



Legalized Marijuana and Employment Toolkit

Courtesy of Employco USA, Inc.



Contents

INTRODUCTION	3
UNIQUE CHALLENGES OF EMPLOYMENT AND MARIJUANA USE	4
NAVIGATING THE LEGAL STATUS OF MARIJUANA.....	5
Federal Laws.....	5
State and Local Laws	6
Table of State and Local Laws for Legalized Marijuana	7
STATE LAWS FOR LEGALIZED MARIJUANA AND RELATED EMPLOYMENT LAWS.....	11
Variations of State and Local Laws for Legalized Marijuana and Employment	12
Table of State Marijuana-related Employment Protections for Employees and Applicants	13
State Drug Testing Laws	16
Table of State Drug Testing Laws	16
Lawful Activities Laws	19
Overview of Other Relevant Employment Laws	19
EMPLOYER BEST PRACTICES	20
APPENDIX.....	23
EMPLOYER CHECKLIST 1 - State Laws to Consider	24
EMPLOYER CHECKLIST 2 – What to Look for in State Laws	25
EMPLOYER CHECKLIST 3 – Outlining the Details of a Workplace Drug Testing Policy.....	26
SAMPLE WORKPLACE DRUG TESTING POLICY	27
Frequently Asked Questions (FAQs) and Answers.....	30

INTRODUCTION

While all marijuana use remains illegal under federal law, most states have enacted laws that allow certain uses of marijuana. Many of these laws either directly restrict employers or implicate provisions of other laws that may restrict employers.

Most state legalized marijuana laws do not restrict an employer's rights to:

- Administer drug tests (though some state laws do restrict testing for marijuana); or
- Prohibit employees from using or being under the influence of marijuana at work or during work hours.

However, it is not always clear whether an employer may take adverse employment actions against an employee based solely on certain factors involving legalized marijuana. For example, legalized marijuana and related state and local employment laws vary as to whether they allow employers to:

- Test employees or applicants for marijuana under certain circumstances;
- Fire or discipline an employee or refuse to hire an applicant based on their status as an authorized medical marijuana user; or
- Fire or discipline an employee or refuse to hire an applicant based on a positive marijuana test.

Employers should be aware of the challenges and complexities that come with testing individuals for marijuana and become familiar with all applicable laws before implementing or enforcing any drug testing or other workplace policies regarding employee marijuana use.

To that end, this toolkit provides an overview of which laws to look for and what to look for in these laws. It also includes information about navigating the legal status of marijuana and guidance on crafting a workplace drug-testing policy that complies with all applicable restrictions. This toolkit aims to help employers understand the full legal landscape surrounding legalized marijuana and work around these challenges while establishing and maintaining compliance with all applicable laws.

Employers should also be aware that legalized marijuana is an active and often rapidly evolving area of law. Because of this, employers should regularly monitor state legislature and agency websites and other relevant sources for any changes that may affect their businesses.

UNIQUE CHALLENGES OF EMPLOYMENT AND MARIJUANA USE

Marijuana use in the workplace can be a serious safety and health concern for a variety of reasons. One reason is that it can impair a user's judgment, leading to poor decision-making and unsafe work practices. This impairment can be especially risky in jobs that involve precision or require workers to make decisions that could have a major impact on an employer's business.

Marijuana can also impair motor skills and distort perception. This can make it difficult and risky for an individual to safely operate machinery or perform other manual labor tasks, which may increase the risk of slips, trips and falls, as well as other types of workplace accidents. Not only can such accidents result in the expenses associated with a particular incident, but they may also cause insurance premiums to rise.

Marijuana use that only occurs outside the workplace and during nonworking hours can be equally complicated and vexing for employers, but usually for different reasons. Specifically, one of the most significant problems inherent in marijuana testing is the fact that marijuana has a slow metabolic rate in the human body, which makes it detectable long after an individual uses it. Because of this, there is no reliable test to determine whether an employee is under the influence of or impaired by marijuana at any given time.

There is also no reliable test to determine how long ago an employee may have used marijuana. This can make it extra difficult (and, under some state laws, impossible) for employers to use a positive test for marijuana alone to prove that an employee was under the influence of or impaired by marijuana or that the employee used the drug at work or during working hours.

Another unique challenge of marijuana testing stems from the facts that:

- Most legalized medical marijuana laws require an individual to have a debilitating medical condition in order to obtain state authorization to use medical marijuana; and
- Under most state disability laws, any debilitating medical condition is likely to qualify as a disability for which reasonable accommodations may be required.

One of the best-known but often misunderstood challenges of state-legalized marijuana is the fact that marijuana remains illegal under federal law.

The next section guides employers through the legal status of marijuana throughout the country.

NAVIGATING THE LEGAL STATUS OF MARIJUANA

When it comes to legalized marijuana, federal and state laws remain largely at odds. The following section provides a brief overview of federal and state laws that may affect employers that test employees or applicants for marijuana.

Federal Laws

The **Controlled Substances Act (CSA)** is a federal law that prohibits the possession, manufacture and transfer of several different intoxicating substances, all categorized into five “schedules.” Marijuana is classified as a Schedule I substance, which means it is considered to have a high potential for abuse and no currently accepted medical applications. All uses of Schedule I substances are illegal under the CSA. In addition:

- The federal **Food, Drug and Cosmetic Act** prohibits the use, dispensation and licensure of substances, such as marijuana, that have not been approved by the federal Food and Drug Administration;
- **Title VII of the federal Civil Right Act (Title VII)** allows employers to establish policies against employing any individuals who currently and knowingly possess or use certain controlled substances, such as marijuana. This type of policy is unlawful under Title VII only if it is adopted or applied with the intent to discriminate based on race, color, religion, national origin or sex;
- The federal **Americans with Disabilities Act** requires reasonable accommodations for individuals with disabilities but specifically excludes addiction to drugs that are illegal under federal law, such as marijuana, from its definition of a disability;
- The federal **Farm Bill of 2018** essentially legalized a derivative of marijuana, called cannabidiol (CBD), throughout the United States.

