

# Brownies, Blunts and Bongs: Medical and Recreational Marijuana in Your Workplace

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## Introduction

Marijuana is the most frequently used illicit drug in the US. It is also the drug most often detected in workplace drug-testing.

Expansion of legal uses of marijuana in communities will impact organizations in many ways. Implementing defensible operating policies will facilitate a safe environment for staff allowing an organization to fulfill its intended mission.

## Brief History of Marijuana Use

Humans have been using cannabis for medicinal and other purposes for over 2,000 years.

- Cannabis-based textiles dating to 7,000 B.C. recovered in northern China
- About 600 B.C. references to cannabis in Indian medicine are cited as a cure for leprosy
- In 200 B.C. Greeks were using it to remedy earaches, edema and inflammation.
- George Washington's diaries cite his interest in medicinal properties of cannabis.
- 1978, NM was first state to recognize medical value of marijuana; 1996, CA first state to pass medical marijuana law.

## Marijuana's Effect on the Body

### Short-term effects

- Euphoria, relaxation, and sociability, mild increase in heart rate, blood pressure, impaired concentration, short-term memory, decision-making, drowsiness, decreased ability to judge distance and space, decreased ability to judge time

### Long-term effects

- Motivational syndrome - diminished inspiration to participate in social situations, apathy, lethargy, decreased drive to complete tasks, to seek and maintain employment

### Medical Marijuana

- People who are terminally ill, or suffer from painful or long-term symptoms associated with certain diseases (epilepsy, AIDS, glaucoma, and cancer) may use medical marijuana as a form of treatment and/or pain relief. <sup>1</sup>

## Marijuana in the Workplace

- There is no Constitutional right to use marijuana in the workplace. Unlike race, national origin, religion, gender and sexual orientation and identity, the cannabis user is not a class of persons protected by federal or state laws.
- Two federal laws prohibit marijuana use in the workplace. The Drug Free Workplace Act of 1988 – companies that contract with federal government or those who receive federal grants must prohibit marijuana and other drugs in the workplaces. Omnibus Transportation Employee Testing Act of 1991 – bars the use of marijuana in “safety-sensitive transportation jobs.”

### Employer Regulation of Drug Use

- Employer regulation of drug use in the workplace usually centers on possession, use or being under the influence of drugs while at work or while working. Employers adopt work rules, policies and provide for testing in appropriate cases. <sup>2</sup>
- Testing may occur in the pre-employment setting, on a random basis or on the basis of a reasonable suspicion based on observation or other information. In addition, some employers routinely test on a post accident or incident basis.

### Random Testing

- Provides each employee an equal chance of being chosen to produce a urine sample at any given time.
- Unannounced random testing may provide the best deterrent because no employee knows when he or she can use an illegal drug without being detected. But the element of surprise can also cause fear and feelings of mistrust and a violation of privacy.

### Reasonable Suspicion Testing

- Only requires an employee to submit a urine sample when he or she is suspected of having used illegal drugs.
- Reduces number of samples that must be tested at one time, reducing costs in comparison to scheduled testing. It also avoids treating every employee as if he or she has committed a crime, producing a more positive attitude toward the employer than does random testing. Reasonable suspicion testing is the most prevalent form of employee drug testing.

## Current Legislation and Case Law

### Federal

- Federal law classifies marijuana as a Schedule I drug: Drugs with no currently accepted medical use, high potential for abuse, and use/possession of which is subject to prosecution.
- The Americans with Disabilities Act (ADA) does not require employers to allow marijuana use as a reasonable accommodation for someone with a disability, even if that person is a registered medical marijuana patient with a legitimate prescription. <sup>3</sup>

### State

- Twenty-three states and the District of Columbia have decriminalized possession of marijuana for medical use. Washington and Colorado allow recreational use as well.

