

MARIJUANA IN THE WORKPLACE

– NATIONAL CONCRETE BURIAL VAULT ASSOCIATION –

Today (4/20) is National Marijuana Day. Here's What You Need to Know.



The Blunt Truth About Marijuana in the Workplace



Written by [Poul Lemasters, NCBVA Legal Counsel](#) | April 2024

If you are a little hazy, and think we addressed this topic before – your memory is fine. We have covered drugs in the workplace, yet there have been changes and more questions. And, unfortunately, things are still hazy. But sit back, relax, as we hash out some specific questions about marijuana in the workplace. (And yes, I think that is the last drug pun.)

[Register for the Q&A call on Tuesday, May 7, at 2:00pm ET](#)

Where is Marijuana Legal?

This is probably the best place to start the conversation. We are seeing more and more states legalize marijuana. Typically, states that legalize the use of marijuana classify it in two ways – recreational and medicinal (**click on the link below for the state-by-state chart**). For an employer, knowing your state status of marijuana legalization is a good first step. While it would be nice if that solved and answered all the questions, it doesn't. Why? Partially because the federal law still classifies cannabis as a Schedule 1 substance – making it illegal. The end result is that every employer will need to develop a program based on their state laws due to the conflict.

Marijuana Legalization Chart by State

Can I Have a Zero-Tolerance Drug Policy?

So, if legalization is the first step – then the second step would be answering the zero-tolerance question. Many businesses have built a policy that there is zero tolerance for drugs in the workplace. **But, if marijuana use is legal in my state – can I still have a zero-tolerance policy?** The short answer is yes, but it is important to understand what a zero-tolerance policy means.



As an employer, you have the right to ban certain drugs from the workplace. For example, just as you ban alcohol from the workplace, which is a legal drug, you can ban other drugs as well. I specifically use the comparison of alcohol because many of the current policies, including testing for marijuana, are now being compared to the process of testing for alcohol. The overall goal and policy of zero-tolerance in the workplace means that a business is prohibiting the actual drugs from the workplace as well as any impairment due to the use of drugs. Yes, this includes the exception for medical use of marijuana. Of course, there is a 'however' even when it comes to medical use.

What About the Medical Marijuana Card?

Currently, 38 states allow marijuana for medicinal use. This creates an added wrinkle when creating and enforcing a drug policy. Some state-level courts have ruled that medical marijuana patients have a disability, which makes them members of a protected class. This means that an employer can't discriminate against employees/patients who are using marijuana for medical purposes.

However, federal laws classify marijuana drugs as illegal, and as a result, federal courts disagree with such rulings. Technically, because marijuana is illegal on the federal level, the ADA does protect the use of marijuana as well. But some states are adding laws that would protect the use of medical marijuana. This contradiction adds confusion as well as a layer of cautiousness when firing or disciplining.

Of course, the big question is simply – **can I fire someone or refuse to hire someone when they have a medical marijuana card?** In regard to hiring, please refer to the chart above and see the Anti-Discrimination column. This shows states that prevent discriminating against a potential employee for drug use. Also, if you look at the chart below, under "Can I Test for Drugs?", you will see that there are many provisions in place when it comes to pre-employment, and some states specifically state that an employer may not refuse employment for being a medical marijuana card holder. In such states, an employer should clearly disclose its policy to avoid issues of marijuana in the workplace.

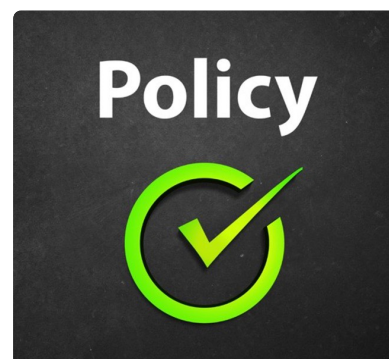
Similarly, for termination, an employer has the right to fire an employee for various acts – including use of drugs in the workplace. Even if someone has a medical use card, that does not allow them the right to be impaired while at work. Again, where this can become confusing is where an employer must accommodate an employee for using a medical diagnosed prescription. While federal law does not recognize such policy, there are states that say otherwise.

