

# Spotlight on: marijuana and employment

## Commercial

October 3, 2018

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## Overview

More states are passing legislation permitting medical and/or recreational marijuana use, which raises the inevitable employment-related questions. In this article, we'll discuss:

- Whether employers need to accommodate off-duty and on-duty marijuana use;
- Whether workers compensation can be denied for an injured worker testing positive for

marijuana use; and

- Whether workers compensation can reimburse injured workers for medical marijuana.

## The legal status of marijuana

Marijuana is currently a Schedule I drug under the federal [Controlled Substances Act](#) (CSA). The CSA defines Schedule I drugs as substances that have “no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse.” Other [substances](#) under Schedule I include heroin, LSD, and peyote.

But despite this scheduling, since the 1990s states have begun passing legislation permitting medical marijuana use under certain circumstances. As of today, 31 states and the District of Columbia [currently permit](#) “comprehensive” medical marijuana programs, which typically allow qualifying patients to access marijuana and marijuana-related products.

Since 2012, states have also begun passing legislation permitting anyone over the age of 21 to possess and use marijuana, subject to certain limitations. Nine states and the District of Columbia [currently permit](#) recreational marijuana. Most of those states also have or are developing regulations for a commercial market to support recreational marijuana sales.

## Determining intoxication: marijuana and “THC Persistence”

Marijuana is a hemp plant of the species *Cannabis sativa* L., part of the genus *Cannabis* L. Unlike industrial hemp, however, marijuana contains appreciable amounts of delta-9-tetrahydrocannabinol (THC), a psychoactive cannabinoid— it’s the active chemical that induces a high in a user. The plant also contains several other, non-psychoactive cannabinoids such as “[cannabidiol](#)” (CBD).

A key issue that arises during discussions about marijuana and employment is “THC persistence.” Unlike alcohol, THC levels in a user’s body may not be an accurate indication of impairment.

Compared with marijuana, determining alcohol intoxication is relatively straightforward. The human body processes alcohol at a rate that allows blood alcohol concentration (BAC) to closely correlate with intoxication, making it an effective and accurate benchmark for [measuring impairment](#).

The human body processes THC differently than alcohol. As the AAA [noted](#) in a major 2016 study, THC can remain in a user’s blood or urine for weeks after they consume marijuana, depending on various factors. It is not currently possible to accurately determine when a user consumed marijuana based on the THC levels in their body.

Furthermore, the length and intensity of intoxication depends not only on the strength of the marijuana product, but also on how the drug is consumed. Inhaling marijuana typically causes

onset of intoxication within five minutes, with symptoms of intoxication lasting a couple of hours. On the other hand, ingesting marijuana (e.g. “special brownies”) can delay onset of intoxication between one to four hours, and **intoxication** can last much longer than that.

These and other reasons led the AAA to conclude that “simply detecting any THC does not therefore indicate impairment.”

A U.S. National Highway Traffic Safety Administration (NHTSA) **report** came to similar conclusions, noting that most studies have found that levels of THC do not closely correlate to the degree of impairment – and that often peak impairment occurs when THC levels have already begun to decline.

The THC persistence feature of marijuana consumption has implications for employment issues and workers compensation, particularly if drug testing within the scope of employment fails to determine employee impairment.

## Recreational marijuana and the workplace

No state affirmatively protects off-duty or on-duty recreational marijuana use. States will often explicitly state that recreational marijuana laws do not affect an employer’s drug-free workplace policy. Nor do these laws require that an employer accommodate off-duty marijuana use by its employees.

## Medical marijuana and the workplace

When marijuana was illegal under both state and federal law, employers would typically prohibit employees or employment candidates from using marijuana off-duty as a condition of employment.

But as states have begun to permit medical marijuana, things have gotten a bit hazier.

No state requires accommodating on-duty marijuana use. As with recreational marijuana, no state that permits medical marijuana requires employers to accommodate on-duty marijuana use, possession, or impairment. States will often explicitly state that medical marijuana laws do not affect an employer’s drug-free workplace policy.

Some states have explicit protections for medical marijuana users for off-duty use. Regarding off-duty medical marijuana use, some states affirmatively protect a patient from an adverse employment action due to their off-duty use of marijuana. Usually the only exception to this is if the employer would lose federal benefits for permitting off-duty marijuana use.

But most states do not – and the courts have gotten involved. Most states with medical marijuana programs do not explicitly protect medical marijuana users from adverse employment actions. As such, courts have typically held that if a state does not explicitly protect medical marijuana use, then there is no protection from adverse employment action. This may change in

the future.

Disability accommodation is a developing trend. A [recent case](#) out of the Supreme Court of Massachusetts involved the question of whether off-duty medical marijuana use is subject to disability accommodation requirements. On that question, the court ruled, in part, that yes, the plaintiff was a handicapped person and the state's medical marijuana law intended to accommodate medical marijuana use outside the workplace. There may be more cases arguing for disability accommodation under medical marijuana programs in the future.

## Insurance impacts: employment practices liability insurance (EPLI)

EPLI policies can vary widely from insurer to insurer, but often cover businesses against claims by employees alleging discrimination or wrongful termination. As marijuana and employment issues evolve, EPLI could begin to be impacted, especially if states and/or courts begin to take a more affirmative stance that disability laws and other accommodation laws cover medical or recreational marijuana use.

## Insurance impacts: Workers compensation

Workers compensation insurance generally offers the exclusive remedy for employee injuries sustained during the scope of their employment. There are at least two workers compensation issues to consider related to marijuana:

Does workers compensation cover a workplace accident in which the injured employee tested positive for marijuana? THC persistence complicates this question, and state courts have differed on this issue, depending on the individual details of each case. For example, in 2015 the Ohio 5th District Court of Appeals [found](#) that an injured worker was eligible for workers compensation benefits despite failing a drug test after the accident. The court ruled, in part, that the worker was eligible unless his marijuana use was the proximate cause of injury.

Does workers compensation cover medical marijuana expenses incurred by an injured employee? Similarly, [states differ on this question](#) – some say that medical marijuana reimbursement is permitted, some that it is prohibited, and some are silent on the matter. Courts have also come to different conclusions – some have found that workers compensation can reimburse medical marijuana expenses, others that it can't.

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