

# Insurance and Risk Management Implications of Marijuana Legalization Following 2016 Elections





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## INTRODUCTION

Across the US, states continue to enact laws legalizing marijuana for medical and recreational use.

In elections in November 2016, voters in eight states approved measures legalizing marijuana use for medical or recreational use. These are just the latest states where local laws now conflict with federal drug laws.

Employers in these and other states must balance the new laws not only against federal requirements, but against employees' rights and the imperative to maintain safe and drug-free workplaces.

Marijuana has long been the most commonly detected illicit drug in workplace drug testing, and its detection continues to increase, according to clinical laboratory services company Quest Diagnostics. Case law, legislation, and court rulings generally support employers' right to keep marijuana out of the workplace, with some limits. Risk professionals should stay abreast of developments, review existing workplace policies, and carefully handle any workers' compensation or other insurance claims in which marijuana use may be a factor.

## LEGAL STATUS OF MARIJUANA

Following the November 2016 elections, 28 states and the District of Columbia now allow comprehensive medical use of marijuana or its active ingredient, tetrahydrocannabinol (THC). Recreational use is also now legal in eight of those states: Alaska, California, Colorado, Maine (pending a potential recount of the 2016 election results), Massachusetts, Oregon, Nevada, and Washington. Limited medical use — for example, in clinical trials or to treat specific conditions — is legal in 16 other states.

No states permit marijuana use in the workplace, while a number of federal laws and regulations explicitly bar its use in and out of workplace settings. For example:

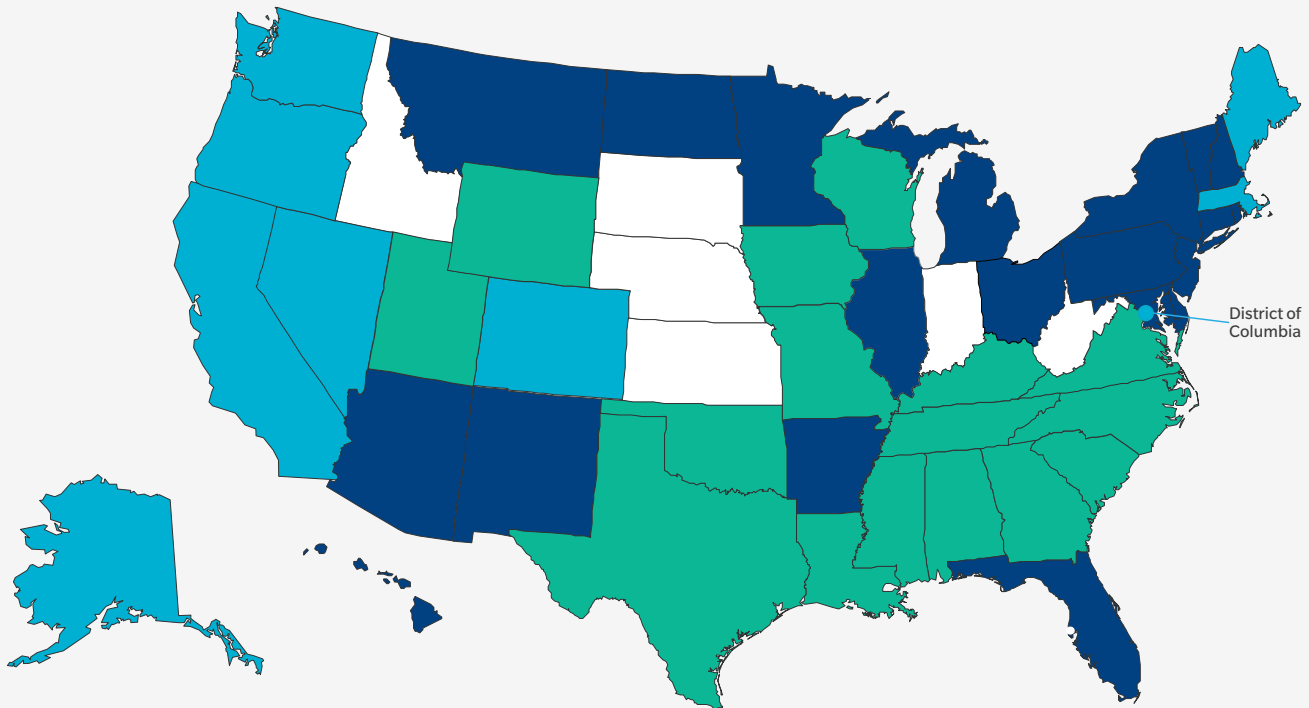
- ▶ Under the Controlled Substances Act of 1970 (CSA), it is illegal to cultivate, possess, use, or distribute marijuana.
- ▶ The Drug-Free Workplace Act of 1988 requires some federal contractors — those with contracts worth \$100,000 or more — and all federal grantees to maintain drug-free workplaces.

