



Medical Marijuana in Oregon: The Need for a Legislative Solution

Paula A. Barran

Barran Liebman LLP
601 SW Second Avenue, Suite 2300
Portland, Oregon 97204-3159
Phone: (503) 228-0500
Fax: (503) 274-1212
www.barran.com
pbarran@barran.com

INTRODUCTION

In the November 1998 general election Oregon voters narrowly approved Ballot Measure 67 to permit the medical use of marijuana. The measure eventually became ORS 475.300-346. Neither the measure as approved (nor the law as codified) suggested that an employer could be required to revise substance abuse policies to accommodate the use of marijuana. The design was, instead, to permit employers to have flexibility. They were not to be required to accommodate the use of medical marijuana, but they could, if they chose.

State law conflicts with federal law, and the right to legislate about controlled substances is a federal right, not a state right. Marijuana is a substance controlled under federal law; it is listed on Schedule I (along with LSD and heroin), which includes drugs for which there is a high potential for abuse, no currently accepted medical use in treatment, and a lack of accepted safety for use under medical supervision. Because federal law controls, Oregon has at most the right to exempt marijuana use from state criminal law. Oregon's law was intended to shield the marijuana user against "civil or criminal penalties." Other provisions of state law confirmed that employers had the right to require their employees to follow any federal law. It was never intended to interfere with the right to have a drug-free workplace.

As of October, 2007, Oregon's program has issued authorization cards to 14,831 individuals; there were 3,125 additional applications pending at that date. Most of the cards have been issued to individuals who have a subjective complaint, "severe pain." In twelve months, the program has rejected only a scant 656 applications.¹ The program advises cardholders that employers are not required to accommodate employees who use medical marijuana, but that it is up to the employee to decide whether or not to tell the employer about use of the drug.² The law does not require applicants to be evaluated to determine whether they are marijuana abusers.

To date the Legislature has refused to consider the need to address employer rights under this law, and case law development has made clear that a legislative solution is needed. Employers are now forced to litigate to defend their substance abuse programs on a case by case basis, and the Bureau of Labor and Industries has taken the position in a final order that employers can be required to modify their substance abuse programs to permit employees to use medical marijuana.

There is no medical or scientific proof that marijuana can be safely consumed in connection with employment.

Prompt legislative action is needed.

THE CONFLICT BETWEEN STATE AND FEDERAL LAW

Congress has plenary authority to regulate controlled substances; in the words of the U.S. Supreme court, the Controlled Substances Act is a "closed regulatory regime" criminalizing the

¹ Source: <http://www.oregon.gov/DHS/ph/ommp/data.shtml>.

² Source: <http://www.oregon.gov/DHS/ph/ommp/top20.shtml#15>.

unauthorized manufacture, distribution, dispensing, and possession of substances classified in any of the Act's five schedules. *Gonzales v. Raich*, 545 U.S. 1, 13 (2005); see also *Gonzales v. Oregon* 546 U.S. 243, 250 (2006) (summarizing extent of Controlled Substances Act regulation). Oregon has taken the position, at least through the Department of Justice, that the state law's effect is solely to protect the user from enforcement of state criminal laws. The Oregon Attorney General has cautioned that Oregon state law does not protect users from federal prosecution:

“*Raich* does not hold that state laws regulating medical marijuana are invalid nor does it require states to repeal existing medical marijuana laws. Additionally, the case does not oblige states to enforce federal laws. The practical effect of *Raich* in Oregon is to affirm what the Attorney General understood to be the law since the adoption of the Act. The Act protects medical marijuana users who comply with its requirements from state criminal prosecution for production, possession, or delivery of a controlled substance. However, the Act neither protects marijuana plants from seizure nor individuals from prosecution if the federal government chooses to take action against patients or caregivers under the federal Controlled Substances Act.”³

There is no question about the coverage of marijuana under federal law: its use is prohibited. *Gonzales v. Raich*, 545 U.S. 1 (2005).

Oregon employers have been told – in legislation relating to employee disabilities – that they have the right to require their employees to follow federal law:

659A.127 Permitted employer action. ORS 659A.112 to 659A.139 do not affect the ability of an employer to do any of the following:

(1) An employer may prohibit the transfer, offering, sale, purchase or illegal use of drugs at the workplace by any employee.

An employer may prohibit possession of drugs except for drugs prescribed by a licensed health care professional.⁴

(2) An employer may prohibit the use of alcohol at the workplace by any employee.

(3) An employer may require that employees not be under the influence of alcohol or illegally used drugs at the workplace.

