



Disciplining Police Officers Re: Medical Marijuana

by

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The production and sale of so-called “medical marijuana” has become a major industry, in some states already generating sales in the billions of dollars, and also resulting in millions of dollars in state tax revenue. It is no surprise, then, that a majority of states and the District of Columbia have enacted laws permitting and regulating the use of marijuana for “medical” purposes. While this, coupled with partial or total decriminalization, will greatly impact traditional law enforcement efforts, the enactment of medical marijuana laws or outright decriminalization by and large should not affect the authority of police departments to discipline officers for possession or use of marijuana or for serving as a caregiver for a person allowed to use or possess medical marijuana. (Civilian employees may be a different story.)

Most state laws allowing the use of medical marijuana do not protect individuals against employment related sanctions. The Americans with Disabilities Act (ADA) does not protect or even apply to current drug users. Similarly, employees using marijuana for “medical” reasons generally are not protected from such sanctions under state disabilities discrimination laws requiring reasonable accommodation of disabling medical conditions.

This article will discuss the legal and employment issues, give a sample policy and procedure, and recommend how to adopt and enforce rules and regulations in both union and non-union police departments.

FEDERAL LAWS CRIMINALIZE USE OR POSSESSION OF MARIJUANA

Regardless of what a state does, under federal law marijuana remains a controlled substance whose use, sale, and possession are federal crimes. 21 U.S.C. §§ 841(a)(1), 844(a). Marijuana is listed as a schedule 1 controlled substance under the federal Controlled Substances Act, 21 U.S.C. Sec. 812(b)(1). While reasonable minds might differ on the appropriateness of doing so, marijuana remains on the

most restricted schedule, along with such drugs as heroin, LSD, or Ecstasy. The U.S. Food and Drug Administration has determined that marijuana has a high potential for abuse, has no currently accepted medical use in treatment in the U.S., and lacks an accepted level of safety for use under medical supervision. 66 Fed. Reg. 20052 (2001).

Adopted in 1970, the Controlled Substances Act (CSA) established a federal regulatory system designed to combat recreational drug abuse by making it unlawful to manufacture, distribute, dispense, or possess any controlled substance. (21 U.S.C. § 801, et seq.; *Gonzales v. Oregon* (2006) 546 U.S. 243, 271-273.) Accordingly, the manufacture, distribution, or possession of marijuana is a federal criminal offense.

The incongruity between federal and state law has given rise to understandable confusion, but no legal conflict exists merely because state law and federal law treat marijuana differently. Indeed, California's medical marijuana laws have been challenged unsuccessfully in court on the ground that they are preempted by the CSA. (*County of San Diego v. San Diego NORML* (July 31, 2008) --- Cal.Rptr.3d ---, 2008 WL 2930117.) Congress has provided that states are free to regulate in the area of controlled substances, including marijuana, provided that state law does not positively conflict with the CSA. (21 U.S.C. § 903.) Neither Proposition 215, nor the MMP, conflict with the CSA because, in adopting these laws, California did not "legalize" medical marijuana, but instead exercised the state's reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition. (See *City of Garden Grove v. Superior Court (Kha)* (2007) 157 Cal.App.4th 355, 371-373, 381-382.

In *U.S. v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 at 49 (2001), the U.S. Supreme Court concluded that the federal Controlled Substances Act does not contain a "medical necessity" exception that permits the manufacture, distribution, or possession of marijuana for medical treatment. Subsequently, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the U.S. Supreme Court upheld the constitutionality of Congress using its Commerce Clause authority to prohibit the local cultivation and use of marijuana, even when it is in compliance with state law.

A U.S. Deputy Attorney General, on Oct. 19, 2009, issued a Justice Department memorandum to U.S. Attorneys in states with laws permitting the medical use of marijuana, allowing for the exercise of prosecutorial discretion to refrain from initiating federal criminal prosecutions when they determine that a patient's use, or their caregiver's provision, of medical marijuana "represents part of a recommended treatment regimen consistent with applicable state law." Doing otherwise, the memo concluded, would be "an inefficient use of limited federal resources." This was followed-up by another such memorandum on June 29, 2011, clarifying that the intent of the first memo was not to shield commercial medical marijuana cultivators from federal prosecution, even if they are complying with state medical marijuana laws. This second memo was apparently issued because of

concern about the growth of large scale marijuana farming operations in some states, as well as an explosion in the number of medical marijuana dispensaries, with some suggesting that medical marijuana was being used as a thinly veiled cover to promote recreational use of the drug for profit. Despite whatever prosecutorial discretion is exercised on the issue of medical marijuana, use, sale, distribution, or possession remains a federal crime.

Numerous letters have been written by various US Attorneys to state law enforcement or criminal justice officials essentially reiterating the current administration's position. The issue of how law enforcement agencies deal with employees using or possessing marijuana for medical purposes has not been addressed in such correspondence or memoranda.

FIREARMS PROHIBITION

Federal law precludes marijuana users from possessing firearms or ammunition. Possessing and using a firearm and ammunition is an essential part of the job duties of many, although not all, public safety employees. Police officers in particular, as well as some correctional personnel, are expected to routinely be able to possess and use such weaponry. Under the federal law, certain persons may not possess a firearm, ammunition, etc. if they are an "unlawful user of or addicted to any controlled substance" which includes marijuana, depressants, stimulants, and narcotic drugs. Such person is one who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within the past year, or multiple arrests for such offenses within the past five years if the most recent arrest occurred within the past year. This includes persons found through a drug test to use a controlled substance unlawfully, provided the test was administered within the past year.

For a current or former member of the Armed Forces, an inference of current use may be drawn from recent disciplinary or other administrative action based on confirmed drug use, e.g., court-martial conviction, non-judicial punishment, or an administrative discharge based on drug use or drug rehabilitation failure.

Perhaps the most dramatic impact on the issue of the right of public safety agencies to terminate employees using medical marijuana in compliance with state

law may be an open letter to all federal firearms licensees issued by the U.S. Dept. of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) on Sept. 21, 2011. The federal agency charged with enforcing federal firearms laws takes the clear and unambiguous position in this open letter that those who are users of medical marijuana, including those in scrupulous compliance with state law, should not be allowed to purchase, possess or use firearms or ammunition.

Firearms dealers are not likely to be aware that a particular customer seeking to purchase a gun or bullets is a medical marijuana user. But if someone seeking to buy a weapon or ammunition does inform a firearms dealer that they are a medical marijuana user, the ATF takes the position that completing the transaction is against federal firearms law. Some purchasers, the ATF notes, might even present a state issued medical marijuana card as either identification or proof of residency.

Under 18 U.S.C. Sec. 922(g)(3), the ATF reminds firearms dealers, it is unlawful for any person who is an unlawful user of or addicted to any controlled substance” (as defined by the Controlled Substances Act) to ship, transport, receive or possess firearms or ammunition. Since marijuana is a schedule 1 controlled substance, and there “are no exceptions in federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by state law,” medical marijuana users may not be sold or possess firearms or ammunition.

Federal law further makes it a crime to sell or otherwise dispose of a firearm or ammunition to anyone knowing “or having reasonable cause to believe” that the person unlawfully uses a controlled substance, such as marijuana. 18 U.S.C. Sec. 922(d)(3). A federal regulation, 27 C.F.R. Sec. 478.11, allows an inference of current illegal use of a controlled substance to be drawn from “evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time.”

According to the ATF, a person who uses medical marijuana, even in compliance with state law, should answer “yes” to question 11.e. (“Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?”) on ATF Form 4473, Firearms Transaction Record. And licensed firearms dealers may not transfer firearms or ammunition to them. Even if the person answers “no” to this question concerning the use of controlled substances, the ATF takes the position that it is a violation of federal law to transfer a weapon or ammunition to them if a person has “reasonable cause to believe” that they use medical marijuana, such as if they have a card authorizing them to possess medical marijuana under state law.

Similar issues have previously arisen concerning officers barred from possessing weapons because of prior convictions for domestic violence offenses. In 1996, the Congress passed a Defense Appropriations Act. Sec. 658 of that enactment made it unlawful for any person who has been convicted of a domestic violence misdemeanor to possess a firearm or ammunition. There is no exception for persons

who must carry a firearm on their jobs: law enforcement officers, security guards, or members of the Armed Forces. Courts have upheld this restriction.

The ATF position is likely to be challenged by some gun rights advocates as constituting a Second Amendment violation, but such a challenge is unlikely to succeed. See *District of Columbia v. Heller*, #07-290, 554 U.S. 570 (2008), finding an individual right to possess handguns for home defense under the Second Amendment, but stating that reasonable firearms regulations would be upheld, and *McDonald v. City of Chicago*, #08-1521, 130 S. Ct. 3020 (2010), applying those principles to the states and municipalities through the Fourteenth Amendment.

