

High or Dry: Weed and the Workplace



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Is your nonprofit workplace a “drug-free” zone? Although nonprofit leaders are in agreement that impaired staff pose an unacceptable risk to the safety of people who serve and receive services, the legalization of medical and recreational marijuana creates a host of challenges for nonprofit employers who wish to take a stand against drug use in the workplace. Statutes permitting medical and recreational cannabis use are sweeping the country, fueled by changing attitudes about pot, the industry’s efforts to promote their product, marijuana advocates who fervently promote various general health and pain-relief benefits, and by state governments that will stand to reap the tax benefits. A recent report from the advocacy group Drug Policy Alliance indicates that 70% of voters favor the right to use marijuana if recommended or prescribed by a doctor.

(See www.drugpolicy.org/issues/medical-marijuana)

The *U.S. Cannabis Report: 2018 Industry Outlook* issued by New Frontier Data forecasts that today’s legal cannabis market of \$8.3 billion will triple in size over the next six years. Thoughtful nonprofit leaders are adjusting their policies to comply with new laws while also considering how they will respond when marijuana concerns arise in the workplace. Even in states where marijuana is completely banned, employers must anticipate situations where staff or volunteers use or consume marijuana legally by crossing state lines, or simply decide to use or consume it illegally.

Understanding Marijuana

According to the National Institute on Drug Abuse (NIDA), marijuana is the most commonly used illicit drug in the U.S. Marijuana is “the dried leaves, flowers, stems, and seeds from the hemp plant, *Cannabis sativa*.” The component of the plant that is most concerning to employers is its mind-altering chemical, delta-9-tetrahydrocannabinol (THC), which alters or impairs senses, movement, and thinking. When smoked, THC effects are felt quickly, but when consumed in food or drink the effects of THC may not be felt until 30 minutes to an hour after the drug is ingested. The “high” from THC wears off in a few hours, but the drug can linger in the bloodstream for days or even weeks.

Cannabis oils can have a wide range of THC concentrations. Several states that haven’t legalized medical marijuana allow limited use of cannabis oils if they contain a low level of THC and a high level of cannabidiol (CBD), a non-psychoactive component that may have some health benefits, as well as risks. (see “Everything you need to know about CBD oil,” www.medicalnewstoday.com/articles/317221.php)

Marijuana: Legal or Not?

The legal landscape pertaining to marijuana is both complex and confusing. As of the date of this writing, “comprehensive” medical marijuana/cannabis programs have been approved in 34 states and the District of Columbia, Guam, Puerto Rico and the US Virgin Islands; recreational marijuana was legal in 10 states. The National Conference of State Legislatures (NCSL) uses the following criteria to determine whether a program is “comprehensive”:

1. Protection from criminal penalties for using marijuana for a medical purpose
2. Access to marijuana through home cultivation, dispensaries, or another system likely to be implemented
3. Allows for a variety of strains or products, including those with more than “low THC”
4. Allows either smoking or vaporization of some kind of marijuana products, plant material or extract, and
5. Is not a limited trial program

(For a Table of State Medical Marijuana/Cannabis Program Laws and links to helpful information on medical marijuana research and public health resources,

see: www.ncsl.org/research/health/state-medical-marijuana-laws.aspx)

Implications for Employers

Under federal law, marijuana is a Schedule 1 substance. Federal law pre-empts state law where a clear and positive conflict exists so that the two laws cannot co-exist; however, many states have enacted laws that diverge from federal law without creating such a conflict. For instance, while federal law would prevent the use of marijuana for illegal purposes, states have been able to define and limit the *legal* purposes of marijuana. Likewise, several states have passed laws to prohibit discrimination against employees solely on the basis that they use marijuana. Every employer must carefully balance two important priorities and interests: 1) ensuring appropriate policies and practices that create and support a safe workplace, and 2) achieving compliance with myriad laws governing the employment relationship.

