

April 5, 2017

# MARIJUANA LEGALIZATION: CONSTITUTIONAL CRISIS AND INCREASED COSTS AND LEGAL JEOPARDY FOR EMPLOYERS?

- New legal and financial risks could further harm state’s already poor business climate.
- Rhode Island needs a prudent approach via a legislative commission.

## Summary

The legalization of recreational use of marijuana, and the increased usage rates to which it is expected to lead (see chart) could create or worsen a number of employer- and employment-related issues for businesses and taxpayers:

- Legal jeopardy and costs for employers
- Workplace safety

- Increased drug testing costs for employers
- Increased workers’ compensation costs and liabilities
- Difficulty in identifying, recruiting, hiring, and maintaining drug-free employees
- Loss of employee productivity
- Increased costs to taxpayers for social services programs for residents who become or remain unemployed for marijuana related reasons

These serious job related considerations must be fully vetted, with appropriate regulation and legal protections put in place, before Rhode Island can responsibly move forward on any decision to legalize recreational use of marijuana.

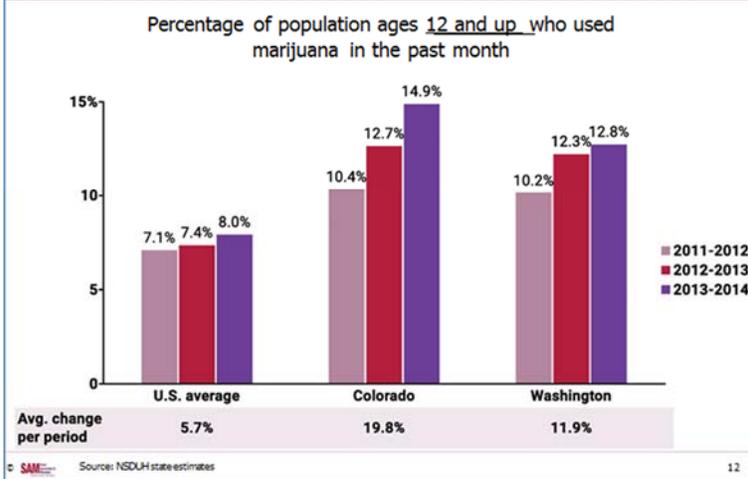
Only one sentence in the proposed legislation attempts to deal with these complex issues; and it is woefully insufficient to protect and comfort employers:

H5555: 21-28.10-9. Places of employment. The provisions of this chapter do not require employers to accommodate the use or possession of cannabis, or being under the influence of cannabis, in a place of employment.

Recognizing the many risks of legalization of recreational marijuana to employers, RI Attorney General Peter Kilmartin has been actively speaking with municipal officials and business organizations across the state raising issues and awareness of both unintended and actual consequences that will have a negative effect on them.

Recent state medical marijuana regulations offer some much-needed oversight of that program with regard to the cultivating, manufacturing, and sales of marijuana products. However, these regulations in no way provide adequate protections for employers and

### Use in CO and WA are both (A) higher than and (B) rising faster than the national average



the business community around the issues discussed in this brief, or other unintended consequences.

The Ocean State’s business climate is already a detriment to the state. For this and other reasons, the RI Center for Freedom & Prosperity reiterates its call for a two-year comprehensive commission to study employer-vs-employee issues and recommend specific and appropriate solutions.

## Legal Jeopardy

Employer versus employee rights could lead to costly lawsuits and contentious court cases if recreational marijuana use is legalized in the Ocean State. With employers at increased legal risk if they seek to preserve drug-free workplaces, Rhode Island’s worst-ranked business climate could be even further degraded, making the state an even less attractive place to build and operate a business.

One South County firm has already been sued for denying employment to a legal medical marijuana user in compliance with the company’s drug-free policies. Similarly, firms in Massachusetts, California, Montana, and Washington — among others — have been burdened with similar lawsuits.

