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Marijuana and CBD Use by Employees

The Critical Questions

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Agenda

- Legal Status of Marijuana and CBD
- Drug Policy Language
- Drug Testing Issues
- Takeaways



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Public Perception of Marijuana is Changing

“More than one-third of Americans live in a state where marijuana is legal.”

Esquire, 7/1/21

“Two-Thirds of Americans Support Marijuana Legalization”

Pew Research Center, 11/14/19

“Michigan Stands To Gain More Than \$1B As Recreational Marijuana Shops Open”

Mlive.com, 11/29/19

“Congressional Candidate Smokes Marijuana And Talks Legalization In Campaign Video”

Marijuana Moment, 11/27/19

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A Complicated Legal Landscape

- Inconsistency between state and federal laws – lack of clarity on impact of federal law;
- New relaxed federal stance on hemp/CBD
- Patchwork of state laws with varying levels of risk
- The lack of technology to pinpoint marijuana use

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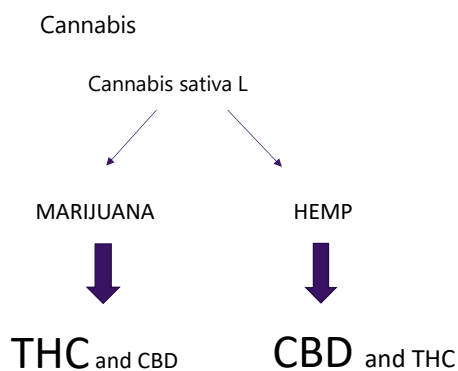
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Legal Status of Marijuana and CBD

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The Controlled Substances Act



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Controlled Substances Act of 1970

Schedule I drugs:

- No currently accepted medical use
- A high potential for abuse

“Marijuana” – “all parts of the plant *Cannabis sativa* L., and expressly includes the seeds, resin, and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin; excluding mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, and seeds incapable of germination.” ⁶

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Federal Laws – Marijuana

- Marijuana is still a Schedule I drug under the Controlled Substances Act
- September 2021 - U.S. House Judiciary Committee approved a bill to legalize marijuana at the federal level
- President Biden supports legalization of marijuana. Vice President Harris introduced a bill to legalize marijuana in 2019.

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Federal Laws – Hemp and CBD

- FDA approved the first CBD-based drug in 2018, to be used by individuals with severe epilepsy
- 2018 Farm Bill – legalized industrial hemp containing no more than .3% THC. CBD is produced from hemp
- FDA still maintains that CBD is illegal
- CBD products are being marketed and sold everywhere

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State Marijuana Laws

36 States + DC have medical marijuana laws

18 States + DC have recreational marijuana laws

17 States have medical-use CBD laws

These lists are constantly growing and changing

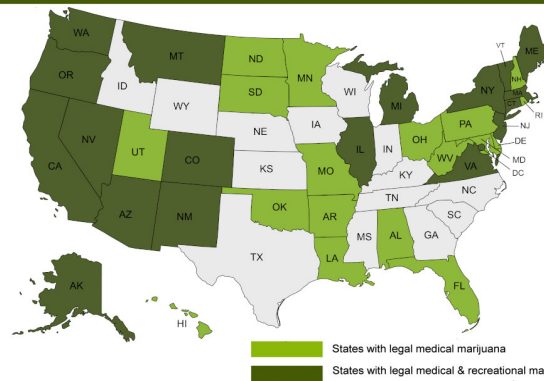
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State Marijuana Laws

Legal Medical & Recreational Marijuana States



BRITANNICA
PROCON.ORG | RELIABLE.
NONPARTISAN.
EMPOWERING.

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States of Interest

Kansas and Nebraska

- No medical or recreational marijuana laws.

Missouri

- State-licensed physicians may recommend medical marijuana for specific conditions.
- No specific provisions governing employment.

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States of Interest

Iowa

- Medical provider can prescribe cannabidiol for certain conditions.
- Available only through state dispensary.
- No specific provisions governing employment.

South Dakota

- State-licensed physicians may recommend medical marijuana for specific conditions.
- Constitutional amendment to legalize recreational marijuana ruled unconstitutional last week.

