijuana and Pre-employment Evaluations

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Abstract

Fourteen states permit the use of medical marijuana yet the Federal Controlled Substance Act prohibits the possession and distribution of marijuana with no medical exclusion. At the same time, while the U.S. Attorneys Office recommends against enforcing the Controlled Substance Act with regard to medical marijuana, several state courts have ruled that medical marijuana laws do not apply to adverse employment decisions. Most employers disqualify applicants for current use of marijuana with no medical exemption. Examiners, as agents of employers, should become familiar with the growing body of law regarding medical marijuana and employment decisions.

The medically recommended use of marijuana raises two separate issues with regard to polygraph testing. These are (1) personal conduct standards and practices, and (2) suitability for testing issues. At the present time, 14 states permit the use of so-called medical marijuana while two states prohibit such use (Ingold, 2010). It is important to note that physicians, and other licensed health care professionals authorized to approve the use of controlled substances, do not write prescriptions for the use of marijuana since that would be a clear violation of Schedule I Controlled Substances requirements and Drug Enforcement Administration (DEA) medical licensing regulations. Rather, physicians and other authorized professionals are only allowed to make the recommendation that the use of marijuana “might mitigate the symptoms or effects of a patient’s condition,” primarily in the alleviation of some symptoms involving pain or discomfort (Oregon Medical Marijuana Act, 2009).

Of the estimated 17 million current and regular marijuana users in the United States, approximately 600,000 have a medical recommendation (Ingold, 2010). It can be further surmised that only a portion of these

persons are members of the current workforce or of those who are seeking employment. An even smaller percentage of those groups are employed or seeking employment by organizations prohibiting the use of marijuana and other illegal drugs. Therefore, at the present time, the number of applicants medically using marijuana and applying for jobs where accommodation is even a possibility is very small. Nevertheless, estimates of current marijuana use in the general population, show increases and speculation indicates that medical recommendations and attempts at legalization, such as California’s recently defeated Proposition 19, would accelerate this trend by providing legal sanctions and the implication of medical benefit. Proposition 19 would have allowed persons over 21 to legally possess an ounce of marijuana, grow as many cannabis plants as they could in a 25-square-foot space and allow cities to develop plans for large-scale marijuana sales and cultivation.

Suitability for Testing Issues

Intentionally or otherwise, drugs affect human physiology and, in many situations, a person’s verbal and non-verbal behavior. In the case of prescribed medications, drugs are

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intended either to correct a condition, in effect, to bring a patient back to a physiological normal, or prevent a condition from occurring or worsening. Schedule I substances, which include marijuana, are drugs authorized primarily for research purposes. They are not supervised in the same fashion as prescribed medications (The Federal Controlled Substance Act of 1970). In the case of Schedule II drugs, which are prescribed, physicians and others are required to monitor the effects of the drug on the patient and adjust the prescription accordingly. Since marijuana is not prescribed, its use is not monitored by any legally authorized person. Therefore, in the specific instance of polygraph testing the effects of medical marijuana on an individual person's physiology are unknown. How those effects influence what is displayed in the polygraph recordings is completely unregulated and uncontrolled.

In the same light, the effectiveness of marijuana use in reducing undesirable states of pain and discomfort – behavioral states known to negatively affect polygraph recordings – is virtually unproven. In fact, it is because marijuana has no proven medical benefit that it is classified as a Schedule I substance. Nevertheless, the fact that marijuana use – being “high” or “stoned” – affects verbal and non-verbal behavior is recounted extensively in a wide variety of scientific, artistic and cultural venues. Polygraph examiners, both as a requirement under Standards of Practice (APA, 2009) and as a procedure common to all techniques currently taught at APA accredited schools, evaluate subjects' suitability for testing by asking about health, physical state and medications (these would be assessed from the verbal behaviors of a subject). Examiners also observe a subject's demeanor, emotional state and ability to comprehend instructions and questions (these would be assessed from non-verbal behaviors). As a result, an examiner's awareness that a subject is currently using marijuana is directly related to the accuracy of a polygraph examination. Global or clinical assessments of polygraph subject behavior are not only used by all examiners to evaluate suitability for testing but by investigative interviewers making credibility assessments using validated techniques such as the Reid Behavioral Analysis Interview (BAI) (Inbau,

Reid, Buckley & Jayne, 2001; Horvath, Blair & Buckley, 2008; Horvath, Jayne & Buckley, 1993; Mensen, Burgoon, Slowik, Blair & Metaxas, 2009).

While there have been several misrepresentations regarding what global or clinical behavioral evaluations are (Matte, 2000; Kleiner, 2002), when used in conjunction with properly conducted polygraph examinations, they serve as a method of identifying possible polygraph errors and enhancing correct decisions (Slowik, 1982). In short, if both the charts and behavioral analysis indicate truthfulness or deception, confidence in the accuracy of the decision increases. When the two contradict each other one of the two analyses is likely to be in error and the examiner should be alerted to that reality (Slowik, 1982; 2003).

