



# WORKPLACE MARIJUANA USE



**A**s of the date of this publication, marijuana is legalized for medical use in 34 states and the District of Columbia, as well as 10 states and the District of Columbia for recreational use. Legalization efforts have not slowed, and with legalization marijuana use in the U.S. continues to rise. Employers are tasked with maintaining workplace productivity and safety whilst navigating increased employee marijuana use, frequent case law, and legislative updates. Unlike other drugs, marijuana's precarious position between legal and illegal makes it unique.

### **Marijuana: Both Legal and Illegal**

The federal government continues to classify marijuana/cannabis as a Schedule I drug. Under the federal Controlled Substances Act (CSA), Schedule I drugs are those that are determined to have a high potential for abuse and have no currently accepted medical use. Although a review of marijuana's status as a Schedule I drug was conducted in 2016, the Drug Enforcement Agency (DEA) chose to keep marijuana classified as Schedule I, where it remains today.

In addition to not being prescribable by doctors, Schedule I drugs cannot be distributed by pharmacies. Possession and distribution of a Schedule I substance can be criminally prosecuted in a federal court, and research and/or clinical studies on these substances are extremely limited. Additionally, as Schedule I substances are illegal, the Food and Drug Administration (FDA) has no oversight or regulation on marijuana or marijuana-containing substances.

In recent history, the federal government has generally chosen not to prosecute those who possess and distribute marijuana in compliance with state laws. Thus, marijuana inhabits an in-between zone of legality: legal and illegal at the same time. Although the government overlooks possession in compliance with state laws, it continues to treat marijuana as an illegal substance in terms of oversight, distribution, federal disability law protection, and more. Federally-regulated drug-free workplaces still require employees to test negative for marijuana, as well as other illegal drugs.



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### **Prescription Marijuana**

There is a common misconception in today's society that medical marijuana use is the same as prescription drug use. Because marijuana remains federally illegal, medical marijuana lacks the government insight and clinical trials that prescription medications are subject to. Doctors who "recommend" marijuana to patients operate with little information about dosage, THC levels, and more. This can lead to a lack of quality control, leaving vulnerable patients at risk of ingesting mold, fungi, bacteria, pesticides, carcinogens, and many more dangerous toxins. Although medical marijuana is popular, it has not been subject to the rigorous testing the prescription drugs must undergo before they are permitted to be utilized as treatment.

Two exceptions to this rule exist - Marinol® and Syndros®. The FDA approved these two THC-containing drugs due to the reported benefits of medical marijuana. These drugs are used to treat patients with cancer, glaucoma, Aids, and HIV. Although these approved medications contain little THC, they still may be prohibited in certain positions/industries (e.g. safety-sensitive).

### **Marijuana and Alcohol**

Although recreational marijuana use and alcohol use are often compared, alcohol impairment is well established while marijuana impairment is not. While a simple breath or saliva test can tell an employer that an employee used alcohol very recently, doing the same for marijuana is much more difficult. Currently, oral fluid testing is the best method for employers that wish to detect marijuana use, as it measures recent use and excludes historic use. Other testing methodologies, such as urine, are unable to discern recent use from use that happened days to weeks ago. While oral fluid testing measures recent use, there is no currently available test that measures marijuana impairment.

The impact that THC has on an individual varies from person to person, and legality arrived long before a standard level of impairment has been tested in the US. Additionally, due to the lack of federal oversight for marijuana, THC levels in products often vary widely, meaning that users rarely know how much THC they are actually consuming. Until marijuana production, manufacturing, labeling, and distribution becomes standardized, use, safety, and wellness will continue to be a foggy area.

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cannot be grounds for discipline and/or termination, or simply state that a medical marijuana using employee cannot be discriminated against in disciplinary procedures, hiring, or termination. Currently, protections for marijuana use in the workplace do not extend to recreational users in 49 states and the District of Columbia, with Maine being the sole exception. Arizona is an example of a state with medical marijuana protections, providing that a medical marijuana using employee can only be disciplined for a marijuana-positive drug test if s/he was impaired by marijuana during work hours or brought/used marijuana in the workplace.

Additionally, case law has emerged that offers medical marijuana users further protections. *Barbuto v. Advantage Sales and Marketing*, for example, held that the Massachusetts state disability discrimination law applies to medical marijuana use. This ruling only holds in Massachusetts, but employers should be aware of any prior and/or progressing cases in their state(s) of employment that may impact their rights when it comes to marijuana-using employees.

### Best Practices

Communication is key for employers – communicate your company policy regarding marijuana use regularly and clearly so as to alleviate any confusion that employees may have. Workplace safety and productivity should remain a top priority, and policies should restrict marijuana use to the extent permitted by law. In all states and industries, policies must, at a minimum, prohibit marijuana use in the workplace as well as marijuana impairment during work hours.

Employers should continue testing for marijuana, using a testing method, such as oral fluid, that indicates recent use. In states with medical marijuana protections, workplace policies should require employees to verify their medical marijuana authorization to a Medical Review Officer. Policies should prohibit marijuana use by employees in safety-sensitive positions, and employers and managers should be trained to identify marijuana impairment. Additionally, employers should work with HR to develop a policy for employees who request accommodation of legal medical marijuana use for a disability, taking care to comply with state disability discrimination laws.

### State Laws and Workplace Marijuana Use

As marijuana is not legalized on the federal level, states treat workplace marijuana use differently when legalizing the substance for medical and/or recreational use. Some laws protect employer's rights, some defer to medical marijuana-using employee's rights, and still case law complicates the matter further. It is essential that employers understand applicable state and case laws in order to remain compliant with their drug-free workplace policies and practices.

Generally speaking, when a state marijuana law does not mention employers at all, the status quo remains in place, meaning that employers may test and discipline for marijuana use in the same manner as other illegal drugs, subject to the requirements of state drug testing laws. Colorado is an example of a state where the status quo remains static, with the state law stating that employers are not required to accommodate the use of medical marijuana in the workplace.

Alternatively, some states protect medical marijuana using employee's rights. Some laws state that a medical marijuana using employee's positive marijuana test alone

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