

The ABCs of THC: What Employers Need to Know About Marijuana Laws

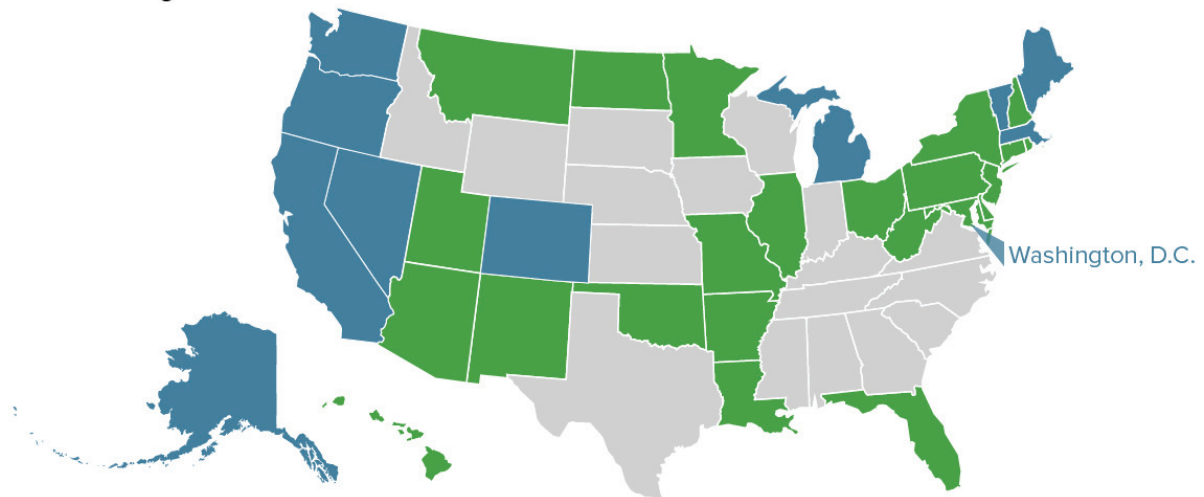
By Lisa Nagele-Piazza, J.D., SHRM-SCP
January 30, 2019

As U.S. support for the legalization of marijuana grows and more states approve marijuana's medical and recreational use, employers must understand the relevant legal developments and how they affect the workplace.

About 62 percent of U.S. respondents to a 2018 Pew Research Center survey (<http://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/>) said marijuana use should be legal, compared to 31 percent who supported legalization in 2000.

State laws reflect the changing attitude toward weed: Thirty-three states and Washington, D.C., have legalized medical marijuana use, and 10 states have approved both its medical and recreational use.

State Marijuana Laws



- States with comprehensive medical marijuana programs
- States that allow recreational and medical marijuana use
- States that do not have a comprehensive marijuana law

Note: Map doesn't show states that allow low-THC products.
Source: National Conference of State Legislatures.

Some states permit limited use of products that contain low levels of tetrahydrocannabinol (THC), the drug's psychoactive component, and some have decriminalized possession of small amounts of marijuana.

So what does this mean for employers? Here are some of the key legal concepts that may influence how employers approach their policies and practices.

All marijuana use is still illegal under federal law. Marijuana is listed as a Schedule I drug (<https://www.dea.gov/drug-scheduling>) under the Controlled Substances Act, which means that it is deemed to have no medical value and a high potential for abuse.

Activists have lobbied the federal government to reschedule marijuana, but there haven't been enough large-scale clinical trials (<https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine>) showing that marijuana's medical value outweighs the risk to patients, according to the National Institute on Drug Abuse.

Despite marijuana's Schedule I status, former President Barack Obama's administration issued a memo in 2013 stating that federal prosecutors wouldn't target adults who were growing or using marijuana in accordance with state laws. Instead, the federal government focused its efforts on preventing marijuana sales to minors and stopping drug cartels.

Although President Donald Trump's administration rescinded the Obama-era memo, there hasn't been a ramp up in enforcement, and states continue to approve marijuana use.

