



Higher Conflict and Controversy: medical and recreational marijuana in the workplace

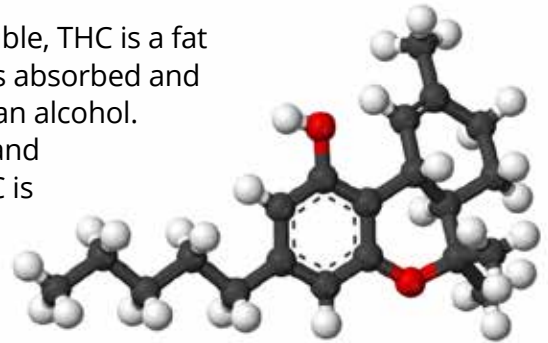
By Michael H. Weier • December 5, 2014

I had the privilege to speak in April 2013 at the Washington Self-Insurers Association Annual Meeting¹ and in November 2014, at the Oregon Workers' Compensation Educational Conference² regarding legalization of medical and recreational marijuana in the Pacific Northwest. This article is based upon my presentations.

What is marijuana? The chemistry and scientific research

Marijuana is dried flowers, leaves and stems of the cannabis plant under the scientific taxonomy ranks of family moracea, species sativa (hemp). The active ingredient is Delta-9-Tetrahydrocannabinol (THC) with a molecular structure composed of $C_{21}H_{30}O_2$.

Unlike alcohol, which is water soluble, THC is a fat soluble substance. As a result, THC is absorbed and excreted in the body more slowly than alcohol. Whereas drinking water may dilute and eliminate alcohol and its effects, THC is generally excreted from the body through burning of fat.



Much research has been performed on the effects of marijuana.³ The medical literature indicates THC remains in the brain and lung tissue for up to three weeks following ingestion or inhalation. Neuropsychological studies reveal THC binds to neuroreceptors in the cerebellum and basil ganglia of the brain and cause difficulties with balance, reaction time, short-term memory, concentration.

Research also indicates THC is associated with anxiety and *continued*

The cannabis connoisseur is not a class of persons protected by federal or state constitutions

¹ *High Conflict and Controversy: Medical and Recreational Marijuana in Washington*, WSIA Annual Meeting, Wenatchee (May 9, 2013)

² *Higher Conflict and Controversy: Recreational Marijuana in Oregon*, OR WCD Educational Conference, Tigard (November 14, 2014)

³ Some of the most significant research has been reported by the National Institute on Drug Abuse, UCLA, Brown University, and various scientific peer-review journals, including *The New England Journal of Medicine*, *NeuroPsycho-Pharmacology*, *Clinical Pharmacy & Therapeutics*, *Scientific American*, *Nature Medicine*, *Anesthesiology* and *Neurology*



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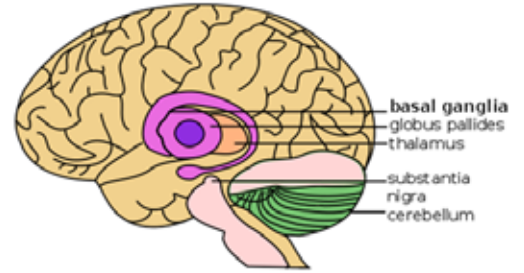
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paranoia and cardiac problems due to increased heart rate.

Scientific criticisms are typically directed to the limitations of scientific research. As marijuana contains more than 400 compounds, isolating the specific effects of THC can be quite difficult. Moreover, scientific testing may be compromised by lack of

proper control groups, inadequate placebo and patient use of multiple medications to control pain and symptoms.

Basal Ganglia and Related Structures of the Brain



Statutes regarding marijuana

Federalism is a division of power among a centralized national government and regional or local governments. The inherent statutory conflict between the United States federal and state governments is alive and well regarding legalization of marijuana.

Federal law

The United States Controlled Substances Act⁴ (CSA) lists marijuana as a Schedule I drug. Such drugs are deemed to be highly addictive and have no medical value. Accordingly, federal law prohibits physicians from prescribing Schedule I drugs.

State laws

In 1996, California became the first state to legalize use of marijuana for medical use.⁵ Two years later, Oregon voters passed a ballot measure that similarly allowed its citizens to possess and use limited amounts of marijuana on advice or recommendation of their physicians.⁶ Thereafter, in 2011, the Washington state Legislature legalized medical marijuana.⁷ Currently, twenty-three states and the District of Columbia have statutes that legalize limited possession and use of marijuana for medicinal purposes.

