



Cannabis in the Workplace

A GUIDEBOOK FOR EMPLOYERS

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SECTION 1

Background on Cannabis: Legal Issues and Assessing Workplace Use and its Consequences

Cannabis is a plant with more than 100 chemical compounds called cannabinoids. Chief among them are tetrahydrocannabinol (THC) and cannabidiol (CBD). The use of cannabis, commonly called marijuana, and its derivatives has grown due to state legalization and ready availability. Employers must deal with increasingly urgent workplace issues, including drug testing, appropriate mental health and substance use disorder treatment, workplace safety, and accommodations.

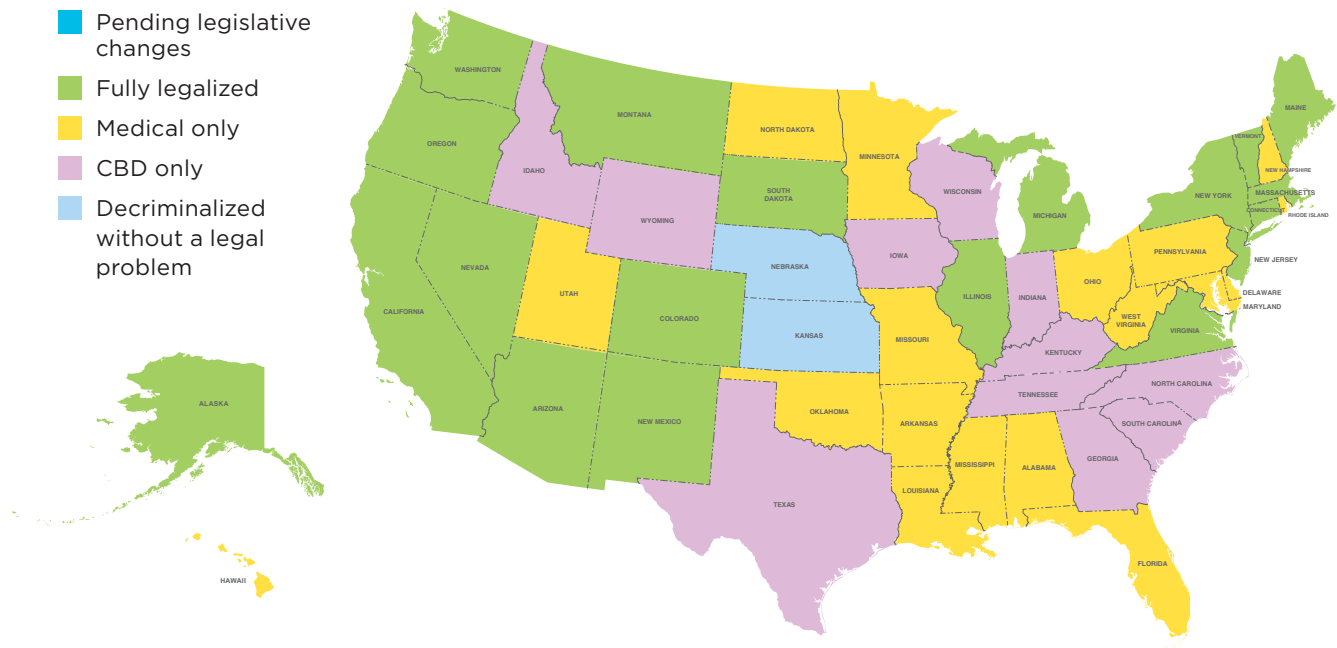


Confusing Patchwork of State Legalization, Medical Claims, and Oversight

Although 48 states have legalized cannabis in some form, its legal uses vary (see chart). Nineteen states have legalized adult use only. Another 18 states have legalized adult use and medical cannabis use. Eleven states have legalized the use of low-THC cannabis

for medical purposes. This patchwork adds a layer of confusion for multi-state companies formulating a workplace cannabis policy.

Even more problematic is that possessing cannabis and aiding and abetting the possession of cannabis remain illegal under federal law.



Note: The map is continually changing. Last updated October, 2021.