The ATF's position would appear to contradict and is likely to trump the position taken by the Oregon Supreme Court in *Willis v. Winters*, 2011 Ore. Lexis 445, 350 Ore. 299, 253 P.3d 1058, holding that two county sheriffs should not have denied concealed handgun licenses to applicants who were otherwise qualified but who admitted to the regular use of medical marijuana. While this court found that the sheriffs' statutory duty to issue the permits under state law as not preempted by federal firearms law, if the use of medical marijuana makes an individual ineligible for any possession of a firearm, it is difficult to imagine how they could qualify for a conceal carry permit.

Practice Pointers

If a public safety employee cannot legally possess a firearm or ammunition, clearly they cannot perform some of the essential job functions of many public safety jobs, and this can be a legitimate basis for their termination. The ATF memo's reasoning makes it highly questionable as to how a department could be legally justified in issuing a firearm or ammunition to a known user of medical marijuana.

ACCOMMODATION REQUIRED?

The Americans with Disabilities Act and most state disability laws require that employers provide reasonable accommodations for qualified individuals with a disability. So, for example, if a diabetic employee requires an accommodation for the administration of insulin, the employer must provide that accommodation if it is reasonable and does not impose an undue hardship under the law. The question then arises about an employer's accommodation obligations concerning an employee with a debilitating medical condition for which medical marijuana treatment has been certified by a physician. Does the employer have an obligation to accommodate the use of medical marijuana in the workplace or during the workday? The short answer can be found in the text of most state's Medical Marijuana Act. Most such laws state, in part, that it does "not require any accommodation of the medical use of marijuana in any workplace, school bus or grounds, youth center, or correctional facility." In addition, the ADA does not require an accommodation for the "illegal use of drugs." The ADA defines "illegal drug use"

by reference to federal rather than state law, and, as discussed above, federal law characterizes marijuana as an illegal substance. The ADA probably requires some accommodation for past drug dependency and labor counsel should be consulted before taking disciplinary action in such cases.

As a general rule, there is no requirement to accommodate officers with a medical marijuana card, nor are departments required to allow officers to be a caretaker or have any role in the operation of a medical marijuana distribution facility or network. Similarly, there is no obligation to offer treatment in place of discipline to officers found using or in possession of marijuana.

Note: While this will not necessarily apply to police personnel, since marijuana is illegal under the federal Controlled Substances Act, employers in states allowing medical marijuana also still must comply with any federal prohibitions related to marijuana use. Thus, employers covered by the federal Drug-Free Workplace Act, which requires certain federal contractors to certify that they will provide a drug-free workplace by issuing a written policy to all employees that prohibits the illegal manufacture, distribution, dispensation, possession, or use of a controlled substance in the workplace, may not allow medical marijuana use in their workplace. Similarly, employers covered by federal drug testing requirements (such as those regulated by the Department of Transportation) also must remove employees from safety sensitive positions if they test positive for medical marijuana.

While the laws in most states typically do not address whether employers must accommodate employees using marijuana and thus do not prevent enforcement of workplace drug policies, such as those prohibiting drug use in the workplace or disciplining employees for positive drug tests, most also do not ban employers from refusing to employ individuals who use medical marijuana. However, Connecticut, Maine, and Rhode Island prohibit employers from discriminating against medical marijuana users based on their use, unless required by federal law. Arizona's and Delaware's medical marijuana laws go a step farther and prohibit employers from taking adverse action including termination of applicants and employees who test positive for marijuana unless they used, possessed, or were impaired by marijuana in the workplace, or unless a failure to do so would result in the employer losing a monetary or licensing benefit under federal law or regulations.

Practice Pointers

Employers may not have to accommodate medical marijuana use under a state's "medical marijuana" law, but they will most likely have to accommodate the disability that led to the physician's recommendation of medical marijuana, assuming the employee is still able to perform the position's essential functions and so long as doing so would not constitute an undue hardship on the employer. The anti-discrimination laws of many states and the Americans with Disabilities Act's most recent regulations are quite broad and require an interactive process and potential

accommodations for a wide range of medical conditions. Chiefs should make certain the department's policies and their enforcement clearly reflect that any adverse employment actions taken are not because of an employee's disability, but for a clear violation of the department's drug and alcohol policies that are in writing and were properly noticed, disseminated and understood.

Courts across the country that have directly addressed these claims have rejected them, often relying, in large part, on the fact that medical marijuana use is still a federal crime, whether widely prosecuted or not. While they reached their conclusions in different ways, the courts in these states have essentially held that the intent of the statutes in question was to decriminalize medicinal marijuana use and not to protect private rights of employees in the workplace.

- In *Roe v. TeleTech Customer Care Mgmt.*, 2011 Wash. Lexis 393, 257 P.3d 586, the Washington State Supreme Court confronted this issue. While Washington state law allows the medical use of marijuana for patients with a certificate for certain conditions, the court ruled that this does not bar employers in the state from firing employees with such certificates for marijuana use, nor does the law require employers to “reasonably accommodate” medical marijuana users. The decision prohibits the state's Human Rights Commission from investigating complaints about such firings. The court reasoned that, despite the allowance for medical use under state law, it would violate public policy to require employers to sanction criminal conduct by retaining such workers, since use of the drug is a federal crime.
- Similarly, the Oregon Supreme Court held that employees who smoke marijuana to relieve pain or nausea may be fired for drug use even if they have a state-issued medical marijuana card. Laws requiring employers to accommodate disabled workers do not extend to medical marijuana use, the court stated. *Emerald Steel v. Bur. of Labor & Indus.*, 2010 Ore. Lexis 272, 348 Ore. 159, 230 P.3d 518. See also, *Washburn v. Columbia For. Prod.*, 2006 Ore. Lexis 354, 134 P.3d 161, in which the Oregon Supreme Court ruled, under its state disabilities law, that an employer is not obligated to retain workers who use medical marijuana.
- Even in California, the state with arguably the largest number of medical marijuana users, in 2008 the California Supreme Court, in a 5-to-2 holding, allowed an employer to fire workers who use medical marijuana, even when the employee has a doctor's written approval. *Ross v. Ragingwire Tel.*, 2008 Cal. Lexis 784. 42 Cal. 4th 920; 174 P.3d 200; 70 Cal. Rptr. 3d 382.
- The same conclusion was reached in Montana where that state's court rejected claims by an employee terminated after he tested positive for drug use while using medical marijuana. In the case of *Johnson v. Columbia Falls Aluminum Company, LLC*, 2009 Mont. Lexis 120 (Mont., Mar. 31, 2009), the plaintiff began

using medical marijuana under the supervision of a physician a year and a half before his termination. The plaintiff used his own funds to purchase medical marijuana and limited his treatment to after-work hours. When the plaintiff tested positive for marijuana, his employer, Columbia Falls Aluminum Company, LLC ("CFAC") suspended him. Shortly thereafter, CFAC gave the plaintiff a "last chance" agreement outlining the conditions upon which he could return to work including, in particular, that he test non-positive for marijuana. The plaintiff did not sign this agreement, and subsequently, CFAC terminated him. In his lawsuit, the plaintiff claimed that CFAC violated the Montana Human Rights Act ("MHRA") and the ADA when it failed to accommodate his medical marijuana use by waiving terms of its drug testing policy. In rejecting this argument, the Montana Supreme Court held that Montana's Medical Marijuana Act ("MMA") *clearly* provides that an employer is not required to accommodate an employee's use of medical marijuana. MCA § 50-46-205(2)(b). Similar to the recently adopted ballot initiative in Massachusetts, the MMA is a decriminalization statute that protects qualifying patients, caregivers and physicians from criminal and civil penalties for using, assisting the use of, or recommending the use of medical marijuana. The MMA specifically provided that it could not be construed to require employers to accommodate the medical use of marijuana in a workplace. Thus, the court concluded that failure to accommodate use of medical marijuana does not violate the MHRA or the ADA, because an employer is not required to accommodate an employee's use of marijuana.

- Michigan (*Casias v. Wal-Mart Stores, Inc.*, 2011 U.S. Dist. LEXIS 15244, 1-2 (W.D. Mich. 2011)). The Federal District Court found that the Michigan Medical Marijuana Act (MMMA) does not regulate private employment and granted Defendant's motion to dismiss. The Court found the MMMA merely provides a defense to criminal prosecution or other adverse actions by the state:

All the MMMA does is give some people limited protection from prosecution by the state, or from other adverse state action in carefully limited medical marijuana situations.

The Court further explained that adopting Plaintiff's argument would create an entirely new protected employee class in Michigan and "mark a radical departure from the general rule of at-will employment in Michigan."

Plaintiff argued Section 4's use of the term "business" expands the MMMA protections to private employment. Section 4, in relevant part, states:

A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or

occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act .