In 2012, Colorado passed Amendment 64 and Washington State passed Initiative Measure 502, becoming the first states to legalize marijuana for recreational use. Most recently, on November 4, 2014, the *continued*

⁴ 21 U.S.C., § 811

⁵ California Proposition 215, The Compassionate Use Act of 1996

⁶ Ballot Measure 67, Oregon Medical Marijuana Act, ORS Ch. 475, §§ 300 – 246

⁷ Engrossed Second Substitute Senate Bill (ESSSB) No. 5073 (April 21, 2011).



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citizens of Oregon,⁸ Alaska⁹ and the District of Columbia¹⁰ passed ballots and became the third, fourth and fifth jurisdictions to legalize recreational use of marijuana.

Fiscal impact

The estimated fiscal impact of Washington and Oregon laws that legalize marijuana is staggering. Marijuana tax revenue in 2015 for Washington is estimated at \$25 million.¹¹ Oregon annual revenue could increase up to \$40 million.¹² Legalization of marijuana will undoubtedly be a significant source of increased revenue for the Pacific Northwest.

Federal enforcement guidelines: U.S. Department of Justice

The U.S. Department of Justice (DOJ) has issued at least four memoranda to all United States Attorneys to provide guidance regarding enforcement of the CSA and federal marijuana laws. In October 2009 and June 2011, the DOJ noted "Congress determined marijuana is a dangerous drug and its illegal distribution is a serious crime." The DOJ expressed its commitment to the enforcement of the CSA, but declared the individual user is not high priority for prosecution.



On August 29, 2013, the DOJ provided updated guidance to its attorneys in light of various state ballot initiatives that legalized marijuana. The DOJ expressed its expectation that states and local governments that legalize marijuana will implement strong, robust enforcement regulations to prevent:

- » Distribution to minors;
- » Marijuana sale revenue to support criminal enterprises, gangs and cartels;
- » Diversion of marijuana to a state where its use remains illegal;
- » State-approved activity for use as a cover for trafficking or other illegal activity;
- » Violence and use of firearms in marijuana cultivation and distribution; and
- » Growth and possession of marijuana on federal property.

On February 14, 2014, the DOJ reiterated its enforcement and prosecution priorities. The DOJ then encouraged U.S. Attorneys to prosecute individuals or financial institutions for money-laundering as appropriate when the above-listed priorities have been violated. *continued*

⁸ Oregon Initiative 53, Measure 91, Control, Regulation and Taxation of Marijuana and Industrial Hemp Act

⁹ Alaska Measure 2

¹⁰ Washington, DC, Initiative 71

¹¹ Fearnow, B., "Marijuana to Boost Washington State Tax Revenue by \$25M in the Next Year." CBS News Radio, Inc., September 14, 2014

¹² Chokshi, N., "Oregon expects up to \$40 million in new revenue annually if voters legalize pot this fall." *The Washington Post*, August 11, 2014





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Court decisions on marijuana: medical prescription vs. recommendation

Nearly ten years ago, the United States Supreme Court in *Gonzales v. Raich*¹³ addressed the federal ban on marijuana. The nation's Highest Court¹⁴ upheld the federal legislative prohibition for a physician to prescribe marijuana under the CSA. The Supreme Court declared the federal government has the constitutional authority to prohibit marijuana for all purposes.



Though a physician cannot legally *prescribe* marijuana, at least one federal judge has declared a doctor may *recommend* use of marijuana. In *Conant v. McCaffrey*¹⁵ the U.S. District Court in California acknowledged the federal Drug Enforcement Administration's has the authority to enforce the CSA and revoke the license of a physician who *prescribes* marijuana. The Court, however, declared a doctor may *recommend* patient use of marijuana as speech protected under the First Amendment of the U.S. Constitution.

The prescribe vs. recommend distinction explains why a medical doctor does not use a prescription pad for a patient to obtain marijuana from a pharmacist. Instead, the physician documents the recommendation for a state-issued medical marijuana card, which may protect the patient from civil or criminal penalties for limited possession in jurisdictions where medical marijuana is allowed.



