

The impact of cannabis laws on employers

Marijuana or cannabis use remains illegal under federal law. Marijuana is a Schedule I substance under the Controlled Substances Act. Drugs on Schedule I have no currently recognized medical use under federal law and are said to have a high substance abuse potential. Under federal rules, employers are free to fire workers who test positive for marijuana's presence. Employers can cover marijuana in their drug-free workplace policies, drug tests for the substance apply zero-tolerance rules for the recreational use of marijuana.

But that's not the end of the story. Unfortunately for employers, a growing number of states have decriminalized cannabis, removed it from their own prohibited drug schedules, and even in some cases decriminalized the use of recreational marijuana. Legalization legislation has now been passed in 37 states, making it essential that employers develop use of cannabis policies individualized to each workplace location. What's worse, some employers have been sued under state laws that provide workplace protection for employees who use state-prescribed medical marijuana. It makes for a confusing patchwork of employment laws and interferes with an employer's right to control what happens on an employer's premises.

So, how does patchwork of laws impact different employers? Let's take a look.

Employers with federal contracts

Federal contractors and grant recipients who receive federal funding must maintain drug-free workplaces under the Drug Free Workplace Act (DFWA). The law prohibits using controlled substances in the workplace. Because marijuana is a Schedule I controlled substance, it can't be used at work. Unfortunately, there is currently no test that clearly determines whether a worker is under the influence of cannabis — the active ingredient remains in the system long after its effect on the user. A federal contractor or grant recipient who uncovers positive test results in medical marijuana users will not know whether the employee is under the influence currently or has used the drug off-premises outside regular work hours. If the usage was legal under state law, the employer has to choose between following federal law or state law.

Federal transportation laws

Employers governed by the U.S. Department of Transportation (DOT) rules have to comply with those rules without regard to state marijuana laws. They must continue to drug test commercial truck drivers. A person is not physically qualified to drive under federal rules if he or she uses any Schedule I controlled substance such as marijuana. Thus, a positive drug test for recreational cannabis legal under a state recreational marijuana law would bar a truck driver from driving. The same would be true for use of medical marijuana legal under a state medical marijuana law.

Medical versus recreational marijuana laws

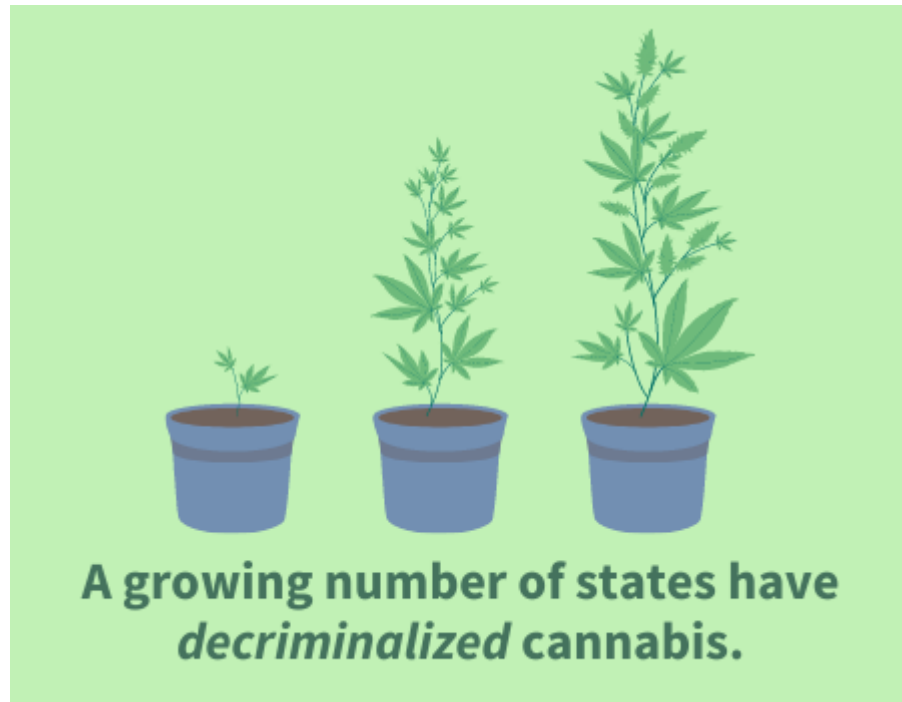
State labor laws governing cannabis usage fall into two categories — those that legalize medical marijuana usage and those that legalize recreational use of marijuana. Some states have legalized both. State legislatures have responded to public pleas for deregulation and decriminalization that have grown louder over the years. Advocates argue that pre-employment drug testing — especially for what they view as having low substance

abuse potential — screens out prospective employees for drug use that doesn't affect the employee's performance or create impairment. Job applicants, or so the argument goes, should not be punished for the use of a drug that they deem harmless or helpful for the treatment of some medical conditions without other effective treatments. They see the federal government's inclusion of cannabis on Schedule 1 as harmful overreach.

