

## Legal Medical Marijuana – A Dilemma for Employers

As of 2017, 29 states and the District of Columbia have enacted laws to legalize medical marijuana, and a number of states have pending legislation on the subject. This trend creates an uncertain situation for employers, who must tread carefully to balance their employees' rights, including disability and privacy laws, against the safety of their workplace.

### What do the Laws Entail?

The laws in each state differ in certain respects, but they do share some features. All of them permit physicians to prescribe medical marijuana for cancer, chronic pain and various other conditions, though the included conditions vary by state. Most of the laws remove any criminal penalties associated with possessing or using marijuana if it is for medical purposes, but do not require employers to allow it in the workplace.

Though the federal government still classifies marijuana as an illegal substance, the Justice Department does not prosecute individuals using marijuana medicinally, as long as they are in accordance with state law. This policy alleviated a prior conflict between the state and federal laws.

### Employer Implications

How do these laws affect you? Unfortunately, the employer's obligations and liabilities are not clear-cut in this situation.

### Discrimination

Because marijuana is prescribed for various medical

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conditions, disability and privacy laws become a factor. For instance, asking employees about medical conditions could violate health privacy regulations. Also, punishing employees for their use of medical marijuana could result in a discrimination lawsuit.

The matter becomes even more unclear in trying to set a standard for acceptable use of medical marijuana. Even if the employee uses only at home, it stays in one's system much longer, so the employee could fail a drug test. Unfortunately, drug tests can only tell if it was used within a general range of time, not when specifically. Thus, if your policy forbids marijuana use at work but allows it privately at home, it is tough to enforce. How can you tell if the employee is impaired at work or not? Navigating this issue can be tricky, so consulting legal counsel is advised.

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## Safety

Of course, any discussion of marijuana, medicinal or not, brings up the subject of safety. As an employer, one of your paramount responsibilities is maintaining a safe workplace. Though marijuana affects people differently, it is generally known to impair the user in some way, which may interfere with one's work responsibilities. Not all users become too impaired to work at full capacity, but how can you determine their level of functionality? A workplace accident involving an employee known to be using marijuana presents an enormous liability to your company.

## What Should Employers Do?

How should you navigate the balancing act between these two potential liabilities? There is no legal guidance for employers on this situation, so it will vary from business to business. However, the best strategy for employers is to anticipate this situation, especially if you operate in a state that has legalized or is considering legalizing medical marijuana. That means reviewing your policies, updating them as necessary, communicating to your employees and staying consistent in your approach. You need to decide what is best for your company and stick with it.

Most experts agree that the numerous state laws require no obligation from the employer to accommodate an employee's use of medical marijuana. In addition, state Supreme Court cases have tended to side with the employer, allowing them to forbid any employee marijuana use, even private use for medicinal purposes, and allowing them to make employment decisions based on that rule. If you decide to stick with a no-tolerance policy, make sure your written policy specifies that even medicinal use is unacceptable, and a positive test will be grounds for termination. A clear, well-communicated policy—and consistent enforcement—should protect you from an anti-discrimination suit.

Some companies have decided to allow private use of medical marijuana or even marijuana use at work if the

employee demonstrates that it does not affect his or her performance. You do not have to allow this, but the decision will be different for each company, depending on various factors. Regardless of your approach, make sure your written policies are clear and well-communicated to employees, so no one can claim discrimination or that they were unaware of your policy.

Once you decide what your workplace policy should be, there are other considerations to take into account. Treat employees who use marijuana medicinally as any other injured or physically-limited employee. More than likely, they were prescribed medical marijuana for a very serious medical condition, so there may be other ways you can help them feel more comfortable during work. Try to find ways to modify their schedule or workload to accommodate their illness or condition, separate of allowing marijuana use. Working to accommodate employees in other ways based on their physical needs can also protect against a discrimination charge, even if you maintain a no-tolerance marijuana policy.

Also, be sure to keep in mind that marijuana is highly unlikely to be covered by your health plan. Thus, even if medical marijuana purchase and use is allowed by the state and permitted by you, employees still must pay out of pocket. Likewise, it is not a covered expense for a flexible spending account or health savings account. If you do permit the use of medical marijuana, be sure employees know that the cost will not be covered by you or your health plan.