Collaborative Counsel Workshop
July 18, 2023

WELCOME

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COLLABORATIVE COUNSEL WORKSHOP

Antitrust Update

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ADA American Dental Association®

Antitrust Enforcement: President Biden and the Federal Antitrust Agencies

- President Biden has called for a "whole-of-government approach…to address overconcentration, monopolization, and unfair competition" with a focus on healthcare and labor

- DOJ: "The era of lax enforcement is over"

- State of the Union: "Pass the bipartisan legislation to strengthen antitrust enforcement"

- More ongoing investigations than ever at DOJ and FTC

Collective Sharing of Fee and Wage Information

- Surveys of average dental fees by procedure, dentists' income by region or specialty, employee v. non-employee dentists, dental staff salaries, etc.

- Regulators may see this data as a signal to competitors or other facilitation of an agreement to fix prices or suppress wages

- FTC/DOJ recently withdrew "antitrust safety zone" for healthcare data that was (i) managed by third party; (ii) more than 3 months old; and (iii) sufficiently aggregated such that individual providers could not be identified

- DOJ: policy was "outdated" and "overly permissive"

- New uncertainty: "a case-by-case enforcement approach"

- What is the business purpose for the information exchange and how does it help consumers and promote competition?

Actions By Dental Boards

SmileDirectClub, LLC v. Battle (11th Cir. 2020); *SmileDirectClub v. Tippins* (9th Cir. 2022); *and Leeds v. Board of Dental Examiners of Alabama* (N.D. Ala. 2019)

- In three recent cases, state dental board members argued that they were entitled to dismissal of the claims based on "state action immunity" because they acted on behalf of the State

- District courts held that the defendants had failed to establish that the board received active state supervision

- In the *Leeds* case, the FTC secured a consent decree enjoining the Alabama Dental Board from prohibiting non-dentist personnel from taking intraoral scans without on-site supervision by a dentist (2021)

Proposed Noncompete Ban

- Proposed FTC Rule to ban noncompete agreements

- FTC received nearly 30,000 comments

- Anticipating a rule will be issued:
  - ➢ Prohibiting entering into a noncompete clause with a worker (including independent contactors); and
  - ➢ Retroactively nullifying existing non-compete agreements

- Anticipating litigation to block the rule

No-Poaching Agreements

- Agreements not to solicit employees of a competing entity

- Ethics provisions that make poaching of competitors' employees unethical

- Biden administration has taken unprecedented steps to challenge no-poach agreements in healthcare (to increase mobility of labor market)

- FTC and DOJ: no-poach agreements "should be afforded the same treatment as market division or market allocation agreements," which are both *per se* antitrust violations, and can be criminal conduct

- Understandable desire not to spend time and money training employees only to have them leave and work for a competitor, but no-poach agreements should be avoided

A Valentine's Day "Noisy Exit"

FTC Chair Christine Wilson Announces Her Resignation From The FTC (Feb. 14, 2023 WSJ)

- "…disregard for the rule of law and due process …and I refuse to give their endeavor any further hint of legitimacy"

- "abuses of government power"

- "concerns about the honesty and integrity….staffers' discomfort…[with senior staff's] dishonesty and subterfuge…."

Where can we learn more?

The Antitrust Laws in Dentistry (ADA 2007), a publication authored by the ADA Legal Division and found at:
https://www.ada.org/6498.aspx

AI in the Dental Society
Collaborative Counsel Workshop 2023

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Gloom and Doom

Will AI:

- Take over jobs?

- Start a war?

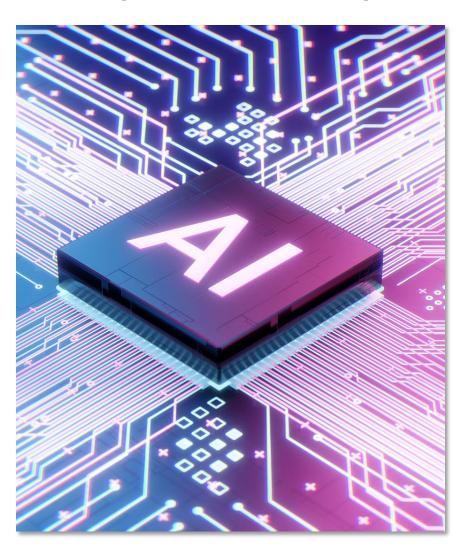- Create a singularity?