In all cases, since drugs, including marijuana, affect both suitability for interviewing and suitability for polygraph testing, examiners need to consider both medical use and illegal drug use before conducting examinations; knowledge or suspicion of either usage would lead the examiner to anticipate abnormalities that might occur. Problems arise however with regard to interviews and polygraph examinations of both applicants and employees. In both cases the Americans With Disabilities Act (ADA) of 1990 and the more recent Americans With Disabilities Amendment Act (ADAAA) of 2009 are controlling. Since the Appellate Courts indicate that pre-employment interviews and polygraph examinations should be conducted prior to a Conditional Offer of Employment (COE), and while current users of illegal drugs are not to be considered disabled as under the Disability laws and therefore are not accommodated, employers are specifically prohibited from asking questions about past or present health, including medications, in the pre-offer phase (ADAAA, 2009). This, of course, creates a Catch-22 situation: conduct the polygraph examination post-offer where questions regarding health affecting behavior are permitted (in violation of Appellate Court decisions) or conduct the polygraph examination pre-offer but don't ask “health” questions to determine suitability for testing (in violation of required practices and procedures).

Even if examiners are able to determine - using methods that don't violate the ADA - that a subject is currently using marijuana, medically or otherwise, at the time of the examination, the real issue becomes one of reasonable accommodation. What level of THC makes someone unfit for testing? Should medical marijuana users be exempt from behavioral interviews and polygraph examinations? Should voice stress analysis be considered a reasonable accommodation to a required polygraph examination? Should applicants be disqualified (or current employees dismissed) because they are determined to be unsuitable for interviewing and polygraph testing? As suggested by Slowik (2010) organizations should anticipate these questions and develop policies and contingencies accordingly or have the question of medical marijuana use resolved by a qualified expert such as a psychological or medical authority, leaving polygraph out of the debate entirely. Presumably, there is some underlying condition upon which physicians and licensed health care professionals base their suggestions that marijuana be considered to alleviate symptoms. Unfortunately, since medical and psychological evaluations should only be conducted post-offer, this approach does not resolve the suitability issues concerning interviews and polygraph examinations that are required to be conducted pre-offer.

Standards of Conduct

While employers have always had standards regarding skills, knowledge, abilities and experience for both employment applicants and current employees, the idea that formal standards should be expanded and applied to a wide variety of character and personal conduct is relatively new (Slowik, 1979). Certainly, both public and private employers have long used criminal and motor vehicle record checks to assist in the evaluation of applicants. The effectiveness of record checking, unfortunately, has decreased because of changes in the nature of criminal activity and criminal justice procedures. It is assumed that most incidents involving the felony sale of illegal drugs go undetected and even when individuals are caught, after deferred prosecution, juvenile considerations, plea bargaining, etc. these individuals are seldom convicted of anything remotely

resembling the act they were caught committing. Since it's the act, not the justice system disposition, that predicts similar, future acts, record checking is becoming less effective at predicting post-hire performance problems. Even in situations where the physical sciences have greatly improved and expanded their application in criminal investigation, e.g. DNA testing, case resolution is actually declining for crimes such as homicides, perhaps as the nature of the victims of such crimes has changed.

Many public and private employers have created employment and conduct standards regarding the use and abuse of drugs due to their negative effects on decision-making and hand eye coordination. Even when drugs are prescribed and their effects monitored by licensed health care professionals, occupations requiring Federal Aviation Authority, Federal Railroad Authority, Department of Transportation and other licenses and certifications are prohibited from performing job tasks while taking such medications. In addition, because of the negative experiences they have had, many public safety and intelligence agencies whose employees require Department of Energy and Department of Defense security clearances, prohibit the use of all illegal drugs as well as the abuse of legal drugs.

While some employees required to conform to standards of conduct regarding the use of drugs are legally challenging employers' their right to evaluate adherence to drug use standards (*NASA v. Nelson*, 2010), particularly with regard to "off the job" use, to date, all jurisdictions have supported the employers' right to maintain such standards and deny employment, revoke clearances and/or engage in disciplinary actions when violations are discovered. In addition, states that have tried to argue that marijuana use somehow qualifies for an exemption to federal drug laws or that employers must "engage in an interactive process" or other ADA/ADAAA requirements, have been consistently rebuffed (*Emerald Steel v. BOLI*, 2010). In essence, the courts have determined that state law cannot authorize that which federal law prohibits. While recovering addicts may qualify under certain conditions for status as disabled Americans, current users cannot. Since "current use" is not statutorily defined,

employers who create performance based standards that incorporate specific periods of accountability, as detailed in training programs such as Objective Pre-employment Interviewing (Slowik, 2001), should be able to deny employment to candidates who do not meet such standards regarding the use of marijuana regardless of the existence of medical marijuana laws. Employers are cautioned not to use general or excessively broad definitions of conduct such as “ever” or “do anything illegal.”

As most examiners and interviewers are aware, the law is not static. Close attention should be paid to *NASA v. Nelson* (2010), now pending before the U.S. Supreme Court. Depending upon the outcome of this case, the standards relevant to employee

selection and conduct may need to be adjusted. Even though this case involves background investigations of Caltech scientists seeking clearances for work at the Jet Propulsion Laboratory, the background procedures being challenged include the asking of questions about drug use.

While the overriding issue should always be the effect of drug use, including alcohol and marijuana, on performance, productivity, health, safety, credibility and other work related criteria, conduct standards regarding conduct must also conform to employment law and organization policy. Therefore, it is recommended that examiners and employers periodically review their standards, including those involving the use of marijuana, and make changes accordingly.

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