

Marijuana and the Modern Workplace *To Test or Not to Test: When Will the Smoke Clear?*

By Jim Reidy

Strict drug screening policies may not be keeping up with the times. That is because drug-testing policies, especially for marijuana use, are no longer in step with the changes to the law in several states, and the realities of today's workforce.

Marijuana is still classified as an illegal substance under federal law, but state legislatures across the country continue to move toward legalizing it for medical and/or recreational purposes. In New Hampshire, marijuana use has been legal for a few years for medical reasons but not yet for recreational purposes. The Governor has already stated that he is not in favor of any legislative efforts to legalize the recreational use of marijuana. One cannabis advocate referred to New Hampshire as “an island of prohibition in a sea of legalization.” Perhaps that is because 33 states and the District of Columbia have legalized marijuana in one form or another and close to home, Massachusetts, Vermont and Maine (as well as all of Canada) have legalized recreational marijuana use. With these significant changes to state law and the difficulties many employers experience when trying to recruit, hire and retain qualified employees, some employers in this competitive labor market are rethinking their drug-testing policies.

While some employers are making changes to their drug-testing policies on their own, others are doing so because of requirements under state law. Maine prohibits employers from testing for marijuana at the pre-employment stage and from discharging an employee for an initial positive drug test. In some states pre-employment tests for drugs are permitted, but only if the applicant is notified in advance. In other states where marijuana is legal, testing agencies have reported a significant decline in drug testing of

job applicants, especially for marijuana, even though positive results for such screens are at an all-time high. (No pun intended.)

Not only are the laws changing but public opinion about marijuana has also changed. According to a Gallup survey, support in the U.S. for marijuana legalization was at a record high of 64 percent last fall. U.S. Department of Labor Secretary Alexander Acosta, because of the changes to marijuana laws, has suggested employers should rethink drug testing for every job applicant. Even OSHA proposed a rule (now shelved) that if adopted would have done away with mandatory post-accident drug tests.

Of course, such testing is still performed routinely — and appropriately — for workers in safety-sensitive positions, both before and during employment. But otherwise, pre-employment drug tests, at least for marijuana, may be going the way of other once-popular, but now largely obsolete, pre-hire screening methods.

Many employers simply don't see a return on investment when they weigh the costs of random and pre-employment testing

against the results. Some complain that random screening hurts morale, and may prompt qualified applicants to look elsewhere for work. Employers can still test employees post-accident or based on reasonable suspicion. While there is no widely acceptable standard to determine if someone is impaired because of marijuana use, the presence in an employee's system can still be good reason to terminate that person's employment, especially if he or she is working in a safety-sensitive position.

Employers can and should still prohibit the use, possession or distribution of marijuana at the workplace, as well as prohibit employees from being under the influence while at work.

While the legalization of recreational marijuana in New Hampshire may still be down the road, employers in the Granite State are already dealing with employees who seek the use of marijuana for medical purposes. In a recent case, the New Hampshire Supreme Court ruled that a Workers Compensation Appeals Board erred when it determined that workers' compensation insurance can't reimburse an employee for the cost of medical marijuana and denied reimbursement because marijuana is still illegal under federal law.



Employers have also asked if they are required to accommodate marijuana use as a reasonable accommodation under disability law. Courts and the U.S. Equal Employment Opportunity Commission have consistently held that employers are not required to permit medical marijuana use as a reasonable accommodation under the Americans with Disabilities Act. That was the same position courts had taken under state law even in states where marijuana use was legal. However, over the last two years there have been cases in Rhode Island and Massachusetts where courts have held that the use of medical marijuana may be a reasonable accommodation for disabled employees under state disability law.

Again, with a majority of states legalizing marijuana use in one form or another, for all of the reasons stated above and with no scientific or legal standard to determine current impairment instead of just evidence of marijuana use at some point, more employers are dropping marijuana testing from the pre-hire screening for many positions. That said, given that marijuana is still an illegal narcotic under federal law and there are still potential liability concerns if an employer is aware of an applicant or employee's off-duty use of marijuana, pot may be the 2019 version of “Don't ask, don't tell.”

In short, with the relaxing of state marijuana laws, the changes in public attitudes towards marijuana use, legal challenges and labor market issues, drug testing, especially for marijuana, is declining — and, over time, screening for pot could go, yes, up in smoke. Queue up the Grateful Dead music — this really isn't your parents' workplace.

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