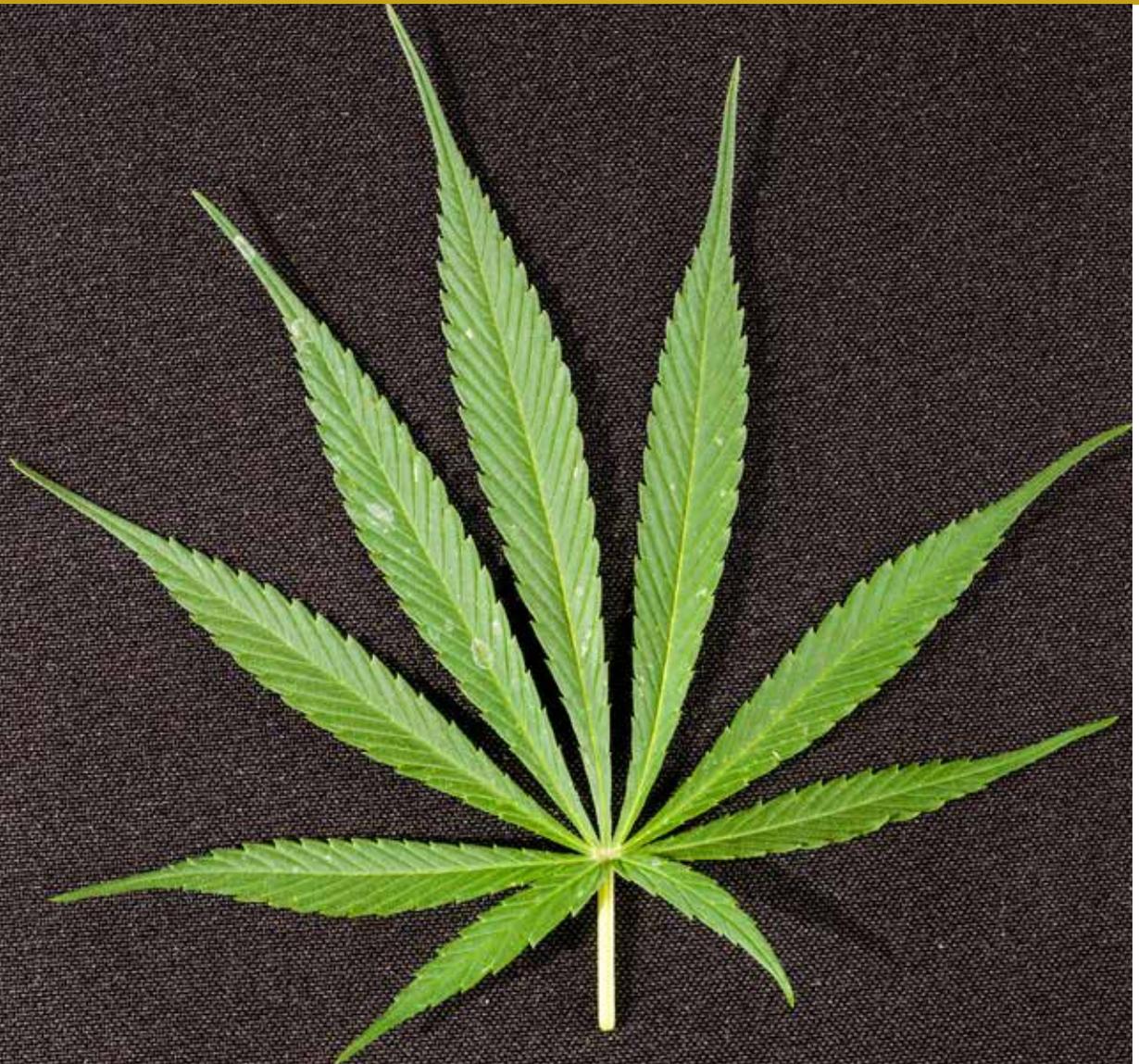


Workplace Impacts of Marijuana Legalization



OVERVIEW

In 2012, Colorado and Washington became the first states to legalize the recreational use and sale of marijuana. Since then, two other states and the District of Columbia have followed suit, while 18 others have legalized medical marijuana. Proponents tout the advantages of being able to regulate, tax and test marijuana. But what's the impact on companies, particularly in relation to drug-free workplace policies?

