



# LEGAL CANNABIS: AN OVERVIEW

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**A**ny employer with a workplace drug testing policy needs to be well-educated on marijuana law(s) in the states in which they operate. In 2023, there is such variation in the way that different states permit or restrict workplace discipline for off-duty marijuana use that an uninformed policy will easily expose an employer to liability. When implementing marijuana testing, it is imperative that an employer understand the basics of marijuana law across the states.

## What is cannabis?

Marijuana is something familiar to most, if not all, people, but the various terms thrown around like “cannabis,” “hemp,” “THC” and “metabolites” can sometimes confuse. Cannabis is a plant that contains over 100 different compounds, including tetrahydrocannabinol (THC) and cannabidiol (CBD).

Tetrahydrocannabinol, or “THC,” is the psychoactive chemical found in cannabis that causes the “high” or euphoric effects, associated with marijuana. Levels of THC vary in different cannabis plants or strains. Delta-9 is the most common chemical THC; however, there are other forms of THC such as Delta-8 and Delta-10, which cause a similar “high.” In addition to THC’s euphoric effects, it can also have negative effects on the body including impaired memory, impaired coordination, paranoia, anxiety and disordered thinking.

Hemp and marijuana are two types of cannabis. Marijuana is a term for cannabis that contains more than 0.3% THC. Marijuana can contain large amounts of THC, and in recent years the amount of THC found in marijuana has risen. Hemp is a term for cannabis that contains less than 0.3% THC. It has been used to describe non-intoxicating cannabis that is harvested for the industrial use of its derived products. Hemp has been historically used in paper products, clothing and textiles, body care products such as lotion and food. Hemp was legalized federally in 2018 through the Farm Bill. Because hemp contains a low amount of THC, it generally contains high amounts of the chemical cannabidiol or “CBD.”

In recent years the amount of THC found in marijuana has risen.

Drug tests are designed to detect either THC, which is referred to as the “parent drug” or a THC metabolite. Urine testing detects only metabolites of THC. This is because metabolites are more stable and stay in the body longer than parent drugs. When THC is broken down and metabolized by the body, it separates into several different metabolites. Most urine drug tests detect the metabolite THC-COOH, which in and of itself is non-psychoactive. Oral fluid testing, however, tests for the parent drug, psychoactive THC and not the metabolite. Once THC has been metabolized, it is not detectable on an oral fluid test.

A drug test cannot differentiate between THC from marijuana, hemp or a CBD product. Most current drug tests detect Delta-9 THC. Delta-8, Delta-10 THC and others are not currently detected in most drug tests that screen for THC and are sometimes used by drug abusers to circumvent drug tests.

## State laws and marijuana

Currently, 39 states and the District of Columbia have legalized medical marijuana and 22 of those states have also legalized recreational marijuana. Additionally, 11 states have passed laws that protect off-duty marijuana use by employees, including recent law changes in California and Washington, which make it more difficult for employers to discipline employees for a positive marijuana test.

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However, in 49 states and the District of Columbia it is still legal to test employees for marijuana use, with New York state as the lone exception that prohibits testing in nearly all circumstances.

As marijuana legalization has risen, so have marijuana positivity rates. Even from 2020-2021, marijuana positivity rates increased 8.3% in one year. Marijuana positivity rates have especially escalated in states with legal recreational marijuana, rising 118.2% from 2012 to 2020.<sup>1</sup> This is important to note as more states move towards restricting workplace discipline for marijuana positives.

Early marijuana legalization never protected an employee's use of marijuana from workplace discipline. However, as legalization grew so did protections for marijuana users. These protections first started with laws that protected the medical use of marijuana. Employees with medical cards could not be disciplined for testing positive unless they were impaired on the job or used medical marijuana in the workplace. However, in recent years even recreational use has received those same protections, with California and Washington being the latest states to enact such laws.

### California AB 2188

California's recent law prohibits employers from disciplining employees or refusing to hire applicants based on marijuana use off work hours and off work property. The law prohibits discrimination in "hiring, termination, or any term or condition of employment" if that discrimination is based on "an employer-required drug screening test that has found the person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids." The law is scheduled to take effect January 1, 2024.