Source: [The NCSL Foundation for State Legislatures](#)

Highly Limited FDA Approval of Cannabis Drugs

The Food and Drug Administration (FDA) has approved one cannabis-derived drug product: Epidiolex (cannabidiol), and three synthetic cannabis-related drug products: Marinol (dronabinol), Syndros (dronabinol), and Cesamet (nabilone). These approved drug products are only available with a prescription from a licensed healthcare provider. Importantly, the FDA has not approved any of the other cannabis, cannabis-derived, or cannabidiol (CBD) products currently available on the market.

Detailed information on the FDA's position on cannabis is available [here](#).



Cannabis for Medical Use and Safety Issues

“Cannabis for medical use” is a misleading and overly generalized term because many of the touted medicinal benefits have not been scientifically proven. Where legal, cannabis for medical use is offered by cannabis dispensaries, but without FDA approval. These products are derivatives of the marijuana plant manufactured without FDA oversight of the manufacturing process. The National Center for Biotechnology Information publishes detailed information on cannabis for medical use and diseases/conditions.

Despite popular (and unproven) claims that cannabis is safe even when unregulated, studies have found cannabis use can have adverse effects. Countless studies have found contamination, inaccurate content labels, and other quality deficiencies in dispensed cannabis products (see [National Alliance Action Brief “Cannabis Products on the Formulary”](#)).

Legal Issues Related to Cannabis in the Workplace

Any employer considering allowing cannabis use in the workplace or paying for cannabis as a covered health benefit should first engage counsel as doing so may create exposure to the legal risks that follow. It's also important to note that much is unknown about drug-drug interactions (e.g., if cannabis exacerbates the impairing effect of another substance, like it does with alcohol).

By allowing the use of cannabis in the workplace or by placing non-FDA approved cannabis products in the formulary, it's possible employers will face:

- 1. Violation of federal law.** Federal law prohibits aiding and abetting the commission of a federal crime. Cannabis remains a Schedule I controlled

Employer Considerations When Making Cannabis Drugs Available



The National Alliance of Healthcare Purchaser Coalitions issued an [Action Brief](#) on how employers should address insurance coverage for non-FDA approved cannabis drugs.

The Action Brief suggests employers insist on FDA-approval or engage legal counsel when considering coverage for non-FDA-approved cannabis products, given their illegal status under federal law.

substance under the federal Controlled Substances Act (CSA) (“hemp,” defined as the cannabis plant and plant derivatives containing no more than 0.3% THC, is exempt from the CSA). Possessing cannabis, even for medical purposes, is a [violation of federal law](#).

The Supreme Courts in Maine and Minnesota have considered the issue of mandating reimbursement of marijuana under workers’ compensation programs. Both courts determined that a state law requiring an insurer to reimburse for marijuana is unconstitutional because it compels insurers to violate federal law.



2. Federal tax code violations. Under the [federal tax code](#), employers may be barred from deducting business expenses incurred in connection with payments for cannabis because regular purchases of cannabis may be deemed “trafficking” in the drug.

3. Liability for worker safety. Workers who test positive for THC have significantly [more accidents and injuries](#). Employers have a duty to provide a safe workplace and to take all necessary steps to protect the health and safety of their employees and others in the workplace.

Contradictory State Perspectives

Contrary to federal law, however, states appear to be moving toward [protecting cannabis use by workers under certain conditions](#). Approximately 20 states prohibit employers from discriminating against medical cannabis cardholders or from firing employees who test positive for cannabis used off-duty.

Some other states explicitly allow employers to fire employees for off-duty medical cannabis use. Most

other states say employers are free to fire, discipline, or take other action against employees who use cannabis at work or show up to work under the influence of cannabis. Courts are commonly siding with employers, but the issue is evolving.

Similar confusion occurs with drug testing. Cannabis accounts for [half](#) of all positive drug tests. Most states allow for testing job candidates after sharing a drug testing policy with them. However, New York City bans pre-employment screening for marijuana use, except for employees in safety and security-sensitive jobs and jobs bound by federal or state contracts or grants. Oregon requires “reasonable suspicion” of drug use. Rhode Island, Vermont, and South Dakota allow testing ONLY AFTER an offer of employment. Virginia forbids discharge of an employee for using cannabis under doctor’s orders.