"As an employer's lawyer, it seems to me that legalization of marijuana for recreational purposes is not a good thing," says Paul L. Bittner, partner and vice chair of the Labor and Employment Group at Ice Miller. "I discourage employers from changing their drug-free workplace policies."

Bittner shared his thoughts on the workplace impact of marijuana legalization at an Assurex Global Loss Control & Claims meeting in September 2015. He began with a story about a client who called him last summer. The company in southeast Ohio was considering abandoning its pre-employment drug screening because it couldn't recruit enough employees: Too many prospective employees tested positive for THC, the psychoactive chemical in marijuana.

"That's disturbing from an employer's perspective," says Bittner. "You don't want people coming to work under the influence of a drug. You not only lose productivity, but the bigger concern for employers is potential liability if there's an accident and someone gets hurt or killed."

Marijuana remains illegal under federal law. But as more states legalize the drug for recreational or medical use, companies grapple with how—or if—to change their human resources policies concerning drug use. Many feel caught between a rock and a hard place: Should they tighten policies to exclude users from their payroll or loosen them to prevent alienating otherwise qualified employees? There is no easy answer, but Bittner offers some perspective on the topic of marijuana legalization and insight into employer options.



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**ABOUT PAUL L. BITTNER**

Paul Bittner is a partner and vice chair of the Labor and Employment Group for the law firm Ice Miller. He has been practicing since 1993 with an emphasis on labor and employment law.

Working in Ice Miller's Columbus, Ohio, office, Bittner has represented both public and private sector employers in union negotiations, labor arbitrations, unfair labor practice proceedings, representation elections and other related matters in front of the National Labor Relations Board as well as state agencies. He is a member of the Wage and Hour Defense Institute, providing counsel to employers on all aspects of wage and hour compliance. He has tried both individual and collective actions under the Fair Labor Standards Act.

Bittner is a frequent lecturer on a variety of employment law topics, including traditional labor law, ADA, FMLA, wage and hour and sexual harassment.

Section 1:

FEDERAL LAWS ON MARIJUANA

The federal government regulates drugs through the Controlled Substances Act, the statute under which the manufacture, importation, possession, use and distribution of certain substances are controlled. Marijuana is classified as a Schedule 1 drug, along with other narcotics including heroin, LSD and ecstasy. According to the U.S. Drug Enforcement Agency (DEA), Schedule 1 drugs have the following characteristics:

- A high potential for abuse
- No currently accepted medical treatment use in the U.S.
- A lack of accepted safety for use of the substance under medical supervision

Though many states have legalized marijuana for medical use, the DEA still considers marijuana and its active ingredient—tetrahydrocannabinol, or THC—illegal.

One argument for legalizing marijuana has been the ability to tax sales. For example, starting Jan. 5, 2015, sales of recreational marijuana in Oregon will be subject to 25 percent sales tax. But the argument may not hold muster with the federal government, which has weighed the benefits of increased tax revenues with societal costs, according to Bittner. “The federal government compares it to the legalization of alcohol and the overall impact that alcohol has had on society,” he says. “There’s a staggering cost to society compared to the actual revenue produced by making and selling alcohol.” The same may hold true for marijuana.

Currently, federal criminal law on marijuana targets both possession of the drug as well as sale and cultivation. Possession is a federal crime with penalties ranging from a misdemeanor with sentences ranging from up to a year in jail and a maximum fine of \$1,000 on the first offense to a maximum fine of \$5,000 plus up to three years in jail for third and subsequent offenses. The sale and cultivation of marijuana is a felony under federal law. The time of incarceration and the monetary fine depends on the amount that is being sold or the number of plants grown.

In states where possession of marijuana is completely illegal, the penalty depends on the amount a person possesses. In states where recreational use is legalized, possession amounts must remain within parameters set under state law. People caught with anything above those limits can be charged with either a misdemeanor or a felony. All four states and the District of Columbia in which recreational marijuana is legalized limit use to adults over 21 years of age. Allowable possession amounts generally vary from less than one to two ounces. Jurisdictions also set limits on the number of plants someone can grow, ranging from fewer than four to six plants.

