

As Marijuana Shops Thrive, California Employers Revisit Drug Policies

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Did these people sober up in time to report to work the next day? And if some didn't, what can a California business do about suspected drug use? Below are some answers to California employers' frequently asked questions about the recreational marijuana law and its effects in the workplace.

Generally, what does California's recreational marijuana law allow?

The [Control, Regulate and Tax Adult Use of Marijuana Act \(AUMA\)](#), California's recreational marijuana law, legalizes recreational marijuana for individuals over the age of 21. It allows adults to possess, transport, and purchase up to one ounce of marijuana and grow up to six plants for recreational use. The law prohibits smoking and ingesting marijuana products in public. Driving while impaired by marijuana and driving with an open container in the passenger compartment remain illegal.

The law regulates the commercial cultivation, distribution, and sale of marijuana. The California State Department of Consumer Affairs created a new department, the [Bureau of Cannabis Control](#), to regulate the industry. The department licenses and regulates commercial enterprises. The law also creates a system for taxation, which is expected to result in substantial revenue to the state.

As provided by the law, cities and counties can ban marijuana businesses or subject them to zoning and permit requirements. For example, while the City of San Diego has decided to issue 40 recreational marijuana shop licenses, several surrounding localities in San Diego County have decided to prohibit the retail sale of recreational marijuana.

Does the Act require employers to condone marijuana use?

The California AUMA leaves employers' workplace rights undisturbed. The law states that it "[a]llow[s] public and private employers to enact and enforce workplace policies pertaining to marijuana." The law also states that it does not amend, repeal, affect, restrict, or preempt the rights and obligations of public and private employers to maintain drug- and alcohol-free workplaces.

In other words, the law does not demand that employers permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace. It does not affect employers' ability to have policies prohibiting the use of marijuana by employees and prospective employees. And it does not limit employers' ability to comply with state or federal law.

Can California employers enforce "zero tolerance" drug policies?

An employer's primary concern is maintaining a safe and productive work environment. The use of drugs and alcohol can interfere with these legitimate concerns in obvious ways. So far, in California, no laws have prohibited an employer from enforcing workplace rules prohibiting employees from using, possessing, or being under the influence of alcohol and/or controlled substances, including marijuana.

The Supreme Court of California has ruled that despite legalization by the state of California, employers may rely on federal law, which has not legalized marijuana. When medical marijuana became legalized in California, the court dealt with the issue of whether employers could "discriminate" against employees who tested positive for marijuana. In *Ross v. RagingWire*, an employee was discharged after he tested positive for marijuana. The employee had a doctor's note indicating he was allowed to use marijuana for back pain. The employee sued, alleging that the company discriminated against him on account of his disability.

The court held the employer was free to discharge the employee based on his marijuana use despite the state's legalization of medical marijuana. The court reasoned that although medical marijuana use was legal in California, it was still illegal under federal law and an employer need not condone a violation of federal law.

At the federal level, marijuana is regulated by the Controlled Substances Act. That law makes any use of marijuana illegal. Federal law characterizes marijuana as it does other controlled substances such as cocaine and heroin. The law places marijuana on "Schedule I," meaning that the substance is considered highly addictive and does not have a medical value.

Thus, the court ruled that the employer did not violate the California Fair Employment and Housing Act by discharging the employee.

What types of workplace drug policies might an employer enforce?

A “zero tolerance” policy would prohibit any detectible level of a substance in a drug test, regardless of whether the employee is under the influence at work. Other substance use policies may prohibit only the using, possessing, or being under the influence of substances during working hours.

In addition to prohibiting the use, possession, or being under the influence of illegal drugs, businesses may also implement drug testing policies. Employers have options when promulgating such policies. In a few industries or occupations, drug testing is legally mandated, but for most employers, it is an option. Employers have the right to require pre-employment testing and test on employees where there is “reasonable suspicion” of use in most circumstances. In some cases, employers may be able to administer random testing. Drug testing programs must be carefully designed so as to avoid invasion of privacy claims and discriminatory practices.

What risks may arise from not enforcing a drug policy?

That will depend on the circumstances. As mentioned above, a company may decide not to impose a zero tolerance policy, but instead focus on prohibiting using, possessing, or being under the influence of substances at work. Just like any other drug or alcohol, being under the influence of marijuana at work may raise safety and productivity problems. Employers may want to keep in mind that workplace accidents can lead to workers’ compensation claims, Occupational Safety and Health Administration citations, lawsuits by injured third parties, and other legal problems. Employers may also want to consider whether or not the workers in their industries must be tested as a matter of law or due to contractual obligations imposed by business partners. Problems arising from the use of marijuana in the workplace can go beyond legal compliance; shoddy workmanship, absenteeism, property damage, bad publicity, and other problems resulting from the use of marijuana can arise.

What can an employer do if an employee is high at work?

A company may want to prepare for such a situation ahead of time by promulgating a written policy describing what is prohibited, the possibility of drug testing, and the consequences for violating the drug policy. Furthermore, employers may consider educating employees regarding expected behavior in light of the new recreational use law.

The safety of the employee, coworkers, and the public in the work environment are of paramount importance. Therefore, if an employee is high at work, it will probably be appropriate to relieve the employee of duty. At the time of the incident, management can thoroughly document the information supporting the

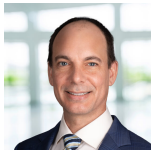
suspicion of drug abuse. In appropriate circumstances, the employee may be required to visit a medical clinic for drug testing.

If the employee is found to have violated the company's drug policy, discipline and even discharge may be appropriate. Rehabilitation or giving the employee a second chance could be considered in certain circumstances.

Key Takeaways

Given those long lines at the marijuana shops, employers can anticipate an increase in drug use amongst the workforce. Now is a good time to review drug policies. Employers may also want to revisit their drug testing policies. Moreover, renewed efforts to ensure workplace safety may become paramount, particularly in industrial settings. Worker efficiency, health, and well-being will be of no less concern.

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