

What Employers Can do about Cannabis in the Workplace

by Jennifer Potter

8 States and the District of Columbia now allow recreational use of marijuana (Maine, Massachusetts, Oregon, Washington, Nevada, Alaska, Colorado and California) and 29 states allow for medicinal use. More employees are testing positive for it since legalization. The rate has risen 75% in the last few years - from 5.1% in 2013 to 8.9% in 2016. An interesting note is that in Colorado, where marijuana was first legalized, many companies are now beginning to look to other states to hire their employees since they are having difficulty finding anyone who doesn't test positive. Medical marijuana has been legal in Canada since 1999, however, changes in the laws have greatly impacted its workforce. At the start of 2014, there were about 11,000 registered medical marijuana users in Canada - at the end of 2016 it had risen to 167,000.

There is a misconception about the 'safety' of marijuana. [AAA found that fatal road crashes in Washington State more than doubled after the state legalized recreational marijuana.](#) Workplace accidents have also risen. [Studies have shown that marijuana use is more detrimental than alcohol in the workplace.](#) There are more reports of accidents, and just plain skipping going to work altogether.

Employers have the legal obligation to provide a safe workplace for their employees and it's their right to expect employees to be at their best for productivity and profit. So...how do employers comply with new laws about recreational and medical marijuana use while maintaining a safe and effective workplace?

SHRM (Society for Human Resource Management) posted that the best way to manage this is to have a [Drug-Free Workplace Policy](#). Include this policy in recruiting materials and all new hire onboarding. To go about this:

1. Set Clear Standards - Clearly define what is expected in the workplace. Standard expectations should be clearly written, and able to be measured effectively.
2. Define all terms in your policy. 'Cannabis', 'Marijuana', 'Medical marijuana', 'recreational use', 'after hours', and any other terms relevant to your company.
3. Clarify what it means to be under the influence. This is a somewhat gray area as there are no tests per se that measure impairment like there are for alcohol. It's not smell, since commercialization has reduced that, and it's not smoke because THC is now in candy, gum and even lotions - no smell at all. In fact, this accounts for more than 50% of the market. As a side note: potency of THC has also greatly increased since legalization - it's almost 5x as strong as it was in the 1980's.
 - a. Some employers have turned to companies that provide cognitive tests. They are administered to the new employee to provide a baseline. If there is a question of

impairment on a future date, the employee is asked to take the same test again. This helps focus on the productivity of the workplace, and doesn't include any humiliating trips to the bathroom.

- b. It also measures their current state - not what they may have done over the weekend.
 - c. There are some employers who have turned to oral swabs because that shows marijuana use over the last few hours instead of days. It would indicate workplace use.
4. Specify procedures and penalties. Be consistent and follow-through in all applications.
 5. Require employees to self-disclose medical marijuana use if they want accommodation under ADA.
 6. Educate employees and managers in the clinical issues; its effects and the workplace, language of law in your state and in your company.
 7. Have a resource to provide treatment for drug use. Companies provide this for alcohol / drug abuse, and it's a good idea to also provide for marijuana.

The employer, as stated, has the obligation to provide a safe environment for its employees. It also has a right to determine its own policy. Some employers may feel marijuana use is allowable, and some may not.. Come up with a policy that works for your company, from Zero-Tolerance to "as long as it doesn't interfere with productivity".

Laws have sided with the employer in the past, however new legislation has been changing. In July, Massachusetts' highest court ruled that [disability discrimination laws protected an employee with a medical marijuana card who claimed a "debilitating medical condition."](#) A Rhode Island trial court [handed down a similar decision.](#) But in employee-first states such as California, employers still have the right to penalty. In 2016, a federal district court in CA reaffirmed that "an employer maintains the right to penalize employees even where cannabis was recommended by a physician." Federal laws, including ADA and FMLA, do not protect marijuana use in the workplace. However, the proof rests on the employer. Employers do have the right to test, and to NOT accommodate. But it must be in writing. So, be sure to document any incidents, and make sure the policy is clearly in place. Be aware that marijuana tests differently than that of alcohol, and stays in the system longer than other drugs, so it's difficult to pinpoint as a cause of accident or poor performance.

Law and Marijuana Use Q & A:

Can anyone smoke marijuana?

Just because it's legal doesn't mean anyone can partake. The legal age is 21, it's not legal in public and recreational use is limited to about an ounce. Driving under the influence is illegal.

Can I go anywhere with it in possession because it's legal in my state?

It is not legal to smoke it in public. And you cannot carry it into a state where it is not legal.

Can I do it at work, because recreational and / or medicinal use is legal?

No, being impaired at work is not a protected class like religion, race or gender. Employers have the right to test for it, and discipline anyone caught being impaired at work. But be sure to have that policy in place. Employers have the right to fire, or not hire, anyone who tests positive. They also have the right to keep them on. We know of an employer who didn't mind that the candidate tested positive. They proceeded with the hire. Unfortunately, this employee was one of the percentages that allowed its use to limit productivity and was subsequently let go due to poor performance.

We also had a client who hired someone that tested positive in his pre-employment testing. They decided they would give him a second chance: they would hire him if he re-tested clean, and if he passed he then had to agree to submit to testing every two weeks for a specific time frame. So far, it's working out fine!

I have a physician's note for medicinal marijuana, I need it at work.

This is where that Drug-Free Workplace policy is so important. Standards of expectations need to be clearly set for the employee. If the marijuana use prohibits them from carrying out the expectations, the employer has the right to impose penalties, including firing. Remember, the law specifies that where it's been legalized - marijuana use is not protected if the employee is caught actually using at work, or "impaired" at work.

I live in a state where recreational marijuana is legal. I work in a state where it is not legal. I tested positive - can my employer fire me?

Employers have the right to set a drug-free workplace policy. Employees need to abide by the policy or suffer the consequences, which may lead to dismissal. Many employers are beginning to look at performance at work, not testing. THC, the psychoactive chemical in cannabis, can stay in a person's system for days or even weeks, experts say — long after the buzz has subsided. "It's the equivalent of firing somebody who drank a glass of wine on Friday evening and then came to work on Monday," said Tamar Todd, legal director for the Drug Policy Alliance, who believes employers should reconsider zero-tolerance policies in light of changing laws and attitudes.

A number of efforts are underway to develop an accurate method, akin to the Breathalyzer for alcohol, to measure actual marijuana impairment. Such a test might be useful not only for employers, but also for police and prosecutors trying to determine what constitutes driving under the influence of marijuana in states where recreational pot is legal.