This variety in regulation makes it difficult for an employer to formulate cannabis policy, [as this law article explains](#).

Assessing Workplace Use and Consequences

To better understand the consequences of cannabis use in the workplace, begin by assessing use and costs (health and welfare, productivity, turnover) in accordance with legal counsel recommendations.

1. Conduct a health claims assessment to identify cannabis-related trends in workplace accidents and absenteeism.
2. Assess workers compensation claims tied to accidents caused by cannabis use.

3. Examine data on tardiness, turnover, retention and productivity linked to cannabis use.
4. Measure costs of cannabis use related to health and welfare programs such as EAPs, mental health (depression, anxiety and PTSD), and chronic condition management.

Virtual Work and Cannabis Use

While federal and state laws permit employers to prohibit drug use at work, what happens when employees are working from home? Most legal advice suggests employers have the right to prohibit drug use in the workplace, a policy which extends to work at home. Subtleties of the law are still evolving. Enforcement is difficult. [HR executives](#) suggest moving carefully and looking for alternatives to enforcement, such as education about the employer's policy and about the consequences of drug use.



SECTION 2

Policies and Best Practices for Cannabis in the Workplace

Below are policy considerations for employers related to cannabis issues in the workplace.

1. Addressing Cannabis Use in the Workplace

Employers have a duty to provide a safe workplace and to take all necessary steps to protect the health and safety of employees and others in the workplace.

Before instituting cannabis-related policy, employers are advised to:

- a. Become educated about cannabis claims and labels and about evidenced-based medical information and research data.
- b. Understand laws on cannabis use in the states in which the employer operates.
- c. Develop workplace programs to educate management and employees about cannabis laws, cannabis health claims and health risks, employee use policies, health plan coverage policies, and the workplace consequences of cannabis use.
- d. Caution employees about the health dangers from impurities, contamination, dosage inaccuracies, label inaccuracies, and the lack of manufacturing standards.

Then consider these policy options:

- a. Employers may prohibit recreational cannabis use in the workplace, just as they may prohibit alcohol use in the workplace. Employers may prohibit cannabis use during breaks, just as they may prohibit alcohol use.
- b. No state requires employers to allow employees to use, possess, or be impaired by, recreational cannabis while working, in the workplace, or on the employer's premises. Employers can state this in their policies.
- c. Employers may include in their remote-work agreement or work-from-home policy a clause

CASE STUDY

Cannabis Use Policies Will Continue to Evolve

The case of an employer in Canada, where medicinal use was approved in 2016 and recreational use was legalized in 2018, illustrates how cannabis policy could be subject to change as state laws in the US change.

The employer, a construction company, employed a painter who operated a crane 37 floors high. This painter used cannabis for chronic pain.

Because the employer had a zero-tolerance policy for the use of drugs and alcohol in the workplace, the employee was terminated.

Precedents are still in the courts (che.gg/3HtwVGk), leaving Canadian HR departments dealing with still-evolving cannabis policy.



prohibiting the use of drugs and alcohol while performing work. This may include language defining the “workplace” as any area used by employees while performing assigned job duties. The employer must state in writing: “Remote offices are considered workplaces.”

- d. If the employer has a drug-free policy, make it clear that employees are prohibited from using, possessing, or being impaired by, drugs illegal under federal or state law (including cannabis) in the workplace or during work hours.
- e. Comply with the Occupational Health and Safety Administration (OSHA). OSHA, along with state health and safety laws, supports measures contributing to a drug-free environment and reasonable programs of drug testing within a comprehensive workplace program. These measures apply to certain workplace environments, such as those involving safety-sensitive duties like operating equipment or machinery. But OSHA’s support of drug testing is nuanced. It contends such programs must also take into consideration an [employee’s right to privacy](#). OSHA policy continues to adapt to changing times, and more changes are expected from Washington in the near future.

- f. Many state laws (check yours) protect an employee’s off-duty use of cannabis, as long as the employee doesn’t report to work impaired. However, an employer may prohibit off-duty cannabis use if required by a federal contract, such that cannabis use by an employee could cause the employer to lose federal funding.

