



Workplace Concerns Regarding Marijuana and the Changing Legal Landscape

By EVAN S. WEISS

Over the last few years, more and more states, cities, and other local jurisdictions have been revising their laws regarding the criminality of marijuana possession and use. The various new laws have included authorizing medical use in limited circumstances; making personal possession a minor, rather than criminal, offense; and fully legalizing marijuana for recreational use. At the same time, under federal law, marijuana remains a Schedule 1 narcotic, making possession illegal even for medical use. This contradictory scheme has proven difficult to navigate for individuals, businesses, and law enforcement alike. For employers, an all-or-nothing approach to employees' marijuana use carries certain risks. Particularly for employers who operate in multiple locations, a more layered and considered approach, taking into account local law, may be necessary.

Can employers still utilize a zero-tolerance marijuana policy?

Many employers take the viewpoint that as long as marijuana is illegal under federal law, they can discipline employees for its use. Whether that is advisable depends on which states (and, in some places, which cities) the employer operates. For employers that operate nationwide, the answer is no, a company-wide zero-tolerance rule for marijuana use in all circumstances is likely not advisable.

In some states, employers can take a wholesale approach. In fact, 13 jurisdictions, including Georgia, Florida, and Michigan, expressly protect a private employer's right to base an adverse employment action on marijuana use, even for medicinal purposes. On the other hand, some states, including New York, Pennsylvania, and Illinois, have some explicit statutory protections for employees who use medical marijuana in accordance with state law. Other states that have legalized marijuana use have not specifically addressed the rights of employees and employers with respect to legal use of marijuana.

Employers that continue to utilize a zero-tolerance policy in the face of local law that expressly protects certain employees' marijuana use can expose themselves to legal liability. While those statutes alone are sufficient to require an employer to rethink its marijuana policies, the answer is not quite as simple as checking the local jurisdiction's codebook. The statutory schemes governing medical and recreational marijuana use are all relatively new. Many states have no statutes governing employer's rights and responsibilities when it comes to employee marijuana use, and many of the existing statutes leave relevant gaps. As a result, even where there is no explicit protection for employees, employers that fail to take a thoughtful and reasoned approach to marijuana policies risk liability depending on how a court interprets certain open questions.

Are employees entitled to disability protection for marijuana use?

One question that is open in some jurisdictions is whether medicinal marijuana use is protected under statutes that prohibit discrimination on the basis of disability. The federal Americans with Disabilities Act does not protect employees for the current use of illegal drugs. Accordingly, as long as marijuana remains illegal under federal law, the ADA will not provide any protections for employees who use it.

Employers must still evaluate state law to determine whether medicinal marijuana use is protected. Courts in some states, particularly in the west, including Colorado, California, and Oregon, have held that medical marijuana use is not protected under disability and other state employment statutes. Other states, particularly in the northeast, including Connecticut, Massachusetts, and Rhode Island, have held that medical marijuana use is protected in some capacity. In Connecticut and Rhode Island, courts found blanket refusals to employ someone who used medical marijuana to be unlawful. In Massachusetts, the high court held that employers must accommodate medical marijuana use to the same extent required by state disability law. These courts have explicitly concluded that protections exist under state law even while marijuana is categorically illegal under federal law.

Am I required to permit employees to use marijuana on the job?

Employers are not presently required in any jurisdiction to permit employees to use marijuana while working or to work while under the influence of marijuana. A drug test, however, may not be the best way for employers to enforce such rules.

As an initial matter, drug tests are not effective to determine whether an individual is currently impaired by marijuana use. Marijuana remains in a person's system, and shows up on a drug test, long after a person is no longer directly affected by its use. Accordingly, positive drug screenings are likely even where an employee is not using or affected by marijuana at work. So, in jurisdictions that protect off-the-job marijuana use, an employer will likely require more evidence than just a positive drug test if seeking to enforce an otherwise legal policy of prohibiting employees from working under the influence of marijuana. Additionally, some local jurisdictions, such as Boulder, Colorado, have recently passed laws limiting an employer's ability to test for marijuana.

Should all employers drop their policies involving off-the-job marijuana use?

Maybe. The decision to have a policy regarding employees' off-the-clock drug use is highly dependent on the particular employer. For employers that feel strongly about enforcing drug policies, the law, while more complex than it was a decade ago, is not so onerous or complicated to make enforcement problematic. While a zero-tolerance policy would no longer be advisable in many places, current law still permits employers to prohibit marijuana use in most circumstances.

On the other hand, employers who do not feel strongly about drug policies may find it easier to be more permissive than state law requires. There are some limited risks to a completely hands-off approach, however, worthy of consideration.

First, it should be pointed out that some employers fall under federal and state regulations (federal Department of Transportation regulations, for example) that require stricter policies. Other employers who do not fall under such regulations may be bound by contract to enforce certain drug policies to the extent permitted by law. While simply not testing is an option, employers who are aware of potential safety issues relating to an employee's drug use may open themselves up to liability should the employee cause damage or injury. Further, employers have been known to get a better rate on certain workplace insurance when utilizing a more thorough drug policy.

So, what should employers do?

As the above discussion hopefully makes clear, there is no one-size fits all approach for employers to grapple with the changing landscape of marijuana laws. The "right approach" for a company depends on several factors.

First, where does the employer operate. Laws in certain states and cities are more permissive than others.

Second, where do the employer's priorities lie. For employers with regulatory, contractual, or safety-related obligations, this question is easier. For other employers, it is helpful to have a clear idea of what the employer's philosophy is. An employer that wants to prohibit employee drug use to the maximum allowable extent should follow a different approach than an employer wanting to take a more hands-off approach to employee conduct that does not affect their work.

Third, the individual circumstances matter. It is important to remember that, even in states that protect medical marijuana use in the employment context, the protection often arises in the context of disability law. Under most disability laws, the employer and employee's required conduct is governed by what is reasonable under the circumstances. Employers should consider both their own needs and the needs of the employee. Accordingly, some flexibility based on context may be necessary.

The main takeaway of the evolving marijuana laws is that employers should, at the very least, more carefully consider their policies. To maximize the effectiveness of such considerations, it is helpful to (1) consult a lawyer regarding the pertinent local laws; (2) have a clear idea of what your priorities are; and (3) be mindful of the idea that context and circumstance matter.

The evolution of marijuana laws is not complete. Laws at the state and local level on marijuana continue to change, and courts are only beginning to interpret these laws. While perhaps not in the next few years, it remains possible that federal law will treat marijuana use differently in the near future. Employers should remain mindful of this evolution. A one-time policy change now may no longer be the right course of action as the landscape continues to evolve.



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