- Destroy civilization as we know it?

We'll see. But we do know that AI can:

- Save time

- Do complex tasks

- Make stuff up

- Tell lies

- Fool humans

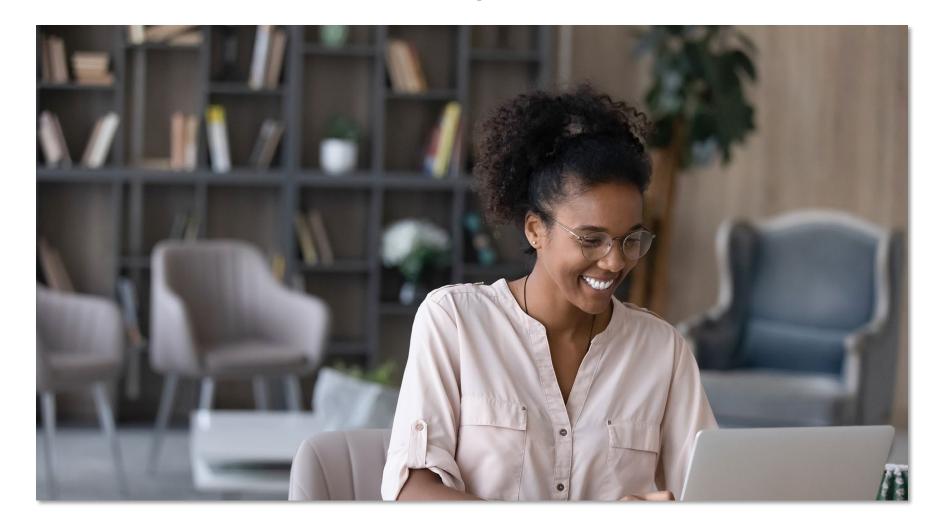- Breach confidentiality and copyright

Examples of workplace AI

- Chatbots
    - Open AI's ChatGPT
    - Microsoft's Bing
    - Google's Bard
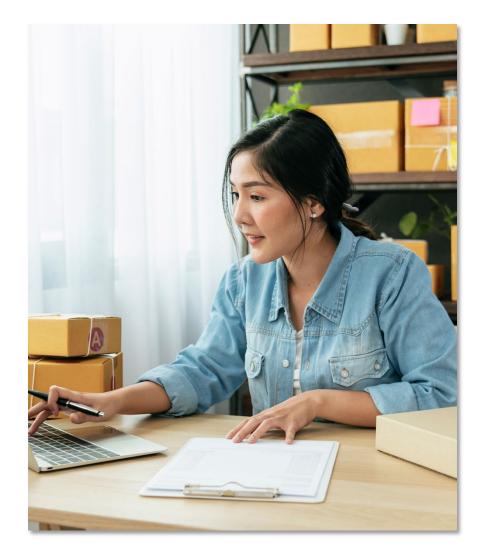
Save time and do complex tasks
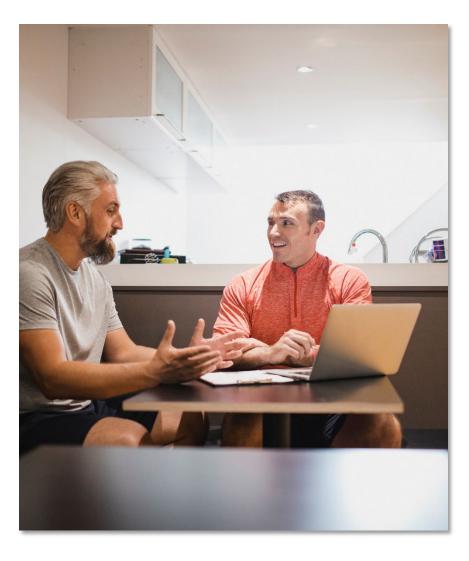
For example, personal shopper

"Act as a shopping assistant. I am looking for..."

