



# Workplace Considerations for Marijuana Use

## **National Drug Screening's (NDS) Provided Checklist of Impacting Issues to Research** *Determining Your Response to Employee Use of Marijuana*

As an employer considering how you will deal with employee use of marijuana, we recommend you work with two knowledgeable professionals:

- An experienced and specialized **attorney** – to research and understand the impacting laws, and
- A specialized **drug-free workplace (DFWP) consultant** – to determine and operationalize your practices.

It is one thing to say, “we can legally test for marijuana in this circumstance,” but quite another to efficiently look at the ramifications of *who, what, how, and where* you are going to do that testing and the course of actions that will follow your decision.

Decisions for a policy and program that are right for your employees will be dependent on a myriad of issues including the state’s marijuana laws, other state and federal laws, as well as a huge set of diverse tangential considerations. National Drug Screening (NDS) is providing you these resources:

- The article, **Workplace Considerations For Marijuana Use**, which provides an overview perspective and serves as a foundation for your process,
- The **Checklist of Impacting Issues to Research** for help identifying laws and authoritative issues that can impact your company’s policy for handling marijuana issues, and
- **State Report** which note some of the state-specific employment-related considerations as they relate to marijuana use.

Using these tools and working with the suggested professionals will help you identify obligations you face in developing your company’s program for handling marijuana issues *in each state* where you have employees.

### **Checklist of Impacting issues to Research:**

- Authorities to which the employer is obligated (e.g., Department of Transportation [DOT])**  
Even in states that require the employer to accommodate medical marijuana use, generally there is a statement of exemption as it relates to complying with a federal authority or the threat of losing a contract.
- State-specific marijuana law**  
Specifically, research what protections and obligations are stipulated in the law related to employment practices. The qualifying conditions for use and which medical practitioners are legally permitted to provide recommendations to use marijuana can be relevant. A state’s marijuana law may reference another law that offers direction for an employer’s program choices. For example, Oklahoma’s law says that a positive test for marijuana means a result that is at or above cutoff levels established by US DOT or Oklahoma law, whichever is lower.



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## ❑ **State-specific recreational marijuana law (sometimes referred to as “Adult use”)**

Specifically, are there specifications in the law that limit an employer response if the employee tests positive at work for consuming a “legal” substance outside of work hours or the workplace? For example, Maine’s law prohibits an employer from discriminating against an individual solely because of his/her use outside of the employer’s property. Although not directly stated as an employment protection, this could have an impact on the employer’s program decisions.

## ❑ **State-specific THC limitations of CBD products**

Under the Farm Bill of 2018, the THC value of federally legal hemp-based CBD is 0.3% THC and any greater amount is considered *marijuana*-derived CBD. Unfortunately, CBD is not well regulated, and products are not always accurately labeled. Additionally, there are states which have laws allowing the use of CBD stating specific allowable/prohibited THC levels which differ from the Farm Bill. Employers will need to take into consideration what their policy will be if an employee tests positive for marijuana and claims that it is due to their “legal” use of CBD (as per their state law or mislabeling).

## ❑ **State disability discrimination protections**

State disability and discrimination laws are increasingly being applied as employment protections for the registered employee who uses marijuana for a medical condition. For example, Massachusetts has established that an employee who uses medical marijuana to treat a disability is entitled to reasonable accommodation under the state disability discrimination law.

## ❑ **Safety-sensitive job functions and positions**

There are states that require employer accommodation but include carve outs for safety-sensitive positions. For example, New Mexico states that it’s unlawful to take adverse employment action against an applicant or employee based on conduct allowed under medical marijuana law with the exception of certain safety-sensitive positions.

## ❑ **State workers’ compensation protections and obligations**

States have differing criterion for determining compensability for injuries when certain substances are involved, and some for payment of certain medications. Some states will stipulate obligations of an employer in order to have defense in denying a claim. All of these could affect operational aspects of an employer’s program.

