

MEDICAL MARIJUANA

Addressing Impairment in the Workplace

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THE INCREASING LEGALIZATION OF MEDICAL MARIJUANA USE

presents a greater risk in the workplace. It presents organizational challenges to maintaining productivity, protecting equipment and property, and preserving employee safety and health. Historically, organizations developed anti-drug use policies and randomly drug tested employees to determine potential impairment at work; however, this strategy must evolve as the use of medical marijuana grows. While medical marijuana is legal, employers may not know if employees are impaired at work. This is a growing problem as several states have already legalized medical marijuana use (see the “Marijuana Legalization Status” sidebar), public support for marijuana legalization rises and

KEY TAKEAWAYS

- Expanding legalization of marijuana for medicinal purposes creates a significant challenge for workplaces where physical impairment may lead to mishaps and injuries.
- While medicinal use of marijuana in federal workplaces is still restricted, states legalizing medical marijuana leave nonfederal workplaces to figure out how to accommodate these changes and still protect their workforce.
- Organizations must decide how to address medical marijuana use while promoting a safe and healthful work environment, and not reconciling the legalization, permitted use and lawful drug testing.
- This article explores some of the challenges and possible approaches for meeting this evolving workplace dilemma.

many other states continue to consider bills on varying levels of reform (Ingraham, 2017; NCSL, 2018).

With the expansion of medical marijuana reform, previous workplace policies may potentially violate employee rights. While federal law still classifies marijuana as a Schedule I substance under the Controlled Substances Act (i.e., drugs with no currently accepted medical use and a high potential for abuse) (U.S. DEA, 2018), U.S. Department of Justice (DOJ) deferred enforcement to each state in 2013 (J.M. Cole, personal communication, Aug. 29, 2013; U.S. DOJ, 2013). Organizations must be wary of state laws regarding marijuana use and understand how the use can affect workplace safety and health, all while clarifying

both employer and employee rights through the lawful execution of workplace drug policies.

Safety & Health Implications

Medical marijuana use may impact injuries and illnesses. National Institute on Drug Abuse (NIDA, 2018) found that employees who tested positive for marijuana experienced 55% more mishaps and 85% more injuries than those who tested negative. Medical professionals have proven that marijuana use declines one’s perception of risk and impairs attentiveness, motor coordination and reaction time (CDC, 1982; 2018). These effects can impact the safety of an impaired employee while performing the job and put the individual at elevated risk for health effects, such as respiratory illness and memory-retention problems (Azofeifa, Mattson & Grant, 2016). Studies also show that coughing, increased sputum production, wheezing and other respiratory symptoms are increasingly present in those who smoke marijuana (Lee & Hancox, 2011; Martinasek, McGrogan & Maysonet, 2016). As one’s risk of respiratory illness increases, it may affect the ability to wear a respirator, which may compromise protection against unhealthful work environments. Memory-retention problems may also lead to employees forgetting how to safely perform their jobs and limit their ability to learn new jobs (CDC, 2018; Martinasek, et al., 2016).

Marijuana impairment may also impact productivity and other business operations (Phillips, Holland, Baldwin, et al., 2015). Marijuana users are known to be absent and tardy from work 75% more often than nonusers (NIDA, 2018), resulting in inexperienced personnel performing tasks more frequently while having a higher risk of injury to themselves and others. Organizations must decide how to address medical marijuana use while promoting a safe and healthful work environment and not reconciling the legalization, permitted use and lawful drug testing.

Workplace Strategies

Organizations must determine the actions needed to mitigate the risk of marijuana impairment at work due to medicinal use. Consider establishing a team of professionals who could contrib-

MARIJUANA LEGALIZATION STATUS

Several states have broadly legalized the use of medical marijuana. *Broadly legalized* means that medical marijuana is legal; however, certain circumstances and limited use conditions apply. Each state has different requirements. As of March 23, 2018, the following states have legalized the use of medical marijuana to some degree:

Alaska	Florida	Montana	Oregon
Arkansas	Illinois	New Hampshire	Pennsylvania
Arizona	Hawaii	New Jersey	Rhode Island
California	Louisiana	New Mexico	Vermont
Colorado	Maryland	New York	Washington
Connecticut	Michigan	North Dakota	West Virginia
Delaware	Minnesota	Ohio	



ute to a conversation of this caliber, then create an action plan to identify a path forward as marijuana use becomes more acceptable in society. In any case, review organizational needs to determine whether it is best for the organization to ban the use of medical marijuana or restrict its use with enforceable guidelines and make employee accommodations as necessary.

