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DRUG CZAR AND DOT SECRETARY ISSUE GUIDANCE THAT MARIJUANA SMOKING PROHIBITED IN SAFETY-SENSITIVE JOBS DESPITE CALIFORNIA PROPOSITION 215 AND ARIZONA PROPOSITION 200.

Statement of General Barry R. McCaffrey, Director, Office of National Drug Control Policy and Secretary of Transportation Federico Peña

National Drug Control Policy Director General Barry R. McCaffrey and Transportation Secretary Federico Peña today issued a strong national warning from the Clinton Administration that the Federal transportation drug testing laws will continue to be fully enforced without effect from the recent passage of California Proposition 215 and Arizona Proposition 200.

According to the formal national advisory, safety-sensitive transportation workers who test positive under the Federally-required drug testing program may not under any circumstance use the new laws as a legitimate medical explanation for the presence of prohibited drugs.

“The law is clear,” said General McCaffrey and Secretary Peña, “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.”

In the world of transportation, safety is the highest priority. The welfare and confidence of the American public using our airplanes, railroads, and highways depend on transportation workers’ unwavering commitment to safety. The use of marijuana and other illicit drugs is incompatible with transportation safety. Since 1988, the Department of Transportation (DOT) has required drug testing of employees in transportation industries to deter drug use. This is similar to the drug testing program the armed forces has used for more than a decade and to the Federal employees drug testing program mandated since 1986.

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Under Department of Transportation drug and alcohol testing program rules, if you are a truck driver, airline pilot, railroad engineer, or other safety-sensitive transportation employee, and you test positive for drugs, you will not continue your function. If the laboratory finds drugs in your system, you have the opportunity to discuss the test with a doctor, called a medical review officer (MRO). If the MRO finds that there is a legitimate medical explanation for the presence of the drug, the MRO declares the test to be negative. The use, however, of marijuana under California Proposition 215 or of any Schedule I drug under Arizona Proposition 200 is not a legitimate medical explanation. As a matter of fact and a matter of Federal law, marijuana and other drugs listed on Schedule I of the Controlled Substances Act do not have a legitimate medical use in the United States. Thus, if you test positive for marijuana, and tell the MRO that a doctor recommended or prescribed the use of marijuana for you, the MRO will verify the test positive. You will have to stop performing your safety-sensitive transportation function.

Today, the Clinton Administration is issuing new guidance to MRO's re-emphasizing this fact. The policy announced today affects:

-- 8 million workers in Federally-regulated transportation industries, for example:
- 6.6 million holders of commercial drivers' licenses
- 340,000 aviation personnel including flight crews, attendants, and instructors; air traffic controllers; aircraft dispatchers; maintenance, screening, and ground security coordinator personnel
- 200,000 mass transit employees including vehicle operators, controllers, mechanics, and armed security personnel
- 80,000 railroad employees including Hours of Service Act employees; engine, train, and signal services, dispatchers, and operators
- 120,000 pipeline workers including operations, maintenance, and emergency response personnel
- 120,000 crewmembers operating commercial vessels

We encourage private employers and any others doing non-Federal drug testing to follow our lead.

The Office of National Drug Control Policy and the Department of Transportation, as well as other Federal, state, and local agencies responsible for health, safety, youth education and law enforcement strongly oppose the California and Arizona drug legalization measures. These measures contradict Federal law. They violate the medical-scientific process by which our nation evaluates and approves safe and effective medicines for use in the United States. They send the wrong message to our

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children. They undermine the concerted efforts of parents, educators, businesses, elected leaders, community groups and countless others to achieve a healthy, drug-free society.

Absent clear Federal action, these two Propositions will impair the safe performance of transportation and other safety-sensitive functions. We are taking such action today.

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RECENT DRUG INITIATIVES IN CALIFORNIA AND ARIZONA

Q. How should medical review officers respond to recent California and Arizona initiatives concerning the medical use of marijuana and other drugs?

Answer:

Background

On November 5, 1996, California voters passed an initiative (Proposition 215) authorizing physicians to recommend the use of marijuana for the treatment of cancer, AIDS, anorexia, chronic pain, spasticity, glaucoma, arthritis, migraine, "or any other illness for which marijuana provides relief." A prescription or other written record of the recommendation for marijuana is not required to authorize its use under the new state law.

In Arizona, voters passed an initiative (Proposition 200) regarding the medical use of drugs. It is in some ways broader and in some ways narrower than the California initiative. It is broader because it applies to all drugs identified on Schedule I of the Controlled Substances Act, not just marijuana. It is narrower because it requires a physician's prescription for legal use of Schedule I drugs, following a second opinion from another physician. Such a drug may be prescribed "to treat a disease, or to relieve the pain and suffering of a seriously ill patient or terminally ill patient."

DOT Policy

The use of Schedule I drugs, whether for recreational or medicinal purposes, is inconsistent with the performance of safety-sensitive transportation functions. The initiatives do not affect Department of Transportation rules concerning the use of these drug by employees performing safety-sensitive duties. For example, Federal motor carrier safety rules prohibiting the use of controlled substances by commercial motor vehicle drivers continue to apply to the use of these Schedule I drugs, without change.

Guidance to MROs

When the laboratory test of an employee's specimen shows the requisite amount of any of the substances for which the Department requires testing, the Department's rules impose the consequences of a positive test unless the MRO determines that there is a legitimate medical explanation for the presence of the substance. A legitimate medical explanation must include documentation that the employee obtained the substance in a

manner consistent with the requirements of Federal law, including the Controlled Substances Act. These requirements include, with a few specific exceptions set forth in Federal rules[1], a prescription or other valid order issued by an authorized practitioner and filled by a licensed pharmacist.