The Court disagreed, finding that the word “business” is not meant to stand alone, but instead, modifies the phrase “occupational or professional licensing board or bureau.” Thus, the statute was intended to protect against disciplinary actions by state board or bureaus, not regulate all private employers.

Note: While these cases did not involve public safety personnel, their reasoning would still apply to those employed as police officers, correctional officers, or firefighters. In addition to the question of not wanting to condone such personnel regularly committing a federal crime, public safety agencies may also, of course, be concerned about the safety issues that can arise from attempting to perform dangerous job duties while an employee’s senses may be impaired by drug use.

Being able to drive a vehicle at high speeds, being able to fire a weapon, being able to work rotating shifts, being able to run after and subdue fleeing suspects, being able to drive at night and a host of similar functions may seem to “go without saying.” However, by not “saying” them in a written job description, chiefs may have trouble proving them at a court or discrimination agency hearing.

A 2013 case involving a nurse at an assisted living facility brought home the point very clearly. At the end of her FMLA leave for elective knee replacement surgery, she returned to work with a note from her physician saying that she could not kneel, squat or lift more than 50 pounds for six weeks. The nurse asked the facility to “reasonably accommodate” her by: (1) allowing her to call for assistance when a resident fell; (2) providing her with an aide; or (3) permitting an extended leave of six weeks until her restrictions expired.

Since the facility’s job description included a list of essential duties, including being occasionally required to kneel, squat and lift up to 100 pounds, a request for accommodation or extended family medical leave was rightly rejected and the case was dismissed on summary judgment by the U.S. District Court for the District of Minnesota in *Attigbe-Tay v. SE Rolling Hills LLC*, No. 12-1109 (D. Minn. Nov. 7, 2013).

The court found the duties were essential, and “the consequences of failing to perform the duties are potentially dire.” (See 29 C.F.R. s. 1630.2(n)(3).) It noted that while in some cases extended leave would be reasonable, based on the size of the operation the employer was not required to do so, and “is not obligated to hire additional employees ... to assist [the employee] in her essential duties.”

Practice Pointers

In the jurisdictions where state law allows the use of medical marijuana, employers have increasingly been faced with the question of whether they can terminate employees engaged in such drug use if they do so in compliance with state law. Employees have argued that the state laws allowing such use implicitly protects them against employment related sanctions. Some employees facing termination for such drug use have also argued that they are protected from such sanctions under state disabilities discrimination laws requiring reasonable accommodation of disabling medical conditions.

Courts that have directly addressed these claims have rejected them, often relying, in large part, on the fact that medical marijuana use is still a federal crime, whether widely prosecuted or not. While these cases did not involve public safety personnel, their reasoning would still apply to those employed as police officers, correctional officers, or firefighters. In addition to the question of not wanting to sanction such personnel regularly committing a federal crime, public safety agencies may also, of course, be concerned about the safety issues that can arise from attempting to perform dangerous job duties while an employee's senses may be impaired by drug use.

Having up to date job descriptions for all positions is crucial to prevailing in a variety of discrimination cases. However, some chiefs continue to dodge the work and hope that "it will never happen to me." Only when an officer asks for a reasonable accommodation does the lack of a detailed job description – containing "essential job duties" – bring home the issue.

POLICE DEPARTMENT RULES OR POLICIES & PROCEDURES

Virtually all police departments have a rule against criminal conduct. No distinction is made in such rules between federal and state criminal laws. Some departments are adopting Policies & Procedures addressing the use or possession of marijuana for medical or recreational reasons. Michigan is one of the U.S. jurisdictions providing for legal use of medical marijuana. A policy adopted on May 12, 2009 by the Berrien Springs Oronoko, Michigan, Township Police Department entitled "Prohibited Substances – Drug Free Workplace," begins by noting that marijuana remains an illegal controlled substance under both Michigan state law and federal law, and that the presence of any detectable amount of any controlled substance in an employee's system while at work is prohibited. It goes on to state that any member of the department who is using, smoking or ingesting marijuana for medical purposes shall be considered unfit for duty, even if that use is sanctioned by state law, and they shall not be permitted to work or perform any job function. The policy further requires any employee or volunteer of the department who applies for, receives, or has been denied a medical marijuana card must inform the police chief of this fact in writing.

Under the policy, employees who test positive for any detectable amount of marijuana, or any other prohibited or illegal substance shall be immediately relieved of duty, and must surrender any and all department issued firearms, identification cards, etc. and shall not be permitted to perform any police function or possess any firearm in connection with their employment. Other provisions address officers acting as "caregivers" to family members under the state's medical marijuana law, and bar them from owning or being involved in any way in a marijuana dispensary or business, in the growing of marijuana for medical use, or in the distribution of drug paraphernalia.

Note: A sample Policy & Procedure drafted by this author for Massachusetts police chiefs is attached to this article.

Practice Pointers

Police departments probably do not need new Rules or Policies before disciplining employees that are otherwise protected by this state's medical marijuana laws since virtually all departments have a rule that prohibits criminal conduct. Regardless of any state law, the federal law still applies; therefore, the misconduct should be covered. However, out of an abundance of caution, some departments may decide to adopt a rule or policy specifically addressing medical marijuana. Unions are likely to notify the chief that they want to bargain over such "changes." In such case, while bargaining may not be required since it is only the wording and not the substance of any rule or policy that is being changed, I would still recommend that chiefs engage in mid-term negotiations in good faith to the point of agreement or

impasse before enforcing a newly worded rule or policy. Consultation with municipal labor counsel is strongly recommended.

Any department drafting such a policy, of course, should consult with competent local legal counsel, as the legal requirements and details of what will work best will vary from jurisdiction to jurisdiction. Collective bargaining agreements may also have an impact on the details of such a policy.

Chiefs should not make the mistake of including a “rehab” requirement in a collective bargaining agreement for officers using, selling or otherwise involved in illegal drug activity. It is better to have no drug testing clause than to have one that waters down a chief’s ability to enforce a zero tolerance policy.

Chiefs should be sure that their department is aware that there is a zero tolerance policy for illegal drug use. Simply issuing a memo reminding officers of an existing rule and or policy is not a unilateral change in a working condition; therefore, no bargaining is required. However, without waiving the ability to assert that there is no change and this is a management right in any event, I do recommend that chiefs meet with the union if a timely request to do so is received. By agreeing to discuss any questions or concerns, and keeping an open mind and making a good faith effort to reach agreement, a chief will avoid prolonged litigation that can be costly and disruptive.

The enactment of “medical marijuana” laws, therefore, should have no impact on the department’s ability to discipline officers for use or possession of marijuana.

Municipal employers should not make the mistake of including a “rehab” requirement in a collective bargaining agreement for officers using, selling or otherwise involved in illegal drug activity. It is better to have no drug testing clause than to have one that waters down a chief’s ability to enforce a zero tolerance policy.

Sample Memo to Union re: Medical Marijuana

MEMO

Date: _____

To: Local _____

From: Chief of Police

Re: Medical Marijuana

I want to take this opportunity to remind all employees that this department has a rule prohibiting criminal misconduct, and that includes the use or possession of marijuana. Regardless of what a state does to allow its use for so-called “medical” purposes, under federal law marijuana remains a controlled substance whose use,

sale, and possession are federal crimes. In addition, possession of a certain quantity of marijuana, without a medical marijuana “prescription” or caregiver certificate, is still a crime under this state’s law. Growing, processing or selling marijuana, except in connection with a medical marijuana facility, is also still illegal. Moreover, any involvement by a police officer in the medical marijuana business amounts to conduct unbecoming a police officer.

Marijuana is listed as a Schedule I controlled substance under the federal Controlled Substances Act, 21 U.S.C. Sec. 812(b)(1). It is on the most restricted schedule, along with such drugs as heroin, LSD, or Ecstasy. Its sale, use, or possession is a federal crime. Further, the U.S. Food and Drug Administration has determined that marijuana has a high potential for abuse, has no currently accepted medical use in treatment in the U.S., and lacks an accepted level of safety for use under medical supervision. 66 Fed. Reg. 20052 (2001).

State laws allowing such use do not protect department members against employment related sanctions. Similarly, employees using marijuana for “medical” reasons are not protected from such sanctions under the Americans with Disabilities Act (ADA) or this state’s disability discrimination laws requiring reasonable accommodation of disabling medical conditions.