Ban Medical Marijuana Use in the Workplace

When subject to work duties, banning marijuana use is a generally safe and responsible policy to adopt. Federal law and the Controlled Substances Act (2014) still consider marijuana as an unlawful and banned substance (Wallace & Steffen, 2015). Any marijuana use or possession is a crime at federally governed organizations, regardless of state laws and notwithstanding a physician's recommended use. This means that federal statutes, such as the Americans with Disabilities Act, may not protect employees who choose to engage in using medical marijuana under their state laws (Gillespie, 2017); this is a factor for organizations to consider.

When determining whether to ban marijuana use, consider applicable state laws. Currently, laws differ between states, but federal law allows employers in every state to prohibit employees from working under the influence of marijuana (Phillips, et al., 2015). This means an employer can discipline an employee for violating a prohibition policy, but usually only if the employer can prove the employee is impaired while on the job (Phillips, et al., 2015; Deschenaux, 2014; DiNome, Haverstick & Perkins, 2014). This continues to be an evolving issue as marijuana laws change in each state.

Accommodate & Restrict Medical Marijuana Use in the Workplace

Many organizations choose to restrict the use and possession of medical marijuana for employees. This frequently leads to many questions regarding workplace drug policies, accommodation policies and discrimination for both employers and employees.

In 2013, a federal court ruled against a Colorado employee claiming discrimination since his employer fired him for using marijuana for medical purposes off duty, then testing positive for marijuana during a random drug test (Wallace & Steffen, 2015). The case went to the U.S. Supreme Court, where the justices ruled the employer's zero-tolerance drug policy trumped the Colorado state medical marijuana laws, since Colorado law allows employers to set their own drug use policies. Colorado's laws state that employers do not have to "accommodate the

medical use of marijuana in any workplace" (Wallace & Steffen, 2015). The court ruled that the antidiscrimination law does not defend disabled employees from employer's policies against employee misconduct. There are many cases similar to this, where employees believe they are permitted to use medical marijuana regardless of the organization's workplace drug policy. Therefore, it is important to clarify organizational expectations surrounding medical marijuana and the accommodations the organization finds acceptable.

Bear in mind that employers have a duty to provide employees with a safe and healthful workplace. Federal law obligates employers to identify potential workplace hazards and take proactive steps to minimize an employee's exposure to these hazards. Even if an organization chooses to place restrictions on the use of medical marijuana and accommodate its users, they must fulfill this duty as well.

Written Workplace Drug Policy

Writing or updating a workplace drug policy is necessary to addressing medical marijuana use and impairment, whether an organization chooses to ban the use of medical marijuana, or restrict and accommodate use and possession. Writing a policy may take a lot of time and effort, especially if legalization has occurred in that state. Become familiar with state laws, and employer and employee rights to help draft the verbiage of the policy; this can help avoid potential legal situations. The more specific the policy, the easier it is to enforce.

Depending on an organization's circumstances, a workplace may need a dedicated policy just for medical marijuana use or a separate section in the general drug policy. Organizations must review written policies at least annually and update these policies when changes to state laws or the workplace occur. It is recommended to have an attorney review the initial policy prior to implementation. In any case, communicate these policies to the workforce. At a minimum, employees should know key points in the policy, as well as where to access it.

Key Policy Topics

A written policy allows organizations to communicate medical marijuana expectations. It provides the organization the opportunity to establish:

- rules for workplace drug use and possession;
- medical marijuana use outside of work hours;
- responsibilities of the employer, supervisor, human resources manager, employees, treating physician and safety-sensitive employees;



The definition of impairment is still an evolving topic in relation to medical marijuana. Ultimately, organizations must decide how to implement their policy. Define impairment and integrate this information into written policy to ensure defined, consistent enforcement should an issue arise.

- impairment expectations at the workplace, including what constitutes impairment;
- reporting policy for issued physician recommendations for medical marijuana;
- drug testing methods;
- steps taken to handle reasonable suspicion and follow-up to drug testing results;
- rules to handle an employee's conviction or arrest;
- access to employee drug abuse programs and support.

Safety-Sensitive Positions

Regardless of an organization's policy, a company may have safety-sensitive employees who are responsible for the safety of others (e.g., emergency responders, physicians) or conduct high-risk jobs (e.g., truck drivers, overhead crane operators). Some organizations establish different policies for safety-sensitive employees that typically ban the use of drugs, including medical marijuana, and employ a stringent drug-testing program (Stringham, Allard, Knapp, et al., 2017). Of course, federally governed organizations still restrict the use of medical marijuana regardless of state laws. Organizations must determine whether they have safety-sensitive employees, how their jobs impact safety and health, and how to incorporate any specific requirements for these personnel into the written drug policy, all without violating state or federal laws.

