



MARIJUANA USE AND PUBLIC SAFETY EMPLOYEES

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June 26, 2024

Presented by
Labor Relations Information System
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Marijuana Use And Public Safety Employees

June 26, 2024

10:00 AM PT (1:00 PM ET)
60 minutes

Many states have legalized or decriminalized marijuana and there is growing evidence of its therapeutic value, but possession of it is still a federal crime.

This one-hour webinar from LRIS will cover the latest legal developments on marijuana use among public safety labor employees.

- **Marijuana & The Law:** State and federal statutory approaches to medical and recreational marijuana use.
- **Testing:** Impairment standards and bargaining over drug testing policies.
- **Medical Privacy:** How the ADA, the FMLA, and other federal laws interact to create privacy rights for employees' medical information.

Presented By Richard Poulson

Mr. Poulson has been representing labor unions for his entire career, representing union clients in collective bargaining, interest and grievance arbitration and employment-related litigation. He is a partner with the Philadelphia, Pennsylvania firm of Willig, Williams & Davidson, where he focuses on advising and representing police, fire, paramedic and other uniformed employees regarding municipal affairs and public employment. He earned his B.A. from La Salle University (1992) and his J.D. from the Catholic University of America, Columbus School of Law (1997). Rick is the Executive Director of LRIS. Since its inception in 1981, LRIS has been a valuable resource for public safety labor relations. LRIS conducts labor seminars, publishes a monthly newsletter, and currently has five books in print.

[Richard G. Poulson | Willig, Williams & Davidson \(wwdlaw.com\)](http://www.wwdlaw.com)

Marijuana And Public Safety Employees

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Presenter Richard Poulson

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Labor Relations Information System is the preeminent resource in the United States on public safety personnel and labor issues. For over 30 years, LRIS has been producing a comprehensive set of materials concerning federal and state employment and labor laws designed for public safety union leaders, managers, labor relations professionals, and attorneys working in employment law.



Marijuana Use And Public Safety Employees – Legal, Medical and Privacy Issues

Richard Poulson

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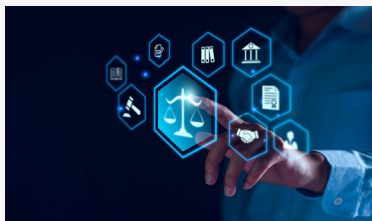


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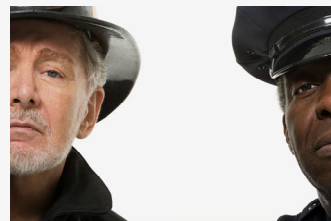
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Where We Stood Then

In 1969:

- 4% of Americans told Gallup that they had ever tried marijuana.
- 12% of Americans believed that marijuana should be legal for medical or recreational use.

In 2013:

- 7% of Americans told Gallup that they CURRENTLY smoke marijuana.
- 50% of Americans believed that marijuana should be legal for medical or recreational use.

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Where We Stand Today

In 2024:

- **48% of Americans tell Gallup that they have tried marijuana.**
- **16% of Americans report that they currently smoke marijuana.**
- **88% of Americans believe that marijuana should be legal for medical or recreational use.**

[Source: Pew Research, Apr 2024]

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Where We Stand Today

In 2024:

- **For the first time, marijuana has replaced alcohol as daily drug of choice for Americans.**
- **17.7 million Americans report using marijuana either every day or nearly every day.**
- **Compare to 14.7 million Americans using alcohol with the same frequency.**
- **15-fold increase since 1992.**

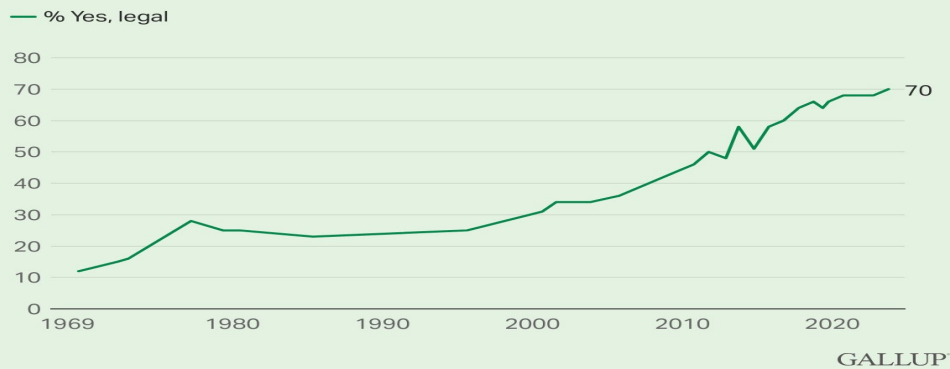
[Source: New York Times, June 2, 2024]

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Where We Stand Today

The Green Wave: Americans' Support for Marijuana, 1969-2023

Do you think the use of marijuana should be legal, or not?