## ❑ **Requirements and guidelines of state-specific workers’ compensation premium discount/rebate programs**

States that offer workers’ compensation premium discounts or rebates will generally require testing and can have specific corrective action following a positive marijuana test. This can be a direct intersection between two state laws that needs to be considered.

## ❑ **State unemployment protections and obligations**

States can have different criterion and specifics for prohibited employee behavior that may relate to marijuana use.

## ❑ **Drug-testing per se laws of a state**

Testing and voluntary protection laws may stipulate or offer guidance regarding how an employer



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handles employee use of marijuana. These may include specifics about such things as what type of drug testing methodology can be administered, when it can be applied, what drugs can be tested and at what cut-off levels. These may be mandatory (i.e., when testing is incorporated in an employer's program) or voluntary (i.e., for employer protections and relief).

## **State “under the influence” specifications**

A state's marijuana law, highway law or other state administrative codes may stipulate objective measures that constitute “under the influence” (i.e., cut-off levels per drug via each type of specimen tested (e.g., breath, blood)). These may or may not be relevant in your company's operational guidelines for determining what will be a positive marijuana test result.

## **State-specific off-duty use and lawful activities statutes**

The lawful use of state-legal substances (which can include alcohol, tobacco and even marijuana) can complicate how the employer handles a positive marijuana test. Some states have specific laws on these topics, others address them in their marijuana laws, and others not at all.

## **State-specific marijuana decriminalization laws/statutes**

Some states have reduced the criminal status of possession, use, etc. of marijuana. Depending upon your industry type, the importance of public image, and other personnel issues, this may be an operational factor relevant in the state(s) you have employees.

## **State-specific OSHA guidelines and requirements**

At the federal level, all employers have a duty to provide a safe working environment. Some states also have state-specific OSHA guidelines and requirements that could influence your company's stand on employee use of marijuana.

## **Reporting requirements of state agencies (i.e., Highway, Human Services, etc.)**

States can have obligations for employers to report alcohol and other drug violations of those employees holding commercial driver's licenses (CDL). Operationally, this can be a program function required for some companies.

## **Employee/Employer-friendliness in case decisions involving marijuana**

Legislators are changing marijuana laws at lightning speed. In just one period, March 6 through April 26, 2019, thirty-two state laws were passed having to do with marijuana and many of which directly or indirectly impacted employers.

However, equally important are case decisions having to do with these issues. Decisions in these suits can create focused, new directions impacting employers' operational directions with their programs. For example, the pivotal 2017 decision by the Massachusetts Supreme Court in the



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Barbuto vs. Advantage Sales & Marketing, LLC was literally a turning point in this nation. Until that time, court suits resulted in no duty to accommodate medical marijuana. Now, many courts are finding duty to accommodate. Following this influence, some legislators are now writing such terms in to laws.

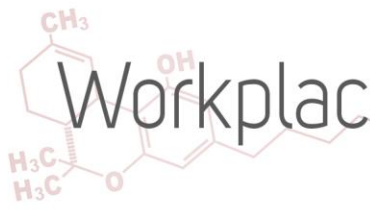
## □ State highway limitation laws

As we discussed, some states identify specific measures (i.e., cut-off levels) in their marijuana laws that will constitute under the influence in an employment setting. Aside from that, employers who have employees driving as part of their responsibilities will need to know a state's impairment/driving under the influence specifications in highway laws.

As we are demonstrating, it is critical that specialized legal counsel and experienced, DFWP consultants help you customize or refine your written policies and practices. There is great risk in not doing the upfront homework *for each state in which you have employees*. An "innocent" mistake or oversight could develop into a very disruptive and costly lawsuit.

Use this checklist to help qualify the professionals you select to assist you. Let the experts serve as your counsel while you serve as an expert on your company. Together you can collaborate to develop policy and procedures that are lawful and appropriate for your workplace. Although complex, knowledgeable experienced professionals can make the process very manageable.

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issues should be consulted for legal advice. In addition, an experienced drug-free workplace professional should be relied upon for assistance on operational issues for your company's program.