



Cannabis at Work: How Employers are Reacting to the Legalization of Marijuana

By Max Freedman

Although cannabis remains a federally illegal substance, the number of states that permit its use is growing rapidly. Currently, 11 states (plus Washington, D.C.) have marijuana laws in place that permit the cultivation, possession and use of marijuana for all adults, while 33 states have legalized some form of a medical marijuana program. These policy developments have created a new challenge for employers who maintain drug testing policies either as part of the employee onboarding process or a periodic condition of employment.

Naturally, employers have a financial interest in ensuring that employees are not coming to work intoxicated, but cannabis use off the clock would result in a failed drug test as well. Are employers responding to the shift in state laws by relaxing their drug-testing policies to allow for employee consumption outside the workplace? Are they changing their policies for new job applicants? Are they enacting separate rules for safety-sensitive positions? Or are they keeping the same rules in place for fear of marijuana in the workplace?

HOW CANNABIS LAWS HAVE CHANGED

In two decades, cannabis legalization has gone from a fringe issue to a national discussion. In the 1990s, only five states plus Washington, D.C., had marijuana laws permitting medical use. That number gradually crept up to eight states plus D.C. after the turn of the 20th century, yet legalized adult use (often referred to as recreational use) remained unheard of.

It wasn't until 2012, when Colorado voters passed Amendment 64, that adult-use cannabis was legalized for the first time. In the past seven years, nine more states plus D.C. have legalized adult-use cannabis. Much of this activity occurred via referendum, but Vermont became the first state to legalize cannabis through the legislature. Today, several states are considering doing the same, including New York and New Jersey.

In the same time frame, the number of states in which residents can obtain a medical marijuana card has grown to 33. While cannabis remains an illegal substance under the federal Controlled Substances Act, the federal government has largely taken a states-first approach to regulating and enforcing the new cannabis industry that has grown as a result of the changing laws. Some federal lawmakers have introduced legislation in support of the industry or that calls for outright legalization nationwide, a shift that could potentially lead to marijuana in the workplace.



CANNABIS LEGALIZATION AND WORKPLACE DRUG POLICIES

These rapid changes have left many employers in a precarious position. Many employers maintain zero-tolerance policies on using drugs (including marijuana) in and outside the workplace and, naturally, don't want their employees showing up to work intoxicated.

The legality of cannabis is not the issue; certainly, employees drinking on the job is grounds for termination in any company, despite alcohol's legal status. However, determining whether employees and job applicants are using cannabis on the job or on their own time is more difficult, said Matt C. Pinsker, an adjunct professor of homeland

security and criminal justice at the L. Douglas Wilder School of Government and Public Affairs of Virginia Commonwealth University.

"For employers, a key issue involving marijuana is not legalization but workplace safety," said Pinsker, who is also a criminal defense attorney. "The problem for employers is that impairment, because of marijuana, is usually much more difficult to detect and test for than alcohol. Unlike alcohol, it is very difficult for employers to determine if a positive drug test for marijuana is the result of drug usage during work or on nonwork hours, so it is logistically simpler to just have an outright ban."

But in some cases, state law makes workplace drug policy more complicated than a simple blanket ban on marijuana use.

ADULT-USE CANNABIS VS. MEDICAL CANNABIS

There is a significant distinction between adult-use cannabis, a leisurely activity of choice, and medical cannabis, which is prescribed as a medicine to patients who use a medical marijuana card to get cannabis for a variety of conditions outlined under state laws. Some states bring that distinction into the workplace, and it can impact employers' drug policies.

"Employers must understand their rights and duties when it comes to drug testing because state laws are evolving," said David Reischer, attorney and CEO of LegalAdvice.com. "Marijuana is still federally illegal, and employers generally are allowed to have a drug-free workplace and to enforce zero-tolerance policies."

However, it's critical that you, as a small business owner, know whether any of your employees are medical marijuana patients and if your state's laws protect their usage of cannabis in the workplace or against the failure of employer-mandated drug tests, Reischer added.

"A company needs to be careful when disciplining medical marijuana users," said Reischer. "Several states have specific

laws protecting medical cannabis patients from employment discrimination. Typically, employers can require drug testing before employment and at random times, so long as there is no discrimination against medical marijuana users [who] are legally allowed cannabis for medicinal reasons.”

Further muddying workplace drug policies is the question of employee morale. Many employees argue that legal usage of cannabis off the clock should not be grounds for their termination if they fail an employer drug test. Employers need to keep in mind the attitude of their workforce when making disciplinary decisions related to drug testing.

HOW EMPLOYERS ARE RESPONDING

How are employers responding to the change in laws and attitudes? Some employers are maintaining tight restrictions and zero-tolerance policies, even for off-the-clock cannabis consumption. Others are relaxing their policies and only disciplining employees for failed drug tests when it's clear their productivity has been negatively impacted. Some employers allow employees to openly consume cannabis on the clock.

