

UNDERCONSTRUCTION

Clearing the Smoke: Workplace Safety Issues Clouded by Medical Marijuana

Phillip B. Russell

Before we try to clear the smoke on the issue of medical marijuana, let's put the subject in its proper context. Regardless of the strength of the arguments in favor of or against medical marijuana usage, its use in the workplace is primarily a safety issue. Construction sites are inherently hazardous. In 2015, of 4,379 private industry fatalities, 937 (21.4%) were in construction.¹ Prudent construction employers now have a new safety threat: the expanding use of medical marijuana and the expanding cultural expectation that employees should be allowed to light up any time because of health issues.

Marijuana's Negative Effects

Construction workers must have full use of their skills and faculties while performing their jobs. Medical marijuana may have positive medical benefits, but there are also well-documented negative effects. Some negative effects to the central nervous system, among others include changes in sensory perception, short-term memory problems, and impaired thinking. Negative physical effects include impaired motor performance, loss of balance and coordination, decreased attentiveness and alertness, prolonged response time to stimuli and danger, decreased ability to judge distance and space, and impaired ability to perform complex tasks.

These negative effects could be disastrous on a job site. Unlike most other drugs, prescription or otherwise, the problem with medical marijuana is in determining whether an employee is potentially subject to these negative effects on a jobsite. Currently, there is no reliable metric for determining when a particular level of THC from marijuana usage impairs the user and for how long that user remains impaired. THC and other psychoactive components stay in the body much longer than alcohol. Studies regarding the duration of impairment show the duration of impairment from marijuana use may be longer than previously known and could be up to 24 to 48 hours. Chronic use of marijuana may have long-term brain effects that could impair construction workers even if they are not actively smoking on the jobsite.

Expanding Use of Medical Marijuana

Marijuana usage is broad-based, particularly with younger Americans. In a recent survey, 31.6% of people 18-25 used marijuana in 2013. But, the largest growth among marijuana users is in the 55 – 64 age group with an increase of 455% from 2002 to 2014.

Marijuana laws vary widely state to state. Of states that have medical or recreational marijuana use, some expressly allow employers to enforce their drug-free workplace policies, including CA, CO, DE, IL, MT, NV, NH, and WA). Some have anti-discrimination provisions for lawful use outside the workplace, including AR, AZ, CT, DE, IL, ME, MN, NY, NV, PA, and RI. In my home state of Florida, we still do not have details for our soon-to-be implemented voter-approved constitutional amendment.

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Isn't Marijuana Still Illegal?

Yes marijuana use (medical or recreational) is still technically illegal under federal law because marijuana is a Schedule I Narcotic under the Controlled Substances Act. Under the CSA, it is illegal to manufacture, sell, distribute, or possess marijuana. No DEA-certified physician may prescribe marijuana. Medical marijuana is illegal under federal law as a controlled substance. However, 28 states have passed laws authorizing the medical use of marijuana.³ The most recent is my home state of Florida. Although there is generally no legal protection for use, possession, or intoxication at work, the expansive adoption of medical marijuana laws by the states poses significant legal and practical issues for construction industry employers who value safety.

OSHA's General Duty Clause

OSHA does not have a specific standard that prohibits drug use or impairment from drug use on a job site. OSHA also does not expressly prohibit post-accident drug testing. Many states' workers' compensation statutes actually require post-accident drug testing to earn premium discounts. However, the General Duty Clause, Section 5(a)(1) of the OSH Act, may be applicable: "Each employer shall furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees." The General Duty Clause is intended to protect employees when there is no particular standard that applies. For example, OSHA has targeted such recognized unregulated workplace hazards as combustible dust and internal traffic control plans in highway work zones. It's conceivable OSHA could attempt to use the General Duty Clause if a medical marijuana use is a factor in a workplace accident. Time will tell.

