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CANNABIS USE ACROSS INDUSTRIES AND OCCUPATIONS: WHAT CAN-A-BUSINESS DO?

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Legalized cannabis is quickly making an entrance into all corners of the United States. Currently, nine states and the District of Columbia have legalized marijuana for recreational use. An additional 20 states allow medical marijuana. These numbers are likely to grow as the societal and political perspectives on cannabis legalization continue to shift.

The ever-changing landscape of legalized marijuana makes it difficult for employers to comply with both state and federal laws and has caused many to question whether their policies and practices should be revised. Employers should evaluate their workforce drug policies and assess whether they are prepared to handle the consequence of their policies in the wake of increased legalization and decreased stigma.

SHIFTING STANCES ON LEGALIZATION AND USE

Despite an increasing number of states allowing legalized marijuana, cannabis is still a Schedule I illegal drug under the Controlled Substances Act. In January 2018, Attorney General Jeff Sessions suggested a willingness to enforce this federal law when he [rescinded the Obama-era Cole Memo](#), which had assured minimal federal interference with legitimate businesses in states where marijuana was legal.

In April 2018, however, several new developments occurred that indicate the federal government is changing its tone. First, the Food and Drug Administration (FDA) [requested](#)

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Danielle H. Moore

Executive Partner,
Management Committee

[858.597.9600](tel:858.597.9600)

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[public comments](#) on the “abuse potential, actual abuse, medical usefulness, trafficking, and impact of scheduling changes” of cannabis substances. Second, for the first time, the FDA advisory panel [unanimously recommended](#) approval of a cannabis-based medication intended to treat severe seizures in children. Third, Senate Minority Leader [Chuck Schumer announced](#) that he would soon introduce a bill to decriminalize marijuana under federal law. And finally, it was announced that President Donald Trump [promised a senator from Colorado](#) that he would support efforts to protect states with legalized marijuana.

These moves parallel a [shift in the public’s opinion on marijuana](#) legalization. In October 2017, [Gallup poll](#) results revealed that 64 percent of Americans are in favor of marijuana legalization. For the first time, this number included a majority of people from both major political parties. Former senate majority leader John Boehner, previously anti-cannabis, announced earlier this month that he was joining the board of directors for a multi-state cannabis corporation. In doing so, he announced that his opinion of cannabis, “like that of millions of other Americans, has evolved.”

STUDY ON MARIJUANA USAGE BY OCCUPATION AND INDUSTRY

The evolution of marijuana legalization has led to an increase in research about the public’s cannabis consumption. The results of these studies can inform employers about the realities of marijuana use by members of their workforce. The newest example of such research examined marijuana use in Colorado—the first state to decriminalize recreational use—but its findings may be useful for employers across the country.

The Centers for Disease Control and Prevention (CDC) recently published data about [current marijuana use in Colorado](#) and categorized that data based on work industry and occupation. The study examined information provided by more than 10,000 Colorado workers aged 18 or older during 2014-2015. The findings reveal that 14.6 percent of Colorado adult workers are current marijuana users. The highest prevalence of marijuana use was among young adults (29.6%), males (17.2%), those working in the accommodation and food services industry (30.1%), and those with the occupation of food preparation and serving (32.2%).

The study also revealed some industries and occupations with surprisingly higher than average marijuana usage rates. For example, adults in many professional industries reported higher than average marijuana use: life, physical, and social science (20.6 percent), sales and related (19.4 percent), legal (15.9 percent); and management (15.2 percent).

Some safety-sensitive occupations, which typically require routine employee drug testing, were also higher than average: farming, fishing, and forestry (16.5 percent), construction and extraction (16.5 percent), and healthcare support (15.8 percent). At the same time, reported marijuana usage by workers in other safety-sensitive industries remained low: transport and warehousing (10.2 percent), mining, oil, and gas (5.2 percent), utilities (5.8 percent), and healthcare and social assistance (7.4 percent).