Courts across the country that have directly addressed these claims have rejected them, often relying, in large part, on the fact that medical marijuana use is still a federal crime, whether widely prosecuted or not. While they reached their conclusions in different ways, the courts in these states have essentially held that the intent of the statutes in question was to decriminalize medicinal marijuana use and not to protect private rights of employees in the workplace. See, for example:

- *Roe v. TeleTech Customer Care Mgmt.*, 2011 Wash. Lexis 393, 257 P.3d 586;
- *Emerald Steel v. Bur. of Labor & Indus.*, 2010 Ore. Lexis 272, 348 Ore. 159, 230 P.3d 518;
- *Washburn v. Columbia For. Prod.*, 2006 Ore. Lexis 354, 134 P.3d 161
- *Ross v. Ragingwire Tel.*, 2008 Cal. Lexis 784. 42 Cal. 4th 920; 174 P.3d 200; 70 Cal. Rptr. 3d 382;
- *Johnson v. Columbia Falls Aluminum Company, LLC*, 2009 Mont. Lexis 120 (Mont., Mar. 31, 2009); and,
- *Casias v. Wal-Mart Stores, Inc.*, 2011 U.S. Dist. LEXIS 15244, 1-2 (W.D. Mich. 2011).

Of particular interest to police officers are the restrictions against purchasing or even possessing firearms and ammunition. An open letter to all federal firearms licensees issued by the U.S. Dept. of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) on Sept. 21, 2011 made it clear that those who are users of medical marijuana, including those doing so in compliance with state law, should not be allowed to purchase, possess or use firearms or ammunition.

Some firearms dealers may not be aware that a particular customer seeking to purchase a gun or bullets is a medical marijuana user; however, if someone seeking to buy a weapon or ammunition does inform a firearms dealer that they are a medical marijuana user, the ATF takes the position that completing the transaction is against federal firearms law.

The ATF memo reminds firearms dealers that under 18 U.S.C. Sec. 922(g)(3) it is unlawful for any person who is an unlawful user of or addicted to any controlled substance (as defined by the Controlled Substances Act) to ship, transport, receive or possess firearms or ammunition. The ATF memo notes that since marijuana is a Schedule I controlled substance, and there “are no exceptions in federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by state law,” medical marijuana users may not be sold or possess firearms or ammunition.

As chief, I am also required to take action concerning a person’s firearms license if I become aware of the person’s violation of the federal drug laws. Federal law makes it a crime to sell or otherwise dispose of a firearm or ammunition to anyone knowing “or having reasonable cause to believe” that the person unlawfully uses a controlled substance, such as marijuana. 18 U.S.C. Sec. 922(d)(3). This includes allowing an officer to carry a weapon or ammunition on or off duty. The ATF memo explains that a federal regulation, 27 C.F.R. Sec. 478.11, allows an inference of current illegal use of a controlled substance to be drawn from “evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time.”

Obviously, lying is a violation of existing rules and can result in termination. This includes lying on a firearms application, gun sales or related form. According to the ATF, a person who uses medical marijuana, even in compliance with state law, should answer “yes” to question 11.e. (“Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?”) on ATF Form 4473, Firearms Transaction Record. And licensed firearms dealers may not transfer firearms or ammunition to them. Even if the person answers “no” to this question concerning the use of controlled substances, the ATF takes the position that it is a violation of federal law to transfer a weapon or ammunition to them if a person has “reasonable cause to believe” that they use medical marijuana, such as if they have a card authorizing them to possess medical marijuana under state law.

Since the ability to lawfully possess and use a firearm and ammunition is an essential job function for a police officer, I cannot allow an officer to work if I become aware that such person is prohibited by federal law from carrying out such essential job function. This can be a legitimate basis for their termination. In fact, the ATF memo’s reasoning makes it highly questionable as to how a department could

be legally justified in issuing a firearm or ammunition to a known user of medical marijuana.

As you will recall, similar issues have previously arisen concerning officers barred from possessing weapons because of prior convictions for domestic violence offenses. In 1996, Congress passed a Defense Appropriations Act. Sec. 658 of that law made it unlawful for any person who has been convicted of a domestic violence misdemeanor to possess a firearm or ammunition. There is no exception for persons who must carry a firearm on their jobs: law enforcement officers, security guards, or members of the Armed Forces. Courts have upheld this restriction.

Police departments do not need new Rules or Policies before disciplining employees that are otherwise protected by this state's medical marijuana laws. Criminal misconduct by department members has always been prohibited. However, out of an abundance of caution, and in a spirit of cooperation, even though I am not required to do so, in order to assure that officers are not caught off-guard or confused, I have decided to draft a policy specifically addressing medical marijuana.

Be assured that I am willing to meet and discuss this or any other questions or suggestions that union may have. While bargaining may not be required, since it is only the wording and not the substance of any rule or policy that is being changed, I am willing to engage in mid-term negotiations in good faith to the point of agreement or impasse before enforcing a newly worded rule or policy, if the union makes a prompt request that I do so.

Without waiving my rights, and consistent with my belief that I am simply spelling out or clarifying the department's existing prohibition against illegal conduct, be advised that effective thirty (30) days from now, i.e., _____, 201_, I intend to put the attached policy into effect.

If you would like to negotiate the impact of such action on members of your bargaining unit, please let me know -- in writing -- within five (5) days of receipt of this notice.

The following dates and times are available:

Please select one (or more) date(s) and times and include such selection in your written reply as well. If you are unable to meet on any of the dates offered, please supply me with three (3) alternatives (during normal business hours), the last of which should be no later than _____, 201_.

If I have not received a written request for bargaining within five (5) days, I will consider this a waiver and implement the proposed policy.

INVESTIGATING SUSPECTED DRUG USE

The manner in which a police officer's suspected drug use is reported may influence the way an internal affairs investigation is conducted. Chiefs may learn of a possible drug problem in a number of ways. A shift supervisor might get a complaint that an officer is using or selling drugs. A citizen might report that an officer smelled of burned marijuana or seemed dazed and inattentive during a traffic stop or when approached by the civilian looking for assistance or directions. A patrol supervisor might report suspicions that an officer's recent problems with attendance or performance could be related to substance abuse. A cruiser or transport vehicle accident, sexual harassment, or domestic violence investigation might lead to evidence of alcohol or drug use. A report might even come from another law enforcement agency (for example, if an officer is arrested for driving under the influence, selling drugs or assaulting a spouse or significant other).

Indicators of Drug or Alcohol Use

Police officers all receive some amount of training in drug recognition, as well as indicators of drug and alcohol use. Part of that training includes a warning that these behaviors don't necessarily mean that an employee is using alcohol or drugs. Investigators should be careful since acting on the basis of these signs alone could lead to serious trouble. Since the Americans with Disabilities Act and many state anti-discrimination laws protect persons "regarded as" disabled, investigators should treat these signs only as indications that additional inquiry or investigation is warranted.

The federal government's Working Partners for an Alcohol- and Drug-Free Workplace has identified some behaviors that might signal a drug or alcohol problem:

- coming in late, leaving early, or unauthorized absences
- unreliability, including being away from the assigned job frequently
- carelessness and repeated mistakes
- being argumentative and uncooperative
- inability or unwillingness to follow directions
- avoiding responsibility
- blaming others or making unbelievable excuses
- taking unnecessary risks by ignoring safety and health procedures, and
- frequent involvement in accidents, mistakes, or damage to equipment or property.☐

Note: In addition, alcohol and drug use cause physical effects that depend on the drug.

Investigators should document as many of these indicators as they can identify when preparing their report.

Substance Abuse Off the Job

Sometimes, an officer's (or family member's) off-duty use of drugs leads to trouble at work. Law enforcement officers that use drugs off duty are generally subject to discipline, up to and including termination in most cases. Unless a state's laws or a department's collective bargaining specifies otherwise, there is no need to give such officers a "second chance" or to provide an opportunity for rehabilitation services when it comes to drugs. Even then, in light of the federal prohibition against possessing firearms and ammunition, it is likely that termination would be justified.

Impaired at Work

Occasionally a chief or other supervisor may ask an IA investigator to look into a report of an officer who is working or attending a work event while intoxicated or under the influence of drugs or alcohol. This requires prompt action and compliance with several legal requirements. Since safety must be a major consideration, placing an officer on sick leave (assuming he or she agrees) or administrative leave pending the outcome of an IA investigation is often appropriate where an officer is (or has been) under the influence of drugs or alcohol at work. Even where the officer is not currently impaired, it may be wise to use the administrative leave option to help prevent safety problems. Departments should be sure that all supervisors are aware that they may order an officer to stop working and "go home" if the individual is under the influence.

IA investigators should familiarize themselves with their department's policies, collective bargaining provisions and applicable laws. If the agency has a drug testing program, the investigator should immediately determine whether there is adequate cause to test under the policy. If the employee has been reported by another officer, a supervisor or even a civilian, the IA investigator should ask that person to detail the reasons why they believe the employee is using drugs or alcohol, and put the response in writing. If an investigator is not certain that the department has the right to test, consultation with the chief or labor counsel is appropriate.

