

# LEGALIZED MARIJUANA: OFF DUTY USE, DRUG TESTING AND STATE LAWS

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## HIGHLIGHTS

### State Marijuana Laws Do Not Affect Employers' Right to:

- Prohibit employees from using marijuana at work or during work hours
- Prohibit employees from being under the influence of marijuana at work or during work hours
- Require employee or applicants to undergo drug testing

### State Marijuana and Other Laws May:

- Require employers to make reasonable accommodations for an employees' off-duty marijuana use
- Prohibit employers from discriminating against employees based on off-duty marijuana use
- Impose employer requirements for workplace drug testing policies

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3167 Berlin Drive • La Crosse WI 54601  
(P)608-788-6160 (F)608-788-7012  
www.mcdonaldagency.com

*The following is a summary of a PowerPoint presentation by Erica Storm, Esq. and Cary May Poniewaz, Esq. on 8/13/19 presented by Zywave and HR360. [CLICK HERE](#) for White Papers #37 "Update on Marijuana, Mental Illness and Violence" and #40 "Marijuana, CBD, Fentanyl and Mental Health". Compliance Overview information by Zywave 2018, 2019, and Wisconsin State Journal 6/6/2019.*

## A) FEDERAL MARIJUANA LAWS

**Food, Drug and Cosmetic Act (1938)** – Prohibits the use, dispensing and licensing of substances, such as marijuana, that have not been approved by the federal Food and Drug Administration.

**Controlled Substance Act (1970)** – Marijuana is a Schedule 1 substance. Prohibits possession, manufacture, distribution and dispensing of marijuana.

**Federal Drug Free Workplace Act (11/18/1988)** – Applies to federal contractors with contract worth more than \$100,000 and all federal grantees other than individuals.

1. Prohibits controlled substances in the workplace
2. Requires employees to abide by the drug-free workplace policy as a condition of employment
3. Establish a drug-free awareness program
4. Timely alert of contracting or a granting federal agency after becoming aware of an employee's criminal conviction under a drug statute
5. Penalize any employee convicted of a reportable drug offense (or require participation in a drug abuse assistance or rehabilitation program)

**Federal Transportation Regulations** – Applies to transportation employers and employees in safety sensitive positions.

- Enforce a zero-tolerance standard for controlled substances on employees in safety sensitive positions.
- 10/30/17 DOT Notice: State-authorized medical marijuana use is not a valid medical explanation for a transportation employee's positive test for marijuana.

## B) STATE MARIJUANA LAWS

### States with Marijuana and Voluntary Drug Testing Laws

Alaska, Arizona, Connecticut, Maine, Maryland, Minnesota, Montana, Oklahoma, Rhode Island, Utah, Vermont

- *Voluntary Drug Testing* – Some states require employers to follow specific rules if they choose to conduct drug or alcohol testing.
- *Industry Specific* – Some states have mandatory drug testing requirements for certain employees, such as commercial vehicle operators.

### Wisconsin Marijuana Laws

- In Wisconsin, it is becoming permissible to allow the medicinal use of cannabis. While state law technically permits the use of medical marijuana, the statute is very limited. Only use of cannabidiol in a form without a psychoactive effect is allowed, and only to treat a seizure disorder.
- Wisconsin Uniform Controlled Substance Act (1939) – Penalty for possession, growing, or selling marijuana is 1-2 years in state prison.
- Possession of Marijuana: Misdemeanor: up to 6 months and/or fine up to \$1,000. Subsequent offense is a class 1 felony.
- Sale of Marijuana: 4 plants or 200 g. or less is a class 1 felony. Sale within 1,000 feet of school, mandatory 1 year without probation.
- Trafficking – Most federal law enforcement agencies have not intruded on states' handling of majority of marijuana cases, but federal law preempts state law.
- CBD oil legalized in 2014.
- Industrial Hemp Cultivation Legalized November 2017.
- Lower Jurisdictions
  - Madison – Possession of small amounts decriminalized (1977).
  - Eau Claire – Small fines of \$1.00 only for possession (2018)
  - Menomonie Reservation – Legalized Recreational Use (2015)

## State “Lawful Products” Law *(a lawful product is legally consumed, used or enjoyed in food, beverage or tobacco)*

Employers may not discriminate against individuals based on their use of lawful products or engagement of lawful activities outside of work.