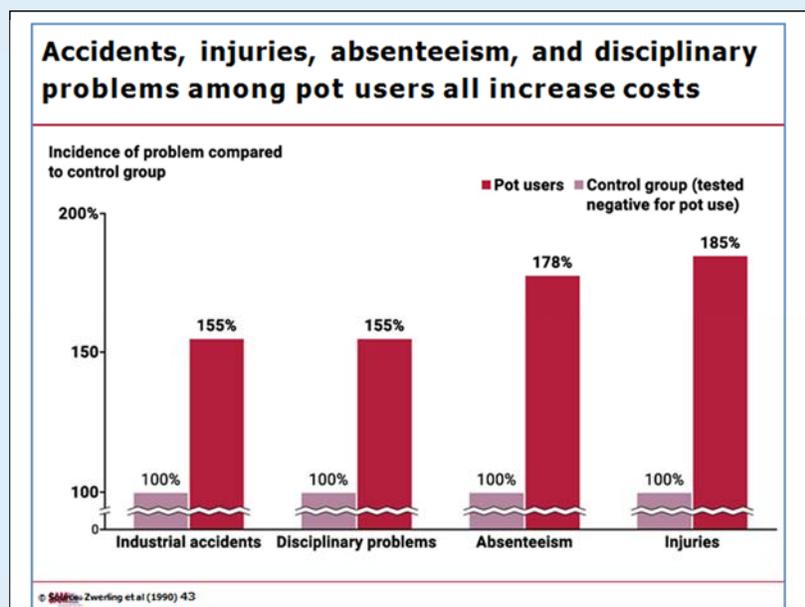
If recreational use of the drug is legalized, the constitutional crisis created by pitting employer rights against employee rights could explode, crippling companies that would have to pay exorbitant legal fees to defend their rights in court, as well as any damages they might incur from adverse rulings. Similarly, a conflict may also exist if landlords seek to ban marijuana use on their private property by their tenants.

Rhode Island’s proposed marijuana legalization law, as in other states that have taken this step, does not adequately address the issue of employment discrimination and does not specify the legal obligations and protections that employers have in this regard. For instance, a company policy against marijuana use in the workplace, whether for medical or recreational purposes, is one legal question, but whether an employer can take action if the drug is used outside of the workplace, with the employee flagged in a drug test, presents yet another compelling legal issue.

## Workers’ Comp Financial Risk

In addition to the legal risks, many businesses may face the prospect of significantly higher workers’ compensation premiums and other direct costs if there are increased incidents of work-related injuries due to increased usage of a job-impairing substance like marijuana.<sup>1</sup>

As worker marijuana usage increases, workplace impairment is also expected to increase, as are related workplace accidents or injuries.<sup>2</sup> Already,



court cases are mounting across the nation that involve claims by workers against their employers, involving medical marijuana.

Depending on each state’s laws and the interpretation of the courts, adverse rulings could burden businesses with funding some or all of an employee’s workers’ compensation benefits or rehabilitation reimbursements — even paying for medical marijuana (against federal law) — potentially totaling tens of thousands of dollars!<sup>3</sup>

## Employee Absenteeism, Productivity Loss, and Monetary Costs

Companies are finding it increasingly difficult to recruit, hire, and retain drug-free employees, especially in circumstances where federal regulations, the safety of a workplace, or public safety are involved.<sup>4</sup> This negative consequence of legalizing recreational marijuana use could hamper the state’s capacity to grow its employment base.

Nationally, employees’ testing positive for drugs has steadily become an epidemic, according to a 2016 report by Quest Diagnostics and as reported by the *New York Times*.<sup>5</sup> The increase has been fueled in part by rural America’s heroin epidemic and the legalization of recreational marijuana.

Marijuana users tend to miss work more frequently and have more disciplinary problems than their colleagues.<sup>6</sup>

Additionally, the cost of employees’ testing positive can be enormous. As marijuana stays in the body’s system for prolonged periods of time, increased “positive” tests will likely result. For many companies, internal policies require a mandatory suspension, completion of a drug-rehab program, and assignment to a substance-abuse professional. It is up to this professional to decide when the employee can return to work and whether or not extra drug tests must be taken by the employee over the next 12 months.

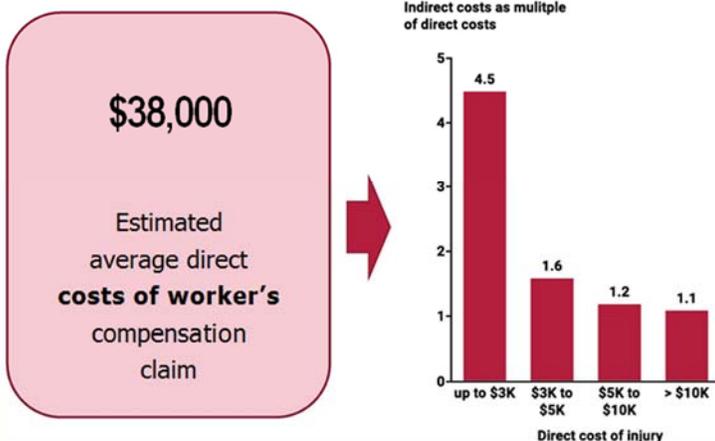
One smoke, leading to one positive drug test, can cost thousands of dollars in lost wages and expenses, investment in specialized training, increased employee turnover and training cost, and other expenses that could cost thousands of dollars in lost productivity for the employer.

This loss of productivity and associated monetary costs are harmful for both the employee and the employer and stockholders.