(4) An employer may require that employees behave in conformance with the requirements established under the

³ Source: June 17, 2005 Media Release, Oregon Attorney General Issues Advice on Medical Marijuana Program, <http://www.doj.state.or.us/releases/2005/rel061705.shtml>.

⁴ Because marijuana is illegally federally it cannot be “prescribed” even under Oregon law; schedule I drugs cannot be dispensed under a prescription. *U.S. v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 492 (2001).

federal Drug-Free Workplace Act of 1988.

(5) An employer may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment, job performance and behavior to which the employer holds other employees, even if the unsatisfactory performance or behavior is related to the alcoholism of or the illegal use of drugs by the employee.

(6) An employer may require that employees comply with all federal and state statutes and regulations regarding alcohol and the illegal use of drugs. [Formerly 659.444] (emphasis supplied)

Some Oregon employers are subject to the requirements of the federal Drug Free Workplace Act, a 1988 statute that requires some Federal contractors and all Federal grantees to agree that they will provide drug-free workplaces as a precondition of receiving a contract or grant from a Federal agency. All covered organizations are required to:

1. Publish and give a policy statement to all covered employees informing them that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the covered workplace and specifying the actions that will be taken against employees who violate the policy.
2. Establish a drug-free awareness program to make employees aware of a) the dangers of drug abuse in the workplace; b) the policy of maintaining a drug-free workplace; c) any available drug counseling, rehabilitation, and employee assistance programs; and d) the penalties that may be imposed upon employees for drug abuse violations.
3. Notify employees that as a condition of employment on a Federal contract or grant, the employee must a) abide by the terms of the policy statement; and b) notify the employer, within five calendar days, if he or she is convicted of a criminal drug violation in the workplace.
4. Notify the contracting or granting agency within 10 days after receiving notice that a covered employee has been convicted of a criminal drug violation in the workplace.
5. Impose a penalty on—or require satisfactory participation in a drug abuse assistance or rehabilitation program by—any employee who is convicted of a reportable workplace drug conviction.
6. Make an ongoing, good faith effort to maintain a drug-free workplace by meeting the requirements of the Act.

Any Oregon employer in the transportation industry is subject to the comprehensive testing requirements of federal law. Employers who are obligated to comply with federal Department of

Transportation testing rules don't have any flexibility to make changes and, as a consequence, don't have to make any decisions on how to handle medical marijuana -- at least where their drivers or other transportation workers are concerned. The DOT rules and their enabling federal law supersede the inconsistent state laws.

In 1991 Congress passed, and the President signed, the Omnibus Transportation Employee Testing Act of 1991. Employers in the transportation industry are required by this federal legislation to maintain strict substance abuse policies, to test for alcohol use in conjunction with safety-sensitive tasks, and to test for the presence of certain designated drugs. Marijuana is one of those drugs.

The Omnibus Act provides that, with some limited exceptions, no state or local government shall adopt or have in effect any law, rule, regulation, ordinance, standard, or order that is inconsistent with the federal regulations. In addition, the Americans with Disabilities Act has a special provision exempting DOT programs from ADA's coverage (at 42 USC § 12114(e)).

When the first state marijuana initiatives were passed (principally California and Arizona, in late 1996), the Office of National Drug Control Policy announced the White House's position on the initiatives. That announcement included a summary of the Department of Transportation position: safety-sensitive transportation workers who test positive under DOT guidelines may not under any circumstances use state law as a legitimate medical explanation for the presence of prohibited drugs. Secretary Pena was emphatic: "The law is clear: if you are a safety-sensitive transportation worker and you're caught using drugs, these propositions don't mean a thing. You're out of that job."⁵

The White House also instructed Medical Review Officers (medical physicians who review and verify laboratory confirmed positive tests under DOT regulations): a positive for marijuana must be reported as a positive verified test even if marijuana was used under state medical authorization. The guidance to MROs provides that once a test shows the requisite amount of any of the substances for which testing is required, the MRO must verify a positive unless he or she determines there is a legitimate medical explanation for the presence of the substance. The state propositions do not make prescribing marijuana legitimate under Schedule I of the federal Controlled Substances Act. The guidance concludes that the use of any Schedule I substance (e.g. marijuana) by an employee performing safety-sensitive functions in transportation "could pose a significant safety risk."⁶

For those employers managing a DOT regulated workforce, state laws have no effect. The answer is the same for any other type of federally mandated testing.

MARIJUANA USE AND ITS IMPACT ON SAFETY AND PRODUCTIVITY

Because marijuana is a Schedule 1 substance, there is little in the way of scientific study. Those studies that have been conducted, however, point to legitimate and serious concerns whether the

⁵ Media Release, Office of National Drug Control Policy, December 12, 1996.