Detailed discussion of these policy options can be found at [SHRM](#).

2. Employee Cannabis Testing, Hiring and Firing Policies

In many cases, employer policy will vary depending on the state in which the employer operates. State laws vary as to whether an employer may require pre-employment drug testing for cannabis use or take adverse action based on the results.

Because there isn’t a breathalyzer to measure impairment from cannabis use, the best approach is to contract with, train or hire a drug recognition expert to detect impairment when it’s suspected.

New Considerations for Drug Testing

A growing alternative to traditional workplace drug testing is impairment testing, which OSHA advocates. It may provide more immediate, actionable, accurate and comprehensive information, allowing employers to be more proactive in minimizing risks in the workplace, while maintaining more privacy and fairness for workers.

Generally, an employer can discipline or terminate a worker impaired by cannabis on the job, as long as the employer can demonstrate a reasonable basis for believing the employee was impaired in a way that violates safety or work requirements.

However, employment protections are changing as court cases test the scope of worker protections. A discussion about the application of the OSHA impairment rule is given by this [law article](#).



Policy Considerations

- a. If the employer's state allows employment testing for cannabis, the employer can develop a clear policy about whether this use is cause for not hiring or, if the person is an employee, for termination.
- b. Employment policy needs to address whether or not the employee may return to work after successfully completing a drug treatment program and whether or not ongoing testing is required to maintain employment. These are called "second-chance" employment practices. These policies support employees with a history of substance abuse who are participating in treatment programs.
- c. A separate policy is needed for drivers of company vehicles. Drivers with commercial driver's licenses are subject to U.S. Department of Transportation (DOT) regulations, which [prohibit use of cannabis](#) (including medical cannabis) by an employee in a safety-sensitive position. DOT provides a [path](#) for employees to stop using cannabis, re-test, and regain their jobs.

All policies should address both medical and recreational cannabis use.

3. Employee Health and Safety Issues and Employee Education

Use of non-FDA approved cannabis products compromises employee health and safety by increasing accidents and straining chronic-condition management resources. THC in cannabis has an impairing effect, even at low levels, causing dizziness, attention and concentration disturbances, disorientation, impairment of motor skills, and loss of full control of bodily movements.

[The National Institute on Drug Abuse \(NIDA\)](#) found 55% more industrial accidents, 85% more injuries, and 75% greater absenteeism among employees who tested



positive for cannabis compared to those who tested negative.

A concerted effort by employers to educate the workforce is needed to combat widespread misinformation about cannabis; state laws governing its use; and how cannabis affects cognitive and motor skills, risk of injury, and overall health and well-being. Employers want their employees to understand why they cannot sanction cannabis use.

Guidelines to address employee health and safety issues:

- a. Inform employees about the impact of cannabis use on motor skills, decision-making, and overall health and well-being.
- b. Educate employees (and management) on cannabis' legal status, quality issues, effectiveness in treating disease, and implications for benefit plans and healthcare costs.
- c. Promote and subsidize health and welfare programs for employees with cannabis overuse issues. These may include EAPs, treatment programs, and drug counseling.



- d.** Document the causes of safety failures due to employee cannabis use on and off the job.

Suggested policies to address employee health and safety issues:

- a.** Clarify which jobs include safety-sensitive roles and tasks. These might include heavy equipment operators, transportation workers, and front-line healthcare workers.
- b.** Establish clear policies prohibiting cannabis use that could compromise employee safety on the job. These policies should address random testing, the immediate action that will be taken, and long-term employment consequences.
- c.** Create a policy, based on applicable state laws, to address whether an employee impaired by cannabis use who is injured on the job may claim workers compensation.
- d.** Address state antidiscrimination or reasonable accommodation provisions for state-approved cannabis for medical use.
- e.** Clarify how cannabis is covered or not covered by benefit plans. For example, require FDA approval of any drug added to the formulary.