California's law does include exceptions. One notable exception is the building and construction trades. This is important as those industries include many safety-sensitive positions. Other exceptions include positions for which state or federal law require drug screening for marijuana, positions that require a federal government background investigation or security clearance in accordance with regulations issued by the United States Department of Defense, and employers that must conduct testing in order to receive federal funding or federal licensing-related benefits or pursuant to a federal contract.

While California's law is restrictive, there is still a lot employers in California can do to protect the safety and productivity of their workplace. Employers are still permitted to test employees for marijuana. Employers are still permitted to discipline and terminate employment if an employee is impaired by marijuana while working, uses marijuana during work hours or brings marijuana into the workplace. Employers should have clear policies regarding these prohibited activities and should monitor employees for signs of impairment in the workplace.

The California law's reference to testing for non-psychoactive cannabis metabolites is thought-provoking but unclear. As mentioned, oral fluid testing does not detect non-psychoactive metabolites but instead detects the parent drug, psychoactive THC. The law on its face seems to permit workplace discipline if based on a test that detects the



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psychoactive parent drug rather than the non-psychoactive metabolites. However, even a drug screening test that detects THC, the parent drug, cannot prove impairment and cannot prove whether a person used marijuana on the job or off-duty. So whether oral fluid testing is an exception to California's prohibition on discrimination solely based on a drug screening test remains murky.

### Washington SB 5123

Similar to California, Washington state also recently passed a law severely limiting employer rights in regard to pre-employment testing for THC. The law prohibits employers discriminating against an applicant during the hiring process if discrimination is based on off-duty and away from the workplace cannabis use or a required drug test that indicates the presence of "nonpsychoactive cannabis metabolites" in the hair, blood, urine or bodily fluid.

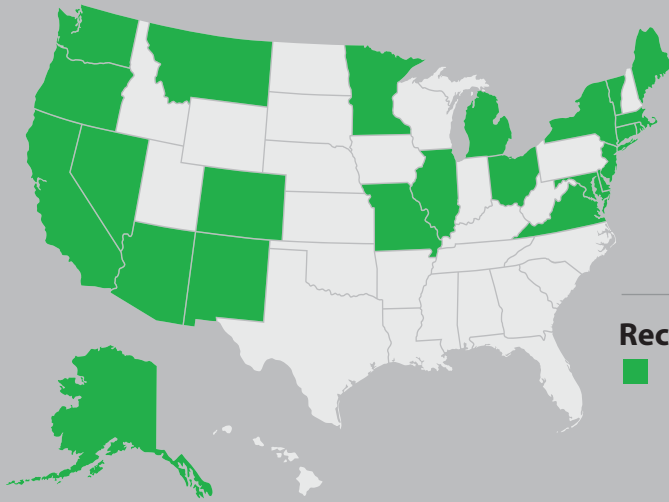
Despite this law change, employers in Washington still maintain a plethora of rights when it comes to drug testing. Employers are still permitted to base hiring decisions on "scientifically valid drug screening conducted through methods that do not screen for non-psychoactive cannabis metabolites." Employers are also still permitted to maintain a drug- and alcohol-free workplace, comply with federal laws and regulations, and continue marijuana testing for all circumstances outside of pre-employment. Employers can also continue to test applicants for marijuana so long as pre-employment THC-positives are not reported to the employer. Washington's law includes a lengthy list of exceptions that should be consulted, including exceptions for safety-sensitive positions "for which impairment while working presents a substantial risk of death." The law is scheduled to take effect January 1, 2024.

