

# The Year Ahead: Marijuana and the Workplace

By Matthew F. Nieman & Kathryn J. Russo

February 4, 2021

## Meet the Authors



### Matthew F. Nieman

Principal

703-483-8331

Matthew.Nieman@jacksonlewis.com



### Kathryn J. Russo

(She/Her)

Principal

(631) 247-4606

Kathryn.Russo@jacksonlewis.com

## Related Services

ADA Title III

Background Checks

Disability, Leave and Health  
Management

Drug Testing and Substance Abuse  
Management

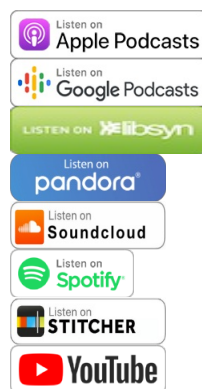
Employment Litigation

## Details

February 4, 2021

Support for medical and recreational marijuana remains high across the U.S. as more states pass laws legalizing its use. This trend runs contrary to federal laws, creating a complicated compliance quandary for employers.

Jackson Lewis P.C. · The Year Ahead: Marijuana and the Workplace



## Takeaways

Support for medical and recreational marijuana remains high across the U.S. as more states pass laws legalizing its use. This trend runs contrary to federal laws, creating a complicated compliance quandary for employers.

## What Employers Need to Know

- Since Election Day in 2020, five new states approved marijuana laws. Thirty-five states have laws allowing for the use of medical marijuana laws, 15 states plus DC have laws that allow the use of medical and recreational marijuana.
- There will likely be more research on the safety and positive uses of marijuana at the federal level under the Biden Administration.
- Federal contractors can point to the Drug-Free Workplace Act when prohibiting the use of marijuana at work by employees. However, the Act is silent on drug testing, nor does it regulate what people do when they are not at work. Federal contractors need to think about the particular circumstances and what types of drug tests to use, because citing the federal law above is no longer a guaranteed defense to a legal claim asserted by an applicant or employee who uses medical marijuana.
- Recreational marijuana use need not be tolerated by employers, even in the states where it is legal, and employers may take adverse actions based on positive drug test results due to recreational use (with some limited exceptions in Nevada and New York City).
- Two main issues dominate the analysis of whether medical marijuana should

be allowed in the workplace:

- Does a prohibition of medical marijuana pose legal risk under the applicable state law? Even if the answer to this question is no, could the factual circumstances give rise to a disability discrimination claim?
- Is the job the user performs dangerous or safety-sensitive?
- Currently, there is no drug test available that can measure whether somebody is, or at the time of testing was, impaired by marijuana.
- Misconceptions about drug test results should also be addressed. If an employer sees that the level or concentration of marijuana is very high, the employer may assume an employee was impaired at the time of testing and act on that assumption to take disciplinary action. That is not always the case; marijuana doesn't move quickly through the body like other drugs or alcohol and high concentrations can be found, especially with medical marijuana users who presumably use their medicine every day.
- Drug tests are further complicated by CBD products.
  - Employers should consider including a provision in their policies warning employees that most CBD products are not regulated by the FDA. Some CBD products claim to have no THC or low THC in them, which may or may not be true. THC is the psychoactive ingredient in marijuana that is tested for in drug testing.
  - Employers should require managers to communicate and reinforce the above warning as employees may not have read their handbook.
- If you know an employee has a disability, think about your obligation to have an interactive dialogue and be familiar with the laws regulating marijuana in your states. Then, analyze the dangerousness of the employee's job duties before making decisions on marijuana use or prohibition.

## Transcript

Alitia ([00:07](#)):

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution and helps answer the question on every employer's mind: How will my business be impacted?

Support for medical and recreational marijuana remains high across the United States as more states passed laws legalizing its use. This trend runs contrary to federal laws, creating a complicated compliance quandary for employers. This episode of We get work™ examines how employers should approach employee use of marijuana in hiring decisions and disciplinary practices to avoid problems down the road.

Our hosts today are Kathryn Russo and Matt Neiman, principals, respectively, in the Long Island and DC region offices of Jackson Lewis. Kathryn and Matt spent a lot of time thinking about and talking about drugs. Imagine having a job where you are paid to think about and talk about drugs. Kathryn advises clients on all aspects of drug and alcohol testing laws and helps craft policies that comply with

federal and state regulations. Matt also writes about and provides training on substance abuse prevention in the workplace. Kathryn and Matt will likely be busy this year as the dichotomy between federal and state regulations expands and the line between what is legal and what is not blurs. Kathryn and Matt, the question on everyone's mind today is: How does the growing legalization of marijuana impact my business?

