

CANNABIS IN THE WORKPLACE

Comparative Law Review on the Impact of Cannabis Legalization in the U.S. Workplace

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Following the passage of California's landmark Compassionate Use Act of 1996, a number of states have legalized cannabis for medical and then recreational use. Thirty-three states permit the medicinal use of marijuana, and 11 states and the District of Columbia allow recreational use. With legislation pending across the country, these numbers will grow. As these laws expand in their geographic and substantive scope, employers increasingly find themselves challenged to balance quickly evolving state and municipal laws and court decisions against the federal Controlled Substances Act, which effectively bars the distribution and possession of cannabis, and their interests in maintaining productive and safe workplaces.

Drug Testing and Employee Rights

With the exception of Nevada, which banned pre-employment drug testing for cannabis, and the City of New York, which implemented a similar local ban on testing for marijuana, the various states' legalization statutes have not curbed employers' existing rights vis-à-vis drug-testing (1) applicants for marijuana use or (2) existing employees for suspected on-duty use. Drug testing remains governed by a patchwork of statutory rules and privacy cases in each state, and not every state allows the same type or kinds of testing.

The question generally is whether employers can act on information once they learn an applicant or employee tests positive for cannabis. Indeed, after passing laws permitting medicinal or recreational use of cannabis, a growing number of states developed laws providing employee protections for lawful off-duty use:

- Arkansas and Illinois passed laws prohibiting adverse actions against persons because of their status as medical marijuana patients.
- Connecticut and Maine more expressly recognize an employee's right to off-duty cannabis use and passed laws prohibiting adverse employment actions based on such use.
- Statutes and case law in states such as Maryland, Massachusetts and Nevada dictate employers must affirmatively engage in the interactive process and possibly accommodate an employee's use of cannabis as medical treatment for a disability.
- Other states, including Vermont, do not address employee protections directly through their legalization statutes, but nevertheless require employers to consider accommodating medical marijuana use for the treatment of a disability through existing state disability discrimination laws.
- In those states with employee rights statutes, exceptions typically exist so an employer need not violate federal law or contractual obligations, place a cannabis user in a safety-sensitive position or permit on-duty use in complying with the statutes.
- Surprisingly, some of the front-runner states in cannabis legalization, such as Colorado, Washington and California, still do not recognize any employee protections for cannabis use.