⁶ Media Release, Office of National Drug Control Policy, December 12, 1996.

drug can be used in connection with any safety sensitive work, as well as whether it can be used in connection with work which requires attention to quality or productivity. The Institute of Medicine, in Marijuana and Medicine: Assessing the Science Base (National Academy Press 1999) concluded that smoking marijuana should be recommended for terminally ill patients or those with debilitating symptoms that do not respond to approved medications; the authors note that marijuana is a powerful drug with a variety of affects. The primary adverse affect of acute marijuana use is diminished psychomotor performance and, accordingly, it is “inadvisable to operate any vehicle or potentially dangerous equipment while under the influence of marijuana, THC, or any cannabinoid drug with comparable affects.”⁷ A study published in 1985 in the American Journal of Psychiatry provided shocking evidence of the carryover effects of marijuana use. The investigators recruited ten experienced pilots and studied the affects of a controlled dosage of marijuana on their performance. Although the worse performances occurred an hour after ingesting the drug, significant performance difficulties continued 24 hours later. Not only did the pilots demonstrate marked deviations from proper performance (the kind that could easily lead to crashes), the pilots reported no awareness of any after affects on their performance, mood or alertness. See Yesavage, et al “Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance” (Am. J. Psychiatry 1985; 142:1325-1329).

The U.S. Supreme Court agrees. In its 1989 decision confirming the constitutional validity of the Railroad Drug and Alcohol Testing Regulations, the court observed:

“The possession of unlawful drugs is a criminal offense that the government may punish, but it is a separate and far more dangerous wrong to perform certain sensitive tasks while under the influence of those substances.” *Skinner v. RLEA*, 489 U.S. 602 (1989).

The Institute of Medicine, in Marijuana as Medicine?: The Science Beyond the Controversy (2000), noted that:

“Clearly, the evidence that marijuana impairs cognitive and psychomotor performance indicates that medical users will need to limit their activities—much as after taking a strong painkiller or drinking alcohol. No one under the influence of marijuana or THC should drive a vehicle or operate potentially dangerous equipment.”⁸

The Supreme Court has emphasized marijuana’s dangers. “Marijuana causes ‘[i]rregular blood pressure responses during changes in body position,’ ‘[r]eduction in the oxygen-carrying capacity of the blood,’ and ‘[i]nhibition of the normal sweating responses resulting in increased body temperature.’” *Vernonia Sch. Dist. 47J v. Acton*, 515 US 646, 662 (1995){ TA \l "Vernonia Sch. Dist. 47J v. Acton, 515 US 646 (1995)" \s "Vernonia" \c 1 }. “Marijuana is classified as a Schedule I substance, § 812(c){ TA \l "21 USC § 812(c)" \s "§ 812(c)" \c 2 }, based on its high

⁷ Marijuana and Medicine: Assessing the Science Base at 5.

⁸ Marijuana and Medicine: The Science Beyond the Controversy at 60.

potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment, § 812(b)(1).” *Raich*, 545 US at 2.

Employers have no comfort at all that marijuana users can work at a safety sensitive position without harm:

“The short-term effects of marijuana can include problems with memory and learning; distorted perception; difficulty in thinking and problem solving; loss of coordination; and increased heart rate. Research findings for long-term marijuana abuse indicate some changes in the brain similar to those seen after long-term abuse of other major drugs. * * * Workers who smoke marijuana are more likely than their coworkers to have problems on the job. Several studies associate workers’ marijuana smoking with increased absences, tardiness, accidents, workers’ compensation claims, and job turnover. A study among postal workers found that employees who tested positive for marijuana on a pre-employment urine drug test had 55 percent more industrial accidents, 85 percent more injuries, and a 75-percent increase in absenteeism compared with those who tested negative for marijuana use²⁶. In another study, heavy marijuana abusers reported that the drug impaired several important measures of life achievement including cognitive abilities, career status, social life, and physical and mental health.”⁹

MEDICAL MARIJUANA AND DISABILITY LAW

Medical marijuana wasn't something Congress had in mind when it passed the Americans with Disabilities Act in 1990, or Oregon when its legislature passed the state's own disability law. Still, both legislative bodies were as practical as they could be when it came to drugs. Current users of illegal drugs are expressly excluded from the protection of the law, but employees in substance abuse recovery are protected. Under both state and federal law, however, employers may continue to prohibit marijuana use even where marijuana is recommended for medical purposes under the new state law.

