

# Drug Testing Employees in the Era of Medical Cannabis

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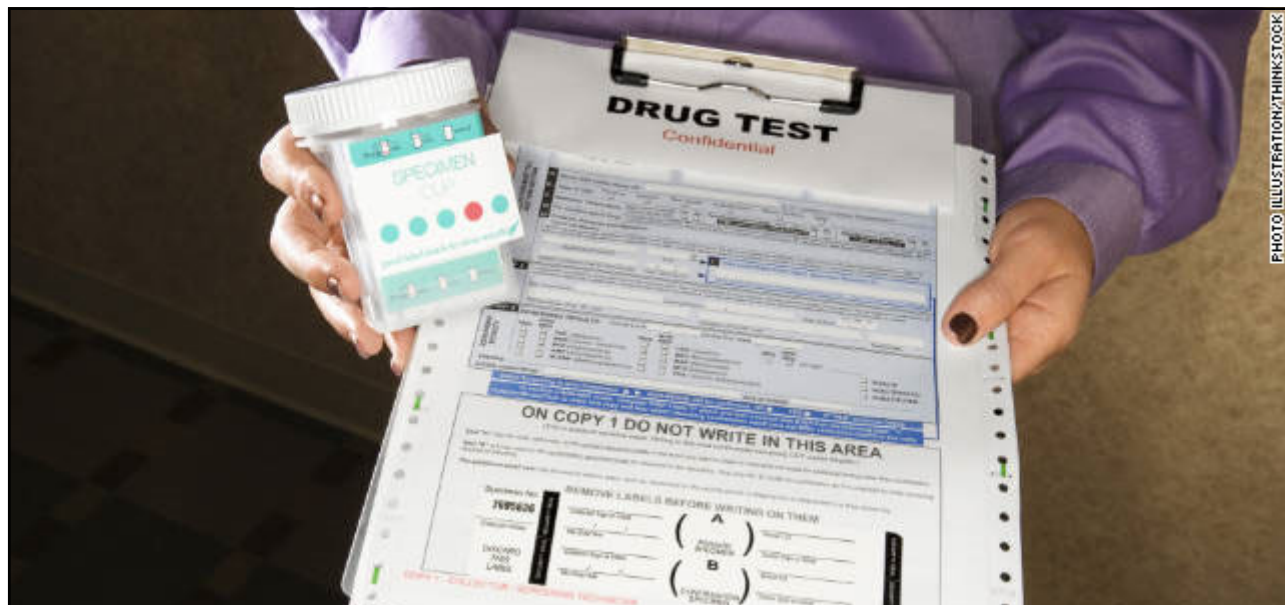


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## Before Creating Drug Policies, Consider Purpose and Relevant Laws

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## Why Should You Establish Drug and Alcohol Policies?

- Drug and alcohol use costs America more than \$400 billion each year
- Drugs are implicated in 40% of all workplace accidents
- Drug testing implicates employees' right to privacy
- Policy is necessary to take effective action – notice is key



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## Before Creating Drug Policies, Consider These Laws:

- Department of Transportation (DOT) and Federal Motor Carrier Safety Administration (FMCSA) requirements
- Drug-Free Workplace Act of 1988
- OSHA Regulations
- EEOC guidance
- ADA
- FCRA
- State-specific laws, court decisions and administrative sources

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## Cannabis and Drug Testing

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## Medical Cannabis Is Legal Now, Right?

- **Cannabis is still illegal under federal law** – Schedule 1 drug
- General Trends in State Cannabis laws
  - Making cannabis use legal – in some form
  - Prohibiting smoking and edibles
  - Adding PTSD and chronic pain as qualifying conditions
  - Providing explicit employee protections and/or requirement of accommodation of use
- State medical cannabis laws are constantly changing and are inconsistent from state to state

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## Medical Cannabis Is Legal Now, Right?