Enforcement of marijuana laws falls to both federal and state governments. “The federal government relies on the states to enforce drug laws at the local levels,” says Bittner. “The federal government wants to use its resources for going after traffickers—people who

Section 2:

BUSINESS CONSEQUENCES OF LEGALIZED MARIJUANA

WHETHER LEGALIZED OR NOT, MARIJUANA USE AFFECTS COMPANIES. In 2014, positive drug tests for marijuana in the general U.S. workforce increased 14.3 percent from the previous year to 2.4 percent incidence rate, according to the Quest Diagnostics Drug Testing Index. Marijuana continues to be the most commonly detected illicit drug. In states where recreational marijuana is legal, usage increased even more: The positivity rate rose 20 percent in Colorado and 23 percent in Washington between 2012 and 2013, compared to a national average of five percent during that time period, according to Quest Diagnostics.

The prospect of employees under the influence of marijuana raises concerns about absenteeism, productivity and workplace safety. Yet employers are wary of legal challenges to drug-free workplace rules in jurisdictions where marijuana is legal. Companies are conflicted on what to do, and Bittner cites a cautionary tale from a 2012 court case that illustrates why their concerns may be well founded.

A forklift operator in a safety-sensitive workplace dropped a large piece of equipment. He neglected to insert the forks all the way into the pallet holding the equipment and, when he backed away, the pallet fell. Fortunately, no one was hurt, but there was property damage. The employee was sent to an occupational health center for a mandatory alcohol and drug test. He tested negative for alcohol, but two days later the company received a fax stating that THC was in the employee's system. Per its drug-free workplace policy, the company fired him. A union agent argued the firing, and an arbitrator subsequently reinstated the employee with a 30-day suspension.

Bittner asserts that legalization of marijuana can have many ramifications on the workplace, including these:

- It will affect your current drug policy.
- It may impact the overall safety of your employees, suppliers and customers.
- It could affect how you hire and your hiring procedures.
- It can affect your standing with the federal government.
- It may affect your insurance.

As momentum for legalized marijuana ramps up in more and more states, the confluence of drug use and corporate responsibility gets murkier. However, Bittner remains steadfast in one area—workplace drug policies. “What you’re aiming for is a safe workplace,” he says. “I think it’s safer to have a policy that says you prohibit the use of illegal drugs, including any metabolites, in an employee’s system. Period.”



Testing for THC

There are four ways to test for marijuana—urine tests, oral fluid tests, blood tests and hair tests. Each one looks for the parent drug (THC) or the drug metabolites (substances that prove the drug was present). All four test methods are used in employee or pre-employment screening and are permitted as court evidence.

Urine Tests – It takes two to eight hours after consumption of marijuana before it can be detected using a urine test. Urine tests can detect the length of time since someone has used marijuana between a few days and several weeks. The test looks for drug metabolites.

Oral Fluid Tests – Also called saliva tests, oral fluid tests detect usage right after the most recent usage and up to three days later. They show the parent drug.

Blood Tests – Like oral tests, blood tests also detect usage immediately and determine whether consumption took place within a few hours or a couple of days. Blood tests expose both the parent drug and metabolites.

Hair Tests – A hair sample is collected from the donor and sent to a lab for testing. Drug use can be detected after five to seven days and up to approximately 90 days. Hair tests show the presence of drug metabolites.

Drug abuse costs employers \$81 billion annually, according to the National Council on Alcoholism and Drug Dependence Inc. (NCADD)



Section 3:

DRUG POLICIES IN THE WORKPLACE

FEDERAL AND STATE LAW DICTATES THE POLICIES THAT EMPLOYERS may have in the workplace, including those regarding drugs. There are conflicting reports on the trends in drug testing policies, says Bittner. “Some sources suggest that drug testing is down because it is hard to quantify the impact on productivity and safety,” he says. “However, other sources prove that drug testing has had a positive effect on productivity and safety in the workplace.” In states where the use of medical marijuana is legal, drug testing is trending upward.