- Get a list of products with certain features or within price range
- Ask which brands have the best ratings (e.g., reliability)

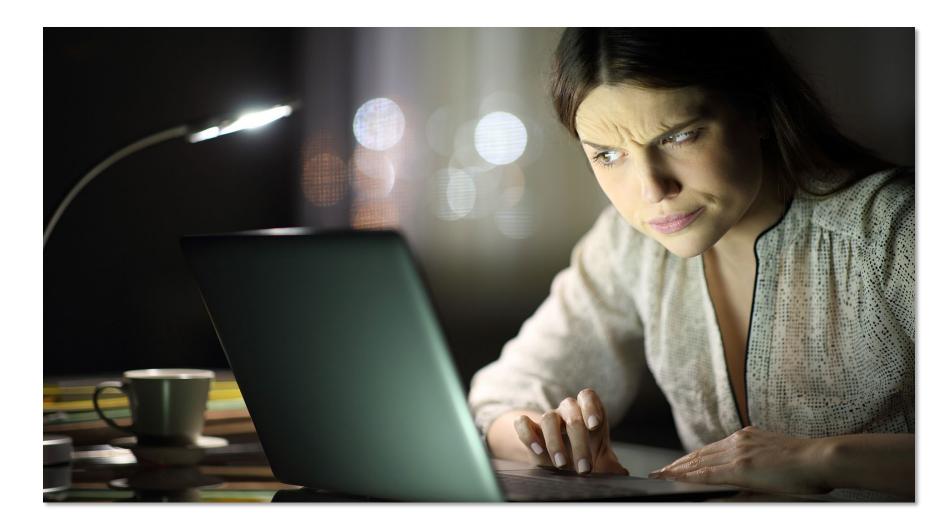Double checking accuracy may be faster than doing the search.

A life coach

- "I want you to act as a life coach…"
- Provide information about situation and goals
- Ask for strategies, advice, plans

Make stuff up ("hallucinations")

Tell lies and fool humans

Breach confidentiality and copyright

AI company might:

- See content you enter

- Use your content for training the AI

- Violate copyright (see above)

Proceed with caution

Possible approaches:

- Notify employees that:
    - Information provided to AI chatbots doesn't remain confidential
    - Text provided by AI chatbots isn't always reliable
    - Output from AI chatbots can be analyzed to show it was AI generated
    - Output from AI chatbots might violate third-party intellectual property rights
- Permit employees to use AI chatbots only in specific cases after submitting a business case for use
- Allow a group of employees to access AI chatbots and determine best practices
- Prohibit using AI chatbots for any business purpose

Learning to use AI

- Do not use details of your life (name, family, work, education, etc.)
- Don't share confidential data
- Use strong, clear prompts
- "Golden Prompts"
  - "Act as if…" (bot will act like an expert)
  - "Tell me what else you need to do this"
  - Point out mistakes and ask it to do better

Resources

Microsoft, Responsible AI

[Responsible AI principles from Microsoft](#)

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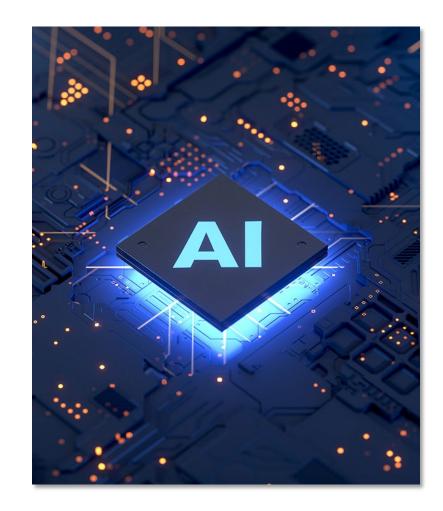
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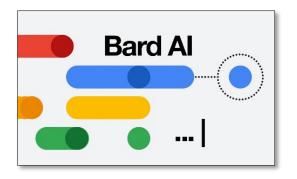
What is Artificial Intelligence?

- <u>Artificial Intelligence (AI)</u> is "machine learning." An AI application uses data to identify *patterns* from the data and will make predictive decisions.

- <u>"Generative AI"</u> describes algorithms (such as ChatGPT, a *natural language* AI tool) that generate human-like outputs through AI learning – *incorporating (learning from) public or user-entered data* into its model to refine its responses.

New Technology/Still Developing

- Development of AI models has expanded exponentially in 2022 and 2023 – this is *new* stuff; developing rapidly.

- Nearly all major tech companies are focusing on AI and incorporating AI into their existing products (Microsoft, Meta, Amazon, etc.).