Despite these laws, a general rule of thumb for employers is to **use caution against solely relying on federal laws** such as the CSA or others to justify any adverse actions against an employee who tests positive for marijuana. Instead, employers should take a close look at the details of all applicable state and local laws before deciding how to deal with these issues.

However, there are three exceptions to this general rule. These are when an employer is subject to:

1. The federal Drug-free Workplace Act for federal contractors;
2. The U.S. Department of Transportation regulations for commercial transportation operators; or
3. Federal (or state) industry-specific licensing or certification requirements that mandate drug testing.

In these cases, employers should follow the applicable federal (or state) requirement.

In other cases, employers may need to take a deep dive into various applicable state and local laws governing employment and workplace issues.

State and Local Laws

State legalized marijuana laws generally fall into one of the following categories:

- **Recreational and medical**—This category's laws cover states that allow individuals who are age 21 or older to use marijuana plants for recreational purposes. Each of these states also has a separate law governing the use of marijuana for medical purposes.
- **Medical only**—The laws in this category pertain to states that allow the use of marijuana plants for medical purposes but do **not** allow any recreational use. Medical marijuana laws generally underlie most employment-related disputes involving the drug.
- **CBD only**—Technically, this category does not qualify as legalized marijuana for purposes of employer testing. It includes states that allow only tightly limited uses of a substance called CBD, a derivative of marijuana that does not produce psychoactive effects in users. CBD is usually administered in oil form and rarely shows up on tests for marijuana. States in this category have not legalized the use of marijuana plants for any purpose and generally allow CBD use only for the treatment of one or more specified medical conditions, such as epilepsy in children. Because of these factors, employment-related issues rarely arise under these laws.

Some localities, including New York City and the District of Columbia (Washington, D.C.), have also enacted laws addressing employment and legalized marijuana use. The tables below list the states (and two cities) that fall into each of the first two categories described above. The table also includes a list that combines the states that have only legalized CBD and the states that have not legalized any form of marijuana or its derivatives.

Table of State and Local Laws for Legalized Marijuana

The tables below provide lists of states with recreational plus medical marijuana laws, states with only medical marijuana laws, and states that have not legalized any uses of the marijuana plant.

RECREATIONAL + MEDICAL MARIJUANA STATES

State	Legalized Marijuana Laws
Alaska	Alaska Medical Uses of Marijuana for Persons Suffering from Debilitating Medical Conditions Act Alaska Regulation of Marijuana Act
Arizona	Arizona Medical Marijuana Act Smart and Safe Arizona Act
California	California Medicinal and Adult-Use Cannabis Regulation and Safety Act
Colorado	Colorado Medical Use of Marijuana Amendment Colorado Use and Regulation of Marijuana Amendment
Connecticut	Connecticut Palliative Use of Marijuana Act Connecticut Regulation of Adult Use Cannabis Act
Delaware	Delaware Medical Marijuana Act Delaware Marijuana Control Act (effective April 26, 2023)
Washington, D.C.	Washington, D.C. Use of Marijuana for Medical Treatment Act Washington, D.C. Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Act
Illinois	Illinois Compassionate Use of Medical Cannabis Pilot Program Act Illinois Cannabis and Regulation and Tax Act
Maine	Maine Medical Use of Cannabis Act Maine Act to Legalize Marijuana
Maryland	Maryland Medical Cannabis Law Maryland Recreational Adult Use Law (effective July 1, 2023)
Massachusetts	Massachusetts Humanitarian Medical Use of Marijuana Act Massachusetts Regulation of the Use and Distribution of Marijuana Not Medically Prescribed Act
Michigan	Michigan Medical Marijuana Act Michigan Regulation and Taxation of Marijuana Act
Missouri	Missouri Right to Access Medical Marijuana Act Missouri Marijuana Legalization Initiative

RECREATIONAL + MEDICAL MARIJUANA STATES

State	Legalized Marijuana Laws
Montana	Montana Medical Marijuana Act
	Montana Marijuana Regulation and Taxation Act
Nevada	Nevada Medical Use of Marijuana Act
	Nevada Regulation and Taxation of Marijuana Act
New Jersey	New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act
New Mexico	New Mexico Lynn and Erin Compassionate Use Act
	New Mexico Cannabis Regulation Act
New York	New York Medical Use of Marijuana Act
	New York Marijuana Regulation and Taxation Act
Oregon	Oregon Medical Use of Cannabis Act
	Oregon Adult Use of Cannabis Act
Rhode Island	The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act
	Rhode Island Cannabis Act
Vermont	Vermont Therapeutic Use of Cannabis Act
	Vermont Act to Eliminate Marijuana Penalties for Adults 21+
Virginia	Virginia Medical Cannabis Law
	Virginia Recreational Marijuana Law
Washington	Washington State Medical Use of Cannabis Act
	Washington Marijuana and Marijuana Products Act

MEDICAL-ONLY STATES

State	Legalized Marijuana Laws
Alabama	Darren Wesley "Ato" Hall Compassion Act
Arkansas	Arkansas Medical Marijuana Amendment
Florida	Florida Medical Use of Marijuana Act
Hawaii	Hawaii Medical Use of Cannabis Act
Kentucky	Senate Bill 47 (enacted March 31, 2023; effective Jan. 1, 2025)
Louisiana	Louisiana Therapeutic Marijuana Act
Minnesota	Minnesota Therapeutic Research Act; Medical Cannabis
Mississippi	Mississippi Medical Cannabis Act
New Hampshire	New Hampshire Use of Cannabis for Therapeutic Purposes
North Dakota	North Dakota Medical Marijuana Law
Ohio	Ohio Medical Marijuana Act
Oklahoma	Oklahoma Medical Marijuana and Patient Protection Act
Pennsylvania	Pennsylvania Medical Marijuana Act
South Dakota	South Dakota Medical Cannabis Act
Utah	Utah Medical Cannabis Act
West Virginia	West Virginia Medical Cannabis Act