While all employers should consult with legal counsel to make sure they adhere to any pertinent state and local laws, the U.S. Department of Labor sites a few general parameters:

- Under the American with Disabilities Act (ADA) and the Rehabilitation Act of 1973, employers may prohibit the illegal use of drugs and alcohol in the workplace.
- The ADA is not violated by testing for illegal use of drugs.
- Drug testing is not required under the Drug-Free Workplace Act of 1988.
- Most private employers have the right to test for a variety of substances.
- Current law in the private sector generally allows non-union companies to require applicants and/or employees to take drug tests.

Bittner offers six tips for best practices regarding employment policies:

1. Make offers for employment conditional on successfully passing a drug test, but keep in mind you can only make this a condition for employment if all new employees in the same job are required to take the test.
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2. Ensure that your state allows “for cause” testing of an employee if you have reasonable suspicion that an employee is impaired.
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3. Be mindful when implementing and designing a random drug test policy. “While random testing can be effective, make sure the testing is truly random,” says Bittner. “If an employee feels that he or she has been singled out too much, it could lead to a discrimination claim.”
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4. Be aware that if you give too much advance notice to employees about pending drug tests, they may be able to evade detection depending on the test used.
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5. Develop a specific policy involving medical marijuana users. If you are federally funded or have federal contracts, the policy must be in compliance with the Drug-Free Workplace Act of 1988. If not, the policy must still meet the standards of state law.
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6. Adhere to your state’s off-duty conduct laws: Twenty-nine states and the District of Columbia have statutes that protect employees from adverse employment actions based on their off-duty activities.

Sample Drug Policy Language

Employment attorney Paul Bittner of Ice Miller strongly encourages companies to adopt drug policies. The law firm offers four sample policies:

Sample 1:

[Employer Name] is committed to providing a safe, healthy and productive workplace that is free from alcohol and unlawful drugs as classified under local, state or federal laws (including marijuana) while employees are working on the employer's premises (either on or off duty) and while operating employer-provided vehicles. [Incorporate or cross refer to any substance abuse policy.] Employees that work while under the influence of drugs or alcohol pose a safety risk to themselves and others with whom they work.

Sample 2:

[Employer Name] has a zero tolerance drug use policy. Employees will be subject to termination if any illegal drugs or illegal drug metabolites are found in the employee's body. Illegal drugs are drugs that are classified by the state or federal law as unlawful. This includes federally controlled substance schedule drugs.

Sample 3:

[Employer Name] has a zero tolerance drug use policy. Employees will not work while under the impairment of any illegal drug. Illegal drugs are drugs that are classified by the state or federal law as unlawful. If the employee is found to be impaired by [insert applicable drug testing policy] that will result in the employee's termination.

Sample 4:

[Employer Name] has a zero tolerance drug use policy. Employees will not work while under the impairment of any illegal drug. Illegal drugs are drugs that are classified by the state or federal law as unlawful. If the employee is found to be impaired by [insert applicable drug testing policy] that will result in the employee's termination. Any amount of illegal drugs or drug metabolites found in the employee's body during applicable testing will result in termination.

Marijuana is the most commonly used and abused illegal drug by employees, according to the National Council on Alcoholism and Drug Dependence Inc.

Section 4:

RELATED LEGAL CASES

AS LEGALIZATION OF MARIJUANA SPREADS ACROSS THE U.S., court cases concerning employee usage, employer drug policies and termination or other punitive actions on the part of employers are starting to develop. Bittner refers to a handful of cases that could set precedence for how future cases will be handled.

Case

Coats v. Dish Network LLC

The plaintiff, Coats, is a quadriplegic with a state-licensed medical marijuana certificate to treat painful muscle spasms. He worked as a telephone customer service representative for Dish Network LLC. In May 2010, Coats tested positive for THC, an indicator of marijuana use, during a random test. Dish Network confirmed that he was a medical marijuana patient and that he planned to continue consuming marijuana at home after work. He was terminated for violating the company's zero-tolerance drug policy.

The case was decided by the Colorado Supreme Court, which determined you could fire an employee for consuming medical marijuana. On the surface, the ruling seems surprising: Colorado's off-duty conduct laws offer employees the highest level of protection, says Bittner. It offers statutory protection for employees who engage in lawful activities outside of work. Since marijuana is legal in Colorado, it's a lawful activity in the state. So why did the court rule in favor of Dish Network? The court held that "lawful" refers to activities that are lawful under both state and federal law, and marijuana remains illegal under federal law. Therefore, employees who consume medical marijuana are not protected by the off-duty statute.