- Protections Vary Too:
  - No adverse employment actions based on participation in medical cannabis program (patients/caregivers)
  - Positive drug test cannot automatically be grounds for refusal to hire or other adverse actions
  - Explicit disability accommodation language
  - Prove impairment before taking adverse employment action

## Medical Cannabis Is Legal Now, Right?

- Some Comfort for Employers
  - No state requires employers to accommodate on-duty use of cannabis
  - No state prohibits action if employee is working under the influence of cannabis
  - No state prohibits testing of or adverse action against employees who must be tested under federal or state law (most explicitly carve-out protections for employers in these circumstances)



## State Laws Legalizing Cannabis

- Recreational use legalized in eight states plus D.C.
- 30 states and D.C. have enacted comprehensive medical cannabis programs
- 17 additional states allow for the use of low-tetrahydrocannabinol (“THC”) and CBD only products
- About a dozen state statutes provide **explicit** employment protections
- Most state statutes only **decriminalize** cannabis use

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## State Laws Legalizing Cannabis

- CBD and THC Products
  - Cannabidiol (CBD)
    - Non-euphoric, very few psychoactive symptoms
    - Documented positive effects on epilepsy and other seizure disorders, inflammation, PTSD and anxiety, Crohn’s Disease, Multiple Sclerosis
  - Tetrahydrocannabinol (THC)
    - Results in euphoria and other common symptoms associated with cannabis
  - CBD and THC come in multiple products and forms, including varying balances of CBD and THC

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## State Laws Legalizing Cannabis – No Employment-Related Protections

- Alaska, California, Colorado, Hawaii, Montana, New Hampshire, New Mexico, Ohio, Oregon, Vermont, Washington
- Statute clearly provides no protections
- Statute explicitly states employers can prohibit any kind of cannabis use
- Statute is ambiguous or silent, and state courts or administrative agencies have found there are no employee protections

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## State Laws Legalizing Cannabis – No Employment-Related Protections

- Montana – *Johnson v. Columbia Falls Aluminum Co.* (2009)
  - State medical cannabis law only decriminalized use
  - State law cannot be construed to require employers “to accommodate the medical use of marijuana in any workplace.”
- Oregon – *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.* (2010)
  - Oregon’s medical cannabis statute was preempted by Controlled Substances Act
  - Protections of state disability discrimination law do not apply to employees “engaging in the illegal use of drugs if the employer takes action based on that conduct.”

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## State Laws Legalizing Cannabis – No Employment-Related Protections

- Washington – *Roe v. TeleTech Customer Care Mgmt.* (2011)
  - Medical cannabis law did not require employer to accommodate employee's off-site use
  - “Nothing in [cannabis law] requires any accommodation of any medical marijuana use in any place of employment.”



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## State Laws Legalizing Cannabis – No Employment-Related Protections

- Colorado – *Brandon Coats v. Dish Network LLC* (2015)
  - “Lawful” off-duty activity statute did not prevent termination of employee for positive cannabis test – must be lawful under both federal and state law
- California – *Shepard v. Kohl's Dep't Stores* (2016)
  - Employee may be terminated for cannabis use, regardless of state law permitting medical cannabis – see *Ross v. Ragingwire Technologies*
  - No need to consider whether use is reasonable accommodation
  - **However**, where company policy stated nondiscrimination for medical cannabis use, termination could be breach of implied contract; statement of reason for termination could also be defamation

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## State Laws Legalizing Cannabis – Unclear Whether Employment-Related Protections Exist

- Unclear in some states whether protections for medical cannabis users exist
  - E.g., Florida, Louisiana, New Jersey, North Dakota
  - Statutes provide for medical use of cannabis, and language is ambiguous regarding protections
- States are constantly shifting position on protections
  - But note: states are shifting in only one direction – more protections

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## State Laws Legalizing Cannabis – Employment-Related Protections Exist

- Also clear that protections already exist in some states
  - Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nevada, New York, Pennsylvania, Rhode Island, West Virginia
  - Statute includes explicit protections for individuals (only for medical cannabis, not recreational)
  - OR court decisions have found protections exist