STATES WITH NO LEGALIZED MARIJUANA

State	More information
Georgia	CBD only
Idaho	CBD only
Indiana	Indiana has not legalized any form of marijuana or its derivatives.
Iowa	CBD only
Kansas	Kansas has not legalized any form of marijuana or its derivatives.
Nebraska	Nebraska has not legalized any form of marijuana or its derivatives.
North Carolina	CBD only
South Carolina	CBD only
Tennessee	CBD only
Texas	CBD only
Wisconsin	CBD only
Wyoming	CBD only

STATE LAWS FOR LEGALIZED MARIJUANA AND RELATED EMPLOYMENT LAWS

Under virtually all state legalized marijuana and related employment laws, employers may still:

- Conduct drug testing (though some laws do restrict testing for marijuana);
- Prohibit marijuana possession and use in the workplace;
- Prohibit employees from being impaired by or under the influence of marijuana in the workplace;
- Prohibit employees from being impaired by or under the influence of marijuana during working hours;
- Comply with all applicable federal or state drug-testing laws; and
- Comply with all applicable licensing and contractual requirements (including collective bargaining agreements).

However, these laws may impose various restrictions related to drug testing and marijuana use. For example, employers **may be prohibited** from:

- Taking adverse employment actions against individuals based on their status as authorized medical marijuana users;
- Taking adverse employment actions against authorized medical marijuana users based on their off-duty marijuana use or based solely on a positive test;
- Taking adverse employment actions against recreational marijuana users based on their off-duty marijuana use or based solely on a positive test; or
- Conducting certain tests for marijuana in the first place.

In addition, employers may be **required** to:

- Make reasonable accommodations for an authorized medical marijuana user's medical needs;
- Provide specified evidence that an employee was using or impaired by marijuana at work before taking adverse action against the individual based on the marijuana use; or
- Comply with specific drug testing requirements.

Even if an applicable marijuana law does not explicitly address employment issues relating to off-duty marijuana use, employers should be aware that state marijuana laws, especially those governing medical use, may still affect their rights and obligations under other applicable laws. For example, states with legalized marijuana laws may also have the following laws:

- **Drug testing-specific laws** require employers to have written policies and certain testing protocols in place before they may even conduct an employee drug test or provide protection against certain claims for employers that comply;
- **Disability discrimination laws** require reasonable accommodations for individuals with disabilities;
- **Other discrimination laws** may require employers to ensure all policies and practices do not adversely affect employees or applicants based on a protected trait (such as race, color, religion, national origin, sex and others);
- **Lawful activities laws** prohibit employers from taking adverse actions against employees based on their off-duty participation in legal activities or use of legal products;

- **Workers' compensation laws** provide premium discounts for employers that establish a drug-free workplace policy or that prohibit claim denials or adverse employment actions based solely on positive drug tests unless certain requirements are met;
- **Unemployment insurance laws** might disqualify an individual for benefits if their employment was terminated based on marijuana or other drug use;
- **Workplace safety laws** generally require employers to provide a safe workplace;
- **Privacy laws** that may affect employer drug testing; and
- **Case law** may address a wide variety of employment-related issues under legalized marijuana laws.

Variations of State and Local Laws for Legalized Marijuana and Employment

Employer-friendly Marijuana Laws

Some state marijuana laws specifically allow employers to prohibit all marijuana use, even by employees who are authorized marijuana users. Some of these further specify that individuals have no cause of action against employers. Some state marijuana laws are silent or unclear about employment issues, but courts have issued rulings on prohibiting all off-duty use.

Employee-friendly Marijuana Laws

Some state marijuana laws prohibit employers from taking adverse employment actions against an authorized marijuana user based solely on a positive test for marijuana. These laws usually contain general exceptions for:

- Safety-sensitive positions;
- Employee impairment; and
- Situations where compliance would result in a loss of any monetary- or licensing-related benefit under federal law or regulations.

Some of these also laws require employers to prove an employee's positive drug test violates a workplace drug policy or that the employee was under the influence, impaired by or using marijuana at work.

Table of State Marijuana-related Employment Protections for Employees and Applicants

The tables below provide a general overview of the employment-related protections relating to marijuana in each of the states with legalized marijuana laws.

RECREATIONAL + MEDICAL MARIJUANA STATES

Does the state's legalized marijuana or related laws include any employment-related protections for employees or applicants?

State	Yes/No	More Information/General Overview
Alaska	Yes	Adverse actions based on authorized medical user status are prohibited. However, recreational law specifies it does not affect employers' rights to prohibit employees from using marijuana.
Arizona	Yes	Adverse actions based on authorized medical user status are prohibited, and adverse actions against medical users based solely on a positive test for marijuana are prohibited except under certain circumstances.
California	Yes	Case law allows employers to have zero-tolerance policies even for authorized medical users, but adverse actions based on any off-duty marijuana use are prohibited as of Jan. 1, 2024.
Colorado	No	Case law allows employers to have zero-tolerance policies, even for authorized medical users.
Connecticut	Yes	Adverse actions based on an individual's authorized medical user status are prohibited. Case law holds that this means employees may sue employers for adverse employment actions based solely on a positive test for marijuana.
Delaware	Yes	Adverse actions based on authorized medical user status are prohibited, and adverse actions against authorized medical users based on a positive test for marijuana are prohibited except under certain circumstances. Recreational law may allow for claims against employers that take adverse actions based solely on a positive test for marijuana.
Washington, D.C.	Yes	Applicants may not be tested for marijuana as a condition of employment unless otherwise required by law. Adverse actions based on an individual's authorized medical user status are prohibited. Adverse actions based on a positive test for marijuana are prohibited except under specified circumstances.
Illinois	Yes	Adverse actions based on authorized medical user status or on the use of legal products, which include marijuana, are prohibited.
Maine	Yes	Authorized medical users may not be denied any right or privilege based on lawful use. Recreational law may allow for claims against employers that take adverse actions based solely on a positive test for marijuana.
Maryland	No	Employment is not addressed.