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States with Higher Legal Risk for Employers

States with Case Law Adverse to Employers

- Arizona
- Connecticut
- Delaware
- Massachusetts
- New Jersey
- Rhode Island

States with Statutory Language Prohibiting Discrimination

- | | |
|--------------|-----------------|
| • Arkansas | • New York |
| • Illinois | • Nevada |
| • Maine | • Oklahoma |
| • Minnesota | • Pennsylvania |
| • New Jersey | • West Virginia |
| • New Mexico | |

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Must employers tolerate recreational marijuana use?

- Recreational marijuana does not implicate the same issues as medical marijuana (e.g., disability discrimination law), but some states have now taken steps to protect off-duty use.

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Medical marijuana

- The majority of states + DC now have medical marijuana or cannabis laws: AK, AZ, AR, CA, CO, CT, DE, FL, HI, IL, LA, ME, MA, MD, MI, MS, MN, MO, MT, NV, NH, NJ, NM, NY, ND, OH, OK OR, PA, RI, SD, UT, VT, WA and WV.
- Unlike recreational marijuana statutes, some medical marijuana statutes include anti-discrimination language and may also implicate disability discrimination laws. This tension has forced courts to address the interplay between federal and state marijuana laws.

Noffsinger v. SSC Niantic Operating Co., LLC (2018)



- First court decision on the merits holding that an employer's refusal to hire a medical marijuana user constitutes employment discrimination
- Connecticut law prohibiting discrimination based on use of medical marijuana
- Employer's status as a federal contractor did not matter because the DFWA does not require drug testing and does not regulate off-duty conduct

Chance v. Kraft Heinz Foods Co. (2018)



- **No federal preemption** because the state medical marijuana law does not require employers to participate in illegal activity
- Rather, it just requires employers not to discriminate against employees who use medical marijuana off-duty

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Callaghan v. Darlington Fabrics (2017)

Court: It is not “physically impossible” to comply with both federal and state law because “what an employee does on his or her off time does not impose any responsibility on the employer.”



“I get high with a little help from my friends.”

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**Note the risk of a generic disability
discrimination claim in all states**

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**We can automatically refuse to hire (or can
terminate employment of) anyone who uses
medical marijuana when the job is safety-sensitive.**

True or False?

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Medical Marijuana and Medical CBD



Start thinking about medical marijuana like other prescription medications, particularly in states where the legal risk is high

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Avoid Blanket Rules About Medical Marijuana

Do

- Conduct individualized assessment
- Engage in interactive dialogue
- Conduct direct threat analysis

Do Not

- Assume marijuana is “too dangerous”
- Create list of jobs that are “too dangerous” for marijuana users
- Create rule that marijuana never may be used by safety-sensitive employees
 - Different standard for **hire** in states like Arkansas

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Individualized Assessment and Direct Threat Analysis

- Train human resources employees and managers to engage in the interactive dialogue and direct threat analysis required under the ADA and comparable state laws
- Direct threat analysis (for safety-sensitive jobs)
 - “A *significant risk of substantial harm* to the health or safety of the individual or others that *cannot be eliminated or reduced* by reasonable accommodation.”

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Individualized Assessment and Direct Threat Analysis, cont'd.

- You may need additional information from the applicant or employee's physician
- **Controversy:** Medical marijuana users will say they can perform the job safely a few hours after using, but the drug is still in their system

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Example Accommodations



Waiver of a Positive Marijuana Drug Test Result (especially pre-employment, random)



Modification to Work Schedules



Exceptions To Policies



Leave of Absence, Reassignment

Policy Language

Work Rules Regarding Marijuana



In all states, it is permissible to prohibit use and possession of marijuana at work, as well as being impaired at work

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Arizona case (2019)



“Proving impairment [at work] based on the results of a drug screen is a scientific matter which requires expert testimony.”