### Case Law Examples

- *Bailey v. Real Time Staffing Services*, Unpublished, 6th Circuit 2013 - employee fired after positive screen for marijuana. Unknown to employer, plaintiff was HIV positive and taking prescribed medication which could result in a false positive for marijuana. Court sided with employer in affirming dismissal of Americans with Disabilities Act lawsuit.
- *Gonzales v. Raich*, 545 US 1 (2005) Congress has authority to criminalize home grown non-commercial use of marijuana despite local law (CA) permitting it.
- *Johnson v. Columbia Falls Aluminum Co.*, 213 P 3d 789 (2009) and *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P 3d 518 (2010). Each court held that an employer was not required to accommodate an employee's use of medical marijuana. Such laws do not prohibit employee from being fired for use of marijuana.
- *Coats v. Dish Network, LLC*, 303 P.3d 147 (Colo. App. 2013) - Employee tested positive for THC. He argued that he did not use marijuana and was never under influence of marijuana while at work, and that use was protected under Colorado law. The Colorado Court disagreed and concluded that medical-marijuana use is subject to both state and federal law and that a company can discipline a worker for off duty use.

## What Legalization of Marijuana means to the Workplace

- The decriminalization of marijuana has created many issues in the workplace. While possession and use of alcohol is legal for many employees, an employer has a right to prohibit employees from possessing alcohol on the job and from working under its influence. Thus, an employer, including a healthcare employer may institute drug-free-workplace policies prohibiting use, possession or being under the influence.
- Nearly half of the states and D.C. have approved medical marijuana use, so employers cannot discriminate against employees who test positive for marijuana when it's prescribed by a physician. However, employers in many states are still allowed to discipline employees who are impaired on the job due to drug use. <sup>4</sup>
- Marijuana use is illegal under federal laws. Therefore, any workplace that receives federal funding or is subject to federal regulations requiring the testing of safety-sensitive workers — like the Department of Transportation, for example — must consider marijuana a prohibited substance according to the Drug-Free Workplace Act of 1988.
- Increased marijuana use, especially in states where it's legalized, can lead to more dangers on the road. Research done by Columbia University revealed that marijuana alone increased the likelihood of being involved in a fatal crash by 80 percent, so employees involved in road travel should be regularly monitored and tested. <sup>5</sup>
- Marijuana users struggle to do multiple tasks and to maintain concentration. In both Colorado and Washington, where recreational use and possession of pot have been legal since late 2012, driving while Under the Influence of Drugs (DUID) arrests have increased.

## Before Crafting or Altering a Workplace Drug Testing Policy

Talk with an attorney.

- A qualified attorney will be able to evaluate a company's drug testing policy against state, federal and local laws to ensure compliance on all levels. Additionally, any questions regarding the intricacies of applicable state marijuana laws can be addressed.

Review your company's drug testing policy.

- Carefully review a drug testing policy, especially the section that addresses marijuana use. Make changes to clarify what your expectations are in terms of impairment, safety, marijuana use, and termination. Once again, an attorney should review any changes before the policy is distributed.

Communicate expectations with employees.

- Speak directly to employees about the company's standards and expectations on drug use and testing, and address any changes that were made to the written policy. Emphasize the importance of maintaining a drug-free workplace for everyone's safety, health, and productivity.

Train HR and Managers on changes.

- HR personnel and managers should be trained and educated on new policies, how to handle failed drug tests, and what to do about any employees who use medically prescribed marijuana. Remind them about the importance of confidentiality of all health records and testing results.

Continue or increase drug testing.

- With drug use and abuse on the rise, employers who strive to preserve a drug-free environment may want to increase workplace drug testing. Even if you don't increase the frequency of testing, don't let your testing policy go slack because of changing laws.

### References

1. Longo, D. 2014. Adverse Health Effects of Marijuana Use. *NEJM* 370: 23.
2. Wildman, E. 2014. Marijuana and the Workplace: A Potpourri of Conflicting Laws for Employers. [www.edwardswildman.com](http://www.edwardswildman.com)
3. Hyman, J. 2013. Medical Marijuana and the Americans with Disabilities Act.
4. Kenny, J. 2006. How State Medical Marijuana Laws Affect Workplace Drug Testing. *Occupational Health & Safety*.
5. Weier, M. 2014. Higher Conflict and Controversy: Medical and Recreational Marijuana in the Workplace. [www.rnwcomplaw.com](http://www.rnwcomplaw.com)