RECREATIONAL + MEDICAL MARIJUANA STATES

Does the state's legalized marijuana or related laws include any employment-related protections for employees or applicants?

State	Yes/No	More Information/General Overview
Massachusetts	Yes	Case law holds that allowing off-duty use by authorized medical users may be a reasonable accommodation under disability discrimination law. However, recreational law specifies that it does not affect employers' rights to prohibit employees from using marijuana.
Michigan	Yes	Employers must have a written workplace drug policy in place before taking adverse action against an individual based solely on a positive test for marijuana.
Missouri	Yes	Adverse actions against authorized medical marijuana users based on off-duty use of medical marijuana are prohibited. Recreational law may allow for claims against employers that take adverse actions based solely on a positive test for marijuana.
Montana	Yes	Lawful activities law prohibits discrimination based on an employee's off-duty use of certain legal products, which include marijuana.
Nevada	Yes	Employers must attempt to accommodate medical marijuana users. Lawful products law prohibits refusal to hire an applicant for a non-safety-sensitive position based solely on a positive test for marijuana.
New Jersey	Yes	Individuals must be given an opportunity to explain positive test results for marijuana and excused if their use is authorized under medical law.
New Mexico	Yes	Adverse actions based on off-duty, authorized medical use are prohibited except under certain circumstances. However, recreational law specifies that it does not affect employers' rights to prohibit employees from using marijuana.
New York	Yes	Authorized medical users are deemed to have a disability for which accommodations may be required under discrimination law. Recreational law prohibits adverse actions based solely on a positive test for marijuana. In addition, employers in New York City (NYC) are subject to a local NYC law that prohibits testing job applicants (other than applicants for certain safety-sensitive positions) for marijuana as a condition of employment unless otherwise required by law.
Oregon	No	Case law holds that zero-tolerance policies are permitted even for authorized medical users.
Rhode Island	Yes	Adverse actions based on authorized medical user status are prohibited.
Vermont	No	Employment is not addressed.
Virginia	Yes	Applicants may not be asked about marijuana-related criminal history.
Washington	No	Case law holds that zero-tolerance policies are permitted even for authorized users.

MEDICAL-ONLY STATES

Does the state's legalized marijuana or related laws include any employment-related protections for employees or applicants?

State	Yes/No	Summary/Explanation
Alabama	No	Law specifies that employers may deny workers' compensation and other claims based on positive marijuana tests and that zero-tolerance policies are permitted even for authorized medical users.
Arkansas	Yes	Adverse actions based on authorized medical user status are prohibited, and adverse actions based on a positive test for marijuana are prohibited except under certain circumstances.
Florida	No	Law specifies that zero-tolerance policies are permitted even for authorized medical users.
Hawaii	No	Employment is not addressed.
Kentucky	No	Law specifies that zero-tolerance policies are permitted even for authorized medical users.
Louisiana	No	Employment is not addressed.
Minnesota	Yes	Adverse actions based on authorized medical user status are prohibited, and adverse actions based on a positive test for marijuana are prohibited except under certain circumstances.
New Hampshire	No	Employment is not addressed.
North Dakota	No	Effective April 11, 2023, Senate Bill 2388 amended the law to specify that it does not prohibit employers from disciplining an employee for working with marijuana in the employee's system.
Ohio	No	Law specifies that zero-tolerance policies are permitted even for authorized medical users.
Oklahoma	Yes	Adverse actions based on authorized medical user status and adverse actions against medical users based on a positive test for marijuana are both prohibited except under certain circumstances.
Pennsylvania	Yes	Adverse actions based on authorized medical user status are prohibited.
South Dakota	No	Employment is not addressed.
Utah	No	Employment is not addressed.
West Virginia	Yes	Adverse actions based on authorized medical user status are prohibited.

State Drug Testing Laws

Employers should become familiar with any applicable laws that specifically address workplace drug testing. Specifically, some states have laws specific to drug testing that require employers to have written policies and certain testing protocols in place before they may even conduct an employee drug test. Other state drug testing-specific laws provide employers with protection against certain claims and lawsuits if they voluntarily comply.

Common requirements under these laws are for an employer to:

- Have a written drug-testing policy that includes certain provisions;
- Follow certain protocols for collecting and handling test samples;
- Use certified testing laboratories;
- Perform confirmatory testing on initial positive results;
- Allow individuals an opportunity to explain any positive results;

Table of State Drug Testing Laws

The table below provides information about state laws governing employer drug testing.

RECREATIONAL + MEDICAL MARIJUANA STATES

Does the state have a general law governing workplace drug testing?