What should the MRO do if an employee documents that a physician prescribed or recommended marijuana under California Proposition 215 or prescribed marijuana or any other Schedule I drug under Arizona Proposition 200?[2] The MRO must, in every case, determine that there is not a legitimate medical explanation for the presence of the drug.

This result is required by Federal law. Under the Controlled Substances Act, a Schedule I drug is one which "has no currently accepted medical use in treatment in the United States [and] there is a lack of accepted safety for the use of the drug...under medical supervision."[3] A drug which, as a matter of Federal law, has no currently accepted medical use in treatment cannot form the basis of a legitimate medical explanation in a Federally-mandated drug testing program. Moreover, the Controlled Substances Act authorizes physicians to prescribe only drugs in Schedules II-V.[4] This means that a physician cannot, under Federal law, legitimately prescribe a Schedule I drug to a patient. A prescription unauthorized by Federal law cannot form the basis of a legitimate medical explanation in a Federally-mandated drug testing program.

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[1]-For example, a physician may administer a narcotic to a patient to relieve acute withdrawal symptoms while treatment is being arranged (21 CFR 1306.07(b)); an individual practitioner may dispense a Schedule II substance directly in the course of his professional practice (21 CFR 1306.11(b)); and a pharmacist may dispense a Schedule II substance in an emergency with the oral approval of a practitioner (21 CFR 1306.11(d)).

[2]-This guidance also applies with respect to any other state in which a statute or court decision may authorize the allegedly medical use of marijuana or other Schedule I drugs or make "medical necessity" an affirmative defense to a charge of possession of a controlled substance. See for instance Rev. Code Wash §69.51.020 - .040; Ohio Revised Code Annotated 2925.11(I); Jenks v. Florida, 582 So. 2d 676 (1991); Idaho v. Hastings, 801 P. 2d 563 (1990); Washington v. Diana, 604 P. 2d 1312 (1979).

[3]-21 U.S.C. 812(b)(1). The Schedule I drugs for which DOT requires testing are marijuana, heroin, and PCP. Cocaine, amphetamines, methamphetamines, marinol, and many opiates are in Schedule II or other schedules

The Department's drug testing program is national in scope. Its objective is to foster nationwide transportation safety by ensuring that safety-sensitive transportation employees everywhere in the country do not abuse drugs. One of the bases on which the Department's rules pre-empt state law is that "compliance with the State or local requirement is an obstacle to the accomplishment or execution of any requirement" of the Department's rules.[5]

CLAIMS OF INGESTION OF HEMP FOOD PRODUCTS

Q. How should MROs respond to an assertion by an individual with a confirmed drug test for marijuana that the legal ingestion of food products containing hemp accounts for the presence of THC in the specimen?

A. Recently, some manufacturers have begun to market food products containing hemp seeds or extracts. Some news reports have suggested that eating one of these products may produce levels of THC (the marijuana metabolite the presence of which laboratory tests confirm in the DOT program), high enough to result in a confirmed positive test in the Department's drug testing program. An individual with a confirmed positive test for marijuana might assert to an MRO that the test should be verified negative because the THC in his or her specimen came from a legally obtained hemp food product.

It is not clear, at this time, whether the reports that one or more hemp food products can result in a confirmed THC positive are accurate. The Department of Health and Human Services (DHHS) is conducting research aimed at answering this question. In addition, the Drug Enforcement Agency (DEA) is currently considering whether to determine that hemp snack bars are illegal, on the basis that they contain a controlled substance.

Regardless of the outcome of the DHHS and DEA actions, MROs must never accept an assertion of consumption of a hemp food product as a basis for verifying a marijuana test negative.

[4]-21 U.S.C. 823(f). The only exception is a prescription that is part of a research project approved by the Secretary of Health and Human Services

[5]-This language is from the Federal Highway Administration rule, 49 CFR 382.109(a)(2). There is parallel language in other modal rules

Whatever else it may be, consuming a hemp food product is not a legitimate <u>medical</u> explanation for a prohibited substance or metabolite in an individual's specimen. When a specimen is positive for THC, the only legitimate medical explanation for its presence under the Department's drug testing program is a prescription for marinol.

To the extent that the California or Arizona initiatives were construed to authorize or require MROs to determine that a legitimate medical explanation exists when Schedule I drugs are prescribed under state law, the Department would view them as pre-empted as creating a serious obstacle to the implementation of the Department's nationwide safety rules. For example, MROs nationwide would be asked to verify marijuana positive tests differently depending on whether the employee obtained marijuana after a physician's recommendation in California or through other means in other states. MROs would be asked to act at variance with Federal law in the context of a Federally-mandated program. This result is unacceptable. When a specimen is positive for THC (the marijuana metabolite the presence of which laboratory tests confirm in the DOT program), the only legitimate medical explanation for its presence under the Department's drug testing program is a prescription for marinol.

It should also be pointed out that an employee can obtain marijuana under California Proposition 215 without a prescription, or even a written recommendation, from a physician. There are no circumstances under which it is appropriate for an MRO to accept, as a legitimate medical explanation for the presence of THC in an employee's specimen, the verbal or written recommendation of a physician for the use of the marijuana. If the employee presents documentation of a "recommendation" that is not a prescription, or does not produce any documentation at all, the MRO has no basis to determine that there is a legitimate medical explanation for the presence of THC in an employee's specimen.

We would also remind MROs that the Department's rules authorize MROs to provide medical information learned during the verification process to employers when the information would result in the medical disqualification of an employee under DOT rules or the information indicates that the continued performance of safety-sensitive functions could pose a significant safety risk. The use of any Schedule I substance by an employee performing safety-sensitive functions in transportation meets these criteria.