OSHA's Controversial Post-Accident Drug-testing "Rule"

In May 2016, OSHA announced a new electronic record-keeping rule that contained what many interpreted as an attempt to prohibit post-accident drug testing. OSHA originally stated that the test must measure impairment at the time of the injury. OSHA later clarified and said it "will only consider whether the drug test is capable of measuring impairment at the time the injury or illness occurred where such a test is available." "OSHA will consider this factor for tests that measure alcohol use, but not for tests that measure the use of any other drugs." In light of this language, employers can expect to discipline employees based on positive drug tests for marijuana and other drugs where the test is not capable of measuring the level of impairment at the time of the injury. As of this article, implementation of the "rule" has been delayed and is in doubt. Regardless, post-accident drug testing is seen by many safety professionals and construction industry employers as an important and critical element to maintaining a safe workplace.

The Drug-Free Workplace Act (DFWA)

The federal DFWA applies to certain federal contractors and grant recipients, but the misunderstandings about the DFWA's scope and requirements far exceed its actual requirements. First, the DFWA does not require drug testing in the workplace. It does not require employers to fire employees for a positive drug test. All it requires is a continuous good faith effort to maintain a drug-free workplace by publishing or distributing a policy, specifying actions for policy violations, providing education about drug use and employee assistance programs. For most employers, if they are complying with state drug-free workplace statutes, they will have gone above and beyond DFWA's requirements. The law really provides no meaningful guidance on medical marijuana.

Must An Employer Accommodate Medical Marijuana Usage?

Not yet. One of the key questions presented by medical marijuana laws is whether an employer must accommodate an employee's medical usage. In *Ross v. Raging Wire Telecomm., Inc.*, 42 Cal.4th 920 (Ca. 2008), an applicant for employment tested positive for marijuana and told his prospective employer he used marijuana for medical reasons. There was no issue in the case about on-site or working time marijuana use. The California Supreme Court held California law did not require the employer to accommodate any employee's on or off premises medical marijuana usage and it could conduct pre-employment drug testing. The Ross decision is not without controversy and has been cited and criticized, so it is not likely to remain the last word on these issues. Accommodations could include permitting a positive drug test result, granting more flexible leave (such as intermittent FMLA leave), or job transfers (out of safety sensitive positions).

On June 9, 2017, the Florida Legislature sent a bill to Governor Rick Scott implementing the Florida Medical Marijuana Legalization Initiative, which voters approved in November 2016. (SB 8-A).⁴ While many aspects of the bill have been covered in other publications, the most important section of the bill for Florida employers has received scant attention. Section 381.986 of the Florida Statutes has been amended to provide:

This section does not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy. This section does not require an employer to accommodate the medical use of marijuana in any workplace or any employee working while under the influence of marijuana. This section does not create a cause of action against an employer for wrongful discharge or discrimination. Marijuana, as defined in this section, is not reimbursable under chapter 440.

Court challenges are likely, most certainly on the aspect of the legislation that precludes actual smoking of marijuana. It is unclear what the result of a court challenge would be on the section that excludes smoking.

The constitutional amendment provides that “[n]othing in this section shall require any accommodation of any on-site medical use of marijuana in any correctional institution or detention facility or place of education or employment, or of smoking medical marijuana in any public place.”

In any event, the legislation gives Florida employers some degree of protection if they do not want intoxicated employees on their worksites. This is also consistent with the federal Department of Transportation rule that medical review officers will not verify a drug test as negative based upon information that a physician recommended that the employee use medical marijuana. Under those rules, “[i]t remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation’s drug testing regulations to use marijuana.”

What Have Courts Said About Drug-Free Workplaces and Medical Marijuana?

