



# Navigating the Workplace Impact of Evolving State Marijuana Legislation

By Curry Sexton

May 21, 2019

Since the first medical marijuana laws were passed in the latter half of the 1990s, few industries have sparked as much conversation and change as the cannabis industry. These changes are impacting employers and creating many questions relating to employee policies and concerns about how the laws and related policies affect hiring and termination decisions and negatively impact the size of your pool of eligible candidates. The patchwork quilt of evolving state legislation is also making a one-size-fits-all approach very difficult. Below is a quick summary of the current status of state laws as of May 2019:

- 10 states have legalized marijuana for recreational and medicinal use
- 23 states (including Missouri) have passed some level of comprehensive marijuana reform that allows for medical use and, in some cases, reduce criminalization for marijuana use that is still deemed illegal
- 3 states have decriminalized certain marijuana uses despite maintaining that marijuana use is fully illegal
- 14 states (including Kansas) continue to provide that marijuana use remains fully illegal without changes to the criminal penalties

With all of the discussion on state marijuana legislation, it is important to remember that marijuana use is still illegal under the federal Controlled Substances Act. The conflict between federal

and state law and language in several of the state laws give most employers continued flexibility to adopt or maintain a wide range of marijuana use policies, including zero tolerance policies, and to take marijuana use into account (or not) when making hiring or termination decisions. However, if you operate a business in a state that allows some form of marijuana use, you will need to continue to monitor the legal landscape as states continue to adopt laws that may be designed to address ways to avoid conflict with the federal law when it comes to employment decisions. It is also important to note that the nature of your employee's use (medical vs. recreational) can also impact an employer's policies and/or decision-making process on employment matters.

### **Employees and Applicants who use Marijuana for Medicinal Purposes**

Employers generally should consider a more cautious approach in addressing medical marijuana use by applicants and employees due to potential conflicts with laws relating to workplace accommodations for disabilities. Courts have generally sided with employers on issues involving the enforcement of drug-free policies in connection with medical marijuana use, often using a conflict with federal law as the basis, but thirteen states have enacted legislation to prohibit workplace discrimination against employees who consume marijuana for medicinal purposes. Additionally, while the Americans with Disability Act (ADA) does not offer protections to marijuana users because of its illegal status under federal law, some state courts have used similar state non-discrimination laws to protect employees.

### **Employees and Applicants who use Marijuana Recreationally**

Employers will generally have more flexibility in enforcing zero-tolerance policies in states where recreational use of marijuana has been legalized. Though some laws are silent on the issue, many of the ten states that have legalized recreational marijuana use also grant employers the ability to maintain zero-tolerance policies based on existing federal law. However, we are starting to see some states explore legislation using an employee's right to privacy as the basis for limiting employer discretion in testing as a way to protect employees' off-duty conduct. Maine recently became the first state to protect employees' use of marijuana – medicinal or recreational – outside of the workplace and prohibits employers from testing applicants for marijuana. Under this law, employers are still able to prohibit use at work and may discipline employees for working while under the influence but have no protections otherwise.

### **Employer Best Practices**

Even though this is an area of evolving law, employers should consider the following best practices when evaluating their workplace policies and decision-making as applied to marijuana use:

- **Use Your Business Judgment to Develop Policy.** Since most jurisdictions currently support employer flexibility relating to marijuana policies, you should first consider your business objectives, staffing needs, and safety concerns in developing or deciding to maintain a policy.
- **Keep Up to Date on Law Changes.** Staying up to date on employment laws (and adjusting practices as appropriate) is always important, but employers need to be especially vigilant with marijuana use laws, as we are in a period of legal and social change that is leading to a rapid-fire change in laws around the country.
- **Understanding Medical Marijuana Use.** If you operate in a state that allows medicinal marijuana use, it is important to understand exactly what your rights and obligations are under applicable state law with respect to drug testing, the appropriate pre-test inquiries and documentation concerning medical marijuana use, and making employment, disciplinary or discharge decisions based on positive test results.

*This article is general in nature and does not constitute legal advice. Readers with legal questions should*

consult the author, Curry Sexton, or any shareholders in Seigfreid Bingham's Employment Law Group, including: John Vering, Rachel Baker, John Neyens, Brenda Hamilton, Shannon Johnson, Mark Opara, or your regular contact at Seigfreid Bingham at 816-421-4460.