

4 TRENDS FOR CANNABIS INDUSTRY EMPLOYERS TO TRACK IN 2023

Insights

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The cannabis industry is growing at a rapid pace given the proliferation of states legalizing medical and recreational use. Indeed, most states already have a comprehensive medical cannabis program, and many are rolling out retail sales plans for recreational adult use. The industry is expected to continue expanding in 2023 as more states ease restrictions. This means employers will continue to face unique challenges and opportunities, particularly as some jurisdictions shine a spotlight on employment protections for workers in the industry. Whether you're a cultivator, processor, dispensary, retailer, or otherwise involved in the cannabis industry, here are four key trends you should track in 2023.

1. Legalization in More Jurisdictions

"States and local jurisdictions continue to act to decriminalize cannabis despite its status under federal law," explains Catharine Morisset, a Fisher Phillips Partner in Seattle and Co-Chair of the firm's Cannabis Practice Group. "Leaders in this industry want to be compliant with all laws — including labor and employment — but may not yet be current on workforce rules and trends."

The [Cannabis Practice Group](#) is comprised of attorneys with experience and commitment to assisting cannabis industry employers grow and cultivate their workforce.

"It's been over a decade since recreational cannabis was first legalized in Washington and Colorado," notes Brett Wendt, a Partner in our Denver office and Co-Chair of the Cannabis Practice Group. "We're excited to continue

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advising businesses on labor and employment issues as more states across the country legalize the recreational use and sale of cannabis.”

As you know, [the legal landscape](#) in the cannabis industry is complex. While cannabis is still illegal at the federal level, 38 states have legalized medical cannabis use and 21 of those states (and the District of Columbia) have also legalized recreational use. At least two others allow low THC products.

While many industry advocates hope Congress will approve nationwide legalization, such efforts have stalled in recent years. For example, while the House of Representatives approved the Marijuana Opportunity Reinvestment and Expungement (MORE) Act several times, the bill failed to make progress in the Senate. The MORE Act, if ultimately passed, would remove cannabis from the Controlled Substances Act and eliminate criminal penalties related to manufacturing, distributing, and possessing cannabis products.

Notably, Congress passed a cannabis research bill — [the Medical Marijuana and Cannabidiol Research Expansion Act](#) — which President Biden signed into law on December 2, 2022. However, while the act removes some red tape and expands cannabis production for research purposes, it does not deschedule or legalize cannabis nationwide. Thus, it is still unclear when nationwide legalization will ultimately be approved by Congress.

In the meantime, more action is expected at the state level in 2023.

What other states might join the trend to legalize recreational use this year? Editors at [the Cannabis Business Times](#) recently provided a full list:

- **Likely to Pass:** Ohio, Minnesota, and Hawaii
- **Might Pass:** Kentucky, New Hampshire, and Pennsylvania
- **Tracking:** Delaware, North Carolina, Texas, and Kansas. Additionally, Tennessee lawmakers recently introduced a bill to legalize recreational use, even though the state has not yet legalized medical use. So far, all states that legalized recreational had already approved a medical



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cannabis program — so it will be interesting to see what happens in Tennessee.

Notably, voters in Arkansas, North Dakota, and South Dakota failed to approve recreational cannabis measures on Election Day in November 2022, as did Oklahoma in March. But residents of Maryland and [Missouri](#) approved adult use in their states. Missouri's law already took effect, whereas adult use will be allowed in Maryland beginning July 1.

2. Expanded Workplace Protections in the Industry

Cannabis businesses should also watch for new state and local laws protecting workers in the industry. Jurisdictions may follow in Seattle's footsteps, where officials already signed three such ordinances into law in 2022, which were touted as a way to promote equity in the cannabis sector.

- One established the city's commitment to support cannabis workers and communities "disproportionately harmed by the federal War on Drugs."
- A second is intended to advance equity in ownership by establishing social equity criteria to obtain licenses for cannabis businesses, among other changes.
- And the third created specific rules related to the workforce when a cannabis business is sold or substantial assets are transferred to a new operator.