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## Court Decisions Establishing Employment-Related Protections

- Michigan – *EEOC v. Pines of Clarkston, Inc.* (April 29, 2015)
  - Positive cannabis test not a shield for employer's decision to terminate employee who used it to treat epilepsy
  - Court found employee had been terminated as a result of her disability – test did not preclude her claim for discrimination
  - Unclear if case will result in additional protections for medical cannabis users

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## Court Decisions Establishing Employment-Related Protections

- Rhode Island – *Callahan v. Darlington Fabrics Corp.* (May 23, 2017)
  - Employer could not refuse to hire a medical cannabis cardholder, even if the employee would fail drug test
  - Statute precludes employers from refusing to employ a person “solely because of his status as a [medical cannabis] cardholder”
  - Employee also made out discrimination claim – “those people with disabilities best treated” by cannabis were at a disadvantage under current policy

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## Court Decisions Establishing Employment-Related Protections

- Connecticut – *Noffsinger v. SSC Niantic Operating Co. LLC* (August 8, 2017)
  - Federal law does not preempt state law protecting employees who are “qualified patients for medical marijuana use”
  - Controlled Substances Act does not prohibit employers from hiring cannabis users (just allowing use on the job)
  - ADA does not require accommodation of cannabis on the job, but says nothing of off-duty use
  - Court implied private cause of action based on medical cannabis law’s antidiscrimination provision

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## Court Decisions Establishing Employment-Related Protections

- Massachusetts – *Barbuto v. Advantage Sales and Marketing, LLC* (July 17, 2017)
  - Existence of drug policy prohibiting use does not preclude employer’s duty to engage in the interactive process
  - Cannot rely on federal illegality of cannabis as basis for termination



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## Court Decisions Establishing Employment-Related Protections

- Massachusetts – *Barbuto v. Advantage Sales and Marketing, LLC* (July 17, 2017)
  - Court relied on statute: (1) patients may not be denied “any right or privilege” on the basis of medical cannabis use; and (2) act does not require “accommodation of any on-site medical use of marijuana in any place of employment.”
  - Court held this implicitly recognizes that off-site medical use of cannabis might be permissible accommodation.

## Court Decisions Establishing Employment-Related Protections

- *Barbuto v. Advantage Sales and Marketing, LLC* is highly significant
- Many states’ laws include statement that “employer has no obligation to accommodate” cannabis “on duty” and/or “in the workplace”
- This language has been construed by courts (Montana, Washington) to mean “no duty to accommodate” at all
- However, *Barbuto* court held the **same language** meant that accommodation of off-duty use may be required

## Legalization of Cannabis Products in Kansas

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# KANSAS



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## Legalization of Cannabis Products in Kansas?

- Still one of the most restrictive states in the nation
- Recreational use – ILLEGAL
- Medical use – ILLEGAL
- May 2018 – state legalized CBD, so long as it contains 0% THC
- Hemp legalized for research purposes

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## Legalization of Cannabis Products in Missouri?

- Partially decriminalized – possession of less than 10 grams not criminal (up to 35 grams not criminal in Kansas City)
- CBD oil – legal to treat persistent seizures
- November 2018 – medical cannabis legalized
  - Patients may grow up to six plants and purchase limited amounts per month
  - May be used to treat any “chronic, debilitating or other medical condition” or any terminal illness

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## Creating a Policy Encompassing Medical Cannabis Testing

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## Before Drafting a Medical Cannabis Policy, Consider:

- Risks of Impaired Employees Versus Risks of Drug Testing?
  - More than 20% of American adults use cannabis – strict prohibition may result in loss of talent
  - Legal off-duty use may result in a positive test but is employee actually impaired?
- Requirements of state laws for all states in which you have employees?
- Accommodation feasible for some or all positions?
- Do you want to accommodate medical cannabis?