Kathryn Russo ([02:07](#)):

Thank you, Alitia. This is Kathryn Russo. Matt and I are delighted to be here today to talk to you about this. Marijuana is certainly a challenging issue for employers. Since Election Day in 2020, five new states approve new marijuana laws, so this list just keeps growing. We've got 35 states now that have medical marijuana laws and 15 states plus DC that have recreational marijuana laws, so for employers who operate in multiple states, this is really a challenging problem and it certainly is confusing, so Matt and I are going to talk about the questions we keep getting most frequently from clients. To kick us off, Matt, I'm going to turn the first one over to you: Do we think that the Biden administration will legalize marijuana at the federal level?

Matt Neiman ([03:00](#)):

Well, it's approaching 4:20 in the afternoon here, 48 hours after Biden took office and if you'd asked me four years ago, if marijuana was going to be addressed during the Trump administration, I would have said, "Absolutely." It didn't, so my best prognostication is yes, I think it will. What will happen? Not sure. Everything is on the table, from let everybody have it whenever they want it to at minimum there being some more research, so I think that as our clients look at this and as companies look to this issue, realize there's going to be a bit more emphasis on the federal level to get marijuana explored, and figure out whether it truly is the wonder drug that works wonders that some think, or is it just another substance to consume like alcohol? But that still doesn't exactly answer where do we go with federal contractors. Kathryn, what do you think?

Kathryn Russo ([03:53](#)):

Yeah, I think for federal contractors, it's still a tough issue. Given that marijuana is still illegal and it hasn't been changed yet on the federal level, many federal contractors rely on the federal Drug-Free Workplace Act, which says that federal contractors may not allow their employees to use marijuana at work. In many cases, that's a good defense. I think if your contract has language that really requires you to ensure that people aren't using it at work and aren't testing positive, that's great. But we just want people to be aware that there have been a couple of court cases where the courts have said, "Well, you're talking about pre-employment testing. The federal Drug-Free Workplace Act doesn't say anything about drug testing and it doesn't regulate what people do when they're off duty," so I think that federal contractors need to think about the particular circumstance and what types of drug tests are you talking about because there are these cases out there that don't say that federal contractors always get a pass in all situations.

But how about this, Matt? We've got a lot of new recreational marijuana laws now,

so now that we're having more and more of these states, are employers prohibited from testing for marijuana in those states? If not, what should they be doing?

Matt Neiman ([05:19](#)):

I love this question because a lot of companies haven't been drug testing before, so why would they start? Unless they're in Oklahoma or New York City, there's nothing prohibiting them from testing for marijuana. But I always ask it as: If you're conducting drug testing to begin with, why would you not test for the substance people are most likely to be using? Remember, there's a big difference between having the information and how you use it. Wouldn't you like to know if your people are deciding that using marijuana is a good idea? Now, maybe that just says, "Hey, right before you put those keys in the truck and drive off down the way, I'd like to make sure you're not high as a kite."

But that being said, when people are concerned about issues of recruitment, "Hey, I'm having issues with my recruiting pool. I got a great candidate and they got through the pre-employment test and they failed it," well, don't you want to know if they were going to pass your test or not? You can decide to say to them, "Hey, look, I know you can buy marijuana here now. That's great. But you got to remember while we're working here, we have rules," and you could still bring them on. It's as much about the communication as how you use that data and I think you got to keep testing. Now, that doesn't change how you should approach medical marijuana, does it?

Kathryn Russo ([06:34](#)):

No. I agree with you. I think the recreational marijuana is the easier question for employers. The harder one is the medical marijuana. I always remind employers, when somebody is using recreationally, they're just using it because they want to, but if they're using it medically, you've got to be thinking about the disability issues, and so I think medical marijuana is a much, much tougher question for employers and there isn't really one-size-fits-all answer when you're dealing with medical marijuana.

I typically look at two issues when I'm giving employers advice about medical marijuana. One is let's look at the state law because the 35 states that have medical marijuana laws, they're all different, so in some states, they prohibit discrimination.

Matt Neiman ([07:19](#)):

So true.

Kathryn Russo ([07:19](#)):

In some states, they don't. Then in addition to looking at the statutory language, I think you also have to look at what is the person's job. If they're doing something that's dangerous or safety-sensitive, then I think the employer has, it's certainly more challenging for them to decide, "What am I going to do with them?" especially if you're in a state where you've got to be careful about the discrimination issues. Unfortunately, I think that with medical marijuana, that's

something that employers really need to look at on an individualized case-by-case basis.

I also think it depends on the type of drug test, too, right? If you're talking about a reasonable suspicion test, even medical marijuana users can't come to work impaired by marijuana. Even if you're in a state that prohibits discrimination, if you're testing somebody for suspicion and they test positive, you still may think about taking disciplinary action against them. But unfortunately, those things really need to be handled, I think, on a case-by-case basis. One of the issues or questions we'd get a lot, Matt, is there any drug testing technology out there that can help us by detecting recent use of marijuana?