In some states, courts have held that federal law pre-empts state medical marijuana laws. In other states, courts have rejected that argument. "It's still a bit of a mixed bag," noted Donald Lawless, an attorney with Barnes & Thornburg in Grand Rapids, Mich.

Medical Marijuana

Most states allow marijuana use for medicinal purposes, but the details of these laws vary. For instance, the qualifying medical conditions for which cannabis can be used differ.

Qualified patients and their caregivers generally must receive a certification from a medical practitioner and register with the state.

Registered medicinal users—or "cardholders"—in some states may have job protections. In New York, for example, they are covered under the state disability nondiscrimination law. And in 2017, the Massachusetts high court held that a worker could bring suit (www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/pages/do-employers-need-to-accommodate-medical-marijuana-users.aspx) against her employer for disability discrimination after she was fired for a positive marijuana drug test.

But state statutes with nondiscrimination provisions for medicinal use typically exclude jobs that require drug testing under federal law, Lawless said. For example, certain commercial motor vehicle operators (<https://www.transportation.gov/odapc/federal-alcohol-and-drug-testing-requirements-information-motor>) would be excluded because the Department of Transportation requires them to pass drug and alcohol screens.

Employers never have to accommodate on-the-job use, but they may want to explore reasonable accommodations for registered medicinal users in these jurisdictions instead of having blanket policies excluding marijuana users from employment.

Some states such as California, Colorado and Ohio do not provide workplace protections for medical users, even if they are following state law and limit their use to off-duty hours. Thus, employers should carefully review the applicable statutes and case law when crafting drug-testing and substance-abuse policies.

Cannabis Oil

Some states that haven't legalized medical marijuana allow limited use of cannabis oils if they contain a low level of THC and a high level of cannabidiol (CBD), a nonpsychoactive component that is said to have medicinal value. Note, however, that cannabis oils can contain varying levels of THC. Laws permitting low-THC/high-CBD products are not considered comprehensive medical marijuana programs.

Congress recently removed hemp, a variety of cannabis, that contains less than 0.3 percent THC concentration from the controlled-substances list. However, products made for human or animal consumption are still illegal under federal law unless they are approved by the FDA (<https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm628988.htm>). Epidiolex was the first cannabis extract (<https://www.fda.gov/newsevents/newsroom/pressannouncements/ucm611046.htm>) approved by the FDA in 2018.

Recreational Use

Ten states and Washington, D.C., have legalized recreational marijuana use for adults ages 21 and older. Each state strictly regulates where it can be purchased and consumed and how much can be grown at home. Importantly, no state law forces employers to accommodate recreational use.

Michigan's recreational law took effect in December 2018 and allows employers to discipline employees for violating a workplace drug policy, Lawless noted. So employers in Michigan should clearly communicate to workers if marijuana use will not be accommodated.

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Decriminalization

Many states have decriminalized marijuana to some degree. The laws also vary, but they typically remove criminal penalties, such as jail time, for possession of small amounts of weed. In some states, violators just have to pay a fine, but in other states they may end up with a misdemeanor on their record.

Employers should note that many cities and states have placed substantial limits on what employers may ask job applicants about their criminal history (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/ban-the-box-turns-20-what-employers-need-to-know.aspx), including restrictions on questions regarding marijuana-related charges.

Policies and Practices

As medical and nonmedical legalization spreads, it will become increasingly important that employers clarify their policies, said Alyson Martin, co-founder of *Cannabis Wire*, a publication about key cannabis issues.

While it may be unlawful in some jurisdictions to discriminate against workers simply because they have a medical marijuana card, employers can still require sobriety at work and treat marijuana as they would alcohol or prescription drugs, said Rob Wilson, president of Employco USA, a national employment-solutions firm based in Illinois.

But, for now, marijuana drug tests can't determine whether someone is currently under the influence the way that alcohol tests can, Lawless noted, so employers may opt to state in their policies that they will discipline employees who are displaying behaviors of intoxication and test positive for marijuana.

"Managing employee expectations is critical," he said.