### What is Lawful?

- Colorado (2015 State Supreme Court decision) – Because federal law prohibits all marijuana use, employee could not prove his medical marijuana use was “lawful”.
- Illinois (eff. January 1, 2020) – “Lawful products” include all products that are legal under state law.

## Interaction with Other State Laws

- Disability Laws – Medical marijuana laws usually require an individual to have a debilitating medical condition in order to become an authorized user. Most debilitating conditions will qualify as a disability under state laws that require employers to provide reasonable accommodations.
- Privacy/Lawful Activities Laws – Some states have laws that prohibit employers from discriminating against individuals based on their use of lawful products or engagement in lawful activities outside of work.

## C) THREE TYPES OF STATE MARIJUANA LAWS

### CBD Only

*Alabama, Georgia, Iowa, Indiana, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Wisconsin, Wyoming*

- Allow tightly limited uses of a substance called cannabidiol (CBD), a low-THC derivative of marijuana, usually administered in oil form.
- These states have not legalized the use of marijuana plants for any purpose.
- Employment-related issues rarely arise under these laws.

### Medical Use Only

*Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Maryland, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Utah, Virginia, West Virginia*

- Qualifying Patients Only – Must have debilitating medical condition, physician recommendation, over 18 years old (or have parent’s permission), state residency and state registration.
- Most laws specify qualifying debilitating conditions, such as HIV/AIDs, cancer, epilepsy, glaucoma, terminal illnesses, chronic pain, etc. Agencies may approve additional conditions.

### Recreational & Medical Use

*Alaska, California, Colorado, District of Columbia, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nevada, Oregon, Vermont, Washington*

- Individuals underage age 21 may not use marijuana (unless they qualify under medical use law)
- Limited Amounts usually up to one ounce. May allow growing edibles or concentrates. Most states allow sales of marijuana.
- Time and Place restrictions such as public places/transport, vehicles, schools, correctional facilities, employer premises, and workplaces.

Unclear Marijuana Laws - In some states, it remains unclear regarding whether (or the specific conditions under which) employers may take adverse actions based solely on a positive test. These include: Hawaii, Maryland, Michigan, New Hampshire and Utah.

## D) Interaction of Federal and State Laws

### Federal vs. State Laws

- 2013 – U.S. Department of Justice “Cole Memo” – Hands off approach to enforcing federal marijuana laws against state-law-compliant marijuana businesses.
- 2014 – Rohrabacher-Blumenauer Amendment – No DOJ spending allowed to interfere with state-approved medical marijuana programs.
- 2018 – DOJ “Sessions Memo” (rescinded Cole Memo) – Prosecutors must follow established principles that govern all federal prosecutions when dealing with marijuana businesses.
- 2018 – Farm Act – Limited legalization of hemp and CBD (up to 0.3 percent of THC)

### State vs. Federal Law

Whether federal law protects an employer may depend on court interpretation of various legal terms or provisions.

- Employer Protection: California and Colorado
- No Employer Protection: Connecticut, Massachusetts and Delaware
- Use caution in relying solely on federal laws to justify adverse employment actions based on positive marijuana tests.
- Federal Law protecting Employers Court Decisions
  - Ross vs. RagingWire Telecommunications (1/24/2008)
  - Coats vs. Dish Network (6/15/2018)
- Federal Law Does Not Protect Employers for adverse employment actions for off-duty marijuana use.
  - Chance vs. Kraft Heinz Foods Co. (12/17/2018)
  - Barbuto vs. Advantage Sales and Marketing (7/13/2017)
  - Noffsinger vs. SSC Niantic Operating Co. (8/8/2017)