If the investigator concludes that testing is required, he or she should start the process, following the protocols in the department's policy. Particularly if a chief, superior officer or investigator suspects that the employee has been drinking alcohol, time is of the essence. As all officers are taught at the recruit academy, alcohol metabolizes relatively quickly, and may not show up in a test taken a few hours after the employee is reported to be under the influence. Some drugs become

undetectable in a matter of days. Urine testing for drugs is usually limited to five categories, but it may be possible to ask for a more comprehensive analysis, especially if there is reason to suspect a certain kind of drug is being misused. While hair testing has the advantage of revealing drug use over a longer period (1/2" per month is normal hair growth), it is more expensive and a testing facility may be harder to find.

If the employee appears to be under the influence, the IA investigator should take detailed notes of the facts that lead him or her to believe the employee has been drinking or using drugs. The chief, supervisor or investigator should also tell the employee why they stopped him or her from working and ask for the employee's explanation, taking careful notes of the employee's response to any questions.

Policy Recommended

Even if an investigator has strong, objective reasons to believe that an employee is under the influence, ordinarily the investigator shouldn't ask or require the employee to submit to a drug test unless the agency already has a written drug testing policy—that has been reviewed and approved by counsel—allowing for a test. A state law or collective bargaining agreement may spell out certain procedures as well. Many states allow drug testing only if the employer has a written policy and employees have been notified of the circumstances when testing will be required and the consequences of testing positive.

While the term "reasonable suspicion" is often used to define the standard for ordering an officer to submit to a drug test, some state courts have interpreted that to be essentially "probable cause." Therefore, unless a drug-testing article in the collective bargaining agreement provides otherwise, a chief will have to be able to document the basis for ordering a drug test. Typically this would include observations of the officer's demeanor, speech, stability and other indications similar to a field sobriety test. Certainly any admissions, or observations of use or possession, will meet the required standard. Once a chief has such reasonable suspicion or probable cause, depending on which is required, an officer may be ordered to go directly to a drug-testing facility, usually accompanied by a superior officer.

Note: There is no requirement that a union official, lawyer or other "buddy" accompany the officer, but so long as it does not delay the test, there is no harm in allowing the officer to be accompanied. The chief should make it clear that refusal or delay will be treated as insubordination and termination will be recommended.

Events That Have Already taken Place

If a chief or other supervisor receives a report or complaint about a past incident, they may still want to take immediate action, depending on how serious

the event was and how many employees may be involved. If the officer appears to have an ongoing drug problem, an investigator may want to recommend that the chief relieve the employee from duty with pay (administrative leave) while the investigation is underway. For example, if a patrol supervisor or shift commander has reported that an officer has shown signs of intoxication twice in the last week, that employee should not be allowed to come back to the workplace until the investigator can find out what's going on. Or, if an officer has endangered other employees or caused an accident, the officer should not be allowed back to work until the investigation turns up what happened.

Plan the Investigation

When investigating drug use, you may be starting with a complaint or report of inappropriate behavior by a particular employee, such as slurred speech, erratic driving, or the odor of marijuana. If the employee was reported while intoxicated, you may also have the results of your preliminary work, such as your notes from talking to the employee, notes taken by the employee(s), citizen, or other person who made the original report, and perhaps the results from a drug test. You may even have the employee's own admission of drug use.

In some cases, however, you may suspect drug use without knowing the culprit. For example, perhaps a superior officer has found obvious signs of drug use, such as drug paraphernalia, or drug-related trash (marijuana cigarette butts, for instance). Perhaps someone found drugs in a locker room or restroom. Maybe there have been a series of accidents on one shift that could be related to drug use. Your planning and approach will depend on how you found out about the problem.

When You Have a Complaint or Report

If an employee has complained about, or a superior officer has reported, potential drug use, any investigation should start with the facts at hand. Consider these questions as you begin to shape your investigation:

- **Who complained or reported the problem?**

What's the relationship between that person and the employee who may be using drugs? Did another officer or a supervisor complain, or did the information come from an outside source, such as a citizen or even another police agency?

- **What allegedly happened?**

Did the person reporting the problem actually see the officer use drugs? If not, what facts led that person to believe the employee was

impaired?

- **Who is the suspected employee?**

Does the suspected employee have any prior misconduct involving drugs? If your agency conducts drug tests, has the employee tested positive? Is there more than one accused employee?

- **Where and when did the alleged incident(s) take place?**

How many incidents were there? Were others in a position to see the accused employee's behavior?

- **How did the department respond to the incident at the time?**

If the employee was tested for drugs or alcohol, were the results positive? Did the employee admit to using drugs or alcohol? Are there notes—your own or from witnesses—detailing why others thought the employee might be intoxicated?

These questions should help you decide whom to interview, what evidence might be available, and what kinds of questions you'll need to ask. If the employee was reported while impaired, and the officer was placed on administrative leave, it may be possible to scale back your investigation since you've already done some of the work. Especially if the employee tested positive or admitted to drug use at the time, a chief or sheriff should have much of the information needed to make a decision (although you will probably want to talk to the accused employee again, and perhaps his or her supervisor and co-workers, to find out the magnitude of the problem).

Fellow officers can be forced to answer questions about a co-worker's drug or alcohol use. However, because drug use may happen around non-police personnel including citizens or other non-government workers, an investigator may need to consider whether and how to approach these potential witnesses.

No Complaint or Report

If no complaint or report points to a particular wrongdoer, consider the facts. How did you find out about the possibility of drug or alcohol use? If drugs or alcohol were found in the workplace, where were they found? Who found them? Who has access to that area? When were they found? If a rash of accidents or complaints of inappropriate behavior have spurred your investigation, consider who was involved in each incident. Do the same names keep coming up, or were many different employees involved? How did you find out about the problem? Does the problem seem to be isolated in one segment of the department or facility? Does the same

person supervise all of the employees involved?

Gather Evidence

As in a criminal investigation, you should gather documents—and particularly, physical evidence—of potential drug use before conducting your interviews. A suspected employee’s first act after being questioned about possible workplace drug use is likely to be destroying the evidence. And, you may need to gather evidence first to decide whether drug testing is warranted under your agency’s policy. Having evidence in hand when you interview the suspected employee can also help you elicit more truthful answers to your questions.

Documents

Although documents may not play a major role in every drug use investigation, they are still important. Before you begin your interviews, pull together all of the relevant paperwork, including:

- the agency’s drug policy, including any provisions relating to testing
- the personnel files and performance evaluations of the suspected employee (if there is one)
- the results of any drug testing involving the suspected employee, and
- any documents pertaining to the incident, such as a police report for an officer’s DUI arrest, a citizen’s written complaint about the officer’s behavior, or your notes from your first encounter with the suspected officer (if you or another officer had to intervene immediately).

Physical evidence

In a drug use investigation, physical evidence often makes or breaks the case. For example, you may have or be able to find actual drugs, drug paraphernalia (such as rolling papers, a razor blade, or hypodermic needles), and items commonly used to mask drug use (breath fresheners, eye drops, or even a clean urine sample or substances used to adulterate or dilute a drug test specimen). There are also special considerations when it comes to gathering physical evidence in these types of situations. In order to find evidence, you may have to conduct a search, which means you must tread very carefully to avoid legal problems. While law enforcement officers have a reduced expectation of privacy in their desks, lockers and filing cabinets, be sure your department has a clearly stated policy that allows searches. Having a policy but never actually conducting searches may reduce or eliminate the ability to conduct warrantless searches. In some cases, especially where an officer has a reasonable expectation of privacy and there is no real exigency, a warrant will be required.

You'll also need to keep detailed records of where evidence was found, what it looked like at the time, and what's happened to it since, so you can show that it hasn't been tampered with or otherwise altered. Video cameras can be helpful in recording any searches.

Finding and Preserving Evidence

When dealing with physical evidence in a drug use investigation, there are a few special considerations. Sometimes, a workplace search can help you turn up evidence of drug use. For example, if you suspect an officer of using drugs at work, you may want to search the employee's desk or locker, or to check the employee's personal belongings, such as a purse, briefcase, or vehicle (a common spot for using drugs during the workday). However, you must make sure you don't compromise employee privacy rights in your efforts to uncover evidence of wrongdoing.

Installing surveillance equipment.

Because it's illegal, drug use and dealing typically take place in private, often in restrooms or locker rooms. To gather actual evidence of such activities, some employers use surveillance cameras or recording devices. Consultation with the DA or labor counsel may help determine whether you have sufficient legal justification for surveillance or can do it as a matter of right.

Much the same as in a criminal case, you must be especially careful to preserve the "chain of custody" with evidence in drug use cases. Start by taking photographs of any evidence you find, exactly where and as you found it. For example, if you find marijuana in an officer's drawer, take a picture of the open drawer with the marijuana sitting in it, before you touch anything. If you find paraphernalia in the trash, take a picture of the trash can with the items in it, then another picture of the paraphernalia once you've removed them from the trash, showing how many there are and in what condition they are discovered.

Be sure to take notes on what you find. What's apparent to you on day one may not be so evident months or years later, if the employee chooses to challenge your conclusions.

Testing Evidence.