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## Drafting a Medical Cannabis Policy

- Include reasons for policy
- Specify covered substances
- Define all important terms
- Clear policy statement expressing prohibitions
- Explicit statement of how cannabis will be handled
  - No Tolerance Policy
  - Safety Sensitive Policy
  - Relaxed Policy

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## Drafting a Medical Cannabis Policy

- Specify testing procedures
  - Who is subject to testing and under what circumstances
    - Do not ask questions/require test/take adverse actions simply because you learned of medical cannabis use – rely on objective evidence of danger or inability to perform duties
  - How testing will be administered
    - Urine, blood, hair, oral fluid?
  - Provide reasonable accommodation if employee cannot comply with standard testing procedures – i.e., end-stage kidney diseases, etc.

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## Drafting a Medical Cannabis Policy

- Consequences of positive results
- Include potential for accommodation of cannabis use (if required under state law or desired)
  - Either explicit or avoid absolute prohibitions
  - Notify employees they should provide notice of medical cannabis/controlled substance use **prior** to testing
  - If employee is a verified user, employer should engage in interactive process for off-duty use

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## Applying Your Medical Cannabis Policy

- Maintain confidentiality
- Enforce consistently
- Train supervisors to elevate requests for accommodation (of medical cannabis use or otherwise)
  - May be prudent to seek legal counsel upon request for medical cannabis as an accommodation, even if not explicitly permitted in state

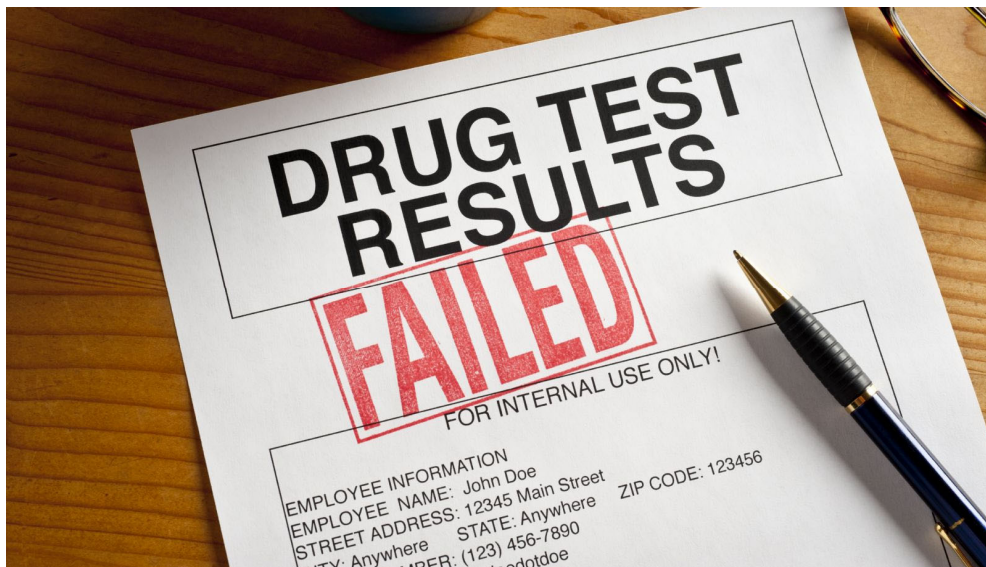
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## DOT Testing and Cannabis

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## DOT Testing and Cannabis

- DOT designates employees who are subject to DOT drug and alcohol testing to ensure safety of workers and traveling public
- Relevant employees subject to testing in the following situations: pre-employment, reasonable suspicion, random, return-to-duty, follow-up and post-accident
- DOT testing screens for cannabis or THC, cocaine, amphetamines, opiates and PCP (the Big Five)

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## DOT Testing and Cannabis

- DOT on Cannabis – A Hard “NO”
  - 2015 Statement: DOT “does not authorize the use of Schedule 1 drugs, including marijuana, for any reason.”
  - This includes both explanation of recreational use off-duty, and employee’s proffer of valid medical cannabis prescription or card.
  - Safety-sensitive employees are not permitted to have cannabis in their systems at any time, even if sober/unimpaired.

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