## Examples of RI Businesses at Risk

**Darlington Fabrics, Westerly:** Sued for denying employment to a legal medical marijuana user in

### The average costs to an employer for the average workplace injury can exceed \$40,000



© Bureau of Labor Statistics; Left-hand chart: National Safety Council; right-hand chart: OSHA45

2014, in compliance with the company's long-standing drug-free employment policies, Darlington Fabrics, which utilizes heavy machinery and other equipment as part of its manufacturing process, seeks to create a safe work environment and to ensure the safety of its employees.

This issue sets up an additional constitutional question: an employee's rights versus the rights of fellow employees to work in a safe workplace. Like alcohol, marijuana use can impair the ability to safely operate machinery and equipment. The case, now in state Superior Court, pits the rights of the employer to maintain a safe and drug-free workplace against the rights of the employee to utilize a drug that the state has legalized.

The company has already spent significant money on legal fees, with potentially much more in the future, as the case could drag on for months or even years, if appeals to higher courts are made. The employee is represented, *pro bono*, by the ACLU, creating a monetary disadvantage for the employer. The next hearing date is scheduled for April 11.

**Professional Security Services, Cranston.** With the safety of her clients of paramount importance, owner Jane Casey is concerned about the potential legal liability to her company if it were to unwittingly deploy marijuana-impaired security guards or transportation chauffeurs on the job. With the company's drivers often responsible for the safety of children and senior citizen groups, and with its security guards responsible to protect the safety of its clients' employees and property, Casey is fearful of the jeopardy her family-owned business and its clients may have to face if she has to make precarious judgments about how to handle marijuana-using employees without clear legal and statutory guidance.

Even more importantly, endangering the safety of her clients by allowing a potentially impaired worker on the job, out of fear of legal repercussion, is what most concerns Casey.

### **M and D Transportation, North Kingstown.**

Operating a fleet of interstate trucks and drivers, public safety and the safety of its drivers are the company's two chief concerns. Subject to federal Department of Transportation guidelines, which clearly gives such transportation employers the right to legally prohibit drug-impaired drivers from taking the wheel, owner Mike Collins is worried about increased testing costs.

Because evidence of marijuana remains in a user's blood system for prolonged periods of time (as compared with alcohol), the cost of expanded drug-testing, necessary if recreational marijuana is legalized, could be prohibitive. However, it could become a legal question when judgments have to be made without proper direction from the law.

"We have to abide by 'reasonable suspicion,' meaning an employee must give us cause. If an employee smokes marijuana on a Saturday night and gets in an accident the next week, current technology is not readily available that would indicate whether or not the traces of marijuana in a user's blood are merely a remnant from use a few days ago or whether or not it indicates a currently impaired physical state of being," said Collins, who believes he will have to increase his drug testing regimen, which could cost tens of thousands of dollars.

## Conclusions

In summary, until the law provides workplace protections that clearly specify how employers can

legally maintain a safe and drug-free environment without illegally infringing on new individual rights to utilize marijuana, the Center believes it would be reckless to move forward with legalization. A study-commission, with appropriate recommendations, must be the prudent next step.

The legalization of marijuana is likely to have a pronounced and adverse effect on workplace safety and on the bottom line of many businesses. With the nation's worst-ranked business climate, Rhode Island must not take a wrong step on this matter.

---

<sup>1</sup> Smart Approaches to Marijuana (SAM); Source: Quest Diagnostics. Available at: <https://blog.employersolutions.com/data-shows-escalating-drug-use-in-the-u-s-workforce/> (Accessed 4/4/17)

<sup>2</sup> Robert Steinbrook. "Study Finds Drug Test Value Exaggerated : Employment: As expected, workers who tested positive before hiring have more injuries and absences. But the rates are far lower than earlier estimates." *Los Angeles Times*. November 28, 1990. Available at: [http://articles.latimes.com/1990-11-28/news/mn-4953\\_1\\_pre-employment-drug](http://articles.latimes.com/1990-11-28/news/mn-4953_1_pre-employment-drug) (Accessed 4/4/17)

<sup>3</sup> Smart Approaches to Marijuana (SAM). "SAM Educational Briefs & Data on Marijuana Policy." February 2017. Available at: <https://learnaboutsam.org/wp-content/uploads/2017/02/06Feb2017-SAM-educational-briefs.pdf> (Accessed 4/4/17)

<sup>4</sup> *The Gazette*. "Drug use a problem for employers." March 24, 2015. Available at: <http://gazette.com/drug-use-a-problem-for-employers/article/1548427> (Accessed 4/4/17)

<sup>5</sup> Jackie Calmes. "Hiring Hurdle: Finding Workers Who Can Pass a Drug Test." *New York Times*. May 17, 2016. Available at: <https://www.nytimes.com/2016/05/18/business/hiring-hurdle-finding-workers-who-can-pass-a-drug-test.html> (Accessed 4/4/17)

<sup>6</sup> Ibid. note 3.