Washington's law is restrictive, but less so than California's, as it only applies to pre-employment testing. Employers should have clear policies in place for pre-employment testing, as well as current employee testing. Similarly to California, Washington's law pertaining to non-psychoactive metabolites is thought-provoking, but ultimately unclear. On its surface, it would appear that an employer could choose not to hire an applicant based on the results of a pre-employment test that detects

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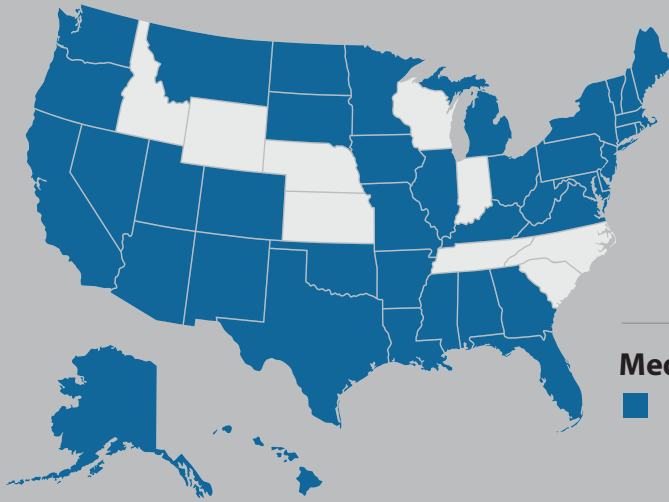
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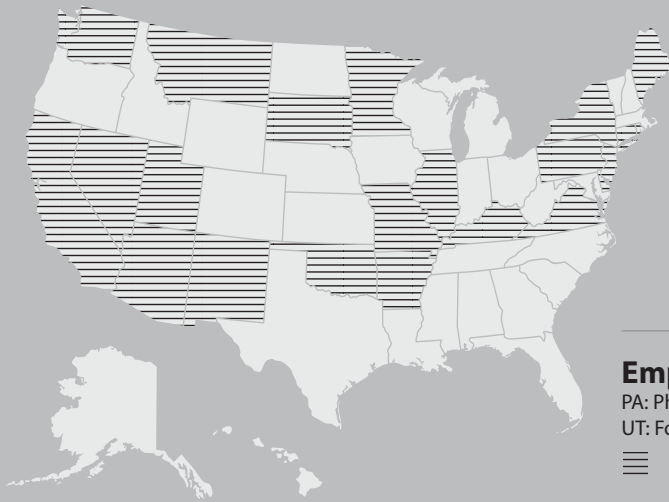
- |                      |               |              |
|----------------------|---------------|--------------|
| Alaska               | Maryland      | New York     |
| Arizona              | Massachusetts | Ohio         |
| California           | Michigan      | Oregon       |
| Colorado             | Minnesota     | Rhode Island |
| Connecticut          | Missouri      | Vermont      |
| Delaware             | Montana       | Virginia     |
| District of Columbia | Nevada        | Washington   |
| Illinois             | New Jersey    |              |
| Maine                | New Mexico    |              |

## Recreational cannabis



- |                       |               |                          |
|-----------------------|---------------|--------------------------|
| Alabama               | Louisiana     | Ohio                     |
| Alaska                | Maine         | Oklahoma                 |
| Arizona               | Maryland      | Oregon                   |
| Arkansas              | Massachusetts | Pennsylvania             |
| California            | Michigan      | Rhode Island             |
| Colorado              | Minnesota     | South Dakota             |
| Connecticut           | Mississippi   | Texas (low-THC cannabis) |
| Delaware              | Missouri      | Utah                     |
| District of Columbia  | Montana       | Vermont                  |
| Florida               | Nevada        | Virginia                 |
| Georgia (low THC oil) | New Hampshire | Washington               |
| Hawaii                | New Jersey    | West Virginia            |
| Illinois              | New Mexico    |                          |
| Iowa (low THC oil)    | New York      |                          |
| Kentucky              | North Dakota  |                          |

## Medical cannabis



- |                      |            |              |
|----------------------|------------|--------------|
| Arizona              | Maine      | Oklahoma     |
| Arkansas             | Minnesota  | Pennsylvania |
| California           | Missouri   | Rhode Island |
| Connecticut          | Montana    | South Dakota |
| Delaware             | Nevada     | Utah         |
| District of Columbia | New Jersey | Virginia     |
| Illinois             | New Mexico | Washington   |
| Kentucky             | New York   |              |

## Employer's rights restricted?



PA: Philadelphia specifically  
 UT: For public employers



only the psychoactive parent drug rather than the non-psychoactive metabolites. Ultimately, it will be up to individual employers to determine their hiring policies with the understanding that no drug test can prove marijuana impairment or when and where marijuana was consumed.