- AI programs have been all over the news – claims of how these programs have passed the bar exam, generated college level essays, and will cause massive unemployment.
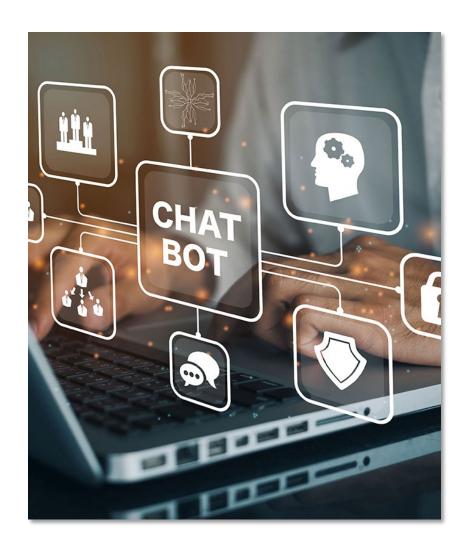
ADA Resources/A Deeper Dive

The ADA Standards Committee on Dental Informatics recently (12/2022) released a detailed white paper offering dentists a comprehensive overview of artificial intelligence/augmented intelligence in dentistry. To locate that white paper, and other truly excellent and current ADA resources on AI and dentistry, go to:

https://pages.ada.org/aianddentistry

Possible Uses for AI Chatbots in the Dental Office

- <u>Hiring</u> – employment decisions
- <u>Communications</u> – emails/letters (patients, plans, other docs)
- <u>Administrative tasks</u> – scheduling, insurance claims processing and billing
- <u>Clinical-related tasks</u> – Generating clinical notes; patient records; clinical evaluations, diagnostics (e.g., virtual consult 2nd opinions), interpreting and generating data and image analysis, teledentistry assistance.
- *While AI use presents many amazing possibilities, today's discussion will focus on some of the <u>legal risks</u>.*

Some Risks of AI Use – Generally and in Dentistry

- **Bias** – AI-based technologies may fail to confer the same benefit for populations and conditions that may have been underrepresented in the training set (such as racial and ethnic minorities, the elderly, and rare or underdiagnosed medical conditions).

- **Confidentiality** – Any information entered into AI models may become a part of the AI's training dataset.

- **Accuracy of information** – Many of the AI technologies pull information from a range of sources, including false and misleading user inputs (AI "hallucinations").

- **Fraud** – Potential False Claims Act, whistleblower complaints

- **Copyright** – Use of AI images, text could be subject to copyright claims

AI Usage Risks: Hiring and Employment

Using AI in hiring selection procedures:

- Potential Liability for Claims of <u>*Bias*</u>
- The EEOC released a technical assistance document exploring employers' potential *Title VII (of the Civil Rights Act) liability* when incorporating AI tools and automated systems in employment selection procedures.

AI Usage Risks: Communications

- **Confidentiality/privacy** – Any information entered into AI models may become a part of the AI's _training dataset_, which builds the machine learning library. Once this info is out there, it can be used in many ways, including when one AI model communicates with another, further allowing usage and making connections of various other data from one AI system to another. The AI may make a connection between data from one training data to data from another source, and the connection may disclose information that would otherwise have been confidential.

- Additional risks – Copyright infringement, bias, "hallucinations" (errors)

AI Usage Risks: Claims Processing and Billing

- **Accuracy of information/"Hallucinations"** – Many of the AI technologies pull information from a range of sources, including false and misleading user inputs (these AI generated falsehoods are sometimes termed "hallucinations"). This could cause billing errors. Consider liability for such submissions under the False Claims Act submissions; billing errors.

AI Usage Risks: Clinical/Images

- <u>Image Analysis</u> – Research analysis indicates image analysis has the ability to detect caries lesions (possibly even earlier than the human eye), bone loss, radiolucencies, and other less common bone-related problems.

- <u>Risks</u> – Hallucinations, possible inaccuracy of image analysis, bias in interpretation.

Trends in Federal; State Law Concerning AI Use

- States have been proposing and enacting laws concerning use of AI; you can check here to see your state: https://www.bclplaw.com/en-US/events-insights-news/2023-state-by-state-artificial-intelligence-legislation-snapshot.html

- Illinois regulates use of AI-enabled assessment in hiring. California apparently regulates AI usage in profiling and automated decision-making. Other states have proposed legislation pending.

- The National Institute of Standards and Technology (NIST) has developed an AI Risk Management Framework

Policy:Current Approaches by Compliance Experts

3 common current recommendations for an AI use policy:

1. Outright ban on use of generative AI

2. Outright ban, but exceptions on a case-by-case basis demonstrating business necessity

3. Permitting use, but warning employees of risks and possible violations of privacy laws by inputting confidential information

If a dental office is considering using AI tools, employees should be warned that information generated may not be accurate and can potentially be biased.