In addition, the Occupational Safety and Health Administration’s General Duty Clause requires that employers maintain workplaces that are “free from recognized hazards that are causing or are likely to cause death or serious physical harm” to employees. Impairment by drugs or alcohol may be considered such a hazard.

Some industries face added scrutiny — notably, transportation. The Omnibus Transportation Employee Testing Act of 1991 requires drug and alcohol testing

**FIGURE 1: State Marijuana Laws (as of November 2016)**  
 Source: National Conference of State Legislatures, news reports

■ Legal Medical and Recreational Use\*   ■ Comprehensive Legal Medical Use   ■ Limited Legal Medical Use



\*Pending a potential recount of 2016 election results in Maine.

of drivers, pilots, and others in “safety-sensitive” jobs. The Department of Transportation’s (DOT) Office of Drug & Alcohol Policy & Compliance has also stated that the use of marijuana is “unacceptable for any safety-sensitive employee” subject to DOT drug testing.

The split between federal and state laws has created some confusion. In 2005, the US Supreme Court held in *Gonzales v. Raich* that the Commerce Clause of the US Constitution allows the federal government to enforce the CSA even in states where medical marijuana use is legal. But a 2009 Department of Justice (DOJ) memo stated that federal resources should not focus “on individuals whose actions are in clear and unambiguous compliance with existing state laws providing

for the medical use of marijuana.” In 2013, the DOJ said it would continue to enforce federal law, but would not challenge laws in Colorado and Washington, the first two states to legalize recreational use of marijuana.

In 2014, Congress passed a measure prohibiting spending by the DOJ and Drug Enforcement Agency to prevent states from “implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” The DOJ took the position that the bill did not prevent it from prosecuting individuals and businesses in states with medical marijuana laws, but several courts — most recently, the US Court of Appeals for the 9th Circuit, in an August 2016 ruling — have rejected this interpretation.

Impairment by drugs or alcohol may be considered a workplace hazard under the Occupational Safety and Health Administration’s General Duty Clause.

## WORKERS’ COMPENSATION

Most state workers’ compensation laws allow an employer to use an “intoxication defense” to dispute an employee’s claim of injury at work if the employee was intoxicated or impaired by alcohol, drugs, or medication at the time of injury. In early 2016, two states passed new laws that substantially reduce workers’ compensation benefits for employees whose injuries occur while they are under the influence of drugs or alcohol:

- Under Wisconsin’s new workers’ compensation law: “If an employee violates the employer’s policy concerning employee drug or alcohol use and is injured, and if that violation is causal to the employee’s injury, no

compensation or death benefits shall be payable to the injured employee or a dependent of the injured employee.” Previously, benefits for intoxicated workers were reduced by 15%.

- With some exceptions, New Mexico Senate Bill 214 reduces workers’ compensation benefits “by the degree to which the intoxication or influence contributes to the worker’s injury or death,” up to a maximum of 90%.

In most other jurisdictions, an employer must prove that intoxication or impairment was the sole cause of the injury in order to deny a workers’ compensation

claim. This means that contributing factors — for example, a wet floor, a falling object, or an equipment malfunction — could invalidate an intoxication defense, whether for marijuana, alcohol, or other drug use. In these cases, coverage could apply even if such use is against company policy. That could give rise to a scenario in which the employer may be able to terminate the employee for drug use, but still be obligated to provide coverage for the claim.