The Americans with Disabilities Act is a federal law and is unlikely to be affected by state laws permitting the medical use of marijuana. In particular, ADA excludes from protection the current users of illegal drugs, and defines "drugs" as substances identified in the Controlled Substances Act (where marijuana is listed under schedule I). But the text of the law is susceptible to a more permissive interpretation depending on how far you stretch the italicized section below and whether you consider the nicely placed comma to separate off the citation to the drug statute:

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. *Such terms does not include the use of a drug taken under supervision by a licensed health*

⁹ National Institute on Drug Abuse, <http://www.drugabuse.gov/infocfacts/marijuana.html>.

care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law. 42 USC § 12210(d)

Oregon's law against discrimination defines "drug" to mean "a controlled substance, as classified in schedules I through V of section 202 of the Controlled Substances Act, 21 U.S.C.A. 812, as amended, and as modified under ORS 475.035", and defines "illegal use of drugs" to mean:

"Any use of drugs, the possession or distribution of which is unlawful under state law or under the Controlled Substances Act, 21 U.S.C.A. 812, as amended, but does not include the use of a drug taken under supervision of a licensed health care professional, or other uses authorized under the Controlled Substances Act or under other provisions of state or federal law." ORS 659.400.

That suggests current users of a drug permissible under state law are not excluded from protection of the discrimination laws, regardless of the provisions of federal law. However, medical marijuana users rarely do so under a physician's supervision; users grow their own drug, or obtain it from sources of their own choosing and make their own decisions about the dosage and frequency of administration. In addition, a separate section of Oregon law says that employers may elect to require employees to follow federal laws:

659A.127 Permitted employer action. ORS 659A.112 to 659A.139 do not affect the ability of an employer to do any of the following:

(1) An employer may prohibit the transfer, offering, sale, purchase or illegal use of drugs at the workplace by any employee. An employer may prohibit possession of drugs except for drugs prescribed by a licensed health care professional.

(2) An employer may prohibit the use of alcohol at the workplace by any employee.

(3) An employer may require that employees not be under the influence of alcohol or illegally used drugs at the workplace.

(4) An employer may require that employees behave in conformance with the requirements established under the federal Drug-Free Workplace Act of 1988.

(5) An employer may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment, job performance and behavior to which the employer holds other employees, even if the unsatisfactory performance or behavior is related to the alcoholism of or the illegal use of drugs by the employee.

(6) An employer may require that employees comply with all federal and state statutes and regulations regarding alcohol and the illegal use of drugs. [Formerly 659.444]

OREGON'S JUDICIAL CONFUSION

Despite the language of Oregon's disability law that permits Oregon employers to require employees to follow any federal law, and despite the Medical Marijuana Act's express statement that it is not intended to require an employer to accommodate the medical use of marijuana in

any workplace, Oregon appellate courts created considerable confusion in the first medical marijuana case to reach them. In *Washburn v. Columbia Forest Products*, 197 Or.App. 104 (2005) and 340 Or. 469 (2006), the courts addressed the statute for the first time in connection with employment.

Washburn, the plaintiff, was a millwright who used marijuana and contended that his employer was obligated to accommodate his use of the drug by amending its substance abuse policies so that he would not be disciplined for violations of the policy. He used the drug to avoid muscle spasms that kept him from getting a good night's sleep and believed that the drug was more effective than prescription drugs which had also alleviated his muscle spasms. The Court of Appeals rejected the trial court's conclusion that the medical marijuana law does not require employers to accommodate users. Instead, the Court of Appeals concluded that the question remained to be resolved by the trial court "applying pertinent aspects of Oregon disability law to the particular facts." The Court of Appeals felt that an individual who uses medical marijuana but does not transport it to and possess it within the workplace is protected because of the wording of the statute. It is the "medical use of marijuana" which an employer need not accommodate, and that in turn references production, possession, delivery or administration of marijuana. A strict construction of the statute, the court concluded, meant that employers were not obligated to permit production, possession, delivery or administration within the workplace, but they could be required to accommodate users, individuals whose use took place off employer premises.

After years of litigation, the Oregon Supreme Court issued its opinion May 4, 2006, reversing the Oregon Court of Appeals. The Supreme Court concluded that the plaintiff was not disabled in the first place and left for another day any complicated issues regarding accommodation of the use of medical marijuana. Justice Kistler, however, noted that federal law preempts the state employment discrimination statute to the extent that it might require an employer to accommodate medical marijuana use and because federal law prohibits possessing, manufacturing, dispensing and distributing marijuana even in medical situations, "state law cannot require what federal law prohibits." When the two laws conflict, federal law must control. He concluded "the fact that the state may choose to exempt medical marijuana users from the reach of the state criminal law does not mean that the state can affirmatively require employers to accommodate what federal law specifically prohibits" 340 Or. at 482.