If you find marijuana, you'll probably know exactly what you've found, based on the distinctive smell and appearance. In some cases, however, you might find pills or powder that you can't identify—or that the employee claims is perfectly innocent. ("That's my blood pressure medication!") The only way to get to the truth may be to ask an expert to analyze the substance. A department's DRE (Drug Recognition Expert) may be useful here. So might a field drug test kit. If the employee or union indicates they will contest that the substance is what you claim, be prepared to submit it to an independent lab.

Interviews

Once you finish gathering evidence, you are ready to start your interviews. Partly because typically there is no traditional “victim,” an investigation of drug use is different than a harassment, discrimination, or domestic violence investigation. In these cases, start by interviewing witnesses (including the person who reported the behavior, if there is one), then move on to the suspected employee(s). Be sure to have all the evidence at your fingertips when you talk to the suspected employee, so you can require a drug test. (Be fair, if treatment is not an option in drug use cases, and termination is virtually certain, don’t lie to an officer.)

Interviewing the Reporting employee

If a co-worker or superior officer has come forward with suspicions about drug use, start your interviews with that person. As always, you should get the interview rolling with an opening statement that briefly explains the process. Tell the employee that you’ve been asked to look into the complaint or report of possible drug and alcohol use, and you need to gather as much information as you can. Order the employee to keep the investigation confidential, and explain that talking about the investigation could lead to discipline. Explain that retaliation is prohibited, and ask the employee to come to you if there are any reprisals for coming forward.

When interviewing an officer or supervisor who suspects that another employee is using drugs, you will often be trying to figure out if you have sufficient facts to either require the employee to submit to testing or conclude that the employee is guilty. The more facts you have, the better your legal position if you confront the employee directly about drug use. Focus on sensory details: What did the reporting employee hear, see, smell, touch, or even taste that raised suspicion? You should also inquire about the reporting employee’s relationship to the suspected employee, to find out if anyone has a motive to be less than truthful.

Sample Questions

- *What happened that caused you to come forward?*
 - *How many incidents have there been?*
 - *When and where did each incident take place?*
- *Please describe each incident to me.*
- *Who else was there?*
- *Did the officer know you were present?*
- *Did you speak to the officer at the time of the incident?*
 - *If so, what did each of you say?*
- *Did you actually see the officer use drugs?*
 - *If not, what leads you to believe the officer is using drugs?*
- *Were there any facts about the officer’s appearance or behavior that led you to believe he or she is using drugs?*
- *Did you smell the odor of drugs on the employee?*

- *Has the employee caused any accidents that you believe are related to using drugs?*
 - *When and where?*
 - *How many accidents?*
 - *Why do you believe they were drug-related?*
- *Has the employee said anything, to you or to others, that led you to believe the employee is using drugs?*
- *Have you seen the employee with drug paraphernalia?*
- *Do you believe other employees are involved?*
 - *If so, why do you hold that belief?*
 - *Which other employees?*
- *Are there others who have witnessed the employee's behavior?*
 - *Who, when, and where?*
- *Have you spoken to the employee about this?*
 - *If so, when, where, and what did each of you say?*
- *Have you reported this to your supervisor?*
 - *If so, when, where, and what did each of you say?*
 - *If not, why not?*
- *Do you work with the officer?*
 - *How would you describe your working relationship?*
 - *Do you have any problems working together?*
 - *Do you socialize outside of work?*
- *Do you know of any evidence relating to these incidents?*
- *Do you know or have an idea where the employee keeps drugs?*
- *Have you taken any notes on these incidents?*
- *Have you spoken to anyone else about this?*
 - *If so, to whom and what was said?*
- *Is there anything else you'd like to tell me?*

When you've finished your questioning, review your notes with the reporting employee. Make sure that you got everything right and there are no gaps in your notes. Remind the employee that the investigation must remain confidential. Ask the employee to bring any new information to your attention right away, and to come to you if he or she faces retaliation for coming forward.

Interviewing Witnesses

When interviewing witnesses, your approach will depend on whether you have an employee suspect (for example, because a supervisor or fellow officer reported the problem or the employee's behavior was public, such as drug use at a holiday party). If you are concerned about a particular employee's drug use, you can treat other employees who might have seen something just as you would any other witness. Start by trying to find out what the witness knows and how—for example, did the witness actually see drug use, hear about it, or see something that led him or her to believe another employee was under the influence? Your goal is to gather the concrete facts without giving too much away.

When dealing with unknown suspects, consider whether your witness might be involved. For example, if your investigation began because rolling papers, small baggies, and the butts of marijuana cigarettes were found in the garage, everyone who has access to that area is a potential witness and a potential suspect.

Getting Started

Begin your witness interviews with a brief explanation of your purpose. If you are dealing with a known incident, you can be more direct. For example, if the holiday party got way out of control, you can tell witnesses, “I’ve been asked to look into what happened at the holiday party.” Explain that you have been asked to investigate the situation, explain the rules on confidentiality and retaliation, and so on. You shouldn’t reveal facts unnecessarily, but you don’t need to be overly secretive.

When dealing with allegations that aren’t generally known in the workplace, be sure to approach the subject with more caution. Explain the general focus of your questions without getting into details. Save the discussion of confidentiality and retaliation for the end of the interview. And, if the employee might be a suspect, you should be the most general of all. As in a criminal investigation, you can begin simply by saying, “I’m hoping you can answer a few questions for me about your work,” or “I’ve been asked to look into how we can improve off-site events, and I’d like to get your input,” for example.

Questions for Witnesses

Your witness questions will depend on the situation. If you already have a suspect employee, consider what led you to this witness. Should the witness have seen or heard something? Did a reporting superior officer tell you that the witness works on the same shift as the suspect officer? Was the witness present at the incident? Start by asking general questions that focus on the connection between the witness and the suspected employee—for example, the incident the witness may have seen. Move toward more specific questions as the witness opens up; if the witness doesn’t offer information about the incidents you’re investigating, you may need to be more direct.

Closing the Interview

Conclude your interview by reviewing your notes with the witness, making sure you got everything down. Recording the interview is recommended, but check your department’s policy. If you have not recorded the interview, you may want to have the employee sign your notes or a written summary of the interview you prepare later. Tell the employee that what you’ve discussed is confidential and may not be revealed to coworkers. Ask the employee to let you know about any retaliation, and to contact you if any new information comes to light.

Interviewing the Suspected Employee

When interviewing the employee suspected of using drugs, you may have a number of goals. You may be trying to figure out whether the facts warrant testing, under the law and your agency's policy. You may want to convince the officer to admit the problem and seek treatment (regardless of whether keeping his or her job is really an option.) Or, you may be trying to find out whether other employees are involved.

With the advent of a state's "medical marijuana" law chiefs and unions may have trouble trying to sort out what rights an employer has to ask questions about current drug use by officers or other employees. The sample Policy & Procedure attached to this article prohibits officers from possessing marijuana even with a state-issued card or from being a caregiver for someone with such card. A recently issued informal opinion from the U.S. Equal Employment Opportunity Commission stated that the Americans with Disabilities Act reinforces that position. According to the EEOC, the ADA does not prohibit employers from asking applicants about current illegal drug use.

"However, questions about past addiction to illegal drugs or questions about whether an applicant has ever participated in a rehabilitation program are disability-related inquiries because past drug addiction generally is a disability," the commission cautioned.

Note: This article will not include a discussion of immunity, union representation or similar rights. Obviously, these are involved in many kinds of investigations, and this article focuses primarily on drug violations. Where criminal conduct is potentially involved, however, investigators must be familiar with this state's immunity rules. Similarly, being aware of a union member's right to a "buddy" or union rep during an interview that might lead to discipline is something an investigator must keep in mind.

Multiple Potential Suspects

If you haven't narrowed your investigation down to one suspect, follow the guidelines for interviewing witnesses who may be suspects, above. Upon reaching some conclusions about who's really responsible for the problem, you can switch to the more direct approach in this section.

Your approach and questions will depend on the facts. Of course, the potential scenarios are endless. The employee may have been seen using illegal drugs, been caught with illegal drugs in his or her possession, or tested positive on a random drug test. The employee may be acting intoxicated; if so, the employee may be using illegal drugs, drinking alcohol, using legal drugs for a disability, or behaving strangely for an entirely different reason.

Given this wide variety, it's impossible to give a list of sample questions. Here are some guidelines and examples that will help you stay on the right track:

Start with background questions

Keeping in mind the suspected or reported problem, ask the employee questions about the incident, area, or behavior.

Scenario:

Dispatcher Jacobs is suspected of using illegal drugs at work, and possibly selling them to one of the janitors and another dispatcher. He is away from his desk frequently, meets with non-employees in the parking area and on the street outside of work, and spends a lot of time on his cell phone and in the bathroom. He is jittery and anxious most of the time, talks a lot to coworkers, and has been losing weight. You might start this interview with basic questions about Dispatcher Jacob's job duties and schedule:

- What is he supposed to be doing and where?
- Does his job require collaboration with other employees?
- How often and which ones?
- Does his job require him to interface with outsiders? In what way, and who are they?

