

**State Bar of Nevada  
Section of Labor & Employment Law**

**Medical Marijuana in the  
Workplace**

**Presented by:**

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# Disclosures

- ⊕ This presentation is an adaptation of two continuing legal education programs created by the Section of Labor and Employment Law and provided by the Section to the Advisory Commission as a public service.
- ⊕ The views and opinions expressed are those of the presenters and do not necessarily reflect the position of the State Bar of Nevada or the Section of Labor and Employment.

# Topics

- ⊕ History of NRS 453A.800(2),(3) - Nevada's statute requiring employers to accommodate medical needs of employees using medical marijuana
- ⊕ Concerns with the current state of the statute
- ⊕ Nevada's Lawful Products statute
- ⊕ Federal Law issues

# History of Medical Marijuana in NV



Article 4, §38 of the Nevada Constitution:

1. The legislature shall provide by law for:

(a) The use by a patient, upon the advice of his physician, of a plant of the genus Cannabis for the treatment or alleviation of ...

2. This section **does not**:

...

(b) Require ... accommodation of medical use in a place of employment.

# History of Medical Marijuana in NV

NRS 453A.800 (added to NRS in 2001)

The provisions of this chapter **do not**:

...

2. Require any employer to accommodate the medical use of marijuana in the workplace.



# 2013 Amendment As Passed

453A.800 The provisions of this chapter **do not**: ...

2. Require any employer to ~~accommodate~~ allow the medical use of marijuana in the workplace.

3. Require an employer to modify the job or working conditions of a person who engages in the medical use of marijuana that are based upon the reasonable business purposes of the employer **but the employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card,** provided that such reasonable accommodation would not:

(a) Pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or

**(b) Prohibit the employee from fulfilling any and all of his or her job responsibilities.**

# Summary of 453A for Employers/Employees

- ⊕ “Legalizes” medicinal marijuana
  - Permits a person with a debilitating medical condition to obtain and use medical marijuana with valid marijuana card, from a regulated dispensary
- ⊕ Requires employers to attempt to accommodate the medical needs of medical marijuana users with a valid card

# Summary of 453A.800 for Employers/Employees

## ⊕ Does not require an employer to:

- provide health care to pay for medical marijuana
- allow the use of medical marijuana at work
- modify the job or working conditions of a person who uses medical marijuana (**OR DOES IT?**)

## ⊕ No accommodation required if using medical marijuana would:

- create a threat of harm to persons or property;
- create an undue hardship for employer; or
- prohibit the employee from completing any assigned duties & responsibilities



# WHAT IS REQUIRED?

## Which standard is it?

No modification required of job or working conditions “that are based upon the reasonable business purposes of the employer”

OR

No accommodation required if it “Prohibits the employee from fulfilling any and all of his or her job responsibilities”

# Concerns with 453A.800

- ⊕ Who will enforce the accommodation requirement?
- ⊕ What is actually required?
  - Without clarity, it is difficult to know what is required
  - Vague, undefined terms, including an undefined scope of protected individuals
  - Inconsistent terms create ambiguity



# ENFORCEMENT



**Who will enforce the accommodation requirement?**

The Division of Public and Behavioral Health?

No.

“The Nevada Legislature has not given the Division any enforcement authority related to NRS 453A.800(3) or any specific authority to adopt regulations.”

Linda C. Anderson, Chief Deputy Attorney General



# ENFORCEMENT



**Who will enforce the accommodation requirement?**

The Nevada Equal Rights Commission?

No.

NERC has stated it will not specifically enforce NRS 453A.800.

NERC will investigate a failure to accommodate the underlying disability for which medical marijuana is being used



# ENFORCEMENT



Who will enforce the accommodation requirement?

The Nevada Labor Commissioner?

Maybe?

- ⊕ NRS 607.160 – LC shall enforce all state labor laws the enforcement of which is not specifically and exclusively vested in any other officer, board or commission.
- ⊕ NRS 607.110 - **Knowledge of labor laws.** The LC shall be informed of all Nevada laws for the protection of life and limb in any of the industries of the State, all laws regulating the hours of labor, the employment of minors, the payment of wages **and all other laws enacted for the protection and benefit of employees.**



# ENFORCEMENT



## Who will enforce the accommodation requirement?

The employee, through private action?

Maybe...but Chapter 453A does not provide for a private cause of action.

“[T]he absence of an express provision providing for a private cause of action to enforce a statutory right strongly suggests that the Legislature did no intend to create a private enforceable judicial remedy.”

*Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 959 (2008).