State	Yes/No	Summary/Explanation
Alaska	Yes	The Alaska Drug Testing Law allows employers that choose to conduct testing to avoid liability for certain claims if they comply.
Arizona	Yes	The Arizona Drug Testing of Employees Act allows employers that choose to conduct testing to avoid liability for certain claims if they comply.
California	No	No general workplace drug testing law, but industry-specific laws apply to contractors on public improvement projects and others.
Colorado	No	No general workplace drug testing law.
Connecticut	Yes	Testing is permitted only in accordance with the Connecticut Drug Testing Law .
Delaware	No	No general workplace drug testing law.
Washington, D.C.	No	No general workplace drug testing law, but the District's labor law prohibits testing applicants for marijuana until after a conditional job offer has been extended, with the exception of safety-sensitive positions.
Illinois	No	The Illinois Human Rights Act provides guidance on testing policies, and the Illinois Substance Abuse Prevention on Public Works Act applies to employers with public works contracts.
Maine	Yes	Testing is permitted only in accordance with the Maine Substance Abuse Testing Law .

RECREATIONAL + MEDICAL MARIJUANA STATES

Does the state have a general law governing workplace drug testing?

State	Yes/No	Summary/Explanation
Maryland	Yes	Testing is permitted only in accordance with the Maryland Drug Testing Law .
Massachusetts	No	No general workplace drug testing law.
Michigan	No	No specific workplace drug testing law.
Missouri	No	No specific workplace drug testing law.
Montana	Yes	Testing is permitted only in accordance with the Montana Workforce Drug and Alcohol Testing Act .
Nevada	No	No general workplace drug testing law, but Nevada's legal products law prohibits testing applicants for marijuana.
New Jersey	No	No general workplace drug testing law.
New Mexico	No	No general workplace drug testing law.
New York	No	No general workplace drug testing law.
Oklahoma	Yes	Testing is permitted only in accordance with the Oklahoma Standards for Workplace Drug and Alcohol Testing Act .
Oregon	No	No general workplace drug testing law.
Rhode Island	Yes	Testing is permitted only in accordance with the Rhode Island Urine & Blood Tests as Condition of Employment Law .
Vermont	Yes	Testing is permitted only in accordance with the Vermont Drug Testing Law .
Virginia	No	The Virginia Drug-free Workplace Act requires employers with government contracts of over \$10,000 to implement a drug-free workplace program.
Washington	No	No general workplace drug testing law.

MEDICAL-ONLY STATES

Does the state have a law generally governing workplace drug testing?

State	Yes/No	Summary/Explanation
Alabama	No	No general workplace drug testing law.
Arkansas	No	No general workplace drug testing law.
Florida	No	No general workplace drug testing law.
Hawaii	Yes	Testing is permitted only in accordance with the Hawaii Substance Abuse Testing Law .
Kentucky	No	No general workplace drug testing law, but pre-certification and post-accident testing are required for coal mining.
Louisiana	Yes	Testing is permitted only in accordance with the Louisiana Drug Testing Law .
Minnesota	Yes	Testing is permitted only in accordance with the Minnesota Drug & Alcohol Testing in the Workplace Act .
Mississippi	Yes	Testing is permitted only in accordance with the Mississippi Drug and Alcohol Testing of Employees Law .
New Hampshire	No	No general workplace drug testing law.
North Dakota	No	No general workplace drug testing law.
Ohio	No	No general workplace drug testing law.
Pennsylvania	No	No general workplace drug testing law.
South Dakota	No	No general workplace drug testing law.
Utah	Yes	The Utah Drug and Alcohol Testing Act allows employers that choose to conduct testing to avoid liability for certain claims if they comply.
West Virginia	Yes	The West Virginia Safer Workplace Act allows employers that choose to conduct testing to avoid liability for certain claims if they comply.

STATES WITH NO LEGALIZED MARIJUANA

Does the state have a law generally governing workplace drug testing?

State	Yes/No	Summary/Explanation
Georgia	No	No general workplace drug testing law.
Idaho	Yes	The Idaho Employer Alcohol and Drug-Free Workplace Act allows employers that choose to conduct testing to avoid liability for certain claims if they comply.
Indiana	No	No general workplace drug testing law, but some public works contractors must have a drug-free workplace plan.
Iowa	Yes	Testing is permitted only in accordance with the Iowa Drug Testing Law .
Kansas	No	No general workplace drug testing law.
Nebraska	Yes	Testing is permitted only in accordance with the Nebraska Drug Testing Law .
North Carolina	Yes	Testing is permitted only in accordance with the North Carolina Controlled Substance Examination Regulation Act .
South Carolina	No	No general workplace drug testing law, but certain state contractors and grantees must have a drug-free workplace program.
Tennessee	No	No general workplace drug testing law.
Texas	No	No general workplace drug testing law.
Wisconsin	No	No general workplace drug testing law, but employers on public works construction projects and transport must have a written program to prevent substance abuse.
Wyoming	No	No general workplace drug testing law.

Lawful Activities Laws

Some states have laws that prohibit employers from discriminating against individuals based on their use of lawful products or engagement in lawful activities outside of work. Marijuana use may or may not be considered lawful products under these laws.

Overview of Other Relevant Employment Laws

Anti-discrimination Laws

Employers in some states with legalized marijuana may face lawsuits and potential liability under state disability laws for taking adverse actions against authorized, off-duty marijuana users. This is because medical marijuana laws usually require an individual to have a debilitating medical condition in order to be an authorized user, and most debilitating conditions will qualify as a disability under state laws that require employers to provide reasonable accommodations.

In states where a legalized marijuana law does not explicitly address workplace drug policies and off-duty use, employers should consider either accommodating a disabled employee's state-authorized, off-duty marijuana use or at least engaging in an interactive process with the employee to determine whether other reasonable accommodations are suitable.

State Workers' Compensation Laws

Some state workers' compensation laws prohibit or otherwise address claim denials or other adverse employment actions based solely on positive drug tests unless certain requirements are met. In addition, some states provide premium discounts for employers that establish specific drug-free workplace programs, and some state marijuana laws specify that they do not affect these programs. Employers should become familiar with these laws as well.