Questions like these will help you evaluate the facts you've learned from others about his behavior.

Give the employee a chance to respond

It's only fair to tell the employee what has been said and ask for the employee's side of the story. But don't reveal the name of the reporting employee.

Scenario:

The evening shift goes out for a happy hour once every month or so. Although no one is required to attend, the Sergeant has made clear that she thinks these events are important for team building; not surprisingly, most officers attend when they can. Several have reported that the Sergeant has been going out to the garage alone at the last few get-togethers and returning with a different demeanor, to the point of stumbling, slurring her words, and embarrassing herself. After the last happy hour, although they did not smell or suspect alcohol intoxication, an officer had to take away her car keys and drive her home.

You can be very direct in this interview. You should still start with

background information—about her shift, the purpose for the happy hours, who comes, what people do there, and so on. But then, you can simply say, “Do you use drugs at these events? What type of drugs do you have? How would you characterize your behavior?” If the Sergeant doesn’t come right out and admits that she’s been using drugs, you can say, “Maria, some officers are concerned that you are using drugs at these events. They have been worried about your driving home, because you’ve disappeared during the get together and returned with obvious changes in your demeanor. Are these reports correct?”

Don’t Judge or Accuse

You aren’t going to get anything out of an employee whom you’ve just called a pothead, and you might be creating unnecessary legal trouble. Even if you don’t call an employee names, accusing someone of substance abuse isn’t likely to help you convince the officer to get help; if the employee doesn’t actually have a problem, you may even be violating the ADA.

Consent to Test

If you conclude that there are grounds to require a test under your department’s policies, let the officer know—and tell the employee that refusing to submit to a test could result in termination (if that’s what your policy provides).

Scenario

Conrad, the new Records Clerk, has been seen ingesting marijuana “edibles” in the bathroom by a coworker, who also reported that his eyes were red, and he was talking nonstop after his trip to the restroom. You immediately meet with Conrad and notice the same physical traits. You have reasonable suspicion to require an immediate drug test, which your department’s policy allows. After you question Conrad about the incident, you tell him, “Conrad, as you know, our department’s policy allows for drug testing if we have reason to suspect that an employee is using illegal drugs at work. Based on a statement from your coworker and your appearance and comments right now, I believe we have a reasonable suspicion. Will you agree to take a drug test, and sign this consent form? I have to warn you that refusing to submit to a drug test could lead to employment termination, as our policy clearly states.”

Evaluate the Evidence

In some drug use investigations, it’s relatively easy to reach a conclusion about what happened. The suspected employee may admit to the problem, there may be too many witnesses to the employee’s drug use to deny, or the employee

may have tested positive in a drug test. In other cases, however—and particularly if no testing was done—you’ll have to weigh the evidence and figure out what happened.

Unlike a harassment or discrimination investigation, a case about drugs typically doesn’t come down to a “he said, she said” scenario. More often, you’ll have to decide whether only one person is telling the truth: the suspected employee. There are a few factors you can use when analyzing the evidence that are particularly likely to be relevant in drug use cases: demeanor, corroboration, and plausibility.

Demeanor. Drug use causes physical symptoms and traits. Did the employee smell of marijuana? Was the employee lethargic, dreamy, out of it, or dazed? Was the employee jittery, talkative, nervous, or paranoid? Has the employee lost weight? Were the employee’s eyes red? Of course, any of these facts could have other explanations. But you should know the signs of using the suspected drug, and look for them during your interview. If there’s enough other evidence, the employee’s appearance and demeanor could help you reach a conclusion.

Corroboration. If an employee claims that apparently intoxicated behavior was due to a bad reaction to over-the-counter medication, for example, is that story supported by a doctor’s note, statements of coworkers whom he told of the problem when it was happening, or other evidence? If the employee is accused of using drugs at work, what did the coworkers who sit near her see?

Plausibility. This often comes up when judging an employee’s alternate explanation for particular behavior or actions, such as why the employee was in a particular place at a particular time, or what caused the employee’s apparently intoxicated behavior. For example, an employee who is suspected of dealing drugs spends a lot of time in the parking lot, and is often not where he is supposed to be working. Does he have an explanation—and if so, does it make any sense? Similarly, an employee who claims that intoxicated behavior is actually due to a prescription drug might need to explain why that particular side effect only showed up at the department’s holiday party.

Take Action

If you conclude that an employee has used drugs at work or off-duty, the chief or appointing authority will most likely have to discipline the employee. As always, the level of discipline depends on the seriousness of the behavior. For extreme misconduct such as possessing, selling or manufacturing drugs at work, firing is clearly in order. In fact, most law enforcement agencies consider any drug use sufficient reason for termination. Many departments and private employers also

choose to fire employees whose alcohol or drug use has injured other employees or done costly damage to property.

What of employees who clearly have a problem with drugs and want to make a change before losing their jobs? Private employers sometimes offer employees like these structured help, through rehabilitation and/or last-chance or return-to-work agreements. Law enforcement agencies are less inclined (or possibly even able) to do so.

Document the Investigation

Document your investigation following your agency's guidelines. Remember, if a lawsuit is filed—by an employee who is fired for drug use or a bystander who is injured by an officer who may have been intoxicated—your report could be used as evidence. Clearly state the facts and conclusions you drew from them, but don't speculate. Making unwarranted assumptions can lead to legal problems.

Scenario: Officer O'Malley is reported for using marijuana and offering it to other employees at the department's holiday party. Because O'Malley offered drugs to his supervisor, among others, he is forced to admit that the allegations are true. The department investigates the incident, and ultimately decides to fire the officer.

The investigator writes, "Patty admitted that he used marijuana at the holiday party and offered it to others. In light of how serious this incident was, it's clear that Patty is unable to control his drug addiction. Accordingly, I recommend that he be fired."

The investigator has made a logical leap from the fact that the officer used marijuana on one occasion to the assumption that Patty is a drug addict. The facts don't warrant this conclusion (maybe it was the first and last time he used the drug), and there's no need to go there. Once that sentence is deleted, the report is accurate and unlikely to lead to legal trouble.

Unlike other types of investigations, an investigation into drug use often creates or involves medical records, which you must handle appropriately. Any document that reveals an employee's disability—including drug addiction—counts as a medical record, as do records of genetic information (which could arguably include, for example, an employee's statement during an interview that addiction runs in the family). The safest legal policy is to treat all records that deal with an employee's drug use as confidential medical records. This means your entire investigation file may have to be handled confidentially.

Under the ADA, you have an obligation to keep the employee's medical records and the facts they reveal confidential—that is, on documents and in files that are separate from the rest of the employee's personnel records, in a separate, locked cabinet. Although the employee is of course free to share his or her situation

with others, the ADA allows the department to make this information available only to:

- the employee's supervisor, if the employee's disability requires restricted duties or a reasonable accommodation
- safety and first aid personnel, if the employee's disability may require medical treatment or special evacuation procedures
- insurance companies that require a medical exam, and
- government officials, if required by law.

Fair Credit Reporting Act.

If a drug lab conducts testing and reports the results directly to the employer, those test results are not a consumer report subject to the Fair Credit Reporting Act or FCRA. If, however, drug test results are reported to the employer by an intermediary that contributes to the results in some way or compiles the results along with other information about the employee (as an employee screening service might do for prospective hires), the results might be subject to the FCRA's requirements. Check with the municipality's or labor counsel.

Follow Up

Once your investigation is complete, there are still a few things to consider. You may want to recommend some changes to department policies and practices, to prevent future problems.

REFERENCES: A great source of information for investigators is a book entitled, "The Essential Guide to Workplace Investigations" by Lisa Guerin, J.D. available on www.nolo.com I relied heavily on its sections on substance abuse investigations in preparing this article.

MEDICAL MARIJUANA USE

<p style="text-align: center;">POLICY & PROCEDURE NO. X.XX</p>	<p>ISSUE DATE: _____</p>
	<p>EFFECTIVE DATE: _____</p>
<p style="text-align: center;">MASSACHUSETTS POLICE ACCREDITATION STANDARDS REFERENCED: None</p>	<p>REVISION DATE: _____</p>

I. GENERAL CONSIDERATIONS AND GUIDELINES

Massachusetts voters decided that this state should join a growing number of other states that currently have laws permitting and regulating the use of marijuana for so-called “medical” purposes. Earlier, the voters “de-criminalized” possession of an ounce or less of marijuana. Regardless of what Massachusetts voters did, however, under federal law, marijuana remains a controlled substance whose use, sale, and possession are federal crimes. In addition, possession of more than an ounce of marijuana by persons without a medical marijuana registration card or caregiver certificate, and possession of more than a 60-day supply even with a “medical marijuana” registration card or caregiver certificate, is still a crime under Massachusetts law. Growing and processing marijuana, except in connection with a medical marijuana facility, is also still illegal.