- Potential training on "prompt engineering" may be a worthwhile endeavor.

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MARIJUANA USAGE BY PATIENTS IS … HIGH

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ADA COMMUNICATIONS TREND REPORT: 2022

THE NEW NORMAL

ADA COUNCIL ON COMMUNICATIONS

2022 REPORT SCORECARD

This scorecard has helped highlight areas of support that are effectively meeting member needs, and those than require further attention and resources. Looking across the three years this information has been collected, a strong positive post-COVID-19 sentiment lifted member satisfaction on a majority of topics in 2021. However, over this past year as new economic issues emerged, the overall member sentiment has declined. The charts below compare 2020 against 2022 because 2021 was such an anomaly year.

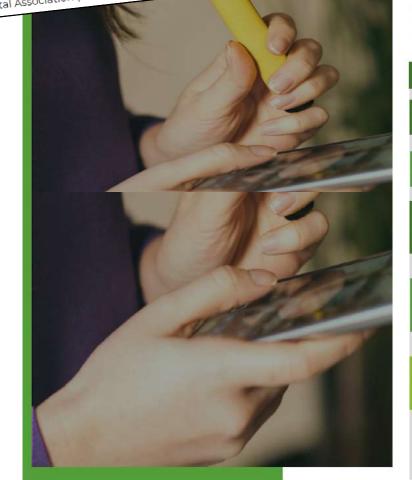| How effectively is the ADA supporting you on…	2020 Very effective	2021 Very effective	2022 Very effective	2020-2022 Difference
COVID-19 Practice support	52%	62%	53%	⬆ 1%
Advocacy	50%	53%	48%	⬇ 2%
COVID-19 Vaccination support	N/A	49%	45%	⬇ 4%
Inclusion/Diversity	20%	23%	24%	⬆ 4%
Loan forgiveness / Financial resources	21%	22%	12%	⬇ 9%
Insurance support	10%	20%	13%	⬆ 3%
Business/Practice management	19%	19%	17%	⬇ 2%
Mindfulness/Wellness	15%	16%	18%	⬆ 3%
Midlevel providers	9%	13%	12%	⬆ 3%
Staffing shortages	N/A	N/A	5%	N/A

How well is the ADA supporting these public health topics…	2020 Very well	2021 Very well	2022 Very well	2020-2022 Difference
COVID-19 and dental visits	50%	59%	56%	⬆ 6%
Water Fluoridation	47%	57%	59%	⬆ 12%
Opioids/Pain management	46%	52%	50%	⬆ 4%
Amalgam	25%	35%	29%	⬆ 4%
Vaping	22%	33%	28%	⬆ 6%
HPV Vaccination	19%	32%	27%	⬆ 8%
Teledentistry	13%	27%	17%	⬆ 4%

Half of Dentists Say Patients Are High at Dental Appointments

Marijuana Use May Affect Oral Health and Treatment

FOR IMMEDIATE RELEASE

CHICAGO, November 3, 2022 – As personal and medical marijuana use increases nationwide, the American Dental Association (ADA) suggests patients refrain from

VAPING & MARIJUANA USE

Currently there are 19 states, plus the District of Columbia, that have legalized the recreational use of marijuana.* As legalization and use continues to increase, oral health issues unique to vaping and marijuana use are beginning to emerge and increase, along with a lack of awareness and understanding of the potential adverse health effects among the patients who use them.

*as of July 2022

Consumer Results:

39% of adults reported currently using some form of marijuana

25% of adults reported vaping

39% of adults reported currently using some form of marijuana

25% of adults reported vaping

67% of adults said they would feel "very" or "somewhat comfortable" talking to their dentist about marijuana/CBD – *high receptivity for dentists to explain the adverse health effects*

Dentist Results:

52% reported patients showing up high on marijuana or another drug

56% reported limiting treatment while they were high over concerns regarding liability on consent for treatment

52% reported patients showing up high on marijuana or another drug

56% reported limiting treatment while they were high over concerns regarding liability on consent for treatment

46% reported sometimes having to increase anesthesia in order to effectively treat these patients

15

A quick note about terminology

Decriminalization

Under state law, individuals caught possessing defined small amounts of recreational marijuana will not face criminal prosecution; instead, they may be subject to a lesser civil—not criminal—penalty (e.g., a fine)