Employers should determine whether these laws have any effect on their workplace policies on marijuana use.

State Unemployment Laws

Some state unemployment insurance laws would allow for the denial of benefits if an individual's employment was terminated due to drug use or misconduct, which may include drug use.

Privacy Laws

In cases involving disputes over drug or alcohol testing and employment issues, some state courts will assess the employer's testing policy to determine whether it violates an individual's right to privacy. Specifically, courts may apply a balancing test that weighs an employer's legitimate interests in regulating the conduct of its employees against the intrusion the employer's drug test has on an employee or applicant's reasonable expectation of privacy. When this analysis applies, courts generally consider several factors, such as:

- The nature of the drug or alcohol test (including the extent to which a person is monitored while supplying urine or other types of samples);
- The equipment used for testing;
- The manner in which the test was administered; and
- The reliability of the test.

Many states have laws governing the use of medical information that require employers to keep the results of any drug or alcohol test **confidential**. In general, employers may not disclose an applicant or employee's test results without first obtaining valid authorization from the individual.

Case Law

When a state marijuana law and its related employment laws are silent or unclear about an issue related to employment, employers may be able to look to court case decisions for guidance on how to proceed. For example, most state marijuana laws specify that employers and their health care plans are not required to reimburse employees for the cost of medical marijuana; however, at least one court has held that employers may have to pay for an employee's medical marijuana that is prescribed as a result of a work-related injury.

EMPLOYER BEST PRACTICES

Best practices for employers that conduct drug testing for marijuana will depend heavily on the applicable state laws, but this section provides general guidance.

Establish a Written Policy.

All employers should establish a written policy on employee drug use and drug testing, even if there is no applicable law requiring it and even if they choose not to conduct testing. A written plan sets

expectations and helps avoid questions about how to handle situations as they occur. Thus, for employers that do choose to conduct drug testing, a written plan is crucial.

Here are general tips when creating a written plan:

- Be clear about expectations;
- Outline exactly when and why drug tests will be required;
- Consider excluding non-safety-sensitive positions from testing;
- Consider excluding marijuana tests for non-safety-sensitive positions;
- Follow any applicable drug testing laws; and
- Address any relevant legal provisions regarding workers' compensation, unemployment, health care costs and other issues.

Communicate the Policy.

Employers should distribute their written drug testing policies to their employees both at hire and at regular intervals, such as annually, during their employment. Employers should also consider posting the written policy in a place where it is easily accessible to employees and applicants.

Ensure the Policy Is Applied Fairly and Consistently.

Employers must ensure all workplace policies, including drug testing policies, are applied fairly, consistently and in a manner that does not result in discrimination against any individual or group based on a protected trait, such as race, color, religion, national origin, sex and others.

Consider Providing Accommodations for Medical Users.

In states where a marijuana law does not explicitly address workplace drug policies and off-duty use, employers should consider either accommodating a disabled employee's state-authorized, off-duty marijuana use or at least engaging in an interactive process with the employee to determine whether other reasonable accommodations may be suitable. Employers should also keep in mind that some state or local laws may specifically require accommodations for medical marijuana users.

Use Compliant Testing Protocols.

When implementing drug testing protocols, employers should ensure they comply with all applicable state laws regarding drug testing. Even when there is no applicable law for this, employers should always use a reliable, accredited lab to perform drug tests and ensure that the testing process is consistent, fair and accurate. Employers should also ensure they provide a safe, secure and confidential environment for employees when they are undergoing drug testing.

Document Everything.

For employers that conduct drug testing, it is crucial to make and keep detailed records of all drug testing, including the date of the test, the results and any follow-up actions. Documentation of drug testing allows employers to track the results of each test, ensure all tests are conducted properly, and provide proof that all employees have been tested in a consistent manner. Documentation also serves as a reference for employers if any questions or issues arise from the testing process. It helps employers make sure that the drug testing process is being conducted safely and ethically.

Train Management and Staff on Signs of Impairment.

Employers should train all management and staff on how to recognize marijuana impairment and intoxication. This often starts with building an understanding of the effects of marijuana use. Specifically, employers should educate members of their staff and management on the physical and cognitive effects of marijuana use, such as changes in mood and behavior, slowed reaction time, and impaired ability to concentrate and make decisions. Physical effects of marijuana use may also include bloodshot eyes, increased appetite, slowed speech, and changes in coordination and balance.

However, employers should keep in mind that some legalized marijuana laws may specify that certain signs of marijuana use, such as bloodshot eyes alone, are not enough to prove impairment.

Employers should also provide staff and management with information about the legal implications of marijuana use in the workplace. For example, employers may explain:

- The risks associated with allowing marijuana-impaired employees to continue to work;
- The potential for legal action should an accident occur due to marijuana impairment; and
- The procedures to follow if an employee is suspected of being impaired on the job.

Finally, it is important to train staff and management on how to document any relevant interactions or situations in a thorough and professional manner. Documentation is often an employer's first and last line of defense against legal claims arising from workplace drug testing policies.

Offer Employee Assistance Programs.

Employers that have concerns about employee drug use should consider providing an employee assistance program (EAP) to help keep their workplaces safe and free of hazards related to drug use. EAPs can provide a range of benefits to marijuana users in particular. These benefits range from counseling and support to resources for finding treatment.

One of the most beneficial aspects of an EAP for marijuana users is the ability to receive confidential counseling and support from a trained professional. This counseling can help employees better manage their marijuana use and identify triggers that may be contributing to their use.

Another benefit of an EAP for marijuana users is access to resources for finding treatment. Through an EAP, employees can receive referrals to treatment centers or support groups that specialize in marijuana use disorder. These resources can help individuals to find the help they need to reduce their marijuana use and live healthier, more productive lives, which often translates into a more productive workplace.

