

# As marijuana becomes mainstream, challenges remain for employers





In 1996, California became the first state to legalize the