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WEED AT WORK: THE LANDSCAPE IS CHANGING AND HERE'S WHAT EMPLOYERS NEED TO KNOW



**It's more important than ever for
employers across all industries to
become familiar with their own
state marijuana laws.**

As of July 13, 2018, [46 states and the District of Columbia](#) had passed laws legalizing the use of marijuana in some form or another - and these are changing seemingly by the day. With the complexity of issues surrounding marijuana use continuing to evolve, so too, do the issues facing employers with regards to medical marijuana use, off-duty use, and workplace drug policies including drug testing.

It's more important than ever for employers across all industries to become familiar with their own state marijuana laws to ensure they are in compliance, and to consider questions regarding employees' use of marijuana, such as:

- **Is my current drug-free workplace policy viable and enforceable?**
- **How can I avoid discriminatory practices and claims when it comes to medicinal marijuana?**
- **How and when can my company screen for impairment on the job?**
- **What involvement does a union have with medical marijuana?**
- **What liability exists if an employee is injured or injures another on the job while under treatment with medicinal marijuana?**
- **How are OSHA safety programs and injury and illness recordkeeping affected?**

Navigating these issues – particularly balancing the rights of employees against the safety of all in the workplace – can be a challenge. So, what can an employer do to mitigate their risk of these two potential liabilities?

Part of the answer lies within the employer's workplace policies. Does the employer maintain a non-tolerance policy against marijuana use? Do the employer's policies address the questions above? Is there a policy that addresses the use of medical marijuana versus recreational use?

As is often the case with legal matters in the U.S., another part of the answer depends on which state the employer is located. At a high level, laws vary greatly among the 46 states and D.C., offering various levels of protection for both medical and recreational use. However, they all fall into three general categories:

- **Cannabidiol (CBD) only:** Cannabidiol is a cannabis compound that has significant medical benefits but does not make people "high" or feel "stoned." Because CBD is non-psychoactive, it is an appealing option for patients looking for relief from such conditions as inflammation, pain, anxiety, psychosis, seizures, and spasms among others. The states below currently have not legalized the use of marijuana **plants** for any purpose. They allow only the use of cannabidiol for the treatment of specific medical conditions **ONLY**, and as a result, employment-related issues rarely come up under these state laws: **AL, GA, IA, IN, KY, LA, MI, MO, NC, SC, TN, TX, UT, WI, WY**
- **Medical only:** The states below currently allow the use of marijuana plants for medical reasons but do not allow any recreational use of the drug. To qualify for medical marijuana, patients must be diagnosed with a condition that's listed among their [state's list of qualifying conditions](#). (Some states permit physicians to approve other ailments not listed.) States with Medical only include: **AZ, AR, CT, DE, FL, HI, MD, MI, MN, MT, NH, NJ, NM, NY, ND, OH, PA, OK, RI, WV**
- **Recreational and medical:** Some states (see below) permit persons who are at least 21 years of age to use marijuana plants for recreational purposes. Merriam-Webster's online dictionary defines recreational drugs as those "used without medical justification for their psychoactive effects often in the belief that occasional use of such a substance is not habit-forming or addictive." These states have separate laws governing use for medicinal reasons: **AK, CA, CO, D.C., ME, MA, NV, OR, VT, WA**

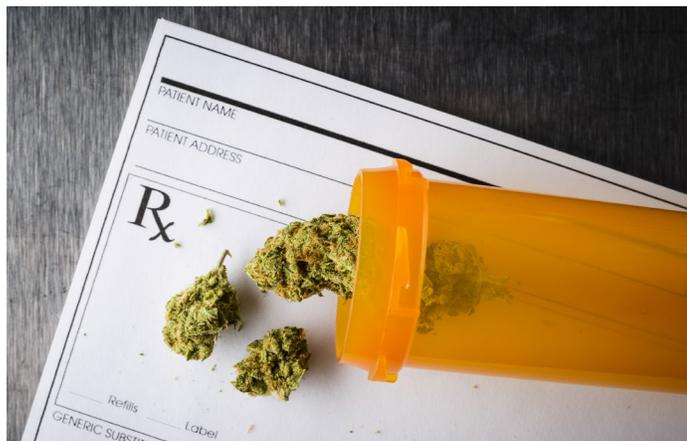


Despite the various state laws throughout the country, the federal government has NOT legalized the use of marijuana for any purpose – medical or otherwise. Under federal law, marijuana is still a Schedule I drug, defined by the United States Controlled Substances Act (CSA) as drugs that have a high potential for abuse and have currently no accepted medical use in treatment in the United States.

All uses of Schedule I substances are illegal under the CSA. Also, the Food, Drug and Cosmetic Act (FDCA) prohibits the use, dispensing, and licensing of substances – including marijuana – that have not been approved by the Food and Drug Administration.

Because of the inconsistency between state and federal laws, the rights of employees versus those of their employers have come into question and have led to several high-level court cases in states throughout the country:

- At least two state supreme courts have ruled the federal law protects employers from litigation for terminating employment based on an individual's use of marijuana that is legal under state law.
- However, at least two other state high courts have held that federal laws do not protect employers from litigation for firing employees based on their legal, off-duty use of medical marijuana.



Other state courts are not bound by these rulings. However, employers in states where marijuana use is legal should be cautious about relying only on federal laws to justify taking action against employees who test positive for marijuana.

Some individual state marijuana laws are very clear about what an employer can and cannot do regarding employment action against their employees:

- At least three states' laws prohibit a company from refusing to hire or penalize a person who is 21 years old or older solely because of the person's use of marijuana outside company property or from firing a person who's authorized to use medical marijuana solely because the person tests positive for using the drug.
- The laws of at least two states allow an employer to exclude a medicinal marijuana user from certain jobs for safety reasons.
- And, laws of at least two states permit employers to establish and enforce zero-tolerance drug testing and drug use policies.

As noted above, employers should become familiar with their own state marijuana laws to determine what is, and is not, acceptable with regards to drug testing protocols in the workplace. Some states have laws that are specifically written for workplace drug testing and require employers to have written policies and specific testing protocols in place before conducting employee drug tests. And, some state workers' compensation laws require specific requirements be met before claim denials or employment actions can be taken based only on positive drug tests.

With so many questions and so much uncertainty surrounding the legalized use of marijuana throughout the U.S., the answer to what employers should do is this: **to protect their businesses as they try to balance the rights of their employees against the safety of the workplace, we urge employers to work with their safety advisor, legal counsel, and insurance provider to ensure the correct workplace policies are in place.**