Finally, an EAP can provide education on the risks and harms associated with marijuana use. This can help to reduce stigma and encourage employees to seek help when needed. Through an EAP, employees can receive information about the signs and symptoms of marijuana use disorder, as well as strategies for reducing use and managing triggers. This can be invaluable for employees who are looking for ways to reduce their marijuana use and improve their overall health and well-being.

APPENDIX

Items in Appendix

- - Employer Checklist 1 – State Laws to Find and Consider
- - Employer Checklist 2 – What to Look for in State Laws
- - Employer Checklist 3 – Outlining the Sample Workplace Drug Testing Policy
- - Sample Workplace Policy on Marijuana Use
- - Frequently Asked Questions (FAQs) and Answers

EMPLOYER CHECKLIST 1 - State Laws to Consider

The following is a list of general categories of state and local laws that employers should become familiar with before establishing or implementing any drug testing policy that includes testing for marijuana.

- ☐ Legalized recreational marijuana laws
- ☐ Legalized medical marijuana laws
- ☐ Drug testing laws
- ☐ Lawful activities laws
- ☐ Disability discrimination laws
- ☐ Other anti-discrimination laws
- ☐ Workers' compensation laws
- ☐ Unemployment laws
- ☐ Workplace safety laws
- ☐ Privacy laws
- ☐ Case law

EMPLOYER CHECKLIST 2 – What to Look for in State Laws

The following is a list of general questions employers should ask and determine the answer to when reviewing state laws for legalized marijuana and employment laws for purposes of establishing a workplace drug testing policy.

Do the state's (or locality's) legalized marijuana or related laws:

- ☐ Provide employment protection for marijuana users?
- ☐ Provide protections or guidance for employers?
- ☐ Address off-duty marijuana use?
- ☐ Create or allow causes of action against employers for adverse actions taken against an individual based on off-duty marijuana use?
- ☐ Prohibit employers from taking specific actions when an individual tests positive for marijuana?
- ☐ Require employers to take specific actions when an individual tests positive for marijuana?
- ☐ Address how to determine whether an individual is impaired by or under the influence of marijuana?
- ☐ Require an established workplace drug policy?
- ☐ Appear in any court decisions addressing employment issues?

EMPLOYER CHECKLIST 3 – Outlining the Details of a Workplace Drug Testing Policy

When initially determining the details and structure of any workplace drug testing plan, an employer will first need to make decisions on the following:

Who will be tested?

- Employees
- Applicants

When and why will individuals be tested?

- During the interview process (prohibited in New York City and Washington, D.C., for marijuana)
- After extending an offer of employment to an applicants
- At random times
- After a workplace accident
- Upon employer's reasonable suspicion of impairment

What drugs will be tested for?

- Include marijuana in all testing.
- Exclude marijuana from all testing.
- Exclude applicants from all marijuana testing.
- Exclude applicants from marijuana testing until after an offer is extended.
- Exclude marijuana from testing of individuals who work in or are applying for non-safety-sensitive positions.
- Other details.

What kind of samples will be collected?

- **Urine**
- Blood
- Hair
- Breath
- Other

What procedures will be used for collecting samples?

- On-site collection
- Off-site collection

Which laboratory will be used for testing?

- Ensure it uses complaint procedures for handling samples.
- Ensure it uses complaint procedures for testing samples.
- Ensure it uses complaint protocols for testing.
- Ensure it has any required certifications or licensing.

What consequences will be imposed if an employee or applicant refuses to participate in the testing?

- Warning
- Discipline
- Termination
- Offer of assistance with addiction recovery
- Other

SAMPLE WORKPLACE DRUG TESTING POLICY

The following provides an outline and sample language for employers to use as a basic framework for a written workplace drug testing plan. Please note that this language requires heavy customization and should not be used without fully analyzing all applicable legal provisions and guidance that may be relevant to any given employer's unique situation. Employers should also work in conjunction with individualized legal counsel to ensure that their drug policies comply with all applicable requirements.

Statement of Policy on Employee Drug Use

[COMPANY] believes that a drug-free workplace is essential for the productivity and safety of our employees and the protection of our business. Therefore, we are committed to providing a drug-free working environment for all employees.

Any employee who is found to be under the influence of drugs or alcohol while on the job may be subject to disciplinary action, up to and including termination of employment. To this end, [COMPANY] reserves the right to require any employee to submit to drug testing to the extent permissible under all applicable laws and as further described below. All drug tests will be conducted in accordance with applicable local, state and federal laws, and all test results will remain confidential.

Under no circumstances will [COMPANY] take adverse actions or otherwise discriminate against an employee or applicant who is an authorized medical marijuana user based solely on that status.

Individuals Subject to Testing

[PROVIDE LIST OF EMPLOYEES/POSITIONS]

Circumstances Under Which Testing May Be Required

Employees may be required to submit to drug testing under the following circumstances and at the following times:

[PROVIDE A DESCRIPTION OF CIRCUMSTANCES AND TIMES, WHICH MAY INCLUDE THE FOLLOWING]

- After an offer of hire is extended to an applicant;
- When [COMPANY] has reasonable suspicion that an employee is under the influence of drugs or alcohol;
- When employees are involved in a workplace accident;
- As part of a routine physical examination;
- At random times;
- Upon employees returning from leave; and
- [OTHERS]

Substances To Be Tested For

[LIST SUBSTANCES AND ADDRESS MARIJUANA SEPARATELY]

- Cocaine
- Opiates
- Amphetamines
- Phencyclidine
- Alcohol
- Benzodiazepines
- Barbiturates
- Synthetic narcotics
- [OTHERS]

[INCLUDE INFORMATION ABOUT ANY APPLICABLE MARIJUANA TESTING RESTRICTIONS]

[The following describes a required restriction for employers in Arkansas, Arizona, Delaware, New Mexico and New York.]

