

What Will Legalized Cannabis Mean for School Districts?

Presented by: Elena M. Gallegos & Karla A. Schultz



WALSH GALLEGOS
TREVIÑO KYLE & ROBINSON P.C.

1

Overview of Applicable Federal Laws



2

Federal Controlled Substances Act

- ❑ The Act makes it unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 812 (Schedule I)(c)(10)
- ❑ Marijuana is a Schedule I controlled substance under this federal law.
- ❑ A Schedule I drug is defined by the CSA as a drug that:
 - Has a high potential for abuse;
 - Has no current accepted medical use; and
 - Has a lack of accepted safety for use.



3

3

Federal Drug-Free Workplace Act

- ❑ Prohibits any entity from receiving grants from federal agencies if they do not provide a drug-free workplace. 41 U.S.C. § 8103(a)(1).
- ❑ This means that the manufacture, possession, use or distribution of controlled substances, as defined by law, including marijuana, and alcohol, are prohibited on district premises or at activities.
- ❑ Violators of the Act can have their grant payments suspended, and their award can be suspended or terminated. 34 C.F.R. § 84.510.
- ❑ School districts have to certify compliance with this law annually.



4

4

Omnibus Transportation Employee Testing Act

- ❑ Requires alcohol and drug testing of an employee performing safety-sensitive functions in the transportation industry, including bus drivers and van drivers. Includes testing for cannabis.
- ❑ Required testing:
 - Pre-employment;
 - Random;
 - Return to duty (from positive test or refusal to test);
 - After a "qualifying accident";
 - "Reasonable cause" – after another accident or rule violation; or
 - Reasonable suspicion.



5

5

Overview of Applicable State Law



6

Medical Cannabis – State Law

- ❑ The Lynn and Erin Compassionate Use Act
 - Passed in 2007;
 - Legalizes and regulates use of medical cannabis in New Mexico.
- ❑ Permits limited and controlled use of medical cannabis by students who are “qualified patients” under the law.
- ❑ It does not relieve a qualified patient, caregiver, or participant from criminal prosecution or civil penalties for use or possession in those individuals’ workplace or any other “public place.”
 - The definition of “public place” in the Act includes schools.



7

7

Medical Cannabis – Employee Protections

- ❑ In 2019, the Lynn and Erin Compassionate Use Act was modified.
- ❑ It says that an employer cannot “take an adverse employment action against an applicant or an employee based on conduct allowed under the Lynn and Erin Compassionate Use Act.”
- ❑ The prohibition on adverse employment action does not “apply to an employee whose employer deems that the employee works in a safety-sensitive position.”
- ❑ It also does not restrict an employer from taking “adverse employment action against an employee for use of, or being impaired by, medical cannabis on the premises of the place of employment or during the hours of employment.”



8

8

“Safety-Sensitive” Position?

- ❑ “Safety-sensitive” position means a position in which performance by a person under the influence of drugs or alcohol would constitute an immediate or direct threat of injury or death to that person or another.
- ❑ Under NMSBA Policy E-2350, drivers are considered to be safety-sensitive positions.
- ❑ Should the District designate other positions as safety-sensitive?



9

9

Are Reasonable Accommodations Required?

- ❑ Background Facts: employer discharged employee on the basis of a positive drug test. Employee sued.
- ❑ In 2016, a federal court in New Mexico ruled that an employer does not have an obligation to accommodate medical cannabis use by a disabled employee, and further held the employer could terminate him for a positive drug test.
- ❑ Why?
 - The Lynn and Erin Compassionate Use Act does not require an employer to accommodate an employee’s use of medical marijuana.
 - Even if it did, such requirement would violate the Controlled Substances Act.

Garcia v. Tractor Supply Company, 154 F.Supp.3d 1225 (D.N.M. 2016)



10

10

Reasonable Accommodation of Students?

- In 2019, a federal court in New Mexico ruled that:
 - Federal Controlled Substance Act preempts the Lynn and Erin Compassionate Use Act.
 - “[I]t would be absurd to interpret the IDEA as requiring APS to commit or accommodate a federal crime to satisfy its obligation to provide Student with a FAPE.”
 - District has no obligation to accommodate the use of a drug that is illegal under federal law.

Albuquerque Public Schools v. Sledge, 2019 WL 3755954 (D.N.M. 2019)



11

11

Recreational Cannabis – State Law

- In 2021, the Legislature passed the Cannabis Regulation Act.
- Under the law:
 - Certain personal use and possession of cannabis, cannabis extract and edible cannabis is permitted; and
 - Smoking of cannabis is lawful in authorized areas.