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Where We Stand Today

In 2024:

- **Criminal justice. 42% of Americans say legalizing marijuana for recreational use makes the criminal justice system fairer.**
 - 18% say it makes the system less fair.
 - 38% say it has no impact.
- **Community safety: 44% say recreational legalization doesn't impact community safety.**
 - 34% say it makes communities less safe.
 - 21% say it makes communities safer.

[Source: Pew Research, Apr 2024]

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Where We Stand Today

In 2024:

- Most Americans support easing penalties for people with marijuana convictions.
- 67% of adults say they favor releasing people from prison who are being held for marijuana-related offenses only.
 - 41% strongly favor this.
- 61% of adults support removing or expunging marijuana-related offenses from people's criminal records.

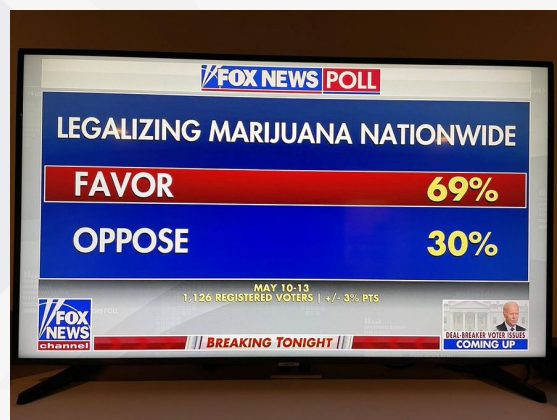
[Source: Pew Research, Apr 2024]

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Where We Stand Today

- Majorities of US political parties and ideologies support marijuana legalization:

- Liberals (91%)
- Democrats (87%)
- Republicans (55%)
- Conservatives (52%).



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Where We Stand Today



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STATUS OF MEDICAL AND RECREATIONAL MARIJUANA LAWS: *State and Local Level*

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Status of State Laws in 2024

Recreational marijuana is legal in 24 states and Washington, D.C.

- 24 states - Cannabis is legal for adults 21 and older.

Medical marijuana is legal in 37 states and Washington, DC.

- 24 states - Cannabis is legal for adults 21 and older PLUS
- 13 states - Medical cannabis only is legal

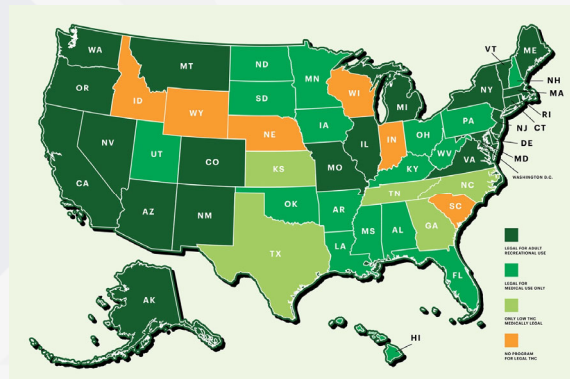
Marijuana is decriminalized in 39 states and Washington, DC

- Nebraska and North Carolina exceptions.

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Status of State Laws in 2024

- 48% of Americans live in a jurisdiction where recreational marijuana is legal.
- 74% of Americans live in jurisdictions with medical marijuana programs.