On July 13, 2006 the Oregon Bureau of Labor and Industries issued its final order on reconsideration in the matter of *Emerald Steel Fabricators, Inc.*, Case No. 30-04. There, the complaining employee was a medical marijuana user who used the drug to reduce symptoms of claimed debilitating medical conditions. The complaining employee worked as a drill press operator. The Bureau of Labor concluded that because he had done his job reasonably well for a period of seven weeks, he was qualified to perform that work despite very heavy marijuana use. The record in the administrative proceedings noted that the employee had been told to use marijuana five to seven times per day, but that he actually used it one to three times per day. He used it daily, and given his admissions during the proceedings it is clear that he must have used the drug a short time before he appeared at work. In light of his physician's suggestion that he might use the drug as frequently as seven times a day, he could have ingested marijuana every single waking hour except when physically working.

After considerable litigation, the *Emerald Steel* case is awaiting a decision at the Oregon Court of Appeals.

IMPAIRMENT TESTING

Proponents of the drug argue that the answer to employers' concerns is to implement impairment testing. That might some day be appropriate. It is not, however, available to solve today's workplace issues. There is no generally available, accredited, economical impairment test, nor one that can be administered effectively in the Oregon workplace.

The Supreme Court has cautioned that employers should not be required to resolve difficult questions of substance impairment by using subjective judgments, particularly of supervisors who are not professionally trained in drug detection. *See Nat'l Treasury Employees Union v. Von Raab*, 489 US 656, 674, 109 S Ct 1384, 1395, 103 L Ed 2d 685 (1989){ TA \l "*Nat'l Treasury Employees Union v. Von Raab*, 489 US 656 (1989)" \s "*Nat'l Treasury Employees Union v. Von Raab*, 489 US 656, 674, 109 S Ct 1384, 1395 (1989)" \c 1 } (“Detecting drug impairment on the part of employees can be a difficult task, especially where, as here, it is not feasible to subject employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments”). *See also, Bhd. of Maint. of Way Employees, Lodge 16 v. Burlington N. R.R. Co.*, 802 F2d 1016, 1020 (8th Cir 1986){ TA \l "*Bhd. of Maint. of Way Employees, Lodge 16 v. Burlington N. R.R. Co.*, 802 F2d 1016 (8th Cir 1986)" \s "*Bhd. of Maint. of Way Employees, Lodge 16 v. Burlington N. R.R. Co.*, 802 F2d 1016, 1020 (8th Cir 1986)" \c 1 }. *Skinner v. Ry. Labor Executives' Ass'n*, 489 US 602, 628-629, 109 S Ct 1402, 1419-1420, 103 L Ed 2d 639 (1989){ TA \l "*Skinner v. Ry. Labor Executives' Ass'n*, 489 US 602 (1989)" \s "*Skinner*" \c 1 } (“An impaired employee, the FRA found, will seldom display any outward ‘signs detectable by the lay person or, in many cases, even the physician.’” 50 Fed.Reg. 31526 (1985){ TA \l "50 Fed.Reg. 31526 (1985)" \s "50 Fed.Reg. 31526 (1985)" \c 6 }. “This view finds ample support in the railroad industry’s experience with Rule G, and in the judgment of the courts that have examined analogous testing schemes”).

Moreover, the Court expressed its support of drug testing as a common sense deterrent to drug abuse, including in those situations where employees are on call or readying themselves to report to work:

“The railroad industry's experience with Rule G persuasively shows, and common sense confirms, that the customary dismissal sanction that threatens employees who use drugs or alcohol while on duty cannot serve as an effective deterrent unless violators know that they are likely to be discovered. By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct, cf.

Griffin v. Wisconsin, 483 US, at 876, 107 S.Ct, at 3170{ TA \l "Griffin v. Wisconsin, 483 US, at 876" \s "Griffin v. Wisconsin, 483 US, at 876, 107 S.Ct, at 3170" \c 1 }, concomitantly increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty.”

Skinner{ TA \s "Skinner" }, 489 US at 629-630.