There have been relatively few reported cases regarding marijuana use. The most often discussed are from Colorado and California. In *Coats v. Dish Network, LLC*, the Colorado Supreme Court held the termination of an employee for off-duty, medical marijuana use was lawful. 350 P.3d 849 (Co. 2015). The employee worked in a job that was not safety-sensitive. He failed a random drug test under the company’s “zero tolerance” drug-free workplace policy and was terminated. The employee argued Colorado’s Lawful Activities Act prohibited his termination for “engaging in any lawful activity off the premises of the employer during nonworking hours.” The Court held that under the Lawful Activities Act, the “lawful” activity must be legal under state and federal law and that marijuana remained illegal under the federal Controlled Substances Act. The *Coats* decision’s potential impact is widespread because 35 states have lawful off-duty conduct statutes similar to Colorado’s Lawful Activities Act (e.g., California Labor Code § 96(k).) Although the case is not binding on other states’ courts, it could be persuasive.⁵

Conclusion - What Should Contractors Do Now?

Medical marijuana is a safety issue. Prudent employers will treat it that way and not let down their guard to this expanding job site risk. Construction industry employers should take the following actions:

- Remind employees that on-the-job impairment is not tolerated and that medical marijuana is no exception (see below sample policy).
- Update your drug-free workplace policy and drug-testing policy and procedures (see below sample policy for one component).
- Provide employee education on company policies and impact of legal changes (with emphasis on safety!).
- Train supervisors and managers on how to spot issues that may need further consideration.

- Offer employee assistance where appropriate (e.g., for serious health conditions under the FMLA or disabilities under the ADA).

Sample Policy Language for Construction Industry Employers:

Your Safety and Marijuana Usage

ConstructCo puts safety first. The safety of our employees, other contractors’ employees, and the general public is our highest priority. Although many states have recently passed laws attempting to legalize medical and recreational marijuana usage, marijuana usage for any purpose remains illegal under federal law and is a serious risk to health and safety on a construction site. ConstructCo strictly prohibits illegal drug possession, use, or impairment, and medical marijuana is no exception, even if a state has a medical marijuana law. ConstructCo intends to follow all state and federal laws, but where they conflict, the company will follow the stricter federal law. ■



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Endnotes

1. United States Department Of Labor, Occupational Safety and Health Administration, <https://www.osha.gov/oshstats/commonstats.html> (last visited May 25, 2017).
2. As of this writing, eight states and the District of Columbia (AK, CA, CO, DC, MA, ME, NV, OR, and WA) have legalized recreational use – but, that is another article!
3. Florida Preserves Employer Protections in Medical Marijuana Bill (Ogletree Deakins Blog, Edmund J. McKenna, June 13, 2017) <https://ogletree.com/shared-content/content/blog/2017/june/florida-preserves-employer-protections-in-medical-marijuana-bill>
4. See, e.g., *Stanley v. County of Bernalillo Commissioners*, 2015 WL 4997159 (D. N.M. 2015) (in remanding case to state court, noting the *Coats* decision’s possible impact on state court decisions).

ON CORPORATE COUNSEL’S DESK Effective Use of Construction Experts: An In-house Perspective

From Div. 11

Brian E. Neuffer, with CTLGroup from Skokie, Illinois, explores ways attorneys can effectively utilize experts in construction cases from the perspective of an in-house attorney. He provides valuable tips to maximize the retention of construction experts. Read *Effective Use of Construction Experts: An In-House Perspective on Under Construction Online* at <http://ambar.org/FCLUC>.

Making the Personal Case For the Forum

In my last two articles in Under Construction, I began developing a theme for my articles. Since becoming Chair Elect, I have been highlighting the advantages of the Forum — whether as a training ground for junior lawyers (or lawyers new to the field), as a source of business, or as a legal resource. While the theme may stem from my membership committee roots, I have always felt the need to draw other construction lawyers into our fold and help them fall in love with the Forum, just as I did more than 17 years ago.

My last article focused on the “business case” for Forum membership. In this bottom-line driven world, where the billable hour seems like everything, this business case is an important one. More important to me, however, is the “personal case” for Forum membership, and what I can say about that.