Organizations with safety-sensitive employees commonly mandate employee reporting of any issued medical marijuana recommendations. This allows a company to evaluate the situation, decide if this would pose a direct threat to the safety of the employee or others, and determine whether a reasonable accommodation is possible through interactive dialogue with the employee (Stringham, et al., 2017). Many organizations also extend this reporting requirement to non-safety-sensitive personnel for consistency in implementing policy.

Accommodation Strategies

Organizations must think about accommodating employees, especially when restricting medical marijuana use.

Written Medical Workplace Accommodation Policy

If an organization chooses to permit employee use of medical marijuana, then it may be advantageous to write a medical workplace accommodation policy. This policy should outline employee requirements concerning:

- responsibilities of parties involved in the employee's use;
- physician documentation of the medical condition(s);
- rationale for the necessity and parameters of medical marijuana use (outside and inside the workplace);
- dosing information;
- route(s) of administration;
- estimated duration of use;

- schedule of use in comparison to scheduled work hours;
 - recommended work accommodations or restrictions, if applicable.
- In addition, the policy should include employee obligations, such as:

- reporting medical updates for parameter changes;
- changes in the dosage or estimated treatment duration.

When changes to the product, dosage, frequency, schedule of use or route of administration occur, employers should initiate a reapproval of drug use for the employee. Apply the policy consistently for all employees to prevent discrimination.

Medical Review Officer & Registry Cards

When an organization decides to accommodate medical marijuana use, it is important to verify all submitted information and documents. Consider designating a medical review officer (MRO) to review all accommodation requests and drug test results. An MRO is a licensed physician responsible for reviewing laboratory results generated by drug testing programs and evaluating medical explanations in response to drug test results (U.S. DOT, 2018). The MRO helps protect the integrity of the drug testing process, as well as the confidentiality of drug test results and employee personal health information. When choosing an MRO, the individual must not have:

- a financial interest in the laboratory or instrumented initial test facility (IITF) performing personnel drug tests for the company;
- an agreement with the laboratory or IITF that could be a conflict of interest;
- financial gain by recommending use of a particular testing facility.

These restrictions prevent any partial influences on the MRO's behalf while reviewing drug test results (SAMHSA, 2017).

Upon receipt of a positive drug test result for tetrahydrocannabinol (THC), the chemical responsible for most of marijuana's psychological effects, MROs can investigate the cause of the result and ask to see an employee's Department of Health and Human Services registry identification card indicating his/her permission to use medical marijuana and further supporting the physician's recommendation of marijuana use.

It is not the responsibility of the MRO to determine whether an employee's medical marijuana recommendation is appropriate, but rather to confirm whether a valid physician's recommendation exists. An organization can use its MRO to contact the employee's physician to discuss the possible impacts on workplace safety and health because of the medical marijuana recommendation. If an employee is classified under a safety-sensitive position, the MRO can inform the organization that the recommendation may affect the individual's ability to perform his/her job in a safe manner. Additionally, the MRO can monitor regulatory changes in state laws, engage with state-level lawmakers if needed, and utilize his/her expertise to prompt reviews and changes to established drug use and accommodation policies.

Enforcement & Education

Many organizations run into legal issues and employee problems when policy enforcement is inconsistent. It is best to avoid applying the policy on a case-by-case basis and always follow the organizational policy. This goes for any occurrence of impairment, possession, arrest or conviction.

Impairment Defined

The definition of *impairment* is still an evolving topic in relation to medical marijuana. As noted, THC is the psychoactive substance in marijuana that causes most impairment (NIDA, 2018). The time to absorb the THC and excrete it through the body varies per person, taking weeks, days or months (depending on the user and frequency of use), making impairment difficult to determine. One resource identifies reasonable suspicions for impairment as “observable specific, articulable appearance, speech, body odor or behavior indicators of alcohol use” (Bakker, 2016), but, ultimately, organizations must decide how to implement their policy. Define impairment and integrate this information into written policy to ensure defined, consistent enforcement should an issue arise.

Training & Exercises

Organizations must train managers, supervisors and employees on their medical workplace accommodation policy, particularly what defines impairment and symptoms of impairment (Phillips, et al., 2015). This training should go beyond general awareness training. Consider including signs and symptoms of impairment in formal training. This can enable the workforce to identify impairment and intervene before it leads to an injury. Consider practice scenarios to determine whether responsible persons can identify marijuana impairment and the actions required to address the issue. Exercises can also help determine whether established policies and procedures are understood and effective. Practice scenarios and training set and maintain organizational expectations. Over time, contextual training may change workplace attitudes and drive a positive culture around the policy, having employees make impairment identification and response part of their everyday duties.

