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# Legal Matters®

summer 2019

## Be on the lookout for dangerous products

**W**e all should be able to expect products, from everyday household goods to drugs and medical devices, to be safe. But that's not always the case.

It doesn't matter if a dangerous product was poorly designed, deceptively marketed, or just presents hazards that weren't known at the time. What does matter is that a defective product can hurt you or even kill you.

It's important to stay informed about safety issues in common products and pay attention to those that have been recalled. That's why we like to give periodic updates on products that may pose safety issues. Here are some potentially hazardous products that have been in the news recently:

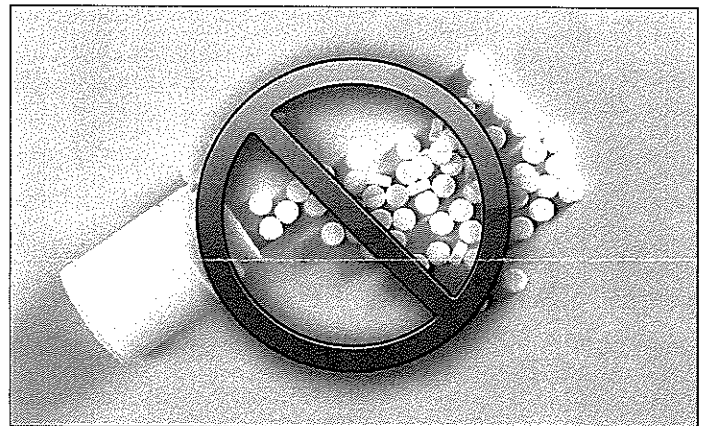
### • IVC filters

An IVC blood filter ("IVC" stands for "inferior vena cava") is a cage-like device inserted into the largest vein in the body to capture blood clots that might otherwise reach the lungs and cause a potentially fatal blockage.

IVC filters are especially helpful to people who can't take blood thinners, but they can present dangerous side effects. For example, these filters can fracture, migrate, get stuck or get tilted, resulting in perforations of vessels, organs and tissues that can be fatal.

A recent case out of Texas highlights the heightened risk of these filters being left in too long. In that case, doctors planned to remove an IVC filter from a Houston firefighter seven weeks after it was implanted. Though the FDA recommends removing the filter 29 to 54 days after implant, meaning his surgery was within the suggested range, it was apparently too long.

During surgery to remove the filter, doctors couldn't find the implant,



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which had lodged in a vessel. A subsequent surgery also was unsuccessful, and now the patient will have to go through ongoing monitoring. A jury found the hospital accountable and ordered the patient to be compensated for his harm.

This isn't to say that IVC filters are dangerous in every case. That's an issue to discuss with your doctor, but beware of the risks and be advised that lifestyle changes can decrease the risks of blood clots too. In the meantime, if you or someone you love has suffered complications from an IVC filter, talk to a lawyer to find out what rights you have.

### • CVS nasal mist

Millions of people who suffer from sinus pain and pressure use nasal sprays

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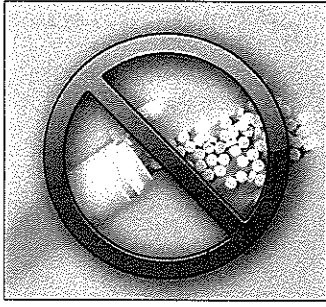
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## Be on the lookout for dangerous products

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for much-needed relief. Nasal mist users should be aware that CVS-brand nasal mist has been pulled from the shelves by its Florida-based manufacturer, Product Quest Manufacturing, in a voluntary recall announced by the FDA.

According to the manufacturer, a specific lot of the spray was contaminated with a bacteria that could result in infection. The infection from this particular strain of bacteria could even be life-threatening for those with immune-system problems or cystic fibrosis. If you have CVS-brand nasal mist in your medicine cabinet, be sure to check the side panel. If it's coded with "Lot 173089" and "EXP 09/19," it's one of the more than 16,000 units that's been recalled.

### • Zostavax

Anyone who's ever experienced the pain of shingles would probably view Zostavax, a drug intended to prevent it in adults, as a godsend. However there are indications that its side effects can result in viral infections, creating questions about how safe it is.