Here are some examples of state marijuana laws

Pennsylvania's version provides some practical tips for employers.

Pennsylvania



Pennsylvania's Medical Marijuana Act (MMA) took effect in 2016. It bars employers from terminating employees solely based on their use of medical marijuana. In other words, Pennsylvania employers can't refuse to hire prospective employees just because they have a medical marijuana card and use cannabis for authorized medical reasons under the state's law.

There are, fortunately, a few built-in limits, including safety-sensitive positions. The law also does not condone an employee's use while at work. Employers don't have to offer a reasonable accommodation of an employee's medical marijuana use at work. In fact, employers can and should ban its use in the workplace. Employers aren't prohibited from disciplining employees for poor workplace behavior while under the influence of marijuana.

Initially, it was unclear whether an employee could sue his employer directly if she believed her employer took an adverse employment action against her for legal at-home medical marijuana use. Inevitably, a case came along that put that question before the courts. A hospital employee received a medical marijuana card to treat her chronic pain, migraines, and persistent fatigue. Her employer's drug testing policies required a drug test for marijuana. She provided the drug screen testing company with a copy of her medical marijuana card. Her test result was positive for marijuana and the hospital terminated her — an adverse action she claimed was due solely to her use of medical marijuana. She filed a suit alleging discrimination in violation of the MMA.

The hospital argued the nurse couldn't sue it directly. The Court of Common Pleas disagreed. It said employees can sue their employer directly under Pennsylvania's marijuana law. The hospital appealed and a Pennsylvania Superior Court agreed employees can sue.

Key takeaways for PA employers:

In its decision, the Superior Court ruled the MMA is remedial in nature and therefore should construe employee rights liberally. This means PA employers have an uphill battle in MMA lawsuits. Any ambiguity in the law or regulations will be interpreted in the employee's favor. The court said employers should view medical marijuana use the same way they see prescription drug use.

Tips for PA employers managing employees using medical marijuana include:

- Employers should not terminate solely based on a positive marijuana test. Any positive test should prompt an inquiry as to whether the employee is certified to take medical marijuana.
- Employers do not have to tolerate inappropriate workplace behavior due to the employee being under the influence of medical marijuana.
- Employers do not have to accommodate medical marijuana use in the workplace. That is, employees don't have to right to take their legally purchased cannabis at work.
- As with any termination, the reasons should be carefully documented, but legal medical marijuana use should not be among them.

New Mexico

New Mexico's marijuana law allows employers to create written zero-tolerance drug testing policies that allow discharge for testing positive for marijuana. However, there is an exception for medical marijuana users. New Mexico employers therefore can't take an adverse employment action against a positive-test applicant or employee with a valid marijuana prescription while they can fire the recreational marijuana user.

New Jersey

New Jersey's state marijuana law is one of the few that specifically addresses positive test results for the presence of marijuana in the system. If the employee tests positive and has a medical marijuana prescription, the employer cannot take an adverse employment action against the worker. Uniquely, the law also requires that at the time of testing, the employer must perform a physical assessment of the employee's possible impairment. In other words, employers cannot assume that a positive test result means the employee is in fact under the influence of marijuana.

Colorado

Colorado has largely legalized the possession and use of marijuana — both for medical reasons and recreational ones. But this is a decriminalization law rather than an employment law. Under Colorado law, employers can still test applicants and employees for marijuana usage and then terminate those employees who test positive. That's even true for those with valid permission to use marijuana for medical reasons. The state has a prohibition against firing workers for engaging in legal conduct outside work hours. But the state's Supreme Court ruled that an employer can fire someone who tests positive for the use of cannabis even though she has a valid medical marijuana card because marijuana is still a Schedule 1 controlled substance under federal law. Thus, illegal under federal law trumps legal under state law when it comes to marijuana testing and use.

Bottom line

Employers may need separate use of marijuana policies for each state in which they operate. Federal law still lists marijuana as a Schedule 1 controlled substance with no medical use and high substance abuse potential. Varied state laws allow limited medical or recreational usage. Some provide employment protection while others do not. Seek legal advice in each state you operate before taking adverse action against employees with a positive test result.