## E) Employee-Friendly Marijuana Laws

1. **Some state marijuana laws specifically prohibit employers from taking adverse employment actions based solely on an individual’s status as an authorized medical marijuana user.** They include Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, New Jersey, New York, Oklahoma, Pennsylvania, Rhode Island and West Virginia. (Arkansas, New York and Oklahoma’s laws also specify that individuals have a cause of action against employers for discriminating based solely on status.)
2. **Some state marijuana laws require employers to take certain actions related to individuals who are authorized medical marijuana users.**
  - New Jersey employers must offer individuals an opportunity to present a legitimate medical explanation for a positive marijuana test.
  - Nevada employers must attempt to make reasonable accommodations for the medical needs of an employee who is an authorized medical marijuana user. Effective 1/1/2020, Nevada’s recreational marijuana law also specifically prohibits employers from taking adverse employment actions against any adult age 21 or older based solely on a positive test for marijuana, subject to exceptions for safety-sensitive positions.
3. **Some state marijuana laws specifically prohibit employers from taking adverse employment actions against an authorized medical marijuana user based solely on a positive test for marijuana.** With exceptions for safety-sensitive positions, employee impairment and compliance would result in a loss of any monetary, or licensing, related benefit under federal law or regulations. States Include: Arizona, Arkansas, Delaware, New Mexico, Oklahoma (Oklahoma’s law also specifies that individuals have a cause of action against employers for willful violations.)
  - District of Columbia – Effective July 22, 2015 – Prohibits employers from testing an applicant for marijuana until after a conditional offer of employment is extended.
  - New York City – Effective May 10, 2020 – Prohibits all employers from testing job applicants (other than applicants for certain safety-sensitive positions) for marijuana as a condition of employment.

## F) Employer Actions, Issues, Legality and Tips

### **Permitted Actions – Employers may still:**

- Conduct drug testing
- Prohibit employees from using or possessing marijuana in the workplace
- Prohibit employees from being impaired by or under the influence of marijuana in the workplace
- Prohibit employees from being impaired by or under the influence of marijuana during working hours
- Comply with applicable federal or state drug testing laws
- Comply with applicable licensing and contractual requirements

### **Restricted Actions – State Marijuana and Other Laws**

- May Prohibit employers from discriminating based on authorized user or off duty status alone and conducting certain tests for marijuana.
- May Require employers to make reasonable accommodations for off duty use and authorized user's medical needs and comply with drug testing requirements.

### **Off Duty Use**

Some state marijuana laws are silent or unclear about employment issues, courts have ruled that employers may or may not prohibit all off duty use.

- Employer Friendly – California, Colorado, Oregon, Washington
- Employee Friendly – Connecticut, Massachusetts

## G) IMPACT ON EMPLOYERS

### **1. Become familiar with applicable state marijuana laws.**

- Do they include protection for employees?
- Do they address off-duty use?
- Do they create or allow causes of action against employers?
- Do they require employers to take specific actions when a person tests positive for marijuana?
- Do they address how to determine impairment?
- Do they require an established workplace drug policy?

### **2. Employer-Friendly Marijuana Laws**

- Some state marijuana laws specifically allow employers to prohibit all marijuana use, even by employees who are authorized marijuana users. They include Florida, Montana and Ohio. These states' medical marijuana laws also specify that individuals have no cause of action against employers.

### **3. State Drug Testing Laws – General Requirements**

- Written testing policy
- Notify employees of intent to implement testing
- Provide employees with copy of written policy
- Following testing protocols

### **4. Workers' Compensation Laws**

- Denying Benefits – Some states require employers to meet specific requirements in order to deny benefits based on employee's drug use.
- Drug-free Workplace Discounts – Some states provide premium discounts for employers that establish specific drug-free workplace programs. Some state marijuana laws specify that they do not affect these programs.

## H) Compliance Tips for Employers

- Establish a written drug testing policy. Be clear about expectations and follow applicable drug testing laws. Consider excluding marijuana tests for non-safety sensitive positions.
- Become familiar with related laws, including disability discrimination, lawful products laws, drug testing, Workers' Compensation and case law.

## I) Potential Issues for Employers

- How is the prohibition enforced? Arkansas, New York and Oklahoma's medical marijuana laws specify that individuals have a cause of action against employers that discriminate based on authorized medical marijuana user status.
- When is discrimination based solely on an individual's status as a medical marijuana user? Can employers discriminate based on status PLUS some other factor? If so, what other factors are necessary? Is a positive drug test enough?
- When is discrimination based solely on a positive test for marijuana? How is impairment determined?
- How are other exceptions defined? What is the safety-sensitive position?
- How is the prohibition enforced? Oklahoma's medical marijuana law specifies that individuals have a cause of action against employers that willfully violate the law. Other laws do not address how the prohibition may be enforced.
- When a law only allows employers to prohibit marijuana use in the workplace, does this mean they cannot prohibit use outside of the workplace?
- When a law protects users from "any penalty" for engaging in legalized marijuana use, does this include employer penalties?
- What constitutes negligence or professional malpractice?
- How is the workplace defined?



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