Documentation

Documentation is important to show that an organization consistently enforces its policy. Organizations willing to accommodate or restrict medical marijuana must maintain records verifying marijuana use. Organizations may also consider drafting a medical marijuana use agreement to ensure that employees understand the policies and workplace risks arising from impairment, and consent to follow the policies in place.

Supervisors and human resources personnel also must be persistent in documenting any signs of marijuana impairment and abuse (McGuire, 2016). When a supervisor recommends drug testing or a drug test is completed, keep the results on file. It is also prudent to maintain training and exercise records to show that the organization has made a good faith effort in policy enforcement and education.

Drug Testing & Outreach

Drug testing is a main component of many organizational drug policies, but caution should be taken to prevent violating employee rights. Organizations may also see benefits in setting up outreach and support programs for employees who may

abuse or become addicted to marijuana, promoting recovery so they can actively contribute to the workforce again.

Drug Testing Methods

Drug testing generally occurs preemployment, upon reasonable cause and after an incident. Preemployment drug testing is beneficial because a positive drug test may indicate ineligibility for employment. Conversely, employers can also execute their workplace accommodation program, prompting an employer to learn whether the positive test results are due to medicinal use.

Organizations must consider when to conduct drug testing. Many organizations conduct random drug tests to ensure that employees follow policies. Drug testing for reasonable causes helps identify potential impairment during work hours, but urine testing is not an accurate measure of whether an employee is impaired at the time of the testing due to the variance of THC absorption. Medical marijuana users may test positive even if they have not used marijuana in the past 24 hours (IBH, 2015). Many states have introduced or are discussing the introduction of safety-relevant THC limits of 5 ng/mL of blood to help determine whether employees are currently impaired at the time of testing, which is especially important for safety-sensitive jobs (Knodt, 2017).

Physicians may also use oral fluid testing to detect more recent marijuana use, but oral fluid tests still make it difficult to pinpoint impairment at work (IBH, 2015). Most oral fluid tests still deliver positive results for THC even after 24 hours of use. Given the timeframe, medical marijuana users could test positive for marijuana use that occurred overnight or over the weekend. It is recommended to combine a positive oral fluid test with some sort of cognitive examination, similar to a field sobriety test, to help evaluate workplace impairment until a more efficient test is identified.

Drug testing after an incident can show whether impairment is a causal factor and determine if employees are abiding by established policies and procedures. However, organizations should be careful in situations regarding mandatory drug testing. Mandatory testing is allowable, but OSHA states that mandatory drug testing may be discriminatory and violate employee rights in situations where drug use could not have been a reasonable basis for the incident. For example, a powered industrial truck incident may occur due to an impaired employee, but the development of carpal tunnel syndrome does not result from drug use, so testing during the latter situation could violate employee rights.

Human Resources Initiatives

Human resources staff generally play an integral role in the development of workplace drug policies; however, they must think about support and programs to help employees with medical marijuana abuse problems. While marijuana abuse has remained relatively steady as more states legalized its use, many anticipate that marijuana addiction will increase due to widespread exposure to the drug, which will also increase abuse (Winters & Sabet, 2017).

Human resources staff can develop and implement an employee assistance program (EAP) to identify resources and outreach programs for marijuana abuse or addiction. An EAP is an employee benefit program that assists with personal or work-related problems that may impact an employee's job performance, health, or mental or emotional well-being (U.S. OPM, 2018).

EAPs can help educate employees who may be abusing or addicted to medical marijuana and assist them with recovery. The goal of the EAP is to help employees who self-report a problem. The federal government exercises this in Executive Order 12564 in which federal employees who test positive for illegal substance abuse may keep their job if they enroll in an EAP. This is also a good practice to have in private industry to encourage recovery.

Conclusion

Medical marijuana use and impairment is a controversial but unavoidable topic. Marijuana is illegal under federal law, but not under many state laws and employers may ban, test for, and restrict or accommodate marijuana use. Employers must continue to monitor the ever-changing landscape of state-legalized medical marijuana use. The question organizations must ask is, How can marijuana use impact safety and health on the job? This allows organizations to define the extent of their policies and the potential impacts on business operations. Consider the workplace strategies contained herein in developing and executing clear policies regarding testing methods and marijuana impairment. Current testing procedures may fail to detect impairment during a normal work shift. Cognitive testing, in combination with short-time detection methods (e.g., oral fluid testing) may provide the best case for exercising disciplinary procedures for employees with suspected workplace impairment. **PSJ**

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