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Typical State Laws

- **Protections for persons who use cannabis (recreational or medicinal) against criminal prosecutions and other discrimination.**
- **Exceptions for categories of persons who are NOT protected.**
- **Prohibitions against cannabis screening in certain circumstances (per-hire, etc.).**
- **Protections for employers to maintain drug-free workplace policies.**

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Typical Conflict in the States

- **As states have legalized marijuana, employers have been left to navigate uncertain standards.**
- **Primary conflict is between:**
 - **(1) Protections afforded to employees in connection with recreational or medicinal use; AND**
 - **(2) Protections for employers to promulgate drug-free workplace policies.**
- **Can these competing standards be reconciled?**

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Typical Conflict in the States

- As states have legalized marijuana, employers have been left to navigate uncertain standards.
- Primary conflict is between:
 - (1) Protections afforded to employees in connection with recreational or medicinal use; AND
 - (2) Protections for employers to promulgate drug-free workplace policies.
- Can these competing standards be reconciled?

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Typical Conflict in the Workplace

- Challenges related to detection of impairment related to marijuana use drive workplace disputes.
- “Old” drug-testing standards for THC not useful in determining timing of marijuana use. No shortcuts.
 - Reflects lack of scientific research. Unlike alcohol.
- In response, most employers have moved away from random testing for marijuana/cannabis. Common sense.

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Impact in Law Enforcement Workplace

- **Law enforcement agencies have struggled with response to state marijuana access laws.**
- **Combination of:**
 - **(1) Law enforcement exceptions in state laws.**
 - **(2) Same impairment-detection challenges as other employers.**
 - **(3) Federal criminal restrictions related to firearms and “unlawful use” of controlled substances.**

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New York City Example

- **2021 – New York state enacts Marijuana and Taxation Act (MARTA), which authorizes recreational marijuana sales and taxation of the products.**
- **MARTA prohibits employers from disciplining employees for recreational marijuana use.**
- **July 11, 2022. New York City issues memo announcing that it will no longer subject NYPD officers to pre-employment, random or scheduled drug tests for cannabis.**

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New York City Example



- NYC memo is leaked and is met with immediate public backlash.
- Memo only banned random testing, not reasonable suspicion testing, BUT TOO LATE.
- July 13, 2022. NYC rescinds memo amid public uproar.

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New Jersey Example

- 2021 – New Jersey enacts Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), which legalized recreational cannabis.
- CREAMMA prohibited employers from firing and disciplining employees for using cannabis, but also permitted employers to prohibit the use or intoxication of cannabis during work hours, and to drug test.
- New Jersey AG issues memo claiming that NJ police agencies could not discipline officers for off-duty cannabis use.

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New Jersey Example



- AG guidance meets immediate and harsh pushback.
- From elected officials.
- From law enforcement agencies.
- From NJ PBA.

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New Jersey Solution

- February 2023. New Jersey AG revised issues guidance.
 - Police agencies required to drug test all applicants, trainees and officers. Including random testing.
 - *But no random testing of active officers for cannabis.* Testing permitted only where there is reasonable suspicion to believe a law enforcement officer is under the influence of cannabis or controlled substances.
 - No screening for personal use off the job, unless the officer works under a federal detail.

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New Jersey Solution

- ***“Reasonable Suspicion Testing for Cannabis Use. Consuming or being under the influence of cannabis while at work or during work hours is strictly prohibited. Officers shall be tested for cannabis in the following situations:***
 - ***a. Upon reasonable suspicion of the officer’s use of a cannabis item while engaged in the performance of the officer’s duties, or***
 - ***b. Upon a finding of observable signs of intoxication related to the use of a cannabis item while engaged in the performance of the officer’s duties.***
- ***In the above situations, the drug test shall include a physical evaluation by a Workplace Recognition Expert to determine the officer’s state of impairment and a urinalysis.”***

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Certification and Licensure

- **Many states with professional certification/licensure requirements maintain strict prohibitions against medical or recreational cannabis use.**
- **Pennsylvania example. Municipal Police Officers Education and Training Commission:**
 - ***“To summarize, the Commission policy directs MPOETC staff to deny or revoke Act 120 certification of an individual who uses medical marijuana or possesses a medical marijuana certification card other than the Caregiver card.”***

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Certification and Licensure

- But ... state certification bodies are having to deal with changing standards and attitudes regarding marijuana.
- May 2023. Nevada Peace Officer Standards and Training (POST) Commission proposes change to rule that people cannot be employed as peace officers if “convicted of an offense involving moral turpitude or the unlawful use, sale or possession of a controlled substance.”