An intoxication defense may also be complicated by the fact that marijuana can stay in a person's system for months. This means that it can be extremely difficult for employers and workers' compensation courts to determine whether an employee was actually impaired at the time of a workplace injury. For example:

- ▶ In April 2015, in *Trent v. Stark Metal Sales, Inc.*, Ohio's 5th Appellate District Court of Appeals affirmed a lower court decision that an employee was entitled to workers' compensation benefits despite testing positive for marijuana after an injury. The appeals court ruled that a lower court "did not abuse its discretion" in excluding evidence related to drug testing, and that such evidence did not demonstrate that marijuana use "was the proximate cause of the accident."
- ▶ In September 2015, in *Leon Joseph and Hannah Boudreaux v. Georgia Pacific*, the Louisiana Court of Appeal, First Circuit, ruled that testimony from a dead employee's coworkers about his behavior could be enough to overcome the state's presumption that a positive drug test proves impairment.
- ▶ In July 2016, in *Unique Staff Leasing, Ltd. v. Kenley Cates*, a Texas appellate court ruled that the family of a worker who was killed on the job in 2010 was entitled to workers' compensation death benefits despite the worker testing positive for marijuana. A trial jury had found that the employee was not intoxicated at the time of his death, based on testimony from several witnesses that the employee "was acting normally on the day of the accident." The appellate court ruled that "the jury's verdict was not against the great weight and preponderance of the evidence."

#### MARIJUANA AND THE INTOXICATION DEFENSE IN US COURTS

**April 2015**

*Leon Joseph and Hannah Boudreaux v. Georgia Pacific*

**September 2015**

*Trent v. Stark Metal Sales, Inc.*

**July 2016**

*Unique Staff Leasing, Ltd. v. Kenley Cates*



An Ohio court ruled that an employee was entitled to workers' compensation benefits despite testing positive for marijuana after an injury.

In Louisiana, a court ruled that testimony about a dead employee's behavior could overcome the state's presumption that a positive drug test proves impairment.

A Texas court ruled that the family of a worker who was killed on the job was entitled to death benefits despite the worker testing positive for marijuana.



## MARIJUANA AS MEDICAL TREATMENT

Advocates argue that marijuana is effective in treating pain, and is less expensive and less addictive than many opioids and other painkillers that are commonly prescribed in workers' compensation cases. According to a June 2015 report in the *Journal of the American Medical Association*, the effects of marijuana can include "reduction in pain, nausea, vomiting, and muscle spasms as well as increased appetite."

Despite research studies and anecdotal evidence indicating that marijuana has some therapeutic potential, there is little scientific evidence of marijuana's efficacy in treating *chronic* pain. In addition, the US Food and Drug Administration (FDA) has not conducted clinical trials to determine its safety and efficacy. The drug is also not included in the Work Loss Data Institute's Official Disability Guidelines (ODG) or the American College of Occupational and Environmental Medicine's (ACOEM) Practice Guidelines. (The FDA has, however, approved two

drugs — dronabinol and nabilone — containing synthetic versions of cannabis.) It's also unclear how to properly dose botanical marijuana, because its ingredients are not well defined and can differ from plant to plant.

Smoking marijuana can also have adverse effects similar to those associated with cigarette smoking, including respiratory illnesses and cancer. And according to the National Institute on Drug Abuse, marijuana use can contribute to workplace absences and tardiness, accidents, workers' compensation claims, and job turnover.

Meanwhile, states vary as to whether workers' compensation coverage will be required to pay for marijuana as a medical treatment where such treatment is legal. Statutes in Arizona, Colorado, Michigan, Montana, Oregon, and Vermont allow workers' compensation insurers to deny payments for medical marijuana.

Despite research studies and anecdotal evidence indicating that marijuana has some therapeutic potential, there is little scientific evidence of marijuana's efficacy in treating *chronic* pain.

In New Mexico, however, as of January 2016, employers and insurers are required to reimburse injured workers for medical marijuana. The change in policy follows three rulings in 2014 and 2015 by the New Mexico Court of Appeals that marijuana constitutes “reasonable and necessary medical care” under the state’s Compassionate Use Act. That said, a federal court in New Mexico ruled in early 2016 that an employer was entitled to fire a new employee and medical marijuana patient based upon the employee’s positive drug test.

