

The Times They Are a-Changin' - Updates to Medicinal and Recreational Marijuana Laws Affecting the Workplace

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As a result of the 2020 election, four more states—Arizona, New Jersey, Montana, and South Dakota— are legalizing the recreational use of marijuana. Fifteen states and the District of Columbia now permit people to grow and consume marijuana to varying amounts. Thirty-six states and the District of Columbia have legalized medical marijuana. At the other end of the spectrum, federal law has remained steadfast in its criminalization of marijuana. Marijuana remains a Schedule I drug with felony level consequences. As of September 16, 2020, nine amicus briefs have been filed on behalf of *Washington v. Barr*, a Supreme Court case seeking to declare the criminalization of marijuana unconstitutional. However, after almost 50 years of petitions, court cases, and bills opposing the criminalization of marijuana, we're not hedging our bets on this one either.

So... what's the solution? The dichotomy in the law creates a mysterious gray zone of law for employers to sort out when considering drug testing and other policies in the workplace. However, there are general rules to outline going forward. The first step for employers is to determine if their state falls in one or both of the following categories:

1. Medical marijuana is legal in: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, D.C., Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, North Dakota, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington, and West Virginia.

*Mississippi, and South Dakota enacted medical marijuana laws pending future date.

**List does not include states who legalized low THC medical marijuana use.

2. Recreational marijuana for adults over the age of 21 is legal in: Alaska, Arizona, California, Colorado, District of Columbia, Illinois, Maine, Massachusetts, Michigan,

Montana, Nevada, New Jersey, Oregon, South Dakota, Vermont, and Washington.

*Includes states with enactment at future date.

The second step is to consider your employee handbook. As a general rule, employees are not permitted to be under the influence at work. Compare marijuana to alcohol: if your employee is over 21 years of age, he or she is able to drink outside of work, but never be under the influence at work. The same rules generally apply, but you should check each state in which you do business to be sure. However, unlike alcohol, marijuana remains in a person's system for days and weeks after they use. This can make drug testing an issue because a user can never smoke during work hours, but still test positive.

There is an ebb and flow to the debate of enacting a zero tolerance policy at the workplace. If employees who use marijuana on or off the clock impacts job safety, the zero tolerance policy is a no-brainer. In many states, intoxicated employees injured on the job are barred from collecting workers' compensation payments. Some companies do not investigate potential drug use unless an issue with performance arises or independent evidence surfaces of an employee's drug habits. For many employers, the difficulty in determining whether an employee is using marijuana during work hours or outside work hours justifies simplification and a zero tolerance policy.

The labor shortage - particularly in certain industries and lower-wage jobs - has created a new conundrum. Some companies have adopted a "don't ask, don't tell" approach to marijuana use and have foregone pre-employment testing altogether. However, even those companies conduct post-accident and reasonable suspicion testing for safety purposes.

Our solution? Know the law in the states in which your company operates. Always put safety as the top priority. Understand that, at the federal level, marijuana is still a Schedule I drug and its possession is illegal. Depending upon your industry and your state, a zero tolerance policy might be the ideal solution.

The final step is to consult an attorney. With an ever-evolving landscape, confirm your handbook remains compliant with federal and state laws. Talk with an attorney about the company culture and mission. If a zero tolerance policy is preferred, let's help you figure out the details!