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Certification and Licensure

- Proposed new rule:
- “A person may not be appointed to perform the duties of a peace officer if he or she has ...
 - (b) Been convicted of an offense involving moral turpitude or the unlawful use, sale or possession of a controlled substance, **excluding marijuana convictions for use or possession that would not be prosecutable under the law as of January 1, 2023.**”

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STATUS OF MEDICAL AND RECREATIONAL MARIJUANA LAWS:

Federal Level

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Federal Crime

- **Since 1970, marijuana use and possession has been a federal crime. 21 U.S.C. §§ 812, 841, 844.**
- **Possessing any amount of marijuana carries up to a year in jail, a fine of up to \$1,000, or both for a first conviction.**
- **A second offense carries a minimum of up to 15 days in jail with a maximum of two years and a fine of up to \$2,500.**
- **Subsequent offenses have a 90-day mandatory minimum, with a maximum sentence of three years in prison and a fine of up to \$5,000.**

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Federal Crime? Really?

- Congress regularly prohibits the Department of Justice from spending funds to prevent states from implementing their own marijuana laws, through a budget rider referred to as the “Rohrabacher-Farr Amendment.”
- In 2021, Attorney General Merrick Garland announced that DOJ would not pursue the prosecution of individuals who use marijuana in accordance with their state marijuana laws:
 - *“Criminalizing the use of marijuana has contributed to mass incarceration and racial disparities in our criminal justice system.”*

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Federal Crime? Really?

- October 2022. President Biden issues pardon for all individuals convicted under federal law for the simple possession of marijuana (6,500 affected convictions).
- December 2022. Congress passes Medical Marijuana and Cannabidiol Research Expansion Act, which streamlines access to marijuana for medical research.

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Federal Crime? Really?

- **April 2023. ATF announces that applicant cannabis activity consistent with state legalization laws is no longer automatically disqualifying.**
- **May 2024. DOJ proposes to transfer marijuana from Schedule I to Schedule III of the Controlled Substances Act.**
 - **Consistent with DHHS view that marijuana has a currently accepted medical use and limited abuse potential and/or level of physical or psychological dependence.**
 - ***But ...* DEA did not support the proposal. Unusual.**

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Federal Approach to Firearms

- **Federal law precludes marijuana users, including medical marijuana patients, from purchasing or possessing firearms.**
- **Section 922(d)(3) of the Federal Criminal Code makes it unlawful to “sell or otherwise dispose of any firearm or ammunition to any person” who is an “unlawful user of or addicted to any controlled substance.”**
- **Section 922(g)(3) prohibits any such “unlawful user” from possessing or receiving “any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”**

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Federal Approach to Firearms

- ATF regulations specifically define “controlled substance” to include marijuana.
- ATF regulations broadly define what constitutes an “unlawful use” of controlled substance:
 - Unlawful use not limited to use of drugs on a particular day, or within a matter of days or weeks before.
 - Use is unlawful if recent enough to indicate that the individual is actively engaged in such conduct.
 - Use is unlawful if a person has tested positive for the use of a controlled substance *within the last year*.

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Are Firearm Restrictions Unconstitutional?

- For years, Section 922(g) has made the “marijuana issue” for police officers straightforward:
 - (1) If you are an unlawful user of marijuana, you can’t carry a gun; and
 - (2) If you can’t carry a gun, you can’t be a law enforcement officer.
- Until the Supreme Court stepped in ...

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New York State Rifle & Pistol Association, Inc. v. Bruen, 142 U.S. 2111 (2022)

- Legal challenge to NYC handgun restriction that provided a public-carry license upon a showing of proper cause or a special need for protection distinguishable from the general community. A “may carry” ordinance.
- Plaintiffs were denied public-carry licenses because their asserted proper cause was merely “self-defense.”
- Supreme Court held that the NYC restriction violated the 2nd Amendment, and announced a new test:

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New York State Rifle & Pistol Association, Inc. v. Bruen, 142 U.S. 2111 (2022)

- *"When the Second Amendment's plain text covers an individual's conduct [here the right to bear arms], the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."*

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***Bruen* Opened the Floodgates?**

- **Bruen’s “historical tradition” test opened the floodgates to new challenges to a host of firearm restrictions:**
 - ***United States v. Rahimi*, (5th Cir. Mar. 2, 2023).** Fifth Circuit struck down 18 U.S.C. § 922(g)(8) prohibition on gun possession by individuals subject to a DVPO.
 - **Argued before US Supreme Court in November 2023.**
 - **Question: *Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face?***