Courts in other states have taken varying approaches:

- ▶ In 2012, in *Creole Steele v. Ricky Stewart*, the Louisiana Court of Appeal, Third Circuit, upheld a ruling by a workers’ compensation judge that an employee’s prescription purchase of a drug containing synthetic THC was “a necessary medical expense” under Louisiana law. The employee was prescribed the drug for treatment of a spinal injury suffered on the job, and the court ordered the employer to pay for the prescription.
- ▶ Also in 2012, in *Cockrell v. Farmers Insurance and Liberty Mutual Insurance Company*, a California workers’ compensation judge ordered reimbursement for medical marijuana that an injured employee had self-procured as treatment for post-surgery spinal pain. The ruling was later overturned on appeal to the California Workers’ Compensation Appeal Board, which returned the case to the trial level.

## AUTO LIABILITY

Some states have established specific legal limits on the amount of marijuana that drivers can have in their system before they are considered criminally impaired. Others have zero-tolerance policies, meaning that any presence of THC is unlawful, although some states make exceptions for medical marijuana patients.

An employer could be held responsible for damage stemming from an auto accident involving an employee who tests positive for marijuana. The facts of an accident will ultimately determine whether an auto liability policy will provide coverage for an injury to another driver or damage to a third party’s car or other property.

## GENERAL LIABILITY

An employee who is under the influence of marijuana while at work could injure others, including customers. An employer’s general liability policy would typically provide a defense and indemnification to the employer for alleged injuries to customers or other third parties on company premises.

An employer could be held responsible for damage stemming from an auto accident involving an employee who tests positive for marijuana.



## EMPLOYMENT PRACTICES LIABILITY

Generally, employers cannot discriminate in hiring and promotions or other terms and conditions of employment based on an employee's status as a medical marijuana patient. There are, however, some exceptions:

- ▶ Because DOT guidelines prohibit the use of marijuana for drivers, pilots, and others in "safety-sensitive" jobs, employers may be able to decline to hire applicants for these positions based on medical marijuana patient status alone. (Other federal and state agencies may have similar prohibitions.)
- ▶ If a job applicant voluntarily discloses use of a prescribed medication that would preclude him or her from safely performing the job, the employer may decline to hire the applicant.

Four states — Arizona, Delaware, Minnesota, and New York — expressly protect medical marijuana users by placing the burden on employers to prove that the employee was impaired while on the job. Whether an employer can discipline an employee for using marijuana without establishing impairment while at work varies by state.

Employers should ensure that human resources personnel and others involved in hiring, promotion, benefits, and other decisions affecting terms and conditions of employment are familiar with applicable federal and state laws regarding marijuana use. Unless job-related or legally necessary, employers should avoid asking job applicants and employees about their prescription

drug use as it may elicit information about disabilities — which could potentially violate the Americans with Disabilities Act or federal or state anti-discrimination laws. Employers should also ensure that drug testing is conducted in a consistent, uniform manner to avoid the appearance of targeting certain classes of employees, regardless of whether they are using marijuana for medicinal or recreational purposes.

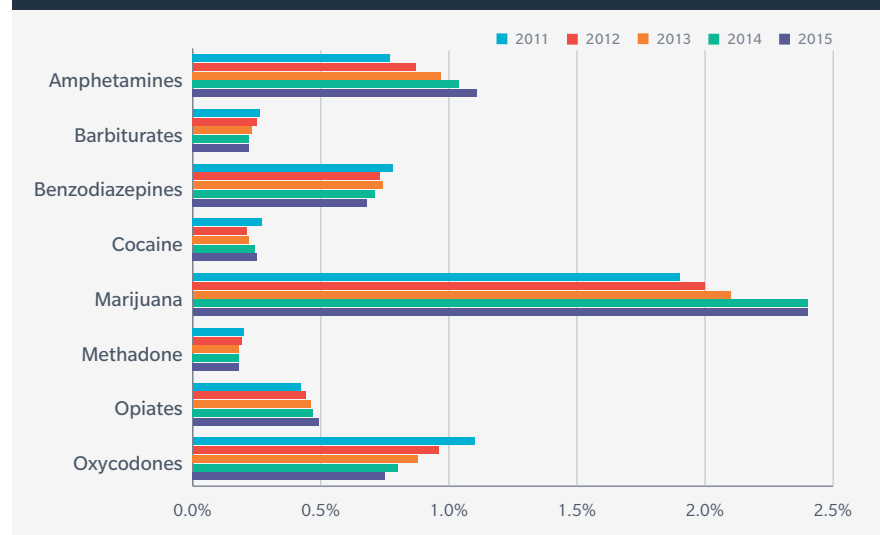
Employment practices liability insurance policies could provide coverage for wrongful termination, failure to hire, discrimination, invasion of privacy, and other claims that could potentially arise from decisions pertaining to an applicant's or employee's use of both medical and recreational marijuana.