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Disclosure of Medications That Pose a Safety Risk

Consider including in your policy a requirement that safety-sensitive employees (*e.g.*, drivers, operators of machinery, etc.) must advise the company about warnings accompanying lawfully prescribed or obtained medications if it may impact the ability to perform the job safely, **before reporting to work under the influence of such substances**

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Disclosure of Medications That Pose a Safety Risk, cont'd.

- This disclosure triggers the requirement to conduct an “individualized assessment” by having an “interactive dialogue” with the employee concerning a potential reasonable accommodation and/or “direct threat”
- For non-safety-sensitive employees, there is no need to inquire about the use prescription medications. Focus on performance issues instead

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Sample Policy Language re: Medical Marijuana

Safety-sensitive employees who use “medical marijuana” under state law must report this use to their supervisor or human resources, so that the company may analyze the potential safety risk. The company will comply with applicable state laws regarding use of “medical marijuana” to the extent that those laws impose any obligations on employers and to the extent that safety is not compromised.

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Drug Testing Issues

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Laws Prohibiting Pre-Employment Marijuana Drug Testing

- **Nevada** (eff. 1/1/20): Pre-employment marijuana testing is prohibited, except for “safety-sensitive” positions
- **New York City** (eff. 5/10/20): Pre-employment marijuana testing is prohibited (some limited exceptions)
- **Illinois** (eff. 1/1/20): Marijuana is a “lawful product.” Drug testing is permitted, but does it make sense, for pre-employment or random?

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Other Limits on Use of Pre-Employment Testing

- Some states have specific statutes restricting use of pre-employment testing for marijuana
- Example – **Arkansas** permits refusal to hire based on a drug test positive for marijuana, but only for positions designated as safety-sensitive **in writing**

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Pre-employment Marijuana Drug Testing

- Many employers are voluntarily choosing to discontinue pre-employment marijuana drug testing
- Difficult to find qualified applicants, especially in states where marijuana is legal recreationally:
AK, CA, CO, DC, IL, ME, MA, MI, NV, OR, VT and WA

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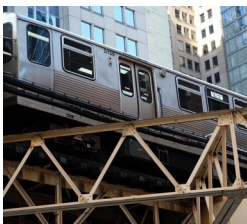
U.S. Dept. of Transportation Prohibits Marijuana



Trucking



Aviation



Railways, Transit



Pipeline

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Continue Testing for Marijuana?

- Not everyone is using “medical” marijuana, and “recreational” use is not protected everywhere
- BUT given that marijuana is legal in many locations, think about your policy/practice
- If your employees are mostly non-safety-sensitive, do you need to test for marijuana?
- How is pre-employment drug testing for marijuana affecting your applicant pool?

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Drug Testing for Marijuana?, cont'd.

- Continue to test only for safety-sensitive employees?
- Still can prohibit use at work or being “high” at work.
- Urine drug testing for marijuana is difficult because marijuana can stay in the body for days or weeks.
- No accepted technology to detect “current use.”
- Oral fluid testing – detects more recent use?

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Employment Actions May Differ, by Reason for Drug Test



Pre-employment



Reasonable Suspicion



Post-Accident



Random

CBD Oil is legal and will not cause a positive drug test result.

True or False?

★★★★☆ & Up

Brand

- CBD
- Zatural
- Nutiva
- Edens Garden
- Absolute Nutrition
- Manitoba Harvest
- Canada Hemp Foods
- Miracle Botanicals
- The Fay Farm
- VitaScents
- Manitoba Harvest Hemp Foods
- Zhou Nutrition
- House of Hemp
- Havasu Nutrition

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- Drops
- Soft-Gels
- Capsules
- Liquids