12

Recreational Cannabis Limits – State Law

- ❑ Use or possession prohibited by those under twenty-one years old.
- ❑ Individuals are not allowed to “smoke cannabis products in a public place, except in a cannabis consumption area...”
 - Again, “public place” includes schools.
- ❑ Also, unless it is otherwise permitted by the Cannabis Regulation Act or the Lynn and Erin Compassionate Use Act, it is unlawful to “possess or intentionally distribute any amount of a cannabis product on the premises of a school or daycare center...”



13

13

Recreational Cannabis “Employer Protections” – State Law

- ❑ Unless the employer and employee agree otherwise, an employer may:
 - Prohibit or take an adverse employment action against an employee for impairment by or possession or use of intoxicating substances at work or during work hours, including cannabis;
 - Adopt and implement a written zero-tolerance policy regarding the use of cannabis products. A zero-tolerance policy may permit the discipline or termination of an employee on the basis of a positive drug test that indicates any amount of delta-9-tetrahydrocannabinol or delta-9-tetrahydrocannabinol metabolite.
- ❑ “Adverse employment action” means refusing to hire or employ a person; barring or discharging a person from employment; requiring a person to retire from employment; or discriminating against an employee in compensation or in terms, conditions or privileges of employment.



14

14

Recreational Cannabis “Other Provisions” – State Law

- ❑ The Cannabis Regulation Act cannot be interpreted to require an employer to commit any act that would cause the employer to be noncompliant with or in violation of federal law or federal regulations or that would result in the loss of a federal contract or federal funding.
- ❑ The Act does not “invalidate, diminish or otherwise interfere with any collective bargaining agreement nor shall it be construed to invalidate, diminish or otherwise interfere with any party's power to collectively bargain such an agreement, or to an employer or employee.”
- ❑ What could be bargained in the public school context?



15

15

What About the Location of Sales and Consumption of Recreational Cannabis?

- ❑ That is left to local jurisdictions, but:
 - The “minimum distance from a school or daycare center as determined by the local jurisdiction...shall not be set at any more than three hundred feet from a school or daycare center that was in existence at the time the establishment or microbusiness was licensed.”
 - Advertising of cannabis products on “billboards, posters, handbills or other visual media” cannot be located or can be viewed within three hundred feet of a school or daycare center.



16

16

Off-Campus Use



17

Legal Off-Campus Medical Use

- NMSA 1978, Section 26-2B-9
 - A. Unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations, it is unlawful to take an adverse employment action against an applicant or an employee based on conduct allowed under the Lynn and Erin Compassionate Use Act.
 - B. Nothing in this section shall:
 - 1) Restrict an employer's ability to prohibit or take adverse employment action against an employee for use of, or being impaired by, medical cannabis on the premises of the place of employment or during the hours of employment; or
 - 2) Apply to an employee whose employer deems that the employee works in a safety-sensitive position.



18

18

Legal Off-Campus Recreational Use

- ❑ BUT, “unless there is an agreement between the employer and employee, nothing in the Cannabis Regulation Act shall...prevent or infringe upon the rights of an employer to adopt and implement a written zero-tolerance policy regarding the use of cannabis products. A zero-tolerance policy may permit the discipline or termination of an employee on the basis of a positive drug test that indicates any amount of delta-9-tetrahydrocannabinol or delta-9-tetrahydrocannabinol metabolite.” NMSA 1978, § 26-2C-34(A)(3).
- ❑ This would indicate that adoption (or not) of a zero tolerance policy, as it relates to off-duty, off-campus use might be bargained.



19

Policies and Regulations



20

District Policies & Regulations

- ❑ Policy E-2350 and Regulation E2361 prohibits use of controlled substances by bus drivers (or other drivers of students) and also sets out testing protocol.
- ❑ Policy G-0950 says employees cannot manufacture, distribute, dispense, possess, or use, on or in the workplace, "alcohol or any narcotic drug, hallucinogenic drug, amphetamine, barbiturate, marijuana, or any other controlled substance, as defined in the Controlled Substances Act." As a condition of employment, employees must comply with District policy on a drug-free workplace.
 - "Workplace includes any school building or any school premises and any school-owned vehicle or any other school-approved vehicle used to transport staff members or students to and from school or school activities or on school business. Off school property, the workplace includes any school-sponsored or school-approved activity, event, or function where students or staff members are under the jurisdiction of the District. In addition, the workplace shall include all property owned, leased, or used by the District for any educational or District business purpose."



21

21

A Word About Drug Testing

- ❑ A drug test of an employee is considered a search under the 4th Amendment of the Constitution.
- ❑ To be lawful, there must be "reasonable suspicion" to search (or test) a school employee or their property for drugs or alcohol.
- ❑ There is "reasonable suspicion" if:
 - There is individualized suspicion of a particular employee due to objective facts that would suggest to a reasonable person the employee is using or impaired by drugs or alcohol.
- ❑ It is advisable for two administrators to confirm the observations of the employee's physical signs, behavior, conduct changes, etc.
- ❑ NMSBA policy G-1950 addresses employee drug and alcohol searches.