Matt Neiman ([08:34](#)):

Using the best legal terminology that I can muster, nope. There is no drug test right now which you can measure whether or not somebody is, in fact, high. I'll tell you, taking a slight step back here as somebody who does substance abuse law all across the country, I love recreational marijuana laws. It takes me away from having a dialogue about whether this person is disabled or not, or do they have to use the marijuana for this or not. Instead, I can focus on, "Is this an accommodation for that disability?"

If there was a drug test that could tell me that someone was high the same way that we have alcohol test to tell you whether you're drunk, this isn't a very entertaining podcast because we'd know if you were high or not and we could say, "Yeah, the whole being at work while high, not so good," and given that we don't have that, we have a challenge in trying to explain to people, "When did you use this?" That's where that communication between you and the individual who's coming forward saying, "Maybe I need to use this medical marijuana," comes up because, I mean, maybe it'd be helpful to talk about whether the concentrations matter. What do you think, Kathryn?

Kathryn Russo ([09:44](#)):

Yeah, this is another common question that we get from employers because I think there's a misconception out there when they receive somebody's drug test result. If they see that the level or concentration of marijuana is very high, then they assume that, "Oh, we can say the person was impaired at the time we tested them, so now we're justified in taking our disciplinary action." Unfortunately, it doesn't really work that way, especially if you're dealing with a medical marijuana user. A medical marijuana user presumably uses their medicine every day and marijuana is very different from alcohol in that alcohol passes through your body very quickly. Marijuana doesn't. Marijuana builds up in the fatty tissues of the body and stays there and if you're using it every single day over time, the concentration will just go up and up and up, and so if the employer has a drug test result with a high concentration, we can't automatically assume, "Okay, there's proof of impairment at the time of the test."

Again, that's another challenge, Matt, because between not having a test that can tell us about recent use and then not being able to really do much with the concentration levels, it just presents so many dilemmas for employers who are

trying to make decisions after somebody is tested after an accident or even for reasonable suspicion or on a random test. It's very challenging now to make decisions based on drug test results. But on that issue, what about, Matt, the people who say, "Oh, well, I didn't really test positive for marijuana. I went out and bought some CBD products."

Matt Neiman ([11:28](#)):

I love the people that have absolute faith in anything they can buy over the counter at the pharmacy. I mean, if people had that much faith, this pandemic would have been over years ago. All things being equal, when somebody heads down to the corner store and buys a package of cannabidiol and says, "Oh, look. It says it doesn't have a lot of THC. I should be totally good." That doesn't mean anything. As I often discuss with clients, it's like when your favorite athlete from your sports team has to say, "Oh, I took a supplement. I didn't realize it was in there." If you are taking the faith of you keeping your job or not keeping your job and assuming that whoever put whatever that substance is into your caplet, whatever else it might be, you're going on that faith. There is no excuse.

I get the question all the time: "Well, how can that be? They told me they took CBD." Well, they can take a lot of CBD. The sheer number of products that have CBD in them is astonishing. I didn't even know that one would use shampoo that would have CBD. Does it seep into your brain? I have no idea. All I know is that if you take a drug test and though whatever you did it, you ended up with a level that goes over the cutoff that says, "This person has definitely used enough THC that it's showing up," you failed the drug test.

Now, look, is that the same as you, the company, saying, "Therefore, I'm firing you. Zero tolerance"? No, but it's the data point that you have to use and people choosing to use CBD versus an edible they buy at their local recreational marijuana store is still a choice they're making. When you're choosing what discipline is appropriate, you're making a decision on whether or not this person is making judgments and choices that are consistent with what your company needs.

I mean, in the end, your company may not think marijuana is a big issue. Now, if you're a federal contractor, I'd caution you it probably is, but it's a conversation you need to have. If you make assumptions on what the rest of the leadership thinks about what's going on, you're going to end up in a super awkward spot. Better to have had the discussion and make an intentional choice as to what you want your company policy to be than to make an assumption and have yourself in deep water at the end of the line. Any final thoughts, Kathryn?

Kathryn Russo ([13:42](#)):

Maybe, Matt, could you clarify what exactly is the difference between marijuana and CBD? Because I think that is an issue that's very confusing to a lot of people.

Matt Neiman ([13:53](#)):

There's a reason I became a lawyer and didn't work out as a farmer, but marijuana is an agricultural product. It's like, "Hey," and CBD is just a piece of it. In the grand scheme of things, THC is the part that makes you high, and if I'm going to



get all far Eastern medicine on here, CBD is the ying to the yang of THC, so it's supposed to actually operate in the opposite direction. It doesn't make you high for the studies that we have and should not cause you to fail a drug test because as we've discussed already, a drug test isn't testing to see if you're high, it's just testing to see what's there.