MAINTAINING ZERO-TOLERANCE DRUG POLICIES

According to Derek Riedle, owner of cannabis lifestyle company Civilized, the ongoing federal prohibition of cannabis has prompted many employers to maintain strict workplace drug policies, sometimes even for medical cannabis patients.

“We're seeing more and more employers revisit their workplace rules around cannabis, but because it remains illegal at a federal level in the U.S., most companies still have a zero-tolerance policy,” Riedle said. “It's more common to see employers loosen up their regulations for patients with a valid medical cannabis card, but even that is not guaranteed.”

TYING ENFORCEMENT OF COMPANY DRUG POLICY TO JOB PERFORMANCE

In his cannabis lifestyle company, Riedle permits employees to periodically step away for a consumption break, especially if it prompts a burst of creativity. Other employers, however, have concerns surrounding cannabis consumption as it relates to employee productivity and have enforced their policies accordingly.

“As an employer, I have no plans to relax any drug policies in and around my work

environment as we move forward in this new era of cannabis tolerance and legality,” said Abtin Hashemian, owner of a Los Angeles-based Subway franchise. “[Against] the backdrop of legalization in California, I've had to terminate employment for several of our employees due to performance-related issues stemming from cannabis intoxication while on the clock.”

Hashemian said his franchise's high-performance and results-oriented culture is important to him, so he feels obligated to act when productivity is impacted. However, Hashemian added that he is certain many well-performing employees consume cannabis off the clock and that he is ultimately indifferent to it as long as their work remains up to par. When it comes to medical patients, he added, employers should always consult with an attorney to determine the best approach.

HOW MARIJUANA USE CAN IMPACT JOB SAFETY

The conversation around marijuana in the workplace takes a completely different shape in occupations with a higher likelihood of on-the-job employee injuries.

Marijuana in the workplace may increase the risk of on-the-job injuries. According to a study in the *Journal of Occupational and Environmental Medicine*, there may be a statistical correlation with marijuana use and an increased likelihood of workplace accidents. This risk is amplified for workers whose jobs involve driving vehicles – especially public transit drivers – as several studies have correlated marijuana intoxication with impaired driving ability.

The risk often associated with marijuana use and job safety have informed workers' compensation laws in several states. In Wisconsin, for example, if an employee is injured in the workplace while intoxicated under any controlled substance, including marijuana, then the employer can reduce the workers' comp indemnity benefits by 15%, with a maximum allowed reduction of \$15,000. In Michigan, workplace injuries sustained while intoxicated aren't covered by worker's comp at all.

Although marijuana in the workplace can be concerning for safety-sensitive positions, it may safeguard against workers' comp claims in other occupations. According to a study published in the journal *Health Economics*, states with medical marijuana programs saw a 7% decrease in workers' comp claims. This drop may stem from medical marijuana treating many of the same illnesses and symptoms that employees may use workers' comp claims to address.

IS ONSITE EMPLOYEE CONSUMPTION RIGHT FOR SOME BUSINESSES?

One employer we spoke with said it benefits his company to allow employees to consume cannabis not only on the clock but in the workplace itself. iBAKE Denver is a cannabis club, an establishment where it is legal to consume cannabis and there are no cannabis products for sale. Owner Steve Nelson Jr., known to employees and customers as Thurlow Weed, said his business's unique model lends itself well to allowing employees to consume onsite.

“We've noticed that when we hire employees that do not smoke, our members get a little worried [and wonder] why,” Nelson said. “We also have found that, for most employees, it does not affect their work.”

Nelson said employee consumption helps his brand-building efforts as an adult-use consumption club, and also helps to establish a relaxed and inviting atmosphere for guests. However, he added, allowing consumption on the clock is clearly not right for everyone, especially businesses that are not in the cannabis industry.

“It's not for all businesses or for all employees,” he said. “[Employers] need to take careful consideration to what ... your employee will be doing. Some tasks are not OK to perform while high.”

TRIAL-AND-ERROR PERIOD OF CHANGING CANNABIS LAWS

The states are often referred to as laboratories of democracy, and we've seen this type of trial-and-error approach in cannabis legalization as each state builds on the experiences of its forerunners. As cannabis legalization becomes normalized and more widespread, employers will have to experiment with different approaches that suit their industry, brand and workplace culture.

Much as with other workplace policies, there is no right or wrong answer. The best approach will be different for each company and, ultimately, is whatever arrangement ensures workplace safety, productivity and high employee morale.

As the cannabis legalization debate moves from the states to the halls of Congress, workplace drug policy on cannabis is something more employers should think about.

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