### Other important state laws

Other states have similarly restrictive laws to California and Washington when it comes to marijuana testing in the workplace. The state of New York has the most restrictive law in the country. The New York state legislature passed an amendment to the marijuana law in 2021 that prohibits employers from discriminating against employees who use recreational marijuana off-duty and off work premises. Then in 2022, the New York Department of Labor issued guidance that clearly stated that employers are prohibited from testing employees for marijuana unless specifically required by law. Examples provided of permissible marijuana testing are for-hire motor vehicle carriers as required by state law and commercial motor vehicle drivers regulated by the Department of Transportation. New York remains the only state with an outright prohibition on workplace drug testing for marijuana for nearly all workplaces.

Both Illinois and Nevada also have laws that restrict the action an employer can take based on a positive test for marijuana. In both states, an employer cannot refuse to hire or discharge any individual because

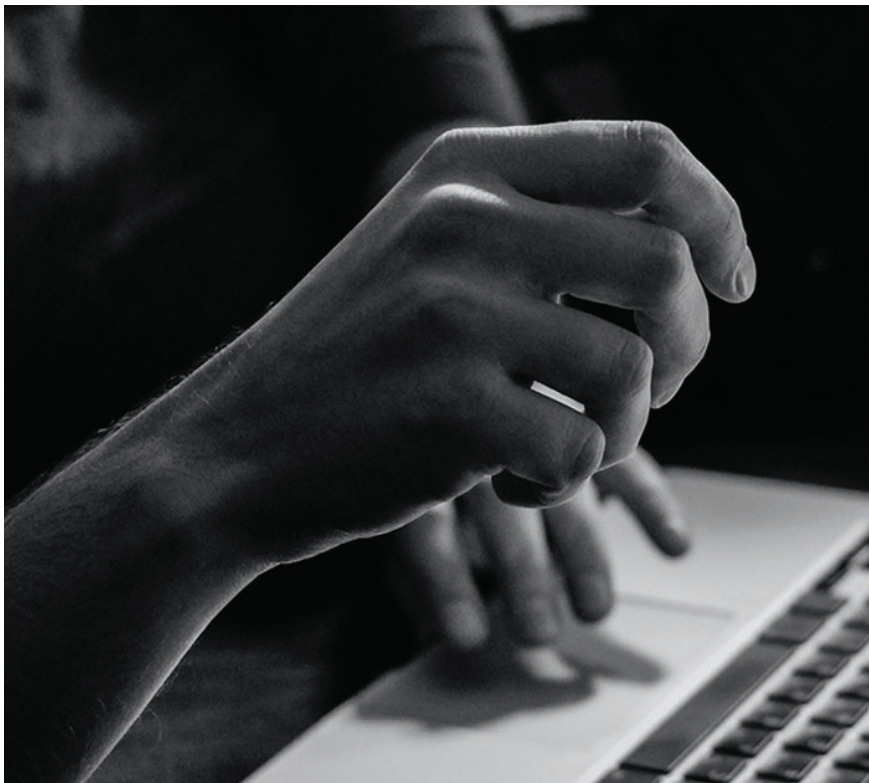
the individual uses marijuana off the premises of the workplace during non-working and non-call hours. However, in both states an employer can discipline or terminate an employee if the employee is impaired by marijuana on the job, consumes marijuana during work hours, or brings marijuana into the workplace. And in both states testing for marijuana is permitted. Nevada does differ from Illinois law in that Nevada permits an employer to terminate employment or refuse to hire based on a positive marijuana test for the following positions: firefighter, emergency medical technician, positions that require an employee to operate a motor vehicle and for which state law or federal regulations require the employee to submit to screening tests, and, importantly, positions that, in the determination of the employer, could adversely impact the safety of others.

### Conclusion

The wrangle over legal marijuana will continue for years to come. Whether more states will join California and New York in restricting employee discipline for marijuana use, or whether the pendulum has swung as far as it will go in that direction, remains to be seen. But either way, employers should be educated on the basics of marijuana law and should make an informed and legally defensible decision on their workplace policy.

1. See Quest Diagnostics Drug Testing Index.

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