Legalization

The repeal of laws banning the possession & recreational use of marijuana

Medical Marijuana

Medical cannabis that is recommended by a doctor for their patient to alleviate the symptoms of certain conditions or diseases
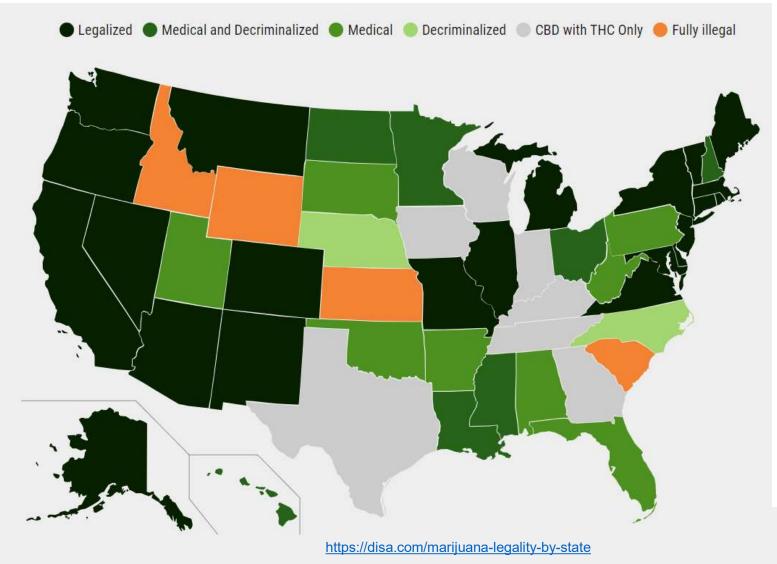
Recreational Marijuana

The use of cannabis by adults to induce an altered state of consciousness for pleasure

Marijuana Law – Modern History

- **1970**: the federal Controlled Substances Act ("CSA") of 1970 created 5 distinct schedules for classifying drugs
    - Marijuana classified as a Schedule 1 drug: no currently accepted medical use in the U.S. & a high potential for abuse
- **1996**: CA became the 1st state to legalize *medical* marijuana
- **2012**: CO & WA became the first 2 states to legalize *recreational* use

A Rapidly Evolving Patchwork

Legend: ● Legalized ● Medical and Decriminalized ● Medical ● Decriminalized ● CBD with THC Only ● Fully illegal

https://disa.com/marijuana-legality-by-state

Marijuana is legal for recreational use in 21 states and D.C.

States that have passed legislation legalizing marijuana for medical or recreational use, April 2023

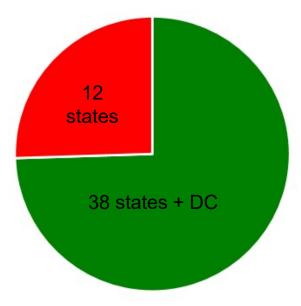Legend: Medical only | Both recreational and medical

Note: States that permit limited access to low-THC products not included. Maryland's law goes into effect July 1, 2023, and Kentucky's will take effect Jan. 1, 2025. The U.S. Virgin Islands, Guam and the Northern Mariana Islands have also passed legislation legalizing marijuana for recreational use.
Source: National Organization for the Reform of Marijuana Laws.

PEW RESEARCH CENTER

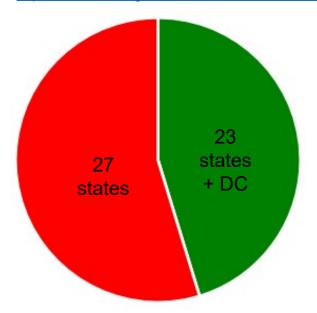https://www.pewresearch.org/short-reads/2023/04/13/facts-about-marijuana/

As of June 2023:

12 states

38 states + DC

Medical Marijuana

27 states

23 states + DC

Recreational Marijuana

- 38 states + DC have medical marijuana programs/policies (details vary)
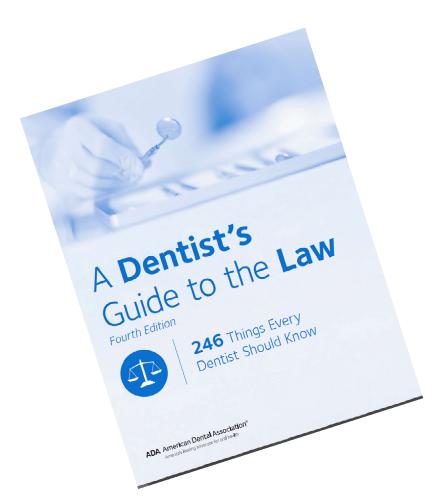- 74% of Americans live in a jurisdiction with a medical marijuana program