What Are My Policy Options?

At the time of writing this article, there seems to be an agreement of three various workplace drug policies. The policies include a **zero-tolerance policy, a medical marijuana use policy, and a recreational use policy.** These policies also range from the strictest to the most relaxed.

Zero-Tolerance Policy

In regard to the zero-tolerance policy, it mandates that no employee is allowed to use marijuana (medical or recreational). An employer with zero-tolerance policies would have some form of testing to ensure that employees are in compliance with the policy. While a drug-free workplace policy is most common in businesses that



work with the government sector, a business that involves the operation of heavy machinery or vehicles may implement such policies as well.

Medical Marijuana Use Policy

The next policy level would include medical marijuana use. A medical marijuana use policy may include language that treats marijuana like other controlled substances, such as opioids when used for pain. Your policy could allow for legal, physician-certified medical marijuana usage by employees. This means that employees would need to disclose whether they were currently using, or planned to use, medical marijuana as part of a treatment plan. Under such a policy, you could also determine whether an employee would need a note from a physician. But – there is always a but! – while you can potentially require employees to report their medical marijuana use, there are some states, under ADA rules, that limit the amount of information an employee can disclose to employers. Again, this would be a state-by-state issue that you would need to investigate.

Recreational Use Policy

The broadest workplace drug policy is a recreational use policy. This policy would be similar to an alcohol policy stating that employees can use it on their own time as long as it does not affect job performance. The thought behind this policy is that you would never terminate an employee for having a drink in the evening or on a weekend. However, it would be a different story if your employee showed up for work intoxicated. Basically, off-duty conduct is not policed unless it begins to directly affect the business or safety in some way.

Can You Test for Drugs?



The last part of any drug policy or workplace program is all about the enforcement, which means testing. There are really two times for testing, one is pre-employment, and one is during employment. Both present their own potential issues, and as an employer you need to determine the intent of your program as well as know your state laws.

For pre-employment drug testing, there has been a movement to reduce – and even omit – the testing process. There is one exception, and that is if the job requires a drug-free test, such as a licensed position or a government contract. If there is no requirement, then pre-employment drug testing will really be based on your state and even local law.

Many states have added, or are in the process of adding, laws that prevent pre-employment drug testing (**click on the link below for the state-by-state chart**). As you can see, there are many states that limit drug testing to employment job offer and/or disclosure of the drug test. Some states even require that if a drug test for employment is required, then it must be listed in the job posting before the interview even takes place. Then, some states and places, including New York and New York City, ban any pre-employment testing for marijuana only, unless it is required – such as a commercial motor vehicle driver.

Pre-Employment Drug Testing Chart by State

More About Drug Testing

When it comes to testing employees, drug testing gets easier – but still isn't easy. There are many possible employment testing times, but the three testing times most common are: random; for-cause; and post-accident.



Random Drug Testing

As far as random drug testing, this has become the most difficult. The reason – if marijuana use is legal in your state, then how do you know when the drugs were used? Most current tests do NOT measure current impairment, and therefore testing alone may not provide any information you can use to determine if they are violating a policy. Many tests measure marijuana in the system for up to weeks later, which will not demonstrate if they are using drugs during work. Again, depending on your state, impairment and use of drugs on the job is a violation, but not if the use was done on personal time.

To go even further, states such as California are eliminating certain tests that only detect non-psychoactive THC metabolites (metabolites are essentially chemical remnants of the marijuana plant – the presence of THC metabolites offers a reliable indicator that a person has consumed the drug, but it also detects these remnants up to weeks later). There are now better testing methods that specifically test only THC, the psychoactive compound in cannabis. These tests are through breath, saliva, and blood and measure use between three hours (breath) and up to 72 hours (saliva and blood).