4. Health Plan Design

Recommendations: Clinical Safety and Efficacy of FDA-approved Products

The following policies and practices related to your health plans will help ensure the clinical safety and efficacy of FDA products and compliance with federal law:

- a.** Offer only health plans that require FDA approval of all drugs in their formularies, which are then eligible for prescription drug coverage.
- b.** In non-ERISA plans, provide clear written policies on non-coverage of cannabis treatments unless approved by the FDA, particularly if states in which the company operates have laws allowing cannabis use for medical treatment. As of April 2022, CBD has only been approved by the FDA in one drug, Epidiolex®, to treat severe epileptic conditions.
- c.** Develop a policy stating that the employer does not support a cannabis recommendation from a doctor for treatment of a condition under the Americans with Disabilities Act, because cannabis use is not protected under the ADA.
- d.** Review federal work contracts prohibiting approval of cannabis drugs or requiring a “drug-free” workplace, and structure health plans to meet these requirements.



Employer Cannabis Policy Checklist

Use this comprehensive checklist as a guide for developing cannabis policy in the workplace.

Cannabis Use and Testing

- ✓ Prohibit possession and use of, and impairment by, cannabis while working and on the employer's premises.
- ✓ Prohibit recreational use at a remote workplace and during breaks.
- ✓ Declare a "drug-free workplace," in which employees are prohibited from use or possession of, or impairment by, drugs prohibited by federal and state laws.
- ✓ Comply with OSHA- supported drug testing for employees with safety-sensitive duties.
- ✓ Prohibit off-duty use of cannabis, if required by a federal contract.
- ✓ Address state antidiscrimination or reasonable accommodation provisions for state-approved cannabis for medical use.

Hiring and Firing

- ✓ Consider making cannabis use a cause for not hiring a candidate or for firing an employee (subject to state law).
- ✓ Decide whether and when completion of a drug treatment program is a condition of return to work.
- ✓ Determine whether ongoing testing is required for continued employment of an employee who violates a work drug policy.

Health and Safety

- ✓ Clarify which jobs include safety-sensitive roles and tasks, such as heavy-equipment operation or front-line healthcare.
- ✓ Prohibit use of cannabis in any safety-related position and when employees are operating a company vehicle.
- ✓ Clarify rules regarding random testing for safety-related positions and the immediate and long-term employment consequences of a failed test.
- ✓ Clarify applicability of workers compensation when an employee is injured on the job due to cannabis use.

Cannabis Education

- ✓ Have a communications strategy in place and communicate clearly with employees and job candidates about cannabis policies, including the fact that there is no health plan coverage for cannabis products.
- ✓ Develop management and employee education on legal status, myths and risks, employer policies, health plan coverage, support programs, testing, and employment consequences.

SECTION 3

The Future of Cannabis: Research and Issues

Because the cannabis industry is dynamic and rapidly expanding and shifting, it is important for employers to stay apprised of developments, understand the market, and make thoughtful benefits and workplace safety decisions. Resources below offer evidence-based information about cannabis.



RESOURCES FOR EMPLOYERS

Cannabinoid Clinical

- [An Evidence-Based Approach to Cannabinoid Science](#)

U.S. Food & Drug Administration

- [FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol \(CBD\)](#)

Centers for Disease Control and Prevention

- [Marijuana and Public Health](#)

United States Drug Enforcement Agency

- [Marijuana](#)

National Institute on Drug Abuse

- [Cannabis \(Marijuana\)](#)

Substance Abuse and Mental Health Services Administration

- [Learn About Marijuana Risks](#)

National Safety Council

- [Cannabis and Safety: It's Complicated](#)

Governors' Highway Safety Association

- [Drug-Impaired Driving](#)

National Highway Safety Administration

- [Feel Different, Drive Different](#)

Consumers for Safe CBD

[The Collaboration for Cannabinoid Science & Safety](#)

“With every sector of the cannabis industry doing its part to move it forward, from consumers and cultivators to distributors and dispensaries, I have every reason to believe cannabis will accelerate positively in 2022.

Cannabis is one of the fastest-growing industries, globally. In 2021, governments across the world took steps toward legalization and investors doubled down (paywall) on backing the technology that is helping to propel the industry forward.”

—Ross Lipson

CEO and Co-founder at Dutchie, the technology platform powering cannabis commerce, as reported in *Forbes*, February 18, 2022

Acknowledgment

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