Marijuana Legalization: Why It’s High Time You Reviewed Your Company’s Drug Policy

A Sterling Talent Solutions White Paper
While it’s still wise to promote and maintain a drug-free workplace, you probably shouldn’t continue your current drug testing practices without considering what marijuana’s legalization means to your company’s official policy.

Earlier this year, the headline of a Washington Post editorial declared, “Pot is increasingly legal. Employers need to stop screening for it.”

While the first statement is undeniably true, it’s no reason for you to stop testing employees and applicants for marijuana—even if you are in a state that has legalized medical marijuana or recreational use of the drug. Legalization doesn’t remove the many reasons for marijuana screening, which include workplace safety, productivity and health concerns, limiting health insurance costs and protecting your company image.

This article offers information and insights that will help you decide if your policy needs refining or adjusting. It details the current status of marijuana use and legalization efforts, how courts have ruled when workers sued employers over workplace sanctions for marijuana use, and the steps you should take to ensure your drug testing practices are both legally compliant and suited to your company’s needs.

By the Numbers

The marijuana legalization trend began in 1996, when California voters passed Proposition 215, making the Golden State the first in the nation to permit the medical use of marijuana. Since then, marijuana legalization laws have been enacted in large swaths of the country, and the trend is showing no signs of slowing. Today, the situation is as follows:

• 23 states and Washington, D.C., have legalized marijuana in some form, with Alaska, Colorado, Oregon, Washington and Washington, D.C. legalizing recreational use.
• 25 million Americans have used marijuana in the past year.
• 14 million Americans use marijuana regularly.

Evidence suggests that legalization causes the number of marijuana users to rise. According to Quest Diagnostics, the world’s leading drug testing company, positive marijuana tests increased 20% and 23% in Colorado and Washington, respectively, since 2012, the year those states legalized recreational use.

Should the current trend of states moving to permit recreational marijuana continue, we could see a substantial rise in use of the drug.

As for the federal level, while it’s unlikely we’ll see recreational marijuana use legalized nationally any time soon, there is movement on the medical marijuana front. In March, Republican Senator Rand Paul and Democratic Senators Cory Booker and Kirsten Gillibrand introduced unprecedented legislation that would “allow patients, doctors and businesses in states that have already passed medical-marijuana laws to participate in those programs without fear of federal prosecution.” Although most experts, including advocates, agree the bill won’t be passed due to opposition from many conservatives, it is, as Time magazine noted, a sign that “some of the winds legalization advocates ... have been fighting against for decades are now at their back.”

Legalization doesn’t remove the many reasons for marijuana screening

The following data provided by the Drug and Alcohol Testing Industry Association (DATIA) highlight why it believes increased marijuana use is a concern for employers:

• A minimum of 24-hour acute impairment is standard after marijuana use, according to several studies.
• One in 10 marijuana users will become dependent to the point of requiring treatment (Gledd).
• There is two to five times greater use of other drugs when marijuana is the onset drug (Lynskey) (Agrawal, Neale, Prescott, and Kendler).

In addition, according to the National Institute on Drug Abuse, drug abusers are less productive, have increased absenteeism, are more likely to become sick or injured, and are more likely to be a danger to themselves and their co-workers.

As a result, employing drug abusers can contribute to making your organization a less attractive and less safe place to work.
How Employers Respond to Legalization

We recently conducted our annual background screening survey, and one of the questions we asked the more than 500 participants was how their organization likely would react if recreational marijuana were legalized.

Among their answers (participants were allowed to choose more than one):

- 50% Continue our drug testing program
- 20% We don’t have a drug testing program
- 12% Ignore positive tests for marijuana
- 10% Overlook past convictions for minor marijuana offenses
- 2% Discontinue our drug testing program

What’s enlightening about these results is how few employers would ignore or overlook positive tests or past marijuana offenses, and how few would end their drug testing programs. Employers are concerned about marijuana use—legal or not.

Perhaps even more eye-opening is what Colorado employers have done since the state decriminalized recreational marijuana use. According to a survey by the Mountain States Employers Council, one in five employers reported they implemented more stringent drug testing policies. Meanwhile only 2% relaxed their testing for marijuana, while 71% reported that their policies hadn’t changed.

“There seems to be a movement toward more testing,” Curtis Graves, staff attorney with the Employers Council, told The Denver Post. “A lot of people are freaked out” about the prospects of employees’ legal marijuana use.

And given the 20% increase in positive marijuana tests in the state, perhaps with good reason.

What Courts Have Ruled

Advocates for legal marijuana argue that it should be treated like alcohol, with employees facing no workplace sanctions, provided marijuana is consumed responsibly off the job. So far, however, courts have generally ruled that employers may fire workers for using pot, even off-duty and if medically prescribed.

Colorado again provides noteworthy examples of this trend. Colorado law prohibits an employer from terminating an employee “due to that employee’s engaging in any lawful activity off the premises of the employer during nonworking hours.” However, in Curry v. MillerCOORS, a Colorado District Court ruled that the protected activity had to be lawful at both the state and federal level. For the same reason, in Coats v. Dish Network, the state’s courts approved the dismissal of a Dish Network employee who admitted he used medical marijuana off the job but said he was never impaired at work.

Increasingly, workers terminated after using marijuana for medical reasons have made discrimination claims in federal courts under the Americans with Disabilities Act. So far, courts are again siding with employers. For example, in 2012, the U.S. Court of Appeals for the Sixth Circuit sided with Wal-Mart (Cassius v. Wal-Mart Stores Inc), which had fired a worker with cancer who had registered with the state medical marijuana program.

Even if the employee alleges discrimination, as in the MillerCOORS case, anti-discrimination law does not protect an employee from an employer’s standard policies against employee misconduct. As long as employers apply their drug-free policies in a neutral manner, courts have held that banning drug use on the job is not discriminatory.

In short, courts are consistently giving you, as a private employer, the right to set your own drug policy. If you have a clear, unambiguous drug policy that you follow fairly and consistently, you can terminate an employee as the result of a drug test showing the presence of marijuana in the employee’s system during working hours.
How Should You React?

With legalization increasing marijuana use, some employers—like those in Colorado—that want to preserve a drug-free environment will simply choose to do more drug testing.

However, unlike alcohol, marijuana has a long, residual presence in a person’s system, so it may not make sense to terminate people who test positive—especially those with marijuana prescriptions—as a matter of policy. But what certainly does make sense is to take the time to ensure that your drug testing policies protect your organization and suit your particular needs.

• Do review your drug-free workplace policy and substance abuse testing program with your legal counsel.
• Don’t stop enforcing your drug policy solely because of state marijuana laws.
• Do apply your drug testing policies fairly and consistently.
• Don’t terminate or disqualify someone without careful consideration and adherence to policies, particularly in light of medicinal or “legal” recreational use.
• Do consider the health and safety of all of your workers in the application of your drug screening policy.

The Society for Human Resource Management (SHRM), has a model Drug and Alcohol Testing Policy available on its website. For another perspective, see NORML’s (the National Organization for the Reform of Marijuana Laws).

It makes sense to ensure that your drug testing policies protect your organization and suit your particular needs.
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With 18 offices in nine countries, our team of more than 3,500 employees proudly serves over 50,000 customers around the world, including 25% of the Fortune 100. Sterling Talent Solutions is accredited by the National Association of Professional Background Screeners (NAPBS), a distinction earned by fewer than 10% of all background screening companies. Visit www.sterlingtalentsolutions.com.

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