As a woman in this industry, and as a former junior lawyer myself, I often felt outnumbered, sometimes intimidated, and, quite frankly, out of place. While being a woman in this industry sometimes set me apart — not always a bad thing when you can use it to your advantage (which I undoubtedly tried to do) — I still needed a “home” where I could learn, thrive, and feel welcome. The Forum provided that place for me. I first found a home in Division 8 (the “International Construction” division) as their liaison to the then newly formed young lawyers committee. There, I was able to form valued and long-term relationships with people like Chris Caputo and Keith Bergeron, people who became my partners in crime for late nights and stellar meals. In Division 8, I not only gained knowledge that was valuable to my practice, but it gave me the opportunity to interact with lawyers throughout the globe who would become my friends and colleagues. I was also welcomed into the membership committee, where I met some of the amazing former leaders of the Forum, including George Meyer, Greg Cashion, and Anne Gorham (to name just a few), eventually working my way up to Chair of that group. As my circle grew in the Forum, so did I.

I grew to crave the camaraderie far more than the CLE (although the CLE is always good). It was the friendships that I formed that had me coming back year after year, meeting after meeting, wherever the Forum could take me—and it took me to some pretty awesome places!

Don’t tell my State Bar, but I far more enjoy the time I



spend in the corridors and exhibitors spaces outside the meeting rooms, talking with my fellow attendees and valued exhibitors. The people that I meet at the forum events are not competitors, they are not trying to sell me anything: most of them are my friends and I look forward to seeing them and finding out how their lives are going, hearing about the good and the bad. Sure, sometimes those connections lead to work acquisition, but that is not why most of us are really here, is it? For many of us, me, the real reason we are here (and the reason we come back year after year, meeting after meeting) is to see the friends that we have made, who share similar experiences to ours (including the ups and the downs), and who can commiserate, congratulate and celebrate with us.

These are people I know and trust. When I made scary and uncertain moves in my life and career, the friends I made in the Forum were there to encourage me, motivate me, and also to catch me if I fell.

Thank you to all of you whom I have met throughout my time in the Forum and those whom have enriched my life in ways I could never have imagined when I first joined. My hope is that every member of the Forum at some point in time realizes just what a gem the Forum is, and takes full advantage of (and fully appreciates) one of its most valuable gifts: the people. While the programs and publications are certainly excellent, the true lifeblood of the Forum and what makes this organization so special are the people who make it all happen and are the true heart of the Forum. ■



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Contractor Participation in Private Project Financing: A Landscape of Opportunity, Risk and Reward

Luke Hagedorn and Justin R. Watkins

There are two fundamental truths in the large-scale Engineering, Procurement and Construction (EPC) and Balance of Plants (BOP) markets: 1) project owners must raise significant capital to finance their projects, often requiring creative approaches to financing, and 2) the universe of EPC/BOP contractors that can provide critical specialized services is limited, making competition for contracts intense. In this particularly demanding marketplace, an opportunity is emerging for EPC/BOP contractors to participate in project financing and to stand out among the competition. Of course, contractor participation in project financing brings inherent risk, and contractors and owners must evaluate a number of factors before considering any such partnership.

Contractor Financing in Action

While not yet a pervasive feature of the construction marketplace, contractor participation in project financing is not unprecedented.

During the mid-2000s, for example, the ethanol industry used contractor financing when a large number of biofuel facilities were constructed across the United States. It became common for equipment vendors and BOP/EPC contractors to participate directly in financing the construction of ethanol facilities. Generally, contractors would either commit an initial investment of funds to the project, or would offer their services at a reduced rate, and in return would receive an equity position in the project entity through issuance of either common or preferred units. The units allowed the contractor to appoint one or more members of the project entity's board of directors and would specify a predetermined dividend amount be paid to the contractor by a certain date. Project owners were rewarded under this financing structure not only by receiving a portion of their capital needs, but also by attaching the reputation and experience of some of the most knowledgeable contractors in the biofuels industry to their projects.