If a readily available reliable impairment test were available, it would already be in use by the entities that are most involved in impairment testing: law enforcement and the Department of Transportation. Law enforcement personnel who are responsible for keeping the roadways free of impaired drivers administer a form of field sobriety testing. They do not have access to some kind of inexpensive and reliable “impairment test.” Instead trained law enforcement personnel administer a collection of sobriety tests which include the horizontal gaze nystagmus test, walk and turn test, the one leg stand test, the modified finger-to-nose test, the Romberg balance test, the finger count test, the alphabet test, the counting test, the internal clock test. Additional training is available for sworn personnel including the lack of convergence test, pupil size estimation test, pulse rate examination test, as well as additional physical examination tests. See OAR 257-025-0012 (identifying field sobriety tests approved by the Board on Public Safety Standards and Training for use by sworn police officers). These are not the kinds of tests that can be administered by untrained personnel. They are very time consuming to perform correctly.¹⁰ In an employment setting they would still need to be confirmed to determine the

¹⁰ (1) Nothing in this rule prohibits the police officer from providing additional information to the person asked or requested to take the field sobriety tests that the officer considers convenient or appropriate. By way of example, but not limitation, the officer may orally describe some or all of the tests intended to be administered. Prior to the administration of each field sobriety test, the officer shall generally explain the field sobriety test to the person requested to take the test. The field sobriety tests shall be administered substantially as described below. Each field sobriety test, as described below, is specifically found to meet the requirements of ORS 801.272:

(a) Horizontal Gaze Nystagmus: The police officer must have received training in the administration of the Horizontal Gaze Nystagmus (HGN) test by the Oregon State Police, BPSST, or other governmental entity prior to its administration under this rule. The officer shall use a stimulus (such as a finger, pencil or penlight) held vertically in front of the person's face approximately 12 to 15 inches away from the person's face. The person tested must hold their head still. The officer, during the administration of the testing procedures, should conduct the testing procedures in the order listed unless circumstances or conditions dictate otherwise:(A) The officer shall move the stimulus from the center of the face to the side, checking for the lack of smooth pursuit of the eyes as they track the stimulus;(B) The officer shall check for distinct nystagmus at the maximum deviation of each eye;(C) The officer shall check for the onset of nystagmus prior to 45 degrees in each eye.

(b) Walk and Turn Test: The officer will instruct the person, while standing, to place the person's left foot on a line (if no line is available, use a general direction for the person to walk an imaginary line) then place the right foot on the line with the heel of that foot ahead of the toes of the left foot. Instruct the person to take nine steps down the line, keeping arms at sides, looking at feet, and counting each step while walking heel-to-toe. Instruct the person how to turn (at the

cause of impairment and whether it results from illegal conduct as compared to illness or prescription medication. Oregon law does not even go so far as to say that field sobriety tests are always going to be admissible in evidence. *State v. O'Key*, 321 Or. 285 (1995). To be used in the workplace they must be tested to determine whether they result in a disparate impact and/or must be validated. See 41 CFR 60-3 (Uniform Guidelines on Employee Selection Procedures).

Time consuming tests such as these may be appropriate for law enforcement but are inappropriate for the workplace. Something as simple as a shift change could see one trained supervisor with a line of 50 employees waiting to pass through the field sobriety bottleneck. Even if the tests were reserved only for "cause" concerns about reliability and admissibility will ensure litigation over nearly every employer decision. Moreover, because the test would show solely impairment without identifying the cause, an employer would be unable to take disciplinary action (even if the impairment were to be caused by a combination of methamphetamine, heroin and cocaine all consumed in the workplace).

Computer based tests have been developed. They require computers, hardly practical for use on a construction site, or in connection with field work. If there were a readily available impairment test for use in addressing workplace substance abuse, it would have already been considered,

discretion of the officer) and to walk back in the same manner previously described. Generally demonstrate the test.

(c) One Leg Stand: Instruct the person to stand straight with the person's feet together and arms at the sides. Instruct the person to raise one foot approximately six inches off the ground while looking at the foot, and to count "1001, 1002, 1003," etc., until told to stop by the officer. The officer will then time the person for thirty seconds. The person will count 1001, 1002, 1003, etc., until told to stop by the officer. The officer may conduct the same test with the other foot. Generally demonstrate the test.

(d) Romberg Balance Test:

(A) Instruct the person to stand straight with feet together with arms at the person's sides.

(B) While standing as described above, instruct the person to tilt their head backward, close their eyes and estimate the passage of thirty seconds before opening their eyes again. Generally demonstrate the test.

(e) Modified Finger to Nose Test: Instruct the person to stand straight with heels together, eyes closed, arms at sides, and head tilted back. Instruct the person to touch the end of the person's nose with end of the index finger by bringing the person's arm and hand from the person's side directly to the end of the nose. Have the person repeat for the other index finger and repeat the test in the same manner, if deemed appropriate. Generally demonstrate the test.

(f) Finger count: Have the person hold a hand out and touch each of the four fingers with the thumb of that hand and count 1-2-3-4, 4-3-2-1, or any other order deemed appropriate by the officer. Generally demonstrate the test.