For example, a woman recently filed suit against the drug's manufacturer, Merck, claiming she developed a severe shingles outbreak, causing vision loss, after she received the Zostavax vaccine. It's the latest in a number of lawsuits filed against Merck over Zostavax side effects. If you are thinking of getting the vaccine, it's very impor-

tant to discuss these safety issues with a physician.

### • 3M earplugs

For a couple of decades, 3M was selling a special kind of earplug with a "dual-ended" design enabling the plug to be flipped over for varying levels of protection. These earplugs have been used in the military to protect against exposure to the sounds of gunfire and explosions while still allowing the user to hear quieter sounds like approaching troops.

As it turns out, these earplugs may have been defectively designed. For example, users say they're too short to be inserted properly to provide the right level of protection, and they often dislodge from ear canals in such a way that users don't notice them. Additionally, they apparently aren't designed in a way to make a correct seal.

As a result, many servicemen and servicewomen who relied on them for protection have reported hearing loss. What's even more serious is that 3M allegedly covered up the risks in order to become the military's exclusive provider of earplugs. Though they were discontinued in 2015 and are no longer in use, it's estimated that millions of military personnel used these earplugs.

If you or a loved one served in the armed forces over the past 20 years and experienced hearing loss, tinnitus or loss of balance that could be linked to these earplugs, contact an attorney where you live to discuss your options.



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## Increase in nursing home closures across U.S.

Choosing nursing home care can be a big, emotional decision. Long-term care is a sizable investment, and many people struggle with entrusting their loved one's care to someone else. Now some families are dealing with an additional hurdle, as nursing home closures are forcing some seniors to relocate, widening the distance families must travel to visit.

In what is described as an "epidemic," rural nursing homes across the U.S. are closing. With staff shortages and low Medicaid reimbursement rates, these long-term care facilities can no longer afford to stay in business.

Approximately 63 percent of nursing home patients have their care funded by Medicaid, according to the American Health Care Association. But with reimbursement rates often below the actual cost of care, these facilities can no longer manage operating costs. In some states, Medicaid programs underfund patients anywhere from \$30 to \$40 per day.

For nursing home residents, the stress of moving is con-

siderable. These facilities may lack the resources to orchestrate a successful closing, meaning residents might not get help to find a suitable home, belongings may be lost in the move and transfer of vital medical records can be delayed.

The stress associated with moving is so real that the industry has a name for it: "transfer trauma." Common outcomes include depression, agitation, falls, weight loss and new deficits in self-care.

Even after making it through relocations, many elders find themselves long distances away from their families. That means fewer visits, greater isolation and increased risk for abuse.

If your loved one is subject to a nursing home closure, be sure you know their rights. The National Consumer Voice, a nonprofit offering ombudsman support for long-term care, provides information on its website ([theconsumer-voice.org](http://theconsumer-voice.org)). The site also has a Nursing Home Closures Kit that can help you understand if the closure is being conducted appropriately.

# Marijuana and the workplace: What employers need to know

The landscape around marijuana use has changed dramatically over the past couple of decades. While possession of even a small amount of marijuana used to be a crime across the country, 33 states and the District of Columbia have legalized its use for medical purposes, and 10 states permit recreational use of marijuana as well. But marijuana is still technically illegal under federal law, which applies everywhere — although the feds don't seem to be going after pot users who follow the laws of their state.

So what does that mean for you as an employer? Do you have to tolerate pot use among your employees?

The answer is that it depends on where you are and it depends on the context.

First off, it's pretty clear that employers still have the right to fire or discipline workers for being under the influence of marijuana at work, and even in states that have legalized marijuana for recreational use the marijuana laws don't seem to prohibit employers from firing employees for off-duty use. Of course, if you're in one of those states, you might think hard before doing that. After all, if you go too far in seeking to regulate your employees' private

**It's pretty clear that employers still have the right to fire or discipline workers for being under the influence of marijuana at work.**

lives — especially when they're not breaking state law or impacting workplace safety and productivity — you may run into morale and retention issues.

The issue of medical marijuana is more complex. In some states, the laws specifically say that employees can't be fired or discriminated against for off-duty medical marijuana use. But even those states generally allow employers to punish workers who are high during work hours.