More recently, in August of 2016, Lion One Metals Limited and Ansteel-CapitalAsia Global Engineering Inc. revealed their agreement to a contractor-financing structure involving substantial contractor investment for the development of a gold processing plant in Fiji.¹ Ansteel agreed to perform EPC services for the project, and to finance up to 80% of the anticipated value of the EPC Contract in the form of a deferred payment of up to \$44,000,000, with Lion One providing the remaining 20% of the anticipated EPC Contract value.² The deferred payment would be treated as a senior secured obligation, secured by project assets, and to be repaid in

quarterly installments plus 7% annual interest.³ Lion One also issued ownership units to Ansteel equal to approximately 10% of the deferred payment amount that would mature upon the earlier of the final scheduled deferred payment, or 5 years.⁴

Potential Contractor-Finance Structures

As illustrated in the ethanol industry and with the Lion One project, contractor financing can provide additional flexibility and security to project delivery, and can create a significant investment opportunity for contractors, as it adds an additional layer of financing with characteristics that often resemble a standard construction loan, but that can also deviate from that model in various respects.

With a standard construction loan, the lender provides a non-recourse loan, secured by assets of the project, and repaid with project revenue. When contractor financing is modeled after a standard construction loan, the contractor provides a portion of the project capital, either through a direct payment of cash or through deferred payments that would otherwise be owed under the EPC or BOP agreement. As consideration, the contractor may receive an equity interest in the project or have its deferred compensation paid, plus interest or some other inflationary factor, upon the achievement of a certain project milestone(s). The contractor's capital investment may also be repaid over time through distributions or other mechanisms tied to on-going proceeds of the project.

Within this construction loan model, the owner and contractor have freedom to form their relationship to balance the allocation of both risk and reward. For example, the EPC/BOP contractor could directly obtain an equity interest in the project company, thus establishing a joint-ownership relationship that could be governed by the equivalent of a participation or joint operating agreement. The joint entity can be established with several tiers of ownership units, some common and some preferred, with distributions for preferred units tied to certain predefined goals or metrics. The EPC/BOP contractor's interest can then be granted through an issuance of select ownership units, which in turn dictate the terms and rate of repayment. The units could be either callable or puttable by the unit-holder, allowing the upside and the downside of the potential return to be negotiated and tailored between the parties.

Venturing further from the traditional construction loan model and traditional project roles, the parties can also enter into a purely contractual relationship under a joint development or strategic alliance agreement defining the rights and obligations of the parties, including capital investments. The terms of the arrangement dictate or

limit the type of interest and repayment terms for the overall financing, so a thoughtful approach is required. With a joint development or strategic alliance agreement in place, a more traditional loan-type investment (as opposed to equity participation in the project company) may make the most sense, as the terms of the repayment will be more dependent on contractual terms, rather than tied to equity participation. But this structure offers significant additional freedom to allocate risks and benefits through defined management rights, distribution and repayment terms, and exit rights between the parties.

Careful consideration must be given to the structure underlying any contractor participation in financing. There are a host of factors and issues that can profoundly impact the overall structure that is proposed, including potentially significant tax ramifications tied to the classification of ownership interests, and of the allocation of income and losses, as well as potential securities, usury or anti-trust issues, all of which must be carefully analyzed.

Unique Benefits and Risks of Contractor-Financing

Contractor financing proposals can offer advantages for both owners and contractors. The project owner can secure a portion of their overall capital need, with some additional freedom to creatively structure the terms and repayment of the investment to benefit the overall economic viability of the project. Additionally, by having an EPC/BOP contractor with skin in the project, the owner ensures the contractor is strongly incentivized to help the project succeed. For the EPC/BOP contractor, there is the opportunity for substantial differentiation from the competition, and to greatly increase the chance of securing the contract. Contractor-financing also presents a unique opportunity for EPC/BOP contractors to diversify their financial portfolios and revenue streams.

Contractor-finance proposals also raise unique risks. Fundamentally, contractor-financing can lead to a blurring of the traditional line between owner and contractor. As a result, it is vital that the parties carefully consider how participation may impact risk allocation. As examples, consider the following:

- Contractor participation in the overall project financing may complicate arbitration or litigation scenarios arising from non-payments, failure to perform specified services, etc.
- The EPC/BOP contractor might be deemed to possess increased knowledge (constructive or actual) of site conditions, regardless of how thorough a site investigation was actually performed.
- If the contractor has a right to participate in owner decision-making for the project, it may be bound by owner decisions regarding changes to the project scope, program, and budget, which could otherwise be disputable.
- Principles of compensable delay and other claim

rights that protect the contractor could be altered if the contractor is deemed jointly responsible for project conditions that would otherwise be typically under sole owner control.

