



WORDS ON WISE MANAGEMENT

How to adapt policies to changing marijuana laws

by Joe Godwin
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Editor's note: Joe's column is written from a national perspective. As we have written about frequently, the Arizona Medical Marijuana Act protects state-authorized medical marijuana patients from adverse employment actions.

Employers once dealt with employees' use of marijuana fairly simply by saying, "You're fired." However, with over half the states (including Arizona) having legalized medical marijuana and several others with legal recreational use, it may no longer be so simple.

Can an employee avoid the consequences of a drug-free workplace policy or negative drug screening result by saying, "It's legal," or "Here's my prescription"? Must you change your policy to allow some marijuana use? Should the policy be changed? To answer those questions, we can start with the understanding that merely because it's "legal" doesn't make it "legal" in the workplace.

You were never required to allow every legal activity in the workplace, and employers have historically limited or prohibited alcohol and smoking, as well as prescribed medications that affect worker performance. There are significant differences between marijuana and other legal substances. The most important from a policy standpoint is that despite changes in state law, the federal government hasn't legalized marijuana, and it remains an illegal Schedule I drug under federal law.

Federal contractors. For employers in states where marijuana use has been legalized, the first consideration is whether the employer is a federal contractor. The Drug-Free Workplace Act (DFWA) requires federal contractors to create and enforce policies that include discipline and termination for employee violations. Because marijuana is still illegal under federal law, federal contractors *must* have policies that prohibit the use of illegal drugs, including marijuana—even if they are in a state that has legalized marijuana.

Noncontractors. If you don't have federal contracts and reside within a state that has legalized the use of marijuana, the development of a policy is within your discretion. If you adopt a policy that permits the use of marijuana, it should be similar to your policy on alcohol. It should prohibit employees from reporting to work or working while "under the influence of alcohol and/or other drugs that adversely affect the employee's ability to safely perform his or her job duties."

Drug testing. Generally, you're permitted to conduct preemployment, random, or reasonable suspicion drug testing provided you have an effective drug and alcohol policy. Does this apply in states that have legalized marijuana?

The simple answer is "yes." You are permitted to continue drug testing in accordance with state law and aren't required to exclude marijuana. Despite employee claims that it's "legal," the courts that have been presented with this issue have routinely held that an employee isn't protected if he or she is discharged for smoking marijuana.

However, you *aren't required* to enact such policies in states where marijuana is legalized unless you are a federal contractor.

Americans with Disabilities Act (ADA). Do you have to accommodate marijuana use? What happens when an employee has medical documentation that permits or requires the use of marijuana for the treatment of a medical condition? Do you now have to permit him to smoke marijuana in the workplace or disregard a positive test?

To date, no court has found in favor of an employee who has been discharged for using medical marijuana, regardless of the state law. The courts have based these determinations on the theory that, until the federal government changes its classification of marijuana, or the ADA is amended, an employer isn't required to permit the use of the "illegal" drug or accommodate those who engage in its use.

Employer action steps. As of today, employees may be discharged for marijuana use even if a state has legalized the drug. However, you must have adequate policies covering marijuana use and notify employees that violation of the policy can be grounds for termination.

Review and update your policy, and ensure that it's reviewed and revised as frequently as necessary to comply with changes in state law. Employees should be aware that showing up to the workplace and claiming that "it's legal" is generally not going to constitute a defense to a positive test.



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