For-Cause Drug Testing

The next testing timeframe for an employer is for-cause. This specific timeframe provides a business a way to allow drug testing for safety concerns, but they still require some protocols to be followed. 'For-cause' testing allows an employer to test employees who show clear signs of being unfit for duty, while 'reasonable suspicion testing' allows an employer to test an employee who has shown a pattern of unsafe work behavior. For each of these scenarios, it is important that the employer has someone trained to be able to show that they recognize the signs of being unfit for duty. Also, an employer should document unsafe behavior so the employer can clearly show the reasonable suspicion.

Post-Accident Drug Testing

The last testing time would be post-accident. Of all the acceptable testing times, this continues to be the easiest to implement. However, there are some provisions to consider for this testing as well. First, any post-accident testing should be done in a secure area, possibly an off-site testing area through a third-party such as a hospital. Any testing should be done as soon as possible, but no later than 12 hours after an accident. Consider the type of testing you use as well (as set forth above) – and focus on a test that will provide you detailed results and not simply a test that shows cannabis in their system. Lastly, test all employees whose conduct could have contributed to the accident. Focusing solely on the injured employee or the person accused of the accident can

create an issue, as there are cases that have held only testing the person injured or causing the injury as retaliatory.

Final Remarks

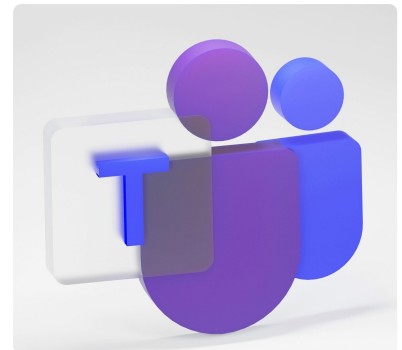
Overall, marijuana in the workplace is an evolving area. Currently, there is no firm, written policy that works for every business. Depending on your business, your state, and even your insurance, your program will be different. For any policy you implement, be prepared to modify and change as the laws continue to evolve. One of the best current practices is to compare your policy and program to your alcohol program and policy. Or as I say, "Start drinking if you're talking about marijuana at work!" The idea is that most states are mirroring alcohol policies because they are both legal drugs. Lastly, just chill. Take a deep breath and relax. It'll all be fine.

Register for the Q&A Call

Tuesday, May 7 at 2:00pm ET

Microsoft Teams Conference Call and Q&A Session with NCBVA Legal Counsel

Want to ask a question related to **Marijuana in the Workplace**? Join Poul Lemasters, NCBVA Legal Counsel, for a 30-minute NO-CHARGE Q&A session **Tuesday, May 7 at 2:00pm ET**. Feel free to [submit a confidential question](#) in advance too. Mark your calendar & [register](#). There is no charge to attend, but registration is required.



Missed the last call?

If you were unable to attend the legal Q&A call on *The Current State of Protecting Information*, visit the [members only page](#) to listen to the recording. [Click here for all legal articles.](#)

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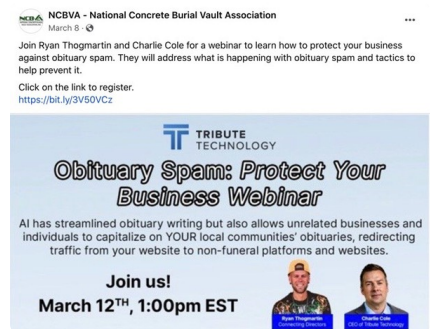
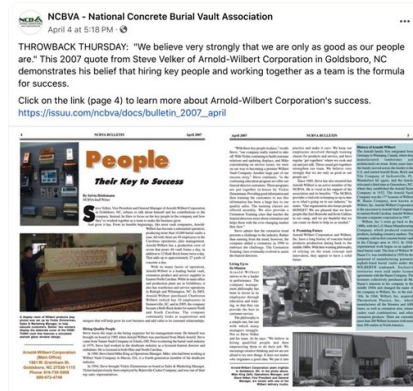
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Tuesday, May 7 at 2:00pm ET



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