(g) Alphabet: Have the person say the alphabet or any portion of the alphabet the officer may choose. This test may be used as part of the Romberg test.

(h) Counting: Have the person count any length of numbers, forward or backward, as the officer may require. This test may be used as part of the Romberg test.

(i) Internal Clock: Ask the person to tell you when 30 seconds has elapsed. Time the person's estimation. See OAR 257-025-0020.

accepted, validated and put into use on a federal level. Instead, the Supreme Court has emphasized that substance abuse testing, when done in accordance with federal protocols, is “highly accurate, assuming proper storage, handling and measurement techniques.” See *Nat’l Treasury Employees Union v. Von Raab*, 489 US 656, 672, 109 S Ct 1384, 1395, 103 L Ed 2d 685 (1989).{ TA \l "Nat’l Treasury Employees Union v. Von Raab, 489 US 656 (1989)" \s "Nat’l Treasury Employees Union v. Von Raab, 489 US 656, 674, 109 S Ct 1384, 1395 (1989)" \c 1 } The Department of Health and Human Services issued mandatory guidelines for drug testing in 1994; these require testing to be performed on urine specimens. See FR volume 69, No. 71 at 19644. The Department of Transportation which administers the congressionally required transportation industry testing programs follows those guidelines. These have been rigorously constructed and implemented and supported by years of analysis and research and have resulted in a series of regulatory best practices designed to ensure accuracy, quality control, repeatability of results. There are more than 20 required steps just for specimen collection. Drug testing must be done by urinalysis with a confirmatory test to ensure reliability. Testing laboratories must meet rigid requirements and the results and processes must be reviewed by a medical review officer.¹¹ The federal Department of labor encourages employers to follow these federal standards in their policies.¹²

If there were a better, cheaper, faster way to ensure reliable results, this agency which has administered the largest testing program in the country would have implemented it in the decades they have operated the program. The following comments of the Federal Railroad Administration upon the issuance of its 1985 regulations are pertinent and demonstrate the careful analysis the agency did before adopting urine testing as its best practice:

“It has recently become possible to evaluate alcohol use by a horizontal gaze nystagmus test (precise measurement of eye movement). However, use of this technique requires considerable training and practice; it is not presently a substitute for more direct measurement of blood alcohol levels; and it does not appear likely that any significant portion of railroad supervisors could be qualified in this technique, given the many competing demands on their time and attention.

If detection of alcohol use is difficult, detecting the use of the wide variety of controlled substances presents a challenge that is even more formidable. Many drugs of abuse produce effects much more subtle or complex (and sometimes more pernicious) than alcohol. Although cases of more extreme drug intoxication (or withdrawal) may produce symptoms and behaviors sufficient to trigger detection, most drug abusers will be careful to control their demeanor when there is a threat of detection. Commenters in this rulemaking generally recognized this problem, although labor spokesmen sometimes contended that co-workers know who is doing drugs (in some cases, presumably, because of the admissions of the drug user or observation of drug use).

¹¹ <http://www.fmcsa.dot.gov/safety-security/safety-initiatives/drugs/drug-guidelines.pdf>

¹² <http://www.dol.gov/elaws/asp/drugfree/drugs/screen92.asp>.

At least one large metropolitan police department has begun developing techniques for evaluating subjects to determine drug intoxication by category of substance, using highly trained and practiced observers. However, the utility and transferability of this expertise is only now being evaluated. Certainly there are no shortcuts on the horizon.

Although it is possible to provide railroad line supervisors with enough information to evaluate egregious cases and from a reasonable suspicion of drug impairment sufficient to warrant further evaluation (or testing), it is not realistic to suppose that supervisors can do what physicians, police officers and others cannot--readily detect drug use by a substantial portion of persons who are currently impaired. Again, many hospitals routinely run drug screens on patients admitted for treatment precisely because of the difficulty of detection (and the need both to respond to problems of toxicity and avoid interactions with therapeutic drugs) and the potential confusion between drug use symptoms and other physical or mental problems.

In sum, to decide that alcohol and drug use in railroad operations will be dealt with only where acute effects are so dramatic as to become notorious would be to acquiesce in the continuation, and potential growth, of this problem. From the point of view of regulatory strategy, the only present alternative to such acquiescence is the selected use of breath and body fluid testing. With reluctance, but without regret, FRA has chosen that alternative.” Control of Alcohol and Drug Use in Railroad Operations; Final Rule and Miscellaneous Amendments 50 FR 31508, 31527 (1985)

Oregon could, of course, spend its scarce resources trying to see whether it can reinvent this particular wheel but the likelihood of improving upon it seems unlikely. The money would be better spent elsewhere. Moreover, if Oregon heads down a different path from the rest of the country, its employers who operate in other states are going to be put in difficult positions. At worst, they would have to operate one set of substance abuse policies for other states of operation, and a separate set of policies for Oregon. Many would conclude it would be easier to forego an Oregon operation.