Unless it would result in a loss of any monetary- or licensing-related benefit under federal law or regulations, [the COMPANY] will not take any adverse employment action against an authorized medical marijuana user based solely on the fact that the individual tests positive for marijuana components or metabolites unless [COMPANY] has a specific reason to believe that the authorized marijuana user who tested positive either:

- Had been using marijuana at work or during working hours; or
- Was under the influence of marijuana at work.

However, this does not apply to any position deemed by [COMPANY] to be safety-sensitive.

[COMPANY] reserves the right to exclude any marijuana user, even an authorized medical user, from any position deemed by [COMPANY] to be a safety-sensitive position if it has a good-faith belief that the individual currently uses marijuana.

[The following are some options for employers that exclude marijuana from testing.]

[COMPANY] will not conduct any drug testing for marijuana on employees in non-safety-sensitive positions.

[COMPANY] will not conduct any drug testing for marijuana. Any employee who is found to be under the influence of marijuana while on the job may be subject to disciplinary action, up to and including termination of employment. However, if an employee is found to be under the influence of drugs or alcohol while on the job, they may be subject to disciplinary action, up to and including termination of employment.

Collection Procedures, Testing Methods and Designated Testing Laboratory

[COMPANY] has designated the following laboratory to carry out drug and alcohol testing: [PROVIDE LAB NAME AND OTHER INFORMATION].

Samples will be collected, and all testing will be performed by this laboratory, which will follow all applicable requirements and procedures for testing. [DESCRIBED ANY ADDITIONAL DETAILS.]

Consequences of a refusal to participate in testing

Any employee who refuses to comply with this policy by failing to submit to testing may be subject to disciplinary action, up to and including termination of employment. [FURTHER DESCRIBE CONSEQUENCES.]

Consequences of a Positive Test

[DESCRIBE ANY ADVERSE ACTION THAT MAY BE TAKEN BASED ON A POSITIVE TEST FOR DRUGS OTHER THAN MARIJUANA.]

[SEPARATELY DESCRIBE ANY ADVERSE ACTION THAT MAY BE TAKEN BASED ON A POSITIVE TEST FOR MARIJUANA, IF ANY.]

Employee Rights

Employees who undergo drug testing have the rights to:

Obtain the results of a test upon request;

Have any positive test results explained in a confidential setting;

[DESCRIBE OTHER EMPLOYEE RIGHTS, INCLUDING CONFIRMATORY TESTS.]

Frequently Asked Questions (FAQs) and Answers

The following are some FAQs and answers about legalized marijuana and employment.

Q: Can employers prohibit marijuana use during rest and meal breaks?

A: Yes. Virtually all state legalized marijuana laws allow employers to prohibit marijuana use during working hours, which usually include rest and meal breaks as work hours, even if the employee leaves the worksite during their breaks.

Q: Can employers prohibit marijuana use while an employee is on call?

A: Yes. The time an employee is on call is usually considered working hours, during which employers may place restrictions on their employees, even if they are not actually performing any work.

Q: Can employers prohibit employees from possessing marijuana at work?

A: Yes. Virtually all state legalized marijuana laws allow employers to prohibit employees from bringing marijuana onto the employer's property.

Q: Can employers prohibit employees who work at home from using marijuana?

A: This may depend on how the state's labor or other laws define a workplace. For example, New York's labor laws do not consider an employee's home that is being used for remote work to be a "worksite," such that employers generally cannot prohibit employees from using marijuana at home. However, employers can take adverse action if an employee exhibits articulable symptoms of impairment during work hours.

Q: Can an employer discipline or terminate an employee for the use of legal marijuana products while on the job?

A: Yes. Virtually all state legalized marijuana laws allow employers to prohibit and discipline employees for marijuana use at work or during working hours. Even in states where employer testing for marijuana is severely restricted, employers are not prohibited from taking employment actions against an employee who is under the influence of marijuana at work.

Q: What kind of evidence is necessary to establish that an employee was under the influence or impaired by marijuana at work or during working hours?

A: First, employers should always be cautious before assuming an employee is impaired or under the influence of marijuana because symptoms that appear to be from the drug could also be an indication that an employee has a disability protected by federal, state or local law. Thus, even if an employee exhibits obvious symptoms of impairment, employers should not rush to judgment and assume that the employee is under the influence of marijuana.

In general, employers should be able to point to specific, articulable symptoms of marijuana impairment that:

- Decrease or lessen the employee's performance of their tasks or duties; or
- Interfere with the employer's obligation to provide a safe and healthy workplace, free from recognized hazards, as required by state and federal occupational safety and health laws.

Also, even if an employee does not exhibit specific articulable symptoms of impairment, employers may always discipline employees who use marijuana during work hours or while on or using the employer's property.

Q: Can employers prohibit all marijuana use outside the workplace?

A: In a few states with legalized marijuana, yes. However, in most states with legalized marijuana, no.

Q: Can employers drug test employees for marijuana?

A: In general, yes, except in New York, Nevada and New Mexico. However, even if no state laws restrict marijuana testing, employers in legalized marijuana states may want to consider excluding marijuana from workplace drug testing of employees in non-safety-sensitive positions.

Q: Can employers drug test employees for marijuana if federal law allows for drug testing?

A: In many states, no. Many legalized marijuana and related state laws place restrictions on employer testing, and employers must follow these laws even if unrestricted testing is otherwise allowed or not prohibited under federal law. However, employers in all states may test for marijuana if it is required under federal or state law or if federal or state law makes it a mandatory requirement for any licensing or certification for the position at issue.