Three of the many questions that arise in the context of marijuana in the workplace include:

1. *Must an employer honor an employee’s request for leave or an accommodation related to cannabis treatment?* In 2006, an Oregon court ruled that an employee was not disabled under state law if his medical issues could be addressed with a prescription for medical marijuana. Because the employee wasn’t disabled under state law, there was no duty to provide an accommodation. (See [Washburn v. Columbia Forest Products Inc.](#)) New York has taken the opposite position, requiring that certified medical marijuana patients be deemed as having a disability and requiring employers to reasonably accommodate the underlying disability associated with the legal marijuana use. (See Public Health Law § 3369.) Thus, the answer varies by state.
2. *May an employer terminate an employee—or disqualify a candidate—for using medical marijuana?* State court rulings have been inconsistent on this important issue as well. For example, a Massachusetts court recently held that permitting offsite marijuana use—an exception to the employer’s established drug policy—may be a reasonable accommodation for an employee whose physician-prescribed marijuana as the most effective treatment for a disability. (See [Barbuto vs. Advantage Sales and Marketing, LLC.](#)) A Washington Court of Appeals found, however, that state law does not restrict an employer from terminating the employment of a staff member after discovering the employee’s use of medical marijuana. In [Rose v. Teletech Customer Care Management](#), the court indicated that state law does not require employers to accommodate either off-duty or on-the-job use of marijuana.
3. *Is an employee who was terminated for using marijuana eligible for unemployment benefits?* The answer to this question depends on the state in which the employee works. In a recent Michigan case, an appellate court found that terminated employees who held medical marijuana cards were eligible for unemployment compensation benefits. (See [Braska v. Challenge Manufacturing Company](#)). In contrast, a Colorado appeals court ruled that a fired employee whose physician recommended but did not prescribe, marijuana was ineligible for benefits. The court cited state laws providing that employees fired for testing positive for nonprescribed controlled substances during work hours are not eligible for unemployment benefits.

Marijuana in the Workplace: Risk Tips

Every nonprofit employer should be prepared to address marijuana use by candidates or current employees. Consider the following tips as you prepare and equip your team to respond thoughtfully when concerns related to weed arise in your organization.

- **Ensure compliance with state law.** Seek legal review of your drug-testing and screening practices to ensure compliance with applicable state laws. For example, if your state permits medical marijuana use, do not take punitive action against an employee or candidate who tests positive for marijuana until you first determine whether the positive drug test is the result of legally-permitted medical use of the drug.
- **Accommodate with care:** Prior to granting an accommodation related to marijuana use, follow your policies that require a medical certification. Make sure your policy is clear with respect to prohibiting on-duty use and confirm the employee's commitment to adhering to safety policies that reduce risk to staff and clientele.
- **Enforce policies consistently and uniformly.** Keep in mind that any policy that is enforced inconsistently could expose your organization to discrimination claims. According to Michael Groebe in the Lorman course "Implications of Medical Marijuana in the Workplace," "If you have policies that aren't enforced and now you're selectively enforcing them, you open yourself up to a claim of discrimination and improper use of your policy." For example, "randomly" screening only employees who disclose their use of medically-prescribed marijuana.
- **Document violations and incidents in detail.** A good paper trail will be priceless if your organization ever needs to demonstrate that its handling of marijuana issues was fair and in accordance with your organization's policies. Make certain that your staff knows when, how, and where documentation is maintained, and that appropriate privacy safeguards are in place.

By the time you read this article, the laws applicable to your workplace may have changed. Marijuana policy reforms are expected to gain traction across the country in the years ahead driven by growing support for marijuana legalization among both politicians and voters. According to Mason Tvert, a spokesman for the Marijuana Policy Project, "Several states across multiple regions of the country are strongly considering ending prohibition and regulating marijuana for adult use. A growing number of state lawmakers and governors are either getting behind these efforts or coming to the realization that they cannot hold them up much longer." With marijuana touching so many facets of employer policies and potentially affecting all stages of the employment relationship, nonprofit leaders are wise to educate themselves and stay attuned to changing expectations, laws, and best practices with respect to prohibiting or restricting marijuana use by staff.

Resources:

- "New Frontier Data Projects U.S. Legal Cannabis Market to Grow to \$25 Billion by 2025": <https://newfrontierdata.com/marijuana-insights/new-frontier-data-projects-u-s-legal-cannabis-market-grow-25-billion-2025/>
- "What is Marijuana?" National Institute on Drug Abuse: drugabuse.gov/publications/drugfacts/marijuana
- Lorman legal course: https://presents.lorman.com/396029EAU?order_id=1163386&attendee_id=978650#
- "5 Tips to Help Employers Deal With Legal Marijuana Use" thebalancecareers.com/employers-legal-marijuana-use-1917551
- "Need answers to how long a marijuana high last?" drugabuse.gov/publications/marijuana-facts-teens/want-to-know-more-some-facts-about-marijuana
- "Marijuana Legalization Bills Are Advancing In Several States": forbes.com/sites/tomangel/2019/02/27/marijuana-legalization-bills-are-advancing-in-several-states/#4f5ecfab7a35

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