

Medical Marijuana and the Construction Job Site

By Kathryn J. Russo & Kristina H. Vaquera

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Meet the Authors



Kathryn J. Russo

(She/Her)

Principal

(631) 247-4606

Kathryn.Russo@jacksonlewis.com



Kristina H. Vaquera

Office Managing Principal and
Office Litigation Manager

(757) 648-1448

Kristina.Vaquera@jacksonlewis.com

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The changing legal landscape relating to marijuana usage means that employers, especially those with safety sensitive positions or who are subject to federally mandated compliance requirements, need to review their current policies and approaches to positive drug tests reflecting marijuana usage to ensure they follow applicable federal, state, and local laws regarding marijuana in the workplace.

Approximately 38 states have legalized the use of medical marijuana, 19 states have legalized the use of recreational marijuana, and approximately 18 states have legalized the medical use of CBD products for treatment of health issues. Additionally, there is a recent trend where some states and cities are starting to prohibit drug testing for marijuana under certain circumstances.

Employers can no longer treat marijuana the way they did 20 years ago.

Federal Law

The federal government still classifies marijuana, all forms, as a Controlled Substances Act Schedule I drug, meaning that there is no currently accepted medical use for marijuana and a high potential for abuse. However, the federal government has not enforced that law in years and both houses of Congress have introduced bills to legalize marijuana at the federal level.

Meanwhile, federal government contractor employers, as well as those employing positions subject to federal agency licensure or compliance, such as the Federal Department of Transportation (FDOT), have additional issues to grapple with. For example, FDOT prohibits all marijuana use in its regulated industries and does not authorize medical marijuana as a valid medical excuse for a positive drug test for a CDL licensed driver and medical review officers are prohibited from verifying a positive marijuana drug test result as negative. Employers who have federal contracts should review those contracts to determine whether they are required to conduct drug tests for marijuana. Being a federal contractor that is subject to the federal Drug-Free Workplace Act, by itself, does not require an employer to test for marijuana and take adverse actions against individuals who test positive. The federal Drug-Free Workplace Act does not require any drug testing and does not allow employers to regulate employees' off-duty use. For these reasons, several courts have rejected employers' arguments that they could not hire a medical marijuana user due to the employer's federal contractor status.

State, Local Laws

Where compliance with federal law is not indicated, employers must comply with state and local laws regarding medical marijuana, recreational marijuana, and drug testing for marijuana. For example, drug testing for marijuana is prohibited (for any reason) in New York and Rhode Island, and it is very restricted in New Jersey and Montana. The City of Philadelphia prohibits pre-employment marijuana drug testing; while in Nevada, pre-employment marijuana drug testing is permitted, but the employer can refuse to hire only

if the job is safety sensitive.

Moreover, there are approximately 22 state laws where lawful or prescription use of medical marijuana is protected from discriminatory and retaliatory actions by employers (e.g., Connecticut, Massachusetts, Illinois, Minnesota, New Jersey, New York, and Virginia). Additionally, there are states where, while there are no statutory protections, there is case law holding that employers may not discriminate or retaliate against employees who use medical marijuana.

Employers can no longer rely on marijuana's illegal status under federal law when there are so many state and local protections for marijuana use and the federal government has not interfered with states' actions to pass such laws.

Steps

Think about medical marijuana like other prescription medications taken for physical or mental health conditions. An employer needs to make sure it is conducting individualized assessments, engaging in interactive dialogue with the employee, conducting safety and direct threat analyses beforehand, as well as looking at whether there will be noncompliance issues with state or federal laws or other requirements if usage is allowed.

A wholistic, individualized review needs to occur before an employer “knee-jerks” and denies an accommodation to medical marijuana usage. An employer should not automatically assume the usage is “just too dangerous” or assume other stereotypes related to marijuana usage. Likewise, steer clear of creating a list of jobs that are “too dangerous” or wooden rules that it can never be used by safety sensitive employees. To stand on a direct threat argument, an employer needs to be able to demonstrate, including for safety sensitive jobs, that there is a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. This likely will require additional information from the applicant/employee's physician. Reasonable accommodations might include waiver of a positive drug test result, especially if related to pre-employment or random testing, exceptions to policies, modification to work schedules, leave of absence, or reassignment.

Revisit your policies. Make sure they address anticipated scenarios. All states currently allow an employer to prohibit use and possession of marijuana at work, as well as being impaired at work. Require employees, especially those in safety sensitive positions, to disclose medications that may impact their ability to perform the job safely, including side effects and warnings, before reporting to work under the influence, including from medical marijuana. Once disclosed, follow individualized assessment policies. If the employee is not in a safety sensitive role, the analysis may shift toward a focus on job duties where performance issues can be addressed if the employee is impaired at work.

Talk to your medical review officers (MRO) and drug testing companies in advance. Employers should ensure they are on the same page as their MROs regarding reporting an applicant/employee's statement that they are using medical marijuana when they test positive and are interviewed by the MRO. This allows the employer to assess next steps, including obtaining a copy of the medical marijuana card or authorization, assessing risk at the state level whether the job is safety sensitive, asking the applicant/employee for additional information from the healthcare provider, and

conducting relevant analyses.

Employers need to address the use of medicinal marijuana and recreational marijuana in the workplace to ensure their policies comply with all applicable laws and that appropriate steps can be taken when faced with positive marijuana drug test results.

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