Marijuana is listed as a Schedule I controlled substance under the federal Controlled Substances Act, 21 U.S.C. Sec. 812(b)(1). It is on the most restricted schedule, along with such drugs as heroin, LSD, or Ecstasy. Its sale, use, or possession is a federal crime. Further, the U.S. Food and Drug Administration has determined that marijuana has a high potential for abuse, has no currently accepted medical use in treatment in the U.S., and lacks an accepted level of safety for use under medical supervision. 66 Fed. Reg. 20052 (2001).

Section 7 of the citizens’ petition adopted in November 2012 includes the following under “Limitations of Law”:

(D) Nothing in this law requires any accommodation of any on-site medical use of marijuana in any place of employment, ..., in any correctional facility, or of smoking medical marijuana in any public place.

II. POLICY

The consistent policy of this department has been that this department does not tolerate the violation of any state or federal law by employees. However, in order to avoid any confusion following the adoption of recent ballot initiatives, department members are reminded that it is the policy of this department that:

- A. Employees shall not, on or off the job, ingest, use or otherwise consume marijuana or THC as defined in Chapter 94C of the General Laws. This prohibition applies to use of any form of such drugs, including but not limited to smoking, injecting or eating, by itself or in combination with other products.
- B. The presence of any detectable amount of marijuana or THC in the employee's system while at work, while on the premises of the department, or municipal property, or while conducting or performing department business is prohibited.
- C. While under the influence of marijuana or THC, Employees shall not:
 - 1. operate any department equipment, including but not limited to motor vehicles, computers, or breathalyzer machines;
 - 2. perform any law enforcement function, including but not limited to making arrests, stopping motor vehicles, interrogating suspects, booking prisoners, taking fingerprints, accessing files, performing CORI or other background checks, and dealing with the public.
 - 3. possess or use any firearm, electronic weapon (e.g., TASER), baton, OC Spray (or similar device), handcuffs or any weapon or device capable of inflicting pain on a subject.
- D. Employees shall not apply for, possess or use a medical marijuana registration card for themselves or others.
- E. Employees shall not apply for or serve as a caregiver for a person in possession of a medical marijuana certificate or registration card.
- F. Employees are not permitted to own, operate, manage, invest or be financially involved in, or be otherwise involved in the operation or management in any way of any marijuana cooperative, dispensary, business or location that is used to manufacture, grow, process, use, sell or dispense marijuana for any reason, including but not limited to so-called medical purposes, or any location that is involved in the sale or distribution of any paraphernalia that can be used for any of the above.

III. DEFINITIONS

The following definitions are taken from the ballot initiative approved by Massachusetts voters in November 2012, effective January 1, 2013:

(G) "Marijuana," has the meaning given "marihuana" in Chapter 94C of the General Laws.

(H) "Medical marijuana treatment center" shall mean a not-for-profit entity, as defined by Massachusetts law only, registered under this law, that acquires, cultivates, possesses, processes (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfers, transports, sells, distributes, dispenses, or administers marijuana, products containing marijuana, related supplies, or educational materials to qualifying patients or their personal caregivers.

(I) "Medical use of marijuana" shall mean the acquisition, cultivation, possession, processing, (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfer, transportation, sale, distribution, dispensing, or administration of marijuana, for the benefit of qualifying patients in the treatment of debilitating medical conditions, or the symptoms thereof.

(J) "Personal caregiver" shall mean a person who is at least twenty-one (21) years old who has agreed to assist with a qualifying patient's medical use of marijuana. Personal caregivers are prohibited from consuming marijuana obtained for the personal, medical use of the qualifying patient.

An employee of a hospice provider, nursing, or medical facility providing care to a qualifying patient may also serve as a personal caregiver.

(K) "Qualifying patient" shall mean a person who has been diagnosed by a licensed physician as having a debilitating medical condition.

(L) "Registration card" shall mean a personal identification card issued by the Department to a qualifying patient, personal caregiver, or dispensary agent. The registration card shall verify that a physician has provided a written certification to the qualifying patient, that the patient has designated the individual as a personal caregiver, or that a medical treatment center has met the terms of Section 9 and Section 10 of this law. The registration card shall identify for the Department and law enforcement those individuals who are exempt from Massachusetts criminal and civil penalties for conduct pursuant to the medical use of marijuana.

IV. PROCEDURES

Marijuana remains an illegal controlled substance by Federal Statute. As such, no member of the department, qualified or not by the so-called Massachusetts Medical Marijuana Act, shall be considered "fit for duty" regardless of their position if they are using, smoking or ingesting marijuana or THC, even for so-called medical purposes.

- A. Any member of the department that has a detectable quantity of marijuana, THC, or any other compound in their body or blood from using or ingesting marijuana or THC, shall be considered "unfit for duty" and as such shall not be permitted to work or perform any job function.
- B. Any employee or volunteer of the department that has applied for, intends to apply for, has received, or been denied a card as a "qualifying patient" under the Massachusetts Medical Marijuana Act, shall immediately notify the Chief of Police of any such action in writing.
- C. Any employee or volunteer of the department that has applied for, intends to apply for, has received, or been denied a card as a "caregiver" under the so-called Massachusetts Medical Marijuana Act, shall immediately notify the Chief of Police of any such action in writing.
- D. Any employee or volunteer of the department that has any person living within their residence or in any property they own, manage or are under the control of that is considered under the so-called Massachusetts Medical Marijuana Act to be a "qualified patient" or "caregiver" shall immediately notify the Chief of Police in writing indicating the person's name, the location in question and what relationship the department member has with the person(s) and/or location.
- E. Any member of the department who tests positive for marijuana, or any detectable amount of any prohibited or illegal substance shall be immediately relieved of duty, surrender any and all department owned firearms, firearms license or identification cards, as well as any police identification cards, and shall not be permitted to perform any police function or possess any firearm in accordance with employment as a member of this department.
- F. No member of the department shall be permitted to be a "caregiver" as defined by the so-called Massachusetts Medical Marijuana Act and/or the Massachusetts Department of Public Health for any person, unless so authorized in writing by the Chief of Police. Permission maybe granted by the Chief of Police to allow a member to be a "caregiver" in extreme circumstances and only for a department member's immediate family who is residing with the department member. No precedent will be set if any such permission is granted and the department may alter, amend or revoke this provision at any time.

V. FIREARMS LICENSING

An open letter to all federal firearms licensees issued by the U.S. Dept. of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) on Sept. 21, 2011, made it clear that those who are users of medical marijuana, including those doing so in compliance with state law, should not be allowed to purchase, possess or use firearms or ammunition.

- A. Under 18 U.S.C. Sec. 922(g)(3), it is unlawful for any person who is an unlawful user of or addicted to any controlled substance” (as defined by the Controlled Substances Act) to ship, transport, receive or possess firearms or ammunition. Since marijuana is a Schedule I controlled substance, and there are no exceptions in federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by state law, medical marijuana users may not be sold or possess firearms or ammunition.
- B. Federal law further makes it a crime to sell or otherwise dispose of a firearm or ammunition to anyone knowing “or having reasonable cause to believe” that the person unlawfully uses a controlled substance, such as marijuana. 18 U.S.C. Sec. 922(d)(3). A federal regulation, 27 C.F.R. Sec. 478.11, allows an inference of current illegal use of a controlled substance to be drawn from “evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time.”
- C. According to the ATF, a person who uses medical marijuana, even in compliance with state law, should answer “yes” to question 11.e. (“Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?”) on ATF Form 4473, Firearms Transaction Record. And licensed firearms dealers may not transfer firearms or ammunition to them. Even if the person answers “no” to this question concerning the use of controlled substances, the ATF takes the position that it is a violation of federal law to transfer a weapon or ammunition to them if a person has “reasonable cause to believe” that they use medical marijuana, such as if they have a card authorizing them to possess medical marijuana under state law.
- D. Since the ability to lawfully possess both firearms and ammunition is an essential function of the job, the use of marijuana by a member of this department is a legitimate basis for their termination. In fact, the ATF memo’s reasoning makes it highly questionable as to how a department could be legally justified in issuing a firearm or ammunition to a known user of medical marijuana. Similar issues have previously arisen concerning officers barred from possessing weapons because of prior convictions for domestic violence offenses. In 1996, the

Congress passed a Defense Appropriations Act. Sec. 658 of that law made it unlawful for any person who has been convicted of a domestic violence misdemeanor to possess a firearm or ammunition. There is no exception for persons who must carry a firearm on their jobs: law enforcement officers, security guards, or members of the Armed Forces. Courts have upheld this restriction.