- Equity ownership or contractual partnership that resembles a joint venture may alter the relationship between contractor and subcontractor, potentially impacting subcontractor lien rights, nullifying pay-if-paid provisions, and otherwise altering the anticipated contractual structure.
- Participating in project financing when the contractor is not involved in design could alter application of the *Spearin* doctrine and diminish the contractor's right to rely upon the adequacy of project design.

Though not necessarily material, if these considerations increase the owner's or EPC/BOP contractor's overall risk, they should be properly assessed when evaluating the transaction as a whole, and steps can and should be taken when drafting the contract documents to ensure that desired risk allocation is preserved.

A Good Tool for the Right Project

If the circumstances align, a contractor-finance proposal can be an excellent tool to help accomplish goals for both the project owner and the EPC/BOP contractor. The primary benefit is the significant flexibility available that grants the parties the ability to craft a structure tailor-made for the circumstances of the project, and to meet the goals of both the project owner and contractor. Of course, that is also its biggest risk, and it is important to fully consider all of the various issues that may arise, both legal and practical, as well as the appropriate allocation of risks and rewards between the parties. ■



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Endnotes

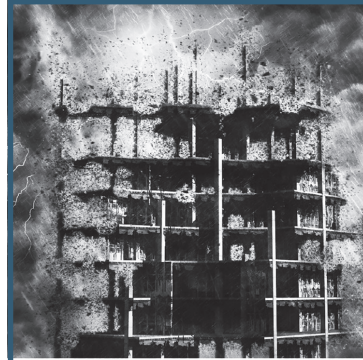
1. Press Release, Lion One Metals, Lion One Announces MOU for EPC Contract and Vendor Financing with Ansteel-CapitalAsia for Construction of the Tuvatu Gold Project (Aug. 24, 2016).
2. *Id.*
3. *Id.*
4. *Id.*

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BOOK PREVIEW

AIA A201 Deskbook

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In April 2017, the American Institute of Architects (AIA) released the 2017 editions of the A201 family of contract documents. This release includes updated versions of the AIA's flagship documents, developed for the design-bid-build delivery model. Working with architects, contractors, subcontractors, owners, and construction lawyers, the AIA Documents Committee engaged in a comprehensive and collaborative review process to update this core set of documents to ensure that the AIA Contract Documents reflect current industry standards. As one of the most widely used industry leading contract forms, the AIA agreements influence how clients and the courts view risk allocation and assign legal and commercial responsibility among the project participants in a construction project. Due to the importance of these changes to the industry, the ABA Forum on Construction's October 2017 Fall Meeting in Boston will focus on these changes and a new Forum publication — the A201 Deskbook — will be available for purchase in time for the 2017 Fall Meeting.

This publication is an essential addition to the library of all construction lawyers because all practitioners need to understand how these documents differ from past versions in order to advise client regarding the use and implications of these changes as well as effectively negotiate modifications whether proposed by clients or adversaries. The A201 Deskbook not only analyzes the changes from the 2007 to 2017 versions of the A201, but also serves as a single comprehensive reference point for court interpretation, legal analysis, business implications, and practice tips for all provisions of the A201. This book delivers a section-by-section analysis of how courts and commentators around the country have interpreted the A201 over the years and provides a current state of the law on the most significant A201 sections. The book does not take sides favoring the owner, contractor, or architect. Instead the book identifies the changes in the 2017 edition of the A201 and analyzes how the A201's individual sections have been interpreted by courts and/or modified by project participants over the years. This book should become an important reference as the first place you will look when negotiating or litigating a disputed term in the A201 and an effective teaching and research tool.

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