

Legalization of marijuana:

Considerations for staffing companies



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The legalization of marijuana, whether for medical or recreational uses, is causing anxiety among many U.S. businesses. Staffing companies have the added complications of hiring employees for their own firm and then placing them with another – straddling the sometimes conflicting needs of employees and client companies. If there are wide disparities between your firm's drug policy and those of your client companies, you could open yourself up to risks in several areas.

Keeping up with marijuana laws is difficult, particularly if you're placing employees in multiple jurisdictions. Therefore, you should seek the advice of a qualified legal advisor when reviewing your drug policy to ensure it doesn't violate labor laws or make you vulnerable to civil litigation. Still, a basic understanding of how the laws are changing, what those changes mean to employers' drug policies, and how you can strengthen your own practices in response to the new laws will help you in hiring, placing and retaining employees while keeping the bonds of your client relationships strong.

Regardless of how the laws change, it's clear that employers in every sector will need to broaden their understanding of how marijuana is used medically, and when it does and doesn't impair judgement or physical activity. Yet, as with alcohol, we all know that legalization doesn't mean anyone should be under the influence at work. Your organization should have a clearly defined, communicated and enforced drug policy created and maintained with the help of a qualified legal advisor.

Legalization trends at the federal and state levels

At the federal level, marijuana is still under Schedule I drugs in the Controlled Substances Act, meaning the federal government views marijuana as having "no currently accepted medical use and a high potential for abuse."¹ However, the federal government's stance could soften as public opinion becomes more supportive of medical marijuana. One major concern with reclassification is the impact full legalization of medical marijuana would have on drug-free workplaces. Once it is accepted as having medicinal value, it would be treated like other prescription medications and employers in all states would be forced to move from zero tolerance to allowing it unless it causes impairment (such as with alcohol). Without a legally defined level for impairment and an easy test for measurement, a law change of this nature would prove challenging in the workplace.

While it would be difficult to stay on top of the legal status of marijuana in every state, you should know the laws of your own jurisdiction and those where you have a client base. The majority of states have laws legalizing marijuana in some form, while only a handful allow its sale for recreational use.² But even though most states allow for limited use of medical marijuana under certain circumstances, some laws are broader than others.

Some allow only for cannabis-infused products, such as oil or pills. Others allow it only for certain rare illnesses.³

How legalization affects workplace drug policies

Most states with laws legalizing some aspect of marijuana use allow employers to regulate the use of marijuana at their facilities *even though its use may be legal in the employer's jurisdiction*. In some states where marijuana is legal for recreational use, the courts have ruled in favor of employers following the federal law and prohibiting its use for any purpose.⁴ Others, such as Massachusetts and Rhode Island, have said employers need to follow an interactive process to accommodate those who need to use medical marijuana.⁵

Companies may have greater latitude in setting zero tolerance policies in safety-sensitive positions.⁶

Examples of safety-sensitive positions include those with job duties that involve:

- Driving motorized vehicles, including highway and off-road (i.e., industrial forklifts and construction equipment)
- Working with heavy machinery
- Exposure to machinery where there is risk of entanglement or entrapment hazards
- Working at heights
- Working with hazardous chemicals/ materials or hazardous processes

Job descriptions should clearly define these types of characteristics. Many office jobs may be difficult to classify as safety-sensitive unless driving a vehicle for business is required. If you're placing employees in companies with federal government contracts, they will almost certainly have zero tolerance for marijuana use. Jobs in the healthcare sector are also almost certain to take a hardline stance in order to protect patients.

Reviewing your workplace drug policy in light of changing marijuana laws

In addition to reviewing your own workplace drug policy, you should review those of your client companies. Even if you have a zero tolerance policy that is strictly enforced, a more lax policy at the client company could put your employee at risk or lead to other types of exposure. Drug policies fall under the categories of “zero tolerance” or “impaired.”

A quick comparison shows some key differences:

Zero Tolerance	Impaired
More testing options (blood, urine, hair, saliva)	Testing options limited to blood test due to inaccuracy of other tests
Greater protection for the employer since there is no “gray area”	THC levels open to interpretation in terms of what is considered “impaired”
Easier to administer and enforce	Supervisors and employees must be trained for signs and symptoms of impairment

Whether your business’ policy or a client company’s policy is zero tolerance or impaired, the written drug policy should consider the following:

- A statement that drugs and alcohol testing is required and that you conduct this testing
- A statement of when this testing will occur (see below)
- A signed statement from the employee that he or she understands the policy
- All workplace drug policies should specify when testing can be conducted. Commonly they would take place:
 - Pre-employment (any attempt by the applicant to put this off for several days should be a “red flag”)
 - Randomly, as long as they are done fairly and equitably
 - In the event of “reasonable suspicion” of impairment
 - After an incident that involves property damage or injury

Hot Issues to watch in marijuana laws

As you monitor what’s going on in your state and around the country with regards to marijuana laws, here are some issues to keep an eye on:

- Where the federal government goes in terms of taking marijuana off the Controlled Substances Act list
- Whether the Supreme Courts in your state are ruling in favor of employers who choose to comply with the federal law versus the state law (as in a recent Colorado case)⁷
- More advanced testing for marijuana becoming available, as well as a clearer definition of what is “impaired”
- Cases where unemployment compensation is disputed when an employee is fired for marijuana use in a state where it’s legal
- Employees using the American’s with Disabilities Act as an avenue to force employers to accommodate medical marijuana use

For more information on the Temporary Staffing Insurance Program, contact World Wide Specialty Programs at **1-877-256-0468**.

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