Case

Casias v. Wal-Mart Stores Inc.

The plaintiff, Casias, was an inventory control manager at a Wal-Mart store in Michigan who received a medical marijuana registry card from the state and used the drug for cancer pain management. In 2009, he injured his knee at work, went to the hospital and was drug tested. (Prior to the test he showed hospital staff his registry card.) When the test came back positive for THC, Casias was fired. He sued Wal-Mart for wrongful termination.

While Michigan has legalized the use of medical marijuana, the Sixth Circuit determined that the Michigan Medical Marijuana Act (MMMA) doesn't regulate private business. MMMA changes state criminal laws and prohibits the licensed medical marijuana patient to be subject to arrest, prosecution or penalty. It also prohibits the denial of any privilege of right, including but not limited to civil penalty or disciplinary action. The court determined that the MMMA provides a potential defense to criminal prosecution or other adverse actions by the state.

While Wal-Mart prevailed in this case, its impact on similar wrongful termination suits is unclear. “Whether you win or lose [in a similar suit] would depend on each state’s interpretation of the medical marijuana law,” says Bittner. “Each state statute is different, thus applying how one state interprets the law would not be particularly helpful.” However, Bittner believes this is a favorable case for employers in the Sixth District, which is the federal appeals court covering Michigan, Ohio, Kentucky and Tennessee.

Case

Vialpando v. Ben’s Automotive Services

There are few cases regarding workers’ compensation and unemployment benefits. Those that have been tried aren’t favorable toward employers, says Bittner. One example is Vialpando v. Ben’s Automotive Services.

The plaintiff, Vialpando, qualified to participate in the State of New Mexico Department of Health Medical Cannabis Program under the Compassion Use Act to relieve pain from a partial permanent disability sustained in a work-related lower back injury in 2000. In 2013, a workers’ compensation judge ordered Vialpando to pay for medical marijuana and required his employer, Ben’s Automotive Services, to reimburse him for the costs. The court held that the Compassion Use Act requires the employer to provide the injured worker “reasonable and necessary” healthcare services from a healthcare provider.

Safety-Sensitive Jobs and Medical Marijuana

There isn’t much guidance on how medical marijuana affects safety sensitive jobs, such as construction workers, physicians, pilots, machinists, truck drivers and other workers who are responsible for their own and other people’s safety. If the safety-sensitive job requires a commercial driver’s license (CDL), then you must adhere to the Omnibus Transportation Employee Testing Act of 1991. The act mandates that all employers drug test employees whose duties necessitate a CDL. Outside of CDL requirements, Arizona provides some guidance. There, employers may refuse to place any worker who consumes medical marijuana in a safety-sensitive position.



Section 5:

ADVICE FOR EMPLOYERS

IN THIS NEW AND OFTEN NEBULOUS WORLD OF LEGALIZED MARIJUANA,

Bittner refers to Coats v. Dish Network as the “go to” case. “If you have a drug-free workplace policy, I would not change it,” he says. “Marijuana remains illegal under federal law. If employees choose to use and test positive, then they will suffer the consequences of your drug policy.”

Bittner offers additional advice for employers depending on whether they are in a state where marijuana is legal or not.

What to Do in a State Where Marijuana is Completely Illegal

- Employers can change their drug policies and address the use of marijuana directly. “Write policies that let your employees know that disciplinary action will take place and could lead to termination,” says Bittner.
- Employers should double check to ensure their company is complying with the Drug-Free Workplace Act of 1988 and any state laws that may affect drug testing.

What to Do in a State Where Marijuana is Legalized

- Employers must review the marijuana legislation carefully to see if they have any direct protections.
- Employers should think about employee off-duty conduct and other applicable statutes regarding employee rights. After that, formulate a policy accordingly to address consumption of marijuana outside of work.
- If the employer is federally funded or has federal contracts, it must still abide by the Drug-Free Workplace Act.
- Employers should stay up-to-date on all relevant cases that are decided on workplace and marijuana issues.



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