Marijuana in employment

There is no constitutional right to use marijuana in the workplace. Unlike race, national origin, religion, gender and most recently sexual orientation and identity, the *cannabis connoisseur* is not a class of persons protected by federal or state constitutions. To the contrary, federal law, in at least two circumstances, expressly prohibits marijuana use in the workplace.



The Drug Free Workplace Act of 1988¹⁶ declares that companies that contract with the federal government or those who receive federal grants must prohibit marijuana and other drugs in their workplaces.



Similarly, the federal Omnibus Transportation Employee Testing Act of 1991¹⁷ and the subordinate guidelines¹⁸ bar marijuana use in *continued*

¹³545 U.S. 1; 352 F 3rd 1222 (2005)

¹⁴Respectfully, no pun intended

¹⁵(N.D. Cal. 2000), 2000 WL 1281174, Lexis 13024 (September 7, 2000)

¹⁶41 U.S.C. § 81

¹⁷49 U.S.C. § 5531

¹⁸49 C.F.R. §§ 40, et seq., 382 et seq., 392, et seq.



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“safety-sensitive transportation jobs.” Pilots, long-haul truck drivers, subway, railway and pipeline workers are expressly prohibited from smoking pot or consuming hemp-laced brownies in the workplace.



Notwithstanding federal laws that declare marijuana an illegal substance and prohibit its use, employers should be mindful of various laws that may have an impact upon employment decisions with regard to the employee who uses marijuana. The Rehabilitation Act of 1973,¹⁹ Americans with Disabilities Act of 1990 (ADA) and the Americans with Disabilities Amendments Act of 2008 (ADAAA),²⁰ the Washington Law Against Discrimination (WLAD)²¹ and the Oregon Equality Act²² each require employers to reasonably accommodate the disabilities of individuals with regard to employment opportunities.

Subsequent to passage of the ADA in 1990, what constitutes a disability has become more expansive. The ADAAA expressly declares “the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”²³ The federal law also proclaims that the definition of disability should be interpreted in favor of broad coverage of individuals.²⁴ Accordingly, if a worker alleges use of marijuana for medical purposes an employer may be required to engage in an interactive process to assess whether a workplace accommodation is necessary. That is not to say an employer must accommodate drug use in the workplace. However, the employer and worker may be obligated to meet and discuss the issue to determine whether a reasonable accommodation may be made for an alleged disability.²⁵

The Family Medical Leave Act (FMLA),²⁶ Washington State Family Leave Act (WaFLA),²⁷ Oregon Family Medical Leave (OFLA),²⁸ Occupational Safety & Health Act of 1970 (OSHA),²⁹ Washington Industrial Safety & Health Act (WISHA),³⁰ Oregon Safe Employment Act (Oregon OSHA),³¹ Fair Labor Standards Act of 1938 (Washington FSLA)³² and numerous other employment *continued*

¹⁹29 U.S.C. § 701

²⁰42 U.S.C. § 12101, et. seq.

²¹Ch. 49.60 RCW

²²ORS Ch. 659A

²³42 U.S.C. § 12101(2)(b)(5)

²⁴42 U.S.C. § 12101(2)(b)

²⁵See, *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir.2000), (“The interactive process is a mandatory rather than a permissive obligation . . . Both sides must communicate directly, exchange essential information and neither side can delay or obstruct the process.”) Rev’d on other grounds, 535 U.S. 391 (2002)

²⁶29 U.S.C. § 28

²⁷Ch. 49.78 RCW

²⁸ORS Ch. 659A, § 50, et seq.

²⁹29 U.S.C. § 561, et seq.

³⁰Ch. 49.17 RCW

³¹ORS Ch. 654

³²29 U.S.C. § 201, et seq.



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laws and labor regulations may be implicated should an employee use marijuana.

Employers must find the proper balance between ensuring a safe and healthful workplace versus reasonably accommodating an employee's disability. Personal use of marijuana may now be a right in the Pacific Northwest; however, the workplace is not a safe haven to smoke pot.

Employers are well-advised to review their respective collective bargaining agreements (CBA) and employment policies. CBAs and employee handbooks may require modifications. A policy that prohibits *illegal* drugs may be obsolete now that Washington and Oregon have legalized use of marijuana. Employers should provide a clear explanatory statement and an unambiguous policy in order to defend against marijuana use and its effects in the workplace. ■