You can read more details [here](#).

At the state and local level, some laws may be specific to the industry and others may cover employers in a variety of industries. In California, for example, Cal/OSHA specifically states that certain occupational safety and health regulations apply to cannabis industry workplaces. "All employers in the cannabis industry, including those who cultivate, manufacture, distribute, sell, and test marijuana products, must take steps to protect their employees from all health and safety hazards associated with their work," according to Cal/OSHA.

Laws vary significantly among jurisdictions, so be sure to review the workplace rules and regulations that apply to the locations where you operate.

3. Focus on Compliance with Traditional Employment Laws

The legal cannabis industry saw a 33% increase in jobs from 2021 to 2022 with a total of 428,059 full-time equivalent jobs, according to [a report by Leafly](#), an online cannabis information resource. The industry's growth highlights the importance of implementing traditional employment policies and procedures that meet the unique needs of your business. But you should note that employers in the cannabis industry must comply with the same laws governing every other workplace. Consider the following examples:

- **Wage and hour.** You'll need to ensure you are complying with the federal Fair Labor Standards Act, as well as similar state laws that likely have stricter rules. Do you have proper timekeeping procedures in place for your nonexempt employees? Are you providing meal and rest breaks in accordance with applicable state laws? Are your security procedures and bag check policies compliant with wage and hour rules?
- **Workplace safety.** Do you have a drug testing policy in place? Regardless of industry, many employers don't want to monitor legal, off-duty cannabis use (and some state laws forbid such monitoring). But you should consider developing a robust policy prohibiting employees from being under the influence of drugs and alcohol while on the job. You may also want to develop a testing policy for other controlled substances that are prohibited under state and federal law in the workplace.
- **Anti-discrimination policies.** Do you have policies in place to prevent and combat unlawful employment discrimination based on age, disability, gender, race, religion, and other protected categories under federal and state law? Moreover, are your employment-related policies fair and consistently applied? You should take steps to ensure a safe and respectful environment for all workers. And while there's no "one size fits all" for workplace culture, you should let workers know that unlawful harassment and discrimination will not be tolerated.
- **Trade secret protections.** Just like employers in other industries, you'll want to ensure your confidential information is protected. For example, do you have unique processing or cultivation methods you want to protect from competitors? [Employee defections](#) can expose your company to losses of valuable intellectual property, trade

secrets, and goodwill. Do you have strong security and safety procedures in place? Do your handbook and other written policies clearly identify what is proprietary and highlight the employee's obligations? To the extent legal in your applicable jurisdiction, do you use legally enforceable confidentiality, non-disclosure, non-competition, and non-solicitation provisions with important key employees?

4. Uptick in Labor Organizing Efforts

Since cannabis businesses are in one of the fastest-growing industries, some labor unions have seen this growth as an opportunity to add members.

"The cannabis space presents a lot of interesting labor law questions, including the ability of states to promote unionization in the face of federal labor law supremacy and application of labor laws to those working in agriculture," opines Alex Wheatley, a Fisher Phillips Partner in Portland and member of the firm's Cannabis Practice Group.

So, you'll want to be sure you have a plan to recognize and proactively address the complex issues that arise in the labor relations arena. As more states legalize medicinal and recreational cannabis, many states are requiring that cannabis employers enter into a "labor peace agreement" (LPA) with a union in order to obtain or maintain a license to grow, manufacture, or dispense cannabis products. Some states offer incentives to cannabis industry employers who voluntarily enter into collective bargaining. Thus, it's critical for cannabis employers to understand labor laws.

Conclusion

We'll monitor these developments and provide updates where warranted, so make sure you are subscribed to the [Fisher Phillips' Insight System](#) to get the most up-to-date information. If you have any questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Cannabis Practice Group](#).