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***Bruen* Opened the Floodgates?**

- **Bruen’s “historical tradition” test opened the floodgates to new challenges to a host of firearm restrictions:**
 - ***Range v. Attorney General*, (3d Cir. 2023).** Third Circuit struck down 18 U.S.C. § 922(g)(1) prohibition on convicted felons possessing firearms (felon-in-possession rule) under the *Bruen* “historical tradition” standard.
 - **Split in the circuits! Eighth Circuit reached opposite conclusion in *US v. Jackson* (8th Cir. 2023) just 4 days before *Range* was issued.**
 - **Petition before Supreme Court held pending *Rahimi* decision.**

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Are Firearm Restrictions Unconstitutional?

***United States v. Harrison* (W.D. Okla. Feb. 2, 2023).**

- Harrison arrested with a loaded firearm and lots of medical marijuana; he had a license for the former, but not the latter. He was hit with state charges re: possession, as well as the federal charge under 922(g)(3).
- U.S. District Court held that the federal prohibition on gun possession by a person “who is an unlawful user of or addicted to any controlled substance,” 18 U.S.C. § 922(g)(3) was unconstitutional.

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Are Firearm Restrictions Unconstitutional?

- Court rejected the government’s reliance on founding-era laws prohibiting persons who were intoxicated from possessing firearms (because they worked only temporary disqualification) and on felon-in-possession laws (because they required a criminal conviction to have effect).
- 10th Circuit appeal held pending SCOTUS decision in *Rahimi*.

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Are Firearm Restrictions Unconstitutional?

United States vs. Patrick Darnell Daniels. Jr. (5th Cir. 2023).

- Daniels pulled over for driving without a license plate. Officers noticed the smell of cannabis. Search of the vehicle found cannabis butts in the ashtray and two loaded firearms.
- Daniels admitted to being a regular consumer of cannabis. Based on that admission, Daniels was charged with a violation of 18 U.S.C. §922 (g)(3) and convicted by a jury.
- Daniels appealed.

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Are Firearm Restrictions Unconstitutional?

- Fifth Circuit Court reversed Daniels' conviction, finding it "inconsistent with our 'history and tradition' of gun regulation" and a violation of the Second Amendment:
- *"Our history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug use. Nor do more generalized traditions of disarming dangerous persons support this restriction on nonviolent drug users."*
- SCOTUS appeal held pending *Rahimi* decision.

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Are Firearm Restrictions Unconstitutional?

***Cooper v. Garland*, Case No 22-13893 (11th Cir).**

- Florida residents registered with the state's medical cannabis program, and a gun owner who wishes to participate in the program, argue that medical marijuana patients should not be prohibited from firearm ownership as a class of individuals based solely on their choice of treatment.
- Direct challenge to Section 922(g). Dismissed at District Court.
- On appeal before 11th Circuit Court of Appeal. Argued in October 2023.

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Are Firearm Restrictions Unconstitutional?

- Applying *Bruen* test, *Cooper* plaintiffs argue that there did not appear to be any historical laws precluding the possession of firearms based upon the general use of any substance.
- Rather, relevant laws dealing with the use of intoxicants focused on prohibiting firearm possession while a person was under their influence.
- Plaintiffs argued that dispossessing an individual of their right to bear arms for generally consuming such a substance is not distinctly similar to such historical laws.

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Are Firearm Restrictions Unconstitutional?

***Greene v. Garland*, Case No. 1:24-cv00021 (W.D.Pa. 2024)**

- Robert Greene, a medical marijuana user *and former elected District Attorney (!)* of Warren County, Pennsylvania brought a direct challenge to Section 922(g).
- Greene seeks a preliminary and permanent injunction and declaratory relief that 18 U.S.C. §§ 922(g)(3), (d)(3) and their implementing regulations violate Greene's and similarly situated citizens' Second Amendment rights.
- Currently pending in District Court.

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What Ever Happened With Rahimi?