When someone is consuming CBD, they're taking a piece of it, sort of like you don't have the whole wheat. You have brand cereal, you have a muffin. That's what you're going with. All things being equal, you got to know, does your test test for what you're looking for? Frankly, people are willing to consume things I never would, but in the grand scheme of things, we're trying to decide is to make good decisions or bad decisions and your drug test result provides as much insight on their decision-making as it does in their substance abuse habits.

Kathryn Russo ([14:59](#)):

One of the things that I've been recommending, I don't know if you are, too, Matt, but I've been recommending to employers that they actually put a provision in their policy to warn their employees that there are lots of CBD products out there on the market, but these items are not regulated by the FDA, and so you're buying them at your own risk and even if the bottle says "No THC" or "Low THC," you really have no idea what you're getting, and so you're taking an unknown product and you may very well test positive, and so I have a warning in the drug-testing policy that says, "Look, these products are unregulated. If you test positive for THC, we're still going to enforce this policy and take disciplinary action."

Matt Neiman ([15:40](#)):

I completely agree with that. Frankly, I'd take it one step farther and ask the managers to be advised of that. I don't, frankly, believe that people read their handbooks all the time. I think they read them more often when they're in trouble than when they're about to get in trouble, so I'd rather have the managers advising folks, "Hey, slow your roll because once you're in trouble, you're in trouble," especially in industries where there's safety involved, driving a truck, moving a forklift, lifting heavy objects over somebody else. I would much rather avoid that issue than be trying to explain how could we do this better the next time around.

Candidly taking us back to where we started, there's just not a lot of research on the underlying impacts of marijuana. We've got people with anecdotal information stretching all the way back their remember from cartoons as a kid. At the moment, all of the research that's being done, at least with federal funding, is marijuana coming from one little farm in Mississippi. We all know just based upon the truly billion-dollar industry that is broken out as states have legalized both medically and recreationally, there's a whole lot more science being put into this than one little farm in Mississippi could possibly handle.

Hopefully, if the administration changes some of the rules, we'll get some more research so that we don't have people sitting in the lunchroom when they're actually allowed to go back to work instead of mid-COVID and we're actually having data that can be pointed to as to whether something is or isn't safe or when it can't be used as opposed to people saying, "Well, you don't know that for a fact."

Well, yeah, here I am in Virginia where I've got legislatures on both sides arguing yeah and no, which is not an effective argument, even when you're in third grade, but neither of them has data that they can point to say it's a good idea, so I can only hope that we can have a little bit more research and data in this so employers aren't as in the dark as they try and come up with the safest plan that they can. Kathryn?

Kathryn Russo ([17:39](#)):

Yeah, and the final point, not to make it even more complicated because it is very complicated, but I think the other thing I want to say about CBD is there are some states, there's about 17 states that allow CBD use for medical reasons, so in those states, again, I caution employers: If you have an applicant or employee coming to you saying "I use either medical marijuana or medical CBD for medical reasons," I think you do need to just pause and make sure you're familiar with the law and think also about the possibility of disability, just straight disability discrimination claims.

Because regardless of whether or not the medical marijuana law prohibits discrimination, or whether CBD is allowed for medical reasons, another issue that I'm becoming more concerned about are just the general disability discrimination claims because you know the person who's using that CBD cream for their arthritis, they're going to come in and say, "Well, this is disability discrimination because you're not allowing me to do this." I think you just have to analyze all of the facts. If you know the person has a disability, think about your interactive dialogue, be familiar with the laws in your states. Then also, as I said earlier, analyze the dangerousness of their job duties and then think about what's the right decision for your company.

Matt Neiman ([19:03](#)):

I mean, communication is definitely the key. If you don't take the time to decide what your company's position is, the lowest-level person that wants to make a decision is going to make your policy, whether you like that or don't like that, so take the time, think about this issue when it's an interesting Friday afternoon discussion, then having it be confronting to you where it's the employee has been working with you for 33 years who tests positive and now you're trying to decide on the fly, "Well, what do we think about marijuana? I don't know. I've never really thought about it," and then you find out that people have used you never otherwise would have expected. Be intentional, be safe, and you'll make the right decision.

Alitia ([19:45](#)):

Thank you for joining us on We get work™. Please tune into our next program where we will continue to tell you not only what's legal, but what is effective. We get work™ is available to stream and subscribe on Apple Podcasts, Google Podcasts, Pandora, SoundCloud, Spotify, and YouTube. For more information on today's topic, our presenters, and other Jackson Lewis resources, visit [jacksonlewis.com](http://jacksonlewis.com). As a reminder, this material is provided for informational purposes only. It is not intended to constitute legal advice, nor does it create a client-lawyer relationship between Jackson Lewis and any recipient.



©2021 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.