## ENFORCING DRUG-FREE WORKPLACE POLICIES

Marijuana is the most commonly detected illicit drug in workplace drug testing, according to clinical laboratory services company Quest Diagnostics. Marijuana positivity in the general US workforce increased from 1.9% in 2011 to 2.4% in 2015 (see Figure 2). Almost half (45%) of individuals with a positive drug test in 2015 showed evidence of marijuana. Driven by greater use of marijuana and amphetamines, the percentage of positive tests for all drugs increased to 4% — the highest level since 2005.

To date, the law has favored employers that seek to prohibit the use of marijuana and other drugs

**FIGURE 2: Positivity Rates by Drug Category Urine Drug Tests, General US Workforce**  
Source: Quest Diagnostics





in the workplace. Legislation in many states specifically permits employers to terminate employees following positive drug tests, and federal employment laws do not protect or allow for the use of medical marijuana in the workplace.

Courts have frequently supported employers' rights in this regard. For example, in August 2013, the United States District Court for the District of Colorado held that the state's medical marijuana statute does not protect employees from being fired for violating company policy. This followed a September 2012 ruling by the 6th US District Court of Appeals — in a case involving a retailer that had fired an employee after a positive drug test — that Michigan's medical marijuana law “does not regulate private employment.” In both cases, medical marijuana had been recommended to the employees in accordance with the law, and neither employee had used marijuana on company premises or been under the influence of the drug while at work.

Still, employers must be mindful of employees' rights. Because marijuana can stay in a person's system for months, an employee who is legally prescribed or

recommended marijuana may test positive for the drug even if he or she is not impaired at work. Terminating an employee solely for a positive drug test — without evidence that the employee was actually impaired at work — could give rise to a claim of discrimination based on medical marijuana patient status, the underlying disability or illness for which the drug is prescribed, or protected class status in the event testing could be perceived to single out certain groups of workers (for example, age groups, genders, races, or other categories of employees).

Laws regarding employers' rights to terminate employees for “lawful” activities outside of work hours vary by state. Employers should consider adopting comprehensive written policies that clearly set forth the circumstances under which uniform, non-discriminatory drug testing may be performed. And before terminating an employee for violating drug-free workplace policies, employers should observe and document any objective factors that support a good faith belief that an employee was impaired at work and such impairment was not for lawful reasons or medically necessitated.

Generally, employers cannot discriminate in hiring and promotions or other terms and conditions of employment based on an employee's status as a medical marijuana patient.

## CONCLUSION

The trend toward legalization of marijuana at the state level is well underway, although the ultimate impact on workforce risk issues remains uncertain. For now, employers can feel confident about their ability to enforce anti-drug policies, although it may be prudent to review and update them as appropriate. Employers should work with their insurance and legal advisors to stay abreast of legislation and court decisions governing marijuana use and the potential impact on such risk management areas as workers' compensation, workplace safety, and employment practices liability.

For more information, listen to a replay of our webcast, [Workers' Compensation 2016: Looking Ahead to 2017](#), or contact:

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## About This Report

This report was prepared by Marsh's Workers' Compensation Center of Excellence (WC COE) and the Employment Practices Liability Group within Marsh's FINPRO Practice. Contributors to this report include Marsh's Casualty and Claims Practices, Marsh Risk Consulting, Express Scripts, and Quest Diagnostics.

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