In other states, laws permit employers to fire employees who use pot off-hours, even for medical purposes. Again, however, as an employer you should think hard about whether you want to impose your own morals on your workers outside the workplace, especially if they have a valid medical reason for using cannabis.

Some states' medical marijuana laws don't address this question at all, which means the courts end up deciding the issue, and different states' courts can reach different conclusions.

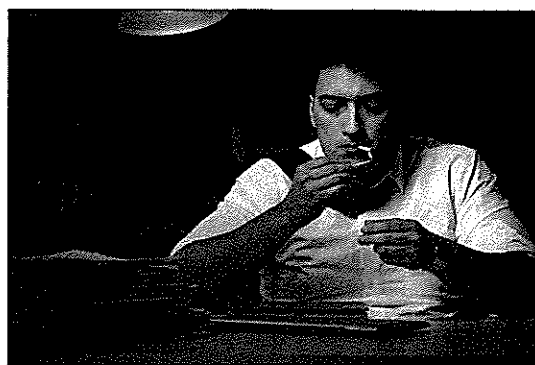
For example, a few years back a cable company in Colorado fired a quadriplegic employee who used medical marijuana to control his leg spasms. He only used marijuana during nonworking hours and he had a valid prescription. The employee sued, arguing that his employer had violated Colorado's "off-duty conduct" law, which bars employers from firing employees for engaging in lawful activities outside the workplace.

But the Colorado Supreme Court ruled that since marijuana was still illegal under federal law, the employee wasn't engaging in a "lawful" activity. Similar decisions followed in Oregon, California and Washington State.

More recently, the Michigan Court of Appeals ruled that a public employer could rescind a job offer after the candidate tested positive for THC in a drug screening that was part of the hiring process. The worker used pot for medical purposes, but the court ruled that Michigan's medical marijuana law doesn't protect a medical marijuana cardholder from a public employer's "zero tolerance" drug policy.

On the other hand, the highest court in Massachusetts ruled in 2017 that a woman who was hired for a marketing position contingent upon passing a drug test (and who told the employer that she was prescribed medical marijuana to treat Crohn's disease, that she didn't use it daily and that she wouldn't use it before or at work) could bring a disability discrimination claim against the company for firing her after her drug test came back positive. Rhode Island's state supreme court also recently ruled that pre-employment drug screenings as applied to medical marijuana could be disability discrimination.

If you're in a state that has legalized medical marijuana use but you're concerned about its impact on your workplace, talk to a lawyer to discuss the best ways to proceed.



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## Seven things sellers do that can kill a sale

The home market is still hot, but that doesn't mean sellers can be demanding prima donnas. Certain mistakes can turn buyers off, cost you thousands of dollars, or even squash a deal altogether.

Here are some of the top things that could dissuade buyers from making an offer on your home:

**Nasty smells:** From sports equipment to stinky shoes, litter boxes and general teenage boy funk, bad odors can leave a lasting impression on buyers.

**Too much personality:** Buyers need to connect emotionally with a home, and they need to be able to picture themselves inside. To help them, take down your personal pictures and eliminate distinctive décor. Don't hang around for showings or open houses, either.

**Lots of stuff:** Too much stuff can make your home look smaller. Declutter and move things out well before moving day. Clean out your closets, cabinets and garage and either get rid of your excess stuff or move nonessentials into storage while you're marketing your house.

**Fibs and coverups:** Be honest about any of your home's known faults. Covering up problems will generally come

back to bite you, as buyers will ask to renegotiate or will simply walk away.

**Unrealistic expectations:** Just because your neighbor's house flew off the market at a premium price doesn't mean yours will too. The market ebbs and flows. Listen to your realtor's advice when it comes to pricing and recommended repairs.

**Possessiveness:** Resist the urge to strip your home of curtain rods, drapes, and specialty light fixtures, unless you specified as much in your listing agreement.

**Ignoring special circumstances:** A variety of situations can create risk and complications in the sale process. Sellers are generally advised to involve a real estate attorney in any sale, but legal support can be essential if you are selling due to a divorce, selling a house from a trust, or selling to family members, or if you have tenants renting the property or have liens or judgments on the property.

Last minute conflicts and complications can unravel a whole deal. A real estate attorney can address any legal issues that crop up during the closing process, or better yet, help you avoid them from the outset.