Health & Personal Care Feature













- Organic
- Natural
- Aromatherapy
- Homeopathic

Health & Personal Care Dietary Speciality

- Natural
- Organic
- Gluten-Free
- Low-Sugar
- Vegan

Book Language

- English

 <p>Hemp Gummies 30000 MG - 500 MG Hemp per Gummy, 60 Sweets - Made in USA - Natural Anxiety & Stress Relief - Premium Hemp & ...</p> <p>★★★★☆ ~ 393</p> <p>\$32.89</p> <p>Save \$2.00 with coupon</p> <p>prime FREE One-Day</p> <p>Get it Tomorrow, Sep 20</p>	 <p>Hemp Oil 50000 MG EXTRA EFFICACY - Stress & Anxiety Relief - Made in The USA - 100% Natural & Safe Hemp Oil - Immune Support - ...</p> <p>★★★★☆ ~ 924</p> <p>\$31.89</p> <p>Save \$2.00 with coupon</p> <p>prime FREE One-Day</p> <p>Get it Tomorrow, Sep 20</p>	 <p>Hemp Oil Drops 3000 MG - Made in USA - Premium Hemp Extract - Optimum Absorption & BIOAvailability - Pain, Anxiety & ...</p> <p>★★★★☆ ~ 1,194</p> <p>\$25.49 (\$12.75/FL Oz)</p> <p>Save \$2.00 with coupon</p> <p>prime FREE One-Day</p> <p>Get it Tomorrow, Sep 20</p>	 <p>Hemp Pain Relief Cream (6000 Mg) - Natural Hemp Extract Cream for Arthritis, Back Pain & Muscle Pain Relief - Efficient Inflammation ...</p> <p>★★★★☆ ~ 910</p> <p>\$29.89 (\$14.95/FL Oz)</p> <p>Save \$3.00 with coupon</p> <p>prime FREE One-Day</p> <p>Get it Tomorrow, Sep 20</p>	 <p>Hemp Pain Relief Cream - 10 000MG - Relieves Muscle, Joint Pain, Lower Back Pain, Knees, and Fingers - Inflammation - Hemp ...</p> <p>★★★★☆ ~ 202</p> <p>\$29.89 \$39.99</p> <p>Save \$2.00 with coupon</p> <p>prime FREE One-Day</p> <p>Get it Tomorrow, Sep 20</p>	 <p>Hemp Oil Extract 5000 MG Natural Drops for Pain Anxiety Relief, Deep ...</p> <p>★★★★☆ ~ 743</p> <p>\$15.99 (\$0.80/FL Oz)</p> <p>Save 5% with coupon</p> <p>Save 5% more with Subscribe & Save</p> <p>prime FREE One-Day</p> <p>Get it Tomorrow, Sep 20</p>
 <p>Healthy, Not High CBD and Hemp Oil</p> <p>CBD Hemp Oil</p>	 <p>Premium Hemp Gummy Bears, 50</p>	 <p>Hemp Gummies Premium 9000MG</p>	 <p>Pure Hemp Extract 45 000 MG for</p>	 <p>CBD: A Patient's Guide to Medicinal</p>	 <p>Hemp Oil Drops 50</p>

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CBD Products



CBD products have been widely available for years, leading people to think they are “legal”

FDA takes the position that these products are **not legal**

These products largely are **unregulated**

They have become more prevalent since the 2018 Farm Bill passed

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CBD Products, cont'd.

- THC Content is uncertain
- Research published by The Journal of the American Medical Association revealed that **43% of CBD oils tested had more THC in them than labeled**
- Possible to test positive on a drug test – leading to a new trend in litigation
 - Significant usage
 - Use of product with more THC than labeled

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Medical-Use CBD

- **17 states** have medical-use CBD laws (separate from medical marijuana laws)
 - AL, FL, GA, IN, IA, KY, MS, MO, NC, OK, SC, TN, TX, UT, VA, WI, and WY
- Cover different medical conditions, and permit varying amounts of THC
- No employment protections, but potential for disability discrimination claim?


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Takeaways

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Review Your Drug and Alcohol Testing Policies

- Continue testing for marijuana?
- Comply with applicable federal, state and local laws.
- Consider safety-sensitive nature of your industry and the jobs in your workplace.

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Other Practical Considerations

- What are your competitors doing?
- What is your company culture?
- Think about the argument that drug tests cannot detect recency of marijuana use.

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Train H.R. Professionals and Other Managers

- Be familiar with the marijuana and CBD laws in the applicable jurisdictions.
- Be knowledgeable about the ADA interactive dialogue and direct threat analysis.
- Conduct training on your drug testing policy and the company's expectations for employees.

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