# NEEDED CLARITY

## Who is an employer?

- ⊕ Nevada's equal employment opportunity statutes, chapter 613, defines an Employer as "any person who has more than 15 employees"
- ⊕ 453A does not define employer, could be anyone who pays another for services:
  - New burden on small businesses
  - Possible application to casual employers who pay directly for services baby sitters, yard work

# WHO IS PROTECTED

## **453A.800 only applies to employees...**

- ⊕ But Chapter 613, prohibits discrimination against employees and prospective employees
- ⊕ Can employers avoid issues with 453A by refusing to hire anyone who tests positive for marijuana in a pre-offer drug test?



# WHAT IS REQUIRED?

What steps are required to satisfy the employer's duty to "attempt" to accommodate the employee's medical marijuana use?

- ⊕ ADA interactive process?
- ⊕ More?
- ⊕ Less?



# Concerns with 453A.800

## What is actually required?

What constitutes “undue hardship” for the employer?



⊕ EEOC & ADA standard?

Employer must show that a specific accommodation would cause significant difficulty or expense. Factors mostly include: the cost of the accommodation, employer's financial resources, and impact the accommodation would have on facility

⊕ It does not seem to fit

# Threat?

What equals a “threat of harm or danger to persons or property?”

Is the slightest chance or imminent certainty of:

- ⊕ Physical injury only?
- ⊕ Harm to good will, reputation
- ⊕ Loss of business



**DANGER**

# GUIDANCE NEEDED

## Impaired at Work?

If Employee tests positive...has a valid card...has been using for years without incident ....



How can the employer measure impairment, or justify a threat of danger or how can employee prove no threat?

Warning! No immunity for injuries caused by employee after employer complies with the statute accommodates medical marijuana use.

# Related 2015 Legislative Changes

- ⊕ SB 447: certain government employers may maintain policies against medical marijuana use
- ⊕ SB 62: Regulations may be passed to discipline state employees who use medical marijuana even with a card



These help avoid the potential loss of Federal dollars under the Drug-Free Workplace Act



# Related 2015 Legislative Changes

⊕ SB 231: Employee who is injured at work, and tests over the legal limit under NV's driving law, then presumed impaired for workers' compensation

- 10 marijuana nanograms in urine, 2 in blood
- 15 marijuana metabolite nanograms in urine, 5 in blood
- NRS 484C.110(3)

⊕ Could this be a fix for 453A?



# What about Nevada's Lawful Use Statute?

Employer cannot refuse to hire, or fire someone because that person "lawfully" used a product outside of work hours. NRS 613.333

⊕ A private cause of action does exist to enforce NRS 613.333

⊕ ***Coates v. Dish Network, LLC***, Colorado Supreme Court decision

– Recreational and medicinal marijuana use is legal under Colorado law

# What about Declaratory Relief?

Declaratory relief is available only if:

- ⊕ a justiciable controversy exists between persons with adverse interests,
- ⊕ the party seeking declaratory relief has a legally protectable interest in the controversy, and
- ⊕ the issue is ripe for judicial determination.



# Does Federal Law really matter?

- ⊕ Controlled Substances Act
- ⊕ OSHA (Occupational Safety & Health Administration)
- ⊕ DOT (Department of Transportation)
- ⊕ Drug Free Work Place Act
- ⊕ Americans with Disabilities Act



# DON'T FORGET!

## The Supremacy Clause

“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”

Art. VI, US Constitution

# Preemption Doctrine

## ⊕ **Express preemption**

- occurs when Congress explicitly states intent in a statute

## ⊕ **Implied preemption**

- can occur when Congress does not explicitly include intent in statutory language

# Preemption Doctrine

## ⊕ **Field preemption**

- when a congressional action so thoroughly occupies the legislative field, or touch a field in which the federal interest is so dominant, that Congress effectively leaves no room for states to regulate conduct in that field.

## ⊕ **Conflict/obstacle preemption**

- occurs when federal law actually conflicts with any state law

# Preemption Doctrine

## ⊕ **Conflict/obstacle preemption analysis involves:**

- Examining federal statute as a whole to determine whether a party's compliance with both federal and state requirements is impossible; or
- Whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives.

# Controlled Substance Act

## Section 903 – Application to State Law

- ⊕ The CSA does not trump the state's laws regarding controlled substances “, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.”
- ⊕ “positive conflict”
- ⊕ Does it matter?

# Summary/Takeaways



- ⊕ Medical marijuana workplace accommodation rights and obligations under 453A are unclear
- ⊕ No protection for employees who use, possess, or are impaired at work
- ⊕ Not required to accommodate poor performance/production
- ⊕ Interplay with federal laws remains a substantial concern



thank you |

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