22

22

Checklist

- ❑ Be sure your policy includes employee use of or impairment due to any cannabis – medical or recreational.
- ❑ You can have a zero tolerance policy.
 - Remember: State law prohibits employee use of, or being impaired by, medical cannabis at school during work hours.
 - Likewise, impairment by or possession or use of intoxicating substances at work or during work hours, including cannabis, can be prohibited under recreational cannabis law.
- ❑ Ensure that administrators report to HR their suspicions of observed use, possession, impairment, etc. NMSBA regulations have a form as well.
- ❑ Might you need to define your “safety-sensitive positions?”



23

23

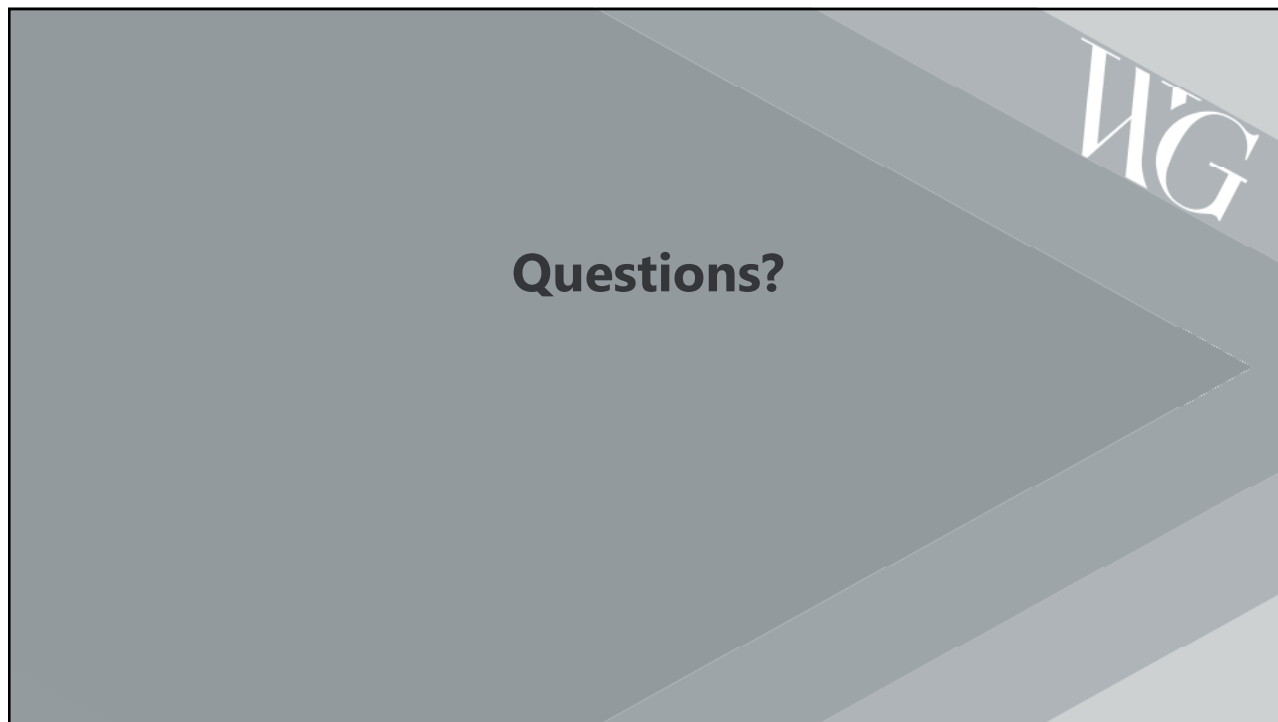
Collective Bargaining

- ❑ Consider that the union may want to bargain issues like:
 - Workplace use of medical cannabis;
 - The definition of a zero tolerance policy;
 - Use of positive drug tests, since marijuana stays in the system longer;
 - The meaning of “under the influence”; or
 - Which jobs are “safety-sensitive” positions.



24

24



25

Karla A. Schultz
kschultz@wabsa.com

Elena M. Gallegos
egallegos@wabsa.com

 | **WALSH GALLEGOS**
TREVINO KYLE & ROBINSON P.C.

500 Marquette Ave. NW, Suite 1310
Albuquerque, NM, 87102
Phone: 505-243-6864
Fax: 505-843-9318

26

The information in this presentation was prepared by Walsh Gallegos Treviño Kyle & Robinson P.C. It is intended to be used as general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.

WG | WALSH GALLEGOS
TREVINO KYLE & ROBINSON P.C.

© 2022