- **June 21, 2024.** Supreme Court reverses 5th Circuit and upholds what is describes as "common sense" firearm regulation.
 - *"When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed. . . Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms."*
 - *"[A]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment."*

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US v. Rahimi (June 21, 2024)

- **Supreme Ct also addressed apparent confusion over Bruen:**
 - *“Some courts have misunderstood the methodology of our recent Second Amendment cases. These precedents were not meant to suggest a law trapped in amber. . . [T]he Second Amendment permits more than just those regulations identical to ones that could be found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers.”*

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US v. Rahimi (June 21, 2024)

- *“[T]he appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court must ascertain whether the new law is “relevantly similar” to laws that our tradition is understood to permit, “apply[ing] faithfully the balance struck by the founding generation to modern circumstances. . . The law must comport with the principles underlying the Second Amendment, but it need not be a “dead ringer” or a “historical twin.”*

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US v. Rahimi (June 21, 2024)

- Court specifically rejected Government's argument that Rahimi could be disarmed simply because he was not "responsible."
 - *"In Heller and Bruen, we used the term "responsible" to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right. But those decisions did not define the term and said nothing about the status of citizens who were not "responsible." The question was simply not presented."*
- What does this mean for recreational marijuana users?
- Does the Court consider them to be "responsible" citizens?

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Legislative Approaches

- Several states have legislation introduced or ballot initiatives to address restrictions on gun ownership by cannabis users:
 - Colorado. Nov 2024 ballot initiative to eliminate state restriction that prohibits law enforcement from granting concealed carry permits to cannabis users.
 - Arizona. 2024 ballot measure to allow medical marijuana card holders to legally obtain and own firearms.
 - Maryland. 2024 pending legislation to ensure that "a person may not be denied the right to purchase, own, possess, or carry a firearm solely on the basis that the person is authorized to use medical cannabis."

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Are Firearm Restrictions Unconstitutional?

- **Post-Bruen challenges to the legitimacy of Section 922(g) threaten to remove the single-largest obstacle to medical or recreational marijuana use by police officers and other public safety personnel.**
- **In other words, the “marijuana issue” likely won’t be an easy one in the future.**

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LEGAL PROTECTIONS FOR MEDICINAL OR RECREATIONAL MARIJUANA: *Pre-Hire and During Employment*

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Marijuana and Workplace Restrictions

- How does the use of recreational marijuana affect the rights under the Family Medical Leave Act (“FMLA”) and the Americans With Disabilities Act (“ADA”)?
- *IT DOESN'T*
- How does the use of medical marijuana affect the rights under the FMLA and the ADA?
- *NOT SO EASY TO SAY*

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Applicability of the ADA – The Basics

- The ADA prohibits employers from discriminating against those who are disabled, and those associated with a disabled person.
- In addition, the ADA requires employers to provide reasonable accommodations to the disabled employee so the employee can perform the essential duties of their job.
- ADA provides that a person currently using illegal drugs is not a qualified individual with a disability and thus is not protected by the ADA.

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Applicability of the ADA

- **Testing for illegal drug use is not considered a medical examination. ADA does not restrict when an employer can test for the use of illegal drugs.**
- **But ... under the ADA, illegal drug use does NOT include use of drugs “taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provision of Federal law.”**
- **So ... does that exclusion include use of medical marijuana when a doctor prescribes medical marijuana per state law?**

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ADA and Workplace Testing

- **If YES, and the medical marijuana use is to treat an ADA covered disability (which definition includes most chronic conditions), then what happens?**
- **ADA requires as a possible accommodation that an employer modify their policies or allow exceptions. Would that include an employer’s drug free workplace policy?**
 - **Probably not, since the ADA explicitly states that employers can require that employee’s behave in conformity with the Drug-Free Workplace Act.**

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Drug-Free Workplace Policies

- **BUT ... even if workplace drug-testing policies survive ADA challenges, the question remains:**
 - **Is random testing for marijuana obsolete?**
 - **Is random testing for marijuana lawful?**
 - **Do negotiated random testing policies that include marijuana expose employers and unions to liability?**
- **Query whether the smart move is to follow the New Jersey model and exclude marijuana from random testing?**

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Final Thoughts

- **The laws governing medical and recreational marijuana use are changing rapidly and will continue to change over the next decade.**
- **It will take years for impairment science to catch up with related science for alcohol intoxication.**
- **Best practice is for public safety agencies and unions to develop common sense solutions that reflect your state laws and incorporate newest impairment detection techniques as opposed to shortcuts.**

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