MEDICAL MARIJUANA COMPLIANCE ROADMAP RECOMMENDATIONS TO AVOID OREGON LEGAL PROBLEMS

1. Policy considerations.
 - A. Federally mandated testing programs
 - (1) No change is permissible
 - (2) All federal testing programs require marijuana to be prohibited
 - B. General company policy
 - (1) Review current (or proposed) policy statements
 - (2) Identify all provisions affecting marijuana users
 - (3) Delete any language that absolutely prohibits marijuana use?
 - (4) Prepare new provisions
 - a. Notice to employees of how marijuana use will be treated
 - b. Identifying need to have current and valid state authorization
 - (5) Reminding employee of statutory prohibitions
 - a. No use on the premises
 - b. No use during work
 - c. No driving under the influence of marijuana
 - d. No use in public view
 - (6) Identify processes
 - a. Should you require advance notice of use
 - b. What verification do you want
 - C. General caveats
 - (1) Consider treating marijuana same as prescription medication
 - (2) Consider whether to make policy changes on interim basis
 - (3) A comment about language: "Prescribed" is a term of art; marijuana cannot be "prescribed" but it can be "authorized"
2. Is there a disability?
 - A. Evaluate whether employee has a disability
 - B. Borrow from BOLI: http://www.boli.state.or.us/BOLI/TA/T_FAQ_Disability.shtml
 - C. Borrow from the EEOC: <http://www.eeoc.gov/policy/docs/902cm.html>
 - D. User who does not have a disability is not protected by disability statute
3. Is a reasonable accommodation available that does not require marijuana use?
Consider requiring medical opinion about other available medications

4. Is the employee a direct threat?
 - A. Individualized assessment
 - B. Present ability to perform essential functions safely
 - C. Based on objective reasonable medical judgment
 - D. Considering
 - (1) The duration of risk;
 - (2) The nature and severity of potential harm;
 - (3) The likelihood that potential harm will occur; and
 - (4) The imminence of potential harm.

5. Is an accommodation possible?
 - A. In the incumbent job?
 - B. In a different job?
 - C. Borrow from the EEOC: <http://www.eeoc.gov/policy/docs/accommodation.html>

6. Is the accommodation unreasonable

7. Initiate and carry out an interactive process with employee.
 - A. Identify necessary verification
 - (1) The Oregon program is confidential
 - (2) You cannot call and check on the status of your employee
 - (3) You can require the employee to provide authorization to verify the card
 - (4) Make sure you understand Oregon's program
<http://www.dhs.state.or.us/publichealth/mm/index.cfm>

8. Document your processes and decision making.

ABOUT THE AUTHOR

Barran Liebman LLP is an Oregon law partnership dedicated to representing employers and finding solutions for their labor-management and employment needs. The firm represents employers in various matters including union organizing, unfair labor charges, non-competition agreements, collective bargaining, sexual harassment, and wrongful discharge. The firm's clients include major corporations in banking, computer manufacturing, software development, employment, hospitality, forest products, health care, insurance, retail, publishing, security, shipping and trucking. Detailed information about the firm's attorneys, products and services is available on the Internet at www.barran.com.

Paula A. Barran is a founding partner of the firm. She has been practicing labor and employment law since 1980. She has written extensively on employment and management law and is a nationally known speaker. Her practice includes advice and assistance to employers designing substance abuse programs, and she donates time to a number of state-wide initiatives which offer low cost employer training. In addition to providing regular employer advice, Ms. Barran handles employment litigation in state and federal courts as well as labor and employment arbitration. She is a fellow of the American College of Labor and Employment Attorneys, the Litigation Counsel of America and the American Bar Foundation. She is the Chambers and Partners top ranked management labor and employment attorney in Oregon, has been named in The Best Lawyers In America directory since 2001, and in Oregon Superlawyers. She is admitted to practice in Oregon and Washington and before the U.S. Supreme Court, the U.S. Court of Appeals, Ninth Circuit; U.S. District Court, District of Oregon and U.S. District Court, Western District of Washington. Ms. Barran received her Ph.D. degree from the University of British Columbia, an M.A. degree from Cornell University, an LL.B. degree, with honors, from Osgoode Hall Law School at York University, and an M.B.A. degree from the University of Oregon, Oregon Executive MBA program.