- 23 states + DC have legalized recreational use by adults (details vary)
- 48% of Americans live in a jurisdiction where adult recreational marijuana is legal

And 27 states + DC have enacted laws reducing criminal penalties for certain marijuana-related convictions or allowing past convictions to be expunged

Federal Law: Also Evolving?

- Possession and use of marijuana (CSA Schedule 1) remains **<u>illegal</u>** in **<u>all</u>** circumstances *(including medical)*

- **October 2022**: President Biden pardoned prior *federal* & DC convictions for simple marijuana possession, urged governors to pardon those convicted on *state* possession charges, and called for an "expedited" review of Schedule 1 classification

Dental Visit Implications of Marijuana Use

Informed Consent

Dental Visit Implications of Marijuana Use, cont.

- Limited treatment options
- Oral health effects of marijuana use
- Patient education

ADA.   Why Join   Education   Advocacy   Publications   **Resources**

Research   ADASRI   Science Resources

Cannabis: Oral Health Effects

Key Points

- Cannabis smoking is associated with periodontal complications, xerostomia, and leukoplakia as well as increased risk of mouth and neck cancers.

- Historically, cannabis has been smoked as marijuana, but is increasingly available in other forms, including edible and topically applied products.

- Cannabis use has increased in recent years, along with state legalization, although it remains federally banned.

Additional Considerations

- Marijuana and the Dental Workplace
  - Employee Protections
  - Workman's Compensation

- Dental Professional Liability Insurance

- **Check with local counsel**
  - Review policies for compliance with federal & state law

Questions?

McLaren Macomb NLRB Decision: The End of Non-Disparagement Clauses in Severance Agreements?

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Facts of *McLaren Macomb*

- Hospital furloughs 11 employees, members of the AFL-CIO.
  - Severance agreement contains the following language:

6. Confidentiality Agreement. The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.

7. Non-disclosure. … At all times hereafter, the Employee agrees not to make statements to the Employer's employees or to the general public which could disparage or harm the image of the Employer ….

McLaren Macomb Holding

- Previous NLRB decisions suggested that some form of animus or coerciveness independent of overly broad severance agreement language was required to find a violation. (Baylor University Medical Center, 369 NLRB No. 43 (2020) and IGT, 370 NLRB No. 50 (2020))

- Now, the mere proffering of a severance agreement with a non-disparagement clause is a violation, as "the absence of such conduct [i.e., coercion, other unlawful act] … cannot eliminate the potential chilling effect of an unlawful severance agreement."

Section 7 of the NLRA (29 USCA Section 157)

Gives employees the right to, among other things,

Engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Key Takeaways from *McLaren Macomb*

- Broad confidentiality and non-disparagement clauses are now prohibited, whether proffered or accepted (even if proffered by an employee), based on the NLRB's view that these impermissibly infringe on Section 7 NLRA rights.

- Employers must reevaluate their severance agreements for *all* employees, regardless of union status, to ensure that the language does not constitute a "forfeiture of statutory rights."

- New guidance from NLRB GC is unclear as to what constitutes a *permissible* confidentiality and non-disparagement clause

Procedural Posture of *McLaren* Macomb

- Board decision rendered on February 21, 2023
- On appeal to Sixth Circuit
- Decision could be overturned in new administration
- Potential constitutional issues over retroactive interpretation of *McLaren* decision by NLRB GC
- Guidance by NLRB suggests that only unlawful provisions will be voided (not whole agreement)

Does *McLaren* Decision Apply to Senior Executives?

- No. Supervisors who possess the authority to hire, fire, promote, lay off, impose discipline, or take other supervisory action with respect to employees are not "employees" under the NLRA.

- However, the GC suggested that the Act protects a supervisor who is retaliated against for refusing to act on employer's behalf in committing unfair labor practices.

  - This would make it a violation for an employer to retaliate against a supervisor who refuses to proffer an overbroad severance agreement, and subsequently offer a severance with overly broad language.

