Burning Questions: Cannabis in the Workplace

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Many employers find themselves stuck in the weeds as they work to navigate cannabis in the workplace now that state legalization efforts are sweeping the country. Companies are asking: Should we have different sets of rules for medical marijuana cardholders versus recreational users? Should we test for cannabis at all? How do we keep our workplaces safe?

Unfortunately for employers, the issue of cannabis in the workplace is one of their most convoluted and far-reaching challenges. However, the good news is that while the issue is complicated and difficult to manage, employers may have more flexibility than they think, depending on the unique circumstances of their business.

As of February 2023, medical cannabis is legal in 38 states and the District of Columbia.[1] Many of the laws in these states contain explicit anti-discrimination provisions[2] (i.e., the medical marijuana law itself prohibits taking adverse employment action based on medical marijuana cardholder status). Additionally, recreational cannabis is currently legal in 21 states and the District of Columbia,[3] with some states including anti-discrimination provisions for recreational users. Further complicating the issue is the rise in indirect protections for cannabis users through "lawful off-duty conduct" laws (i.e., state laws prohibiting employers from taking adverse employment action based on an individual's otherwise lawful activity occurring outside of work).

Notwithstanding the complicated buffet of employment-based legal claims and risks, employers can still prohibit employees from possessing, using, or being under the influence of cannabis in the workplace — even in states with direct or indirect protections for cannabis users. While this concept may sound simple, it poses its own set of challenges related to detecting cannabis use on the job.

Traditional drug tests do not measure for "impairment" but instead only show if cannabis is in someone's system. A positive cannabis test cannot indicate whether a person is under the influence of cannabis. Generally, the effects of cannabis only last for a few hours. However, tetrahydrocannabinol (THC), the principal psychoactive compound found in cannabis, can remain in an individual's system for days, weeks, or months, depending on usage. In other words, an employee can test positive for cannabis long after its effect has worn off, leaving an employer to question what it can do with a positive cannabis test result.

Understandably, employers are incredibly confused about how to confront cannabis in the workplace. Every day at Ogletree Deakins, we speak to clients who are wrestling with these complexities — working to balance legal risks with operational preferences, all while prioritizing workplace safety and addressing recruiting and retention challenges.

Clients pose dozens of questions on this topic, but below are some that we see most often.

We just received a positive test result for cannabis, and our employee says she's a medical cardholder. Now what?

First and foremost, ask for a copy of the card. Employers have much more flexibility with recreational cannabis users than with medical cardholders. So, employers should always confirm that an individual is being truthful and ask for a copy of a medical marijuana card. This is neither a Health Insurance Portability and Accountability Act of 1996 (HIPAA) violation, nor is it impinging upon someone's medical privacy interests.

Assuming that an individual is a medical cannabis cardholder, employers should then run through a checklist of questions:

1. What is the state of employment?
2. What type of job is at issue: safety-sensitive or non-safety-sensitive?
3. Depending on the answers to 1 and 2, what are the legal risks associated with taking adverse action against the individual?
4. What does the company "want" to do?

Evaluating this checklist will help employers establish a risk profile for each specific situation and determine a course of action that could go in countless directions. Assuming an employer wants to take action against the individual, a best practice in handling medical cardholders is to engage in a disability accommodation process with the individual.

Many outcomes can arise from the accommodation process, but employers would be well-suited to engage in this process with medical cardholders. Remembering that the accommodation process can play out in many ways, employers should approach the process with an open mind, just as with any other disability accommodation issue.

We just received a positive test result for cannabis. The applicant says adult use of recreational cannabis is legal in our state. What now?

Employers have greater flexibility in taking adverse action against recreational cannabis users than medical cardholders. A small number of states maintain recreational laws that contain express protections (i.e., within the recreational marijuana law itself) for recreational users. A few states have indirect employee protections for recreational cannabis where an employer cannot take adverse action against an employee or applicant for off-duty, off-premises use of cannabis. However, for now, employers have fewer state laws to navigate in handling recreational users than medical cardholders. As a result, employers will likely face a different and, in most cases, lower risk profile when dealing with recreational users than with medical cardholders.

We are struggling to find enough qualified applicants who can pass the THC test. How can we continue cannabis testing?

Consider this: In the combined U.S. workforce urine tests, the percentage of working Americans testing positive for drugs hit a two-decade high (4.6%) last year, driven by an increase in positive marijuana tests.[4]

However, in what should be refreshing news for employers, the answer to this question is largely a business decision first and a legal issue second.

The question remains — how can employers implement testing to protect both themselves and their employees who use cannabis legally outside of work? Traditional sample types such as oral fluid and urine have windows of detection that can last days or weeks after use. Businesses can't afford to risk lawsuits, production downtime, and the costs of replacing

[1] *Business Insider*, https://www.businessinsider.com/legal-marijuana-states-2018-1
[2] *The National Law Review*, https://www.natlawreview.com/article/virginia-enacts-employment-protections-medical-use-cannabis-oil
[3] *Business Insider*, https://www.businessinsider.com/legal-marijuana-states-2018-1
[4] *2022 Quest Diagnostics Drug Testing Index*, https://blog.employersolutions.com/workforce-drug-test-positivity-climbs-to-highest-level-in-two-decades/

WORK IT SAFE

WORKPLACE STRESS: GUIDANCE AND TIPS

Workplaces can have many stressors. Issues in the workplace can exacerbate the risk of experiencing mental health challenges. Combined, these stressors can make it more difficult for workers to get their tasks done; threaten their productivity, happiness, and well-being; and lead to burnout. Because of the many potential stressors employees may be experiencing, a comprehensive approach is needed to address stressors throughout the community, and employers can be part of the solution.

Reducing workplace stress benefits everyone across an organization. It can improve morale and lead to increased productivity and better focus, fewer workplace injuries, fewer sick days, and improved physical health (e.g., lower blood pressure, stronger immune system). All these factors can also lead to reduced turnover among an employer's workforce. The goal is to find ways to alleviate or remove stressors in the workplace to the greatest extent possible, build coping and resiliency supports, and ensure that people who need help know where to turn.

Employers can make a difference when it comes to helping their staff manage stress. Key things they can do include:

- Being aware and acknowledging that people carry an emotional load that is unique to their own circumstances. They may be experiencing heightened levels of loneliness, isolation, uncertainty, grief, and stress. Some may face additional demands, such as parents caring for children or elderly household members, or those with existing mental health or substance use challenges.
- Identifying the factors that are making it harder for workers to get their jobs done and determining if adjustments can be made.
- Showing empathy by ensuring workers that 1) they are not alone, 2) their employer understands the stress they are under, 3) there is no shame in feeling anxious, and 4) asking for help is important. Employers can reassure employees that they are open and receptive to discussions about employees' work stress by creating a safe and trustworthy space.
- Providing access to coping and resiliency resources, workplace and leave flexibilities without penalty, or other supportive networks and services.

For more information, contact: Occupational Safety and Health Administration (OSHA), www.osha.gov.