

TODAY IN HR



Current Trends in Marijuana Law in the Workplace

The legalization of marijuana has rapidly expanded over the last couple of years throughout the country. New York, New Jersey, Virginia, and New Mexico have recently passed legislation that legalizes marijuana use for recreational purposes, joining 13¹ other states, Guam, and the District of Columbia. Marijuana is approved for medical use in 35 states, while several others decriminalized possession, meaning that at least a first offense is treated as a civil infraction instead of a criminal

matter. These new laws, however, conflict with the federal law which still defines marijuana as an unlawful controlled substance. Given the ambiguity and lack of clear guidance, many employers, especially small businesses are unclear on how to manage situations in the workplace that may involve marijuana.

Drug Testing

The patchwork of marijuana laws also poses an issue for employers that conduct drug tests as part of their hiring process. Laws that allow marijuana use for recreational purposes do not give employees license to be under the influence at work. Nevertheless, employers must keep in mind that if someone tests positive for marijuana,

¹ Alaska, Arizona, California, Colorado, Oregon, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, New York, South Dakota, Vermont, Virginia, Washington, Washington, D.C., and Guam.

it does not mean that they are currently under the influence, since traces of the drug can be detected in a person's system for up to 30 days. Nor should it be assumed that an individual that tests positive has engaged in unlawful behavior. To address this issue, some jurisdictions, such as New York City, have limited marijuana testing as part of pre-employment screening, and deemed it an unlawful discriminatory practice, with some exceptions for certain safety sensitive and federal contract positions. In addition, passing a drug test or a background check is no longer allowed to be referenced in job postings and advertisements. Therefore, if a company has business operations in a state where marijuana use is lawful, it should be cautious before taking adverse action against any employee or job applicant if they test positive for marijuana use. As such, managers and supervisors in the workplace should fully understand what constitutes "reasonable suspicion" for marijuana use at work.

Medical Marijuana and Disability Discrimination

Currently under federal law, marijuana cannot be prescribed for medical purposes. This means disability protections under the Americans with Disabilities Act (ADA) are not applicable for individuals who use it for medical purposes, even if legally prescribed under state law. There is a possibility there will be movement to loosen restrictions on the federal level within the next few years to allow marijuana and other cannabis related products to be medically prescribed. It is conceivable that the current Administration may choose to reclassify marijuana and other cannabis related products, making them available to be medically prescribed. If that action is taken, persons prescribed marijuana *will* be protected from disability discrimination under the ADA.

In the meantime, the states that allow marijuana to be prescribed for medical purposes have laws that include anti-discrimination or reasonable accommodation provisions to protect those prescribed and using medical marijuana. Therefore, it is critical that employers know the legality of marijuana use in their state or local jurisdictions to avoid running afoul of disability discrimination laws.

Guidance for Employers

- Although marijuana remains illegal on the federal level, that may change. A growing number of jurisdictions have legalized it and enacted statutes prohibiting employers from discriminating against employees who lawfully use marijuana. Employers should proceed with care before taking adverse action against employees who are lawfully using marijuana, particularly where the employee's use occurs off-premises and outside of working hours.
- The use of medical marijuana by employees in states where it is currently legal should be handled like any other reasonable accommodation. Employers should enter the interactive process with employees that need such an accommodation to ensure that it does not interfere with workplace safety and productivity while also not discriminating against the employees.
- Employers should review their Drug Testing policies to ensure they are flexible and compliant with the evolving marijuana laws in areas where their employees are located.
- When dealing with issues involving medical marijuana in the workplace and conflict between state and federal laws on such issues, it is best to consult an employment law expert or an experienced HR consultant who can provide guidance to help management make the best decisions for the company. **Your Engage HR Consultant can help answer your questions on this topic and other changing legislation.**