Potential Future Issues With Severance Agreements

Jennifer Abruzzo, General Counsel for NLRB, suggested the following provisions might interfere with Section 7 rights:

- Non-compete clauses; (aligning with FTC's recent proposal to ban non-competes)

- No solicitation clauses;

- No poaching clauses;

- Broad liability releases and covenants not to sue that go beyond employment claims;

- Cooperation requirements involving employer as that effect's an employee's right to refrain under Section 7

Current Recommendations from Employment Experts

- Don't be too hasty – the NLRB is a political body whose messaging changes with new administration

- Supplement existing confidentiality and non-disparagement clauses with disclaimers

- Addition of "savings clause" – which serves to protect validity of remaining provisions (although GC suggested this is not dispositive)

- Confidentiality agreements that restrict dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications are still OK

- Narrowly tailored non-disparagement clauses (ex. limiting to ban on defamation) also likely permissible

Learning Objective

Explore the connection between oral health and quality of life in older adults.

Introduction

- Older adults in the United States are diverse and heterogeneous and their health and health behaviors vary greatly. According to the World Health Organization, ("WHO") when it comes to health there is no "typical" older person. Biological aging is only loosely associated with a person's chronological age.

Baby Boomers

The term baby boomers has been applied to children born after World War II, between the years of 1946 to 1964. The oldest baby boomers turned 84 in 2020. By the year 2030 all baby boomers will be at least 65 years old. (WHO)

In 2014, 14.5% or 46.3 million persons of the U. S. population were aged sixty-five or older. This population is expected to reach 23.5% or 98 million by the year 2060. It is projected globally that the number of people aged sixty or older will increase from 900 million to 2.1 billion between 2015 and 2050. (WHO)

How Dentistry defines older adults

According to Dr. Ronald Ettinger, dentistry defines the elderly based on their ability to travel and seek services or functionality. (Ettinger 2015) MacEntee states "that clearly there is an interaction between how we experience quality of life and how we experience oral health. Quality of life seems to be influenced by the extent one feels capable of participating in activities that meet their needs and expectations (MacEntee 2007).

The Canadian Dental Association defines the good life as that which contributes to the enjoyment of life's possibilities. Oral health allows one to speak, eat and socialize unhindered by pain, discomfort or embarrassment.

Diseases of older adults and their effect on oral health

- Geriatric dentistry includes the diagnosis, treatment and prevention of caries, and periodontal diseases as well as oral mucosal disease, head and neck pain, impaired chewing, tasting and swallowing. (Ettinger, 2007)

Some of the most common systemic diseases seen in older adults include:

- cancer,

- arthritis,

- chronic obstructive pulmonary disease,

- diabetes,

- heart disease,

- hypertension

Diseases of older adults cont.

- These diseases also have a significant impact on the oral health of older adults, affecting their quality of life, especially the ability to eat, speak, taste and swallow, as well as causing significant pain and discomfort. (Ettinger 2007).

- Many of the systemic drugs prescribed for these diseases can also have an adverse effect on oral health; such as periodontal diseases, which are common in older adults and has been associated with cardiovascular disease, stroke and diabetes. (Ettinger 2016)

ADA Principles of Ethics

Under the ADA's principle of Justice dentists have a duty to treat people fairly. The principle of justice requires as a primary obligation the delivery of dental care without prejudice. "This principle in its broadest sense expresses the concept that the dental profession should seek allies throughout society on specific activities that will help improve access to care for all".

Flipping the switch – Changing how we view aging.

According to WHO

Health in older age is not random. Although there are findings that indicate some variation in older adults' health reflect inherited genetics, most is due to physical and social environments. This means that an older person from a disadvantaged background is more likely to experience poor health and access to the services and care that they may need.

Systems need to be reassessed to include the needs of aging populations. Systems must be capable of providing older persons – centered and integrated care and focus on maintaining functionality as people age.

Comprehensive public health action will require fundamental shifts in how we think about aging and health.

Conclusion

- Oral health is integral to the general health and well- being of older adults. Having adequate access to dental care will allow older adults to preserve functionality and enhance their quality of life (Yellowitz, 2016). Good oral health allows older adults to eat, drink and maintain proper nutrition; be free from oral pain and discomfort; and enjoy interpersonal relationships.

- To ensure access to and the availability of comprehensive oral health care, oral health care must be integrated into healthcare systems, with Dentist and dental professionals being at the forefront as guided by the ethical principle of justice.(Yellowitz)

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