



Does Your State Protect Off-Duty Cannabis Use? 8 Questions for Employers to Consider as You Revamp Your Policies

Insights

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The impact of cannabis on the workplace continues to evolve as more states legalize its recreational use. One such example is increasing protection for workers' off duty cannabis use. How will these changes affect your workplace? Here is a brief overview on the history of evolving cannabis laws and eight questions to consider when you review your related workplace policies.

A Brief History of Local Cannabis Laws

California was the first state to approve medical cannabis use through a ballot initiative in 1996. Since then, 37 more states and the District of Columbia have passed laws allowing medical cannabis use.

In 2012, Colorado and Washington broke new ground by decriminalizing recreational cannabis use and paving the way for cultivation, distribution, retail sales, taxation, and more. Now, more than 20 states allow for adults 21 years of age or older to purchase and consume cannabis products even without a medical recommendation.

In 2020, support for legalization in the U.S. reached 68%, an all-time high according to [Gallup research](#). As attitudes towards cannabis change, we'll likely see more cannabis-friendly laws and related workplace protections.

So, what does this mean for the workplace? While the statistics don't necessarily mean that employees are coming to work impaired, they do mean that a portion of your workforce may be using cannabis off duty – conduct that may be protected under state law from any adverse employment action.

A Maze of Complex Laws

Before you update your policies, you should take note of the current – and complex —maze of cannabis laws that can impact the workplace. Here are just a few of the reasons cannabis laws are so complicated:

- **Cannabis remains a Schedule I drug under the Controlled Substances Act.** Congress has considered several bills to legalize cannabis, but as of now, those efforts have stalled. While the

federal government has not taken any enforcement action in recent years against adult cannabis use that complies with a state law, its use remains unlawful. No federal laws provide workplace protections. In fact, the opposite is often the case.

- **Drug testing limitations.** No reliable test yet exists to distinguish between “weekend and weekday” impairment. While tests can detect if someone has consumed cannabis, they remain inaccurate in measuring real-time intoxication. Determining on-the-job impairment through a drug test remains difficult.
- **State laws vary significantly.** Some states allow employers to take adverse action against job applicants or employees solely based on a positive drug test. Others protect registered medical patients in certain situations. A smaller but growing number of states also protect off-duty recreational cannabis use.

A Patchwork of Employment Protections

Many state laws still allow employers to conduct pre-employment cannabis screening or test current employees. These laws, however, are not uniform on what steps employers must take during the screening process and when they may take adverse employment action. Some states and localities outright prohibit pre-employment cannabis screening. Many states provide some protection for medical cannabis patients, and a more recent trend protects employees’ off-duty recreational cannabis use.

Last year, California became the most recent state to add such protections with its passage of AB 2188, making it unlawful for an employer to discriminate against an individual for using cannabis off the job. Employers with California workers have until January 1, 2024, to comply with the new rules impacting policies on drug testing and off-duty recreational cannabis use.

Connecticut, Montana, Nevada, New Jersey, New York, and Rhode Island also have laws that explicitly protect off-duty recreational use. Compliance can get complicated for multistate employers as each law is unique. For example:

- **California’s law** does not apply to “employees in the building and construction trades and applicants and employees in positions requiring a federal background investigation or clearance.”
- **Connecticut’s law** has a long list of “exempted employers,” including those performing certain mining, manufacturing, transportation, and health and safety services. The law also identifies “exempted positions,” which include firefighters, emergency medical technicians, certain law enforcement and correction positions, and drivers that must comply with drug screening requirements.
- In **New Jersey**, an employer is exempt if complying may jeopardize a federal contract or receipt of federal grant money or put the employer out of compliance with federal regulations governing its employees. But the state’s interim guidance does **not** address an exception for employees in

safety-sensitive positions, meaning even those workers likely are protected from an adverse employment action if it is based **solely** on a positive drug test.

8 Questions to Consider When Updating Your Policies

A variety of factors will shape your drug-testing policies, including your industry, location, job types, and workplace culture. Here are eight key questions you should consider when developing your policies in light of evolving cannabis laws:

1. Will you continue **pre-employment drug screening**? Depending on the nature and location of the business and legal prohibitions, employers may opt to drop cannabis from the drug-screening panel. However, federal law may still require that cannabis (specifically THC) be included on any drug screening.
2. Will you create a different policy for **safety-sensitive positions**? Some employers may opt to eliminate THC from pre-employment screening for some roles, such as office jobs, but continue screening for safety-sensitive roles, like fork-lift drivers and machine workers. Of course, such policies must be applied consistently and comply with applicable state and local requirements.
3. How will you handle cases of **reasonable suspicion**? Even where cannabis use is decriminalized, states, like Washington, may prohibit workplace use. Consider developing clear guidelines on how to detect cannabis impairment and what to do when an employee is suspected of working under the influence.
4. What will the **consequences** be for violating company policy on cannabis use and other policies pertaining to having cannabis and cannabis derived products or paraphernalia in the workplace?
5. How will you **train managers** on observing and reporting possible on-the-job use of cannabis?
6. Will you have an internal process for employees to **dispute the results** of an investigation or drug test?
7. Do you want to **create a single policy** that is compliant with all states where you operate or **separate policies** based on specific state and local rules?
8. Have you **consulted legal counsel** to review your policies or advise on terminations following a positive drug test?

Conclusion

Employers have a lot to consider as the trend to legalize the recreational use of cannabis continues. Your Fisher Phillips attorney is ready to help you adapt and create compliant policies.

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](#).

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