This information gives employers valuable insight into the prevalence of adult marijuana usage by workers across industries in a state where recreational marijuana has been legal for some time. This information can be utilized by employers across the country to determine appropriate workplace marijuana policies and safety awareness campaigns.

WHAT SHOULD EMPLOYERS DO?

Because this area of law is constantly evolving and continues to be tested in courtrooms across the country, it is most important for employers to understand their rights and duties under any applicable state-specific marijuana law, and decide what their position will be with respect to marijuana as the law continues to evolve. You should consult with counsel regarding your drug-related policies and practices, in addition to considering the following:

Drug-Free Workplace

Although every state is different, marijuana is still federally illegal and employers are generally [allowed to require a drug-free workplace](#) and enforce zero-tolerance policies. Employees can be disciplined for, and even terminated for, coming to work under the influence, possessing marijuana on company premises, or using marijuana while at work, even in states where marijuana is legal.

But you need to tread carefully when disciplining medical marijuana users. Currently, 11 states now have specific laws

protecting medical cannabis patients from employment discrimination. And in 2017, cannabis patients in Massachusetts, Rhode Island, and Connecticut [won lawsuits against companies](#) that rescinded job offers or fired workers because of positive tests for cannabis. In [Barbuto v. Advantage Sales](#), the Supreme Court of Massachusetts held that employees with medical marijuana prescriptions may be entitled to reasonable accommodations, and employers are required to engage in the interactive process to make that determination.

Drug Testing

Typically, employers can require drug testing at different times depending on their state laws, including pre-employment drug testing, randomized drug testing, reasonable suspicion drug testing, and post-accident drug testing. However, with the changing landscape, there are a number of drug testing issues that employers must consider. First, in certain states, you may need to consider accommodating medical marijuana depending on the position and the employee's needs.

Second, many employers who require pre-employment drug testing for marijuana have reported difficulty finding eligible candidates. Some employers who need to stay competitive are considering softening their drug testing policy or taking cannabis off the drug testing panel. At the same time, however, softening the stance on marijuana make not be a viable option for government contractors or those employers with safety-sensitive positions. You need to look at your business needs, weigh the pros and cons, and your stance on marijuana in light of what's best for your business.

Finally, you need to grapple with the fact that the science used to test for marijuana has been slow to catch up with increased legalization. While there are testing methodologies currently in development, there is no test for current marijuana inebriation. An employee may test positive for marijuana even if they used the drug days before their shift began and were not actually impaired on the job.

This creates a potential legal landmine for employers who wish to discipline employees who are believed to be impaired on the job. Even if an employee tests positive, it could be difficult to show that an employee was in fact under the influence while working. Until testing technology becomes available, you should consider your company's

position on marijuana and consult counsel before taking any definitive steps.

Additional information on workplace drug testing can be found [here](#). Information on special considerations for marijuana use and safety-sensitive positions is available on our firm's [Workplace Safety and Health Blog](#).

CONCLUSION

As the CDC study shows, marijuana use is prevalent across industries and occupations. In order to determine the best drug policies and practices for your workforce, there are a variety of factors to consider. What industry are you in? Are workers in your industry more inclined than others to use marijuana? What are the state marijuana laws where you operate? Does your business have safety-sensitive positions? Does your company have difficulty recruiting candidates? Has employee impairment at work been a problem?

You should consider these issues now so that you are not caught off-guard and unaware of changes to marijuana-related employment law, especially as societal and political perspectives shift towards the acceptance of marijuana. Most importantly, you must ensure that you can find the balance between compliance with state and federal law and what is right for your business.

Until the conflict between state and federal laws is resolved, you should: (1) stay up to date on the quickly evolving marijuana laws; (2) develop state-compliant workplace drug policies that are appropriate for your company, potential applicants, and employees; (3) apply your marijuana policies in a uniform fashion; and (4) contact counsel if any concerns regarding specific incidents arise.

For more information, contact the authors at DMoore@fisherphillips.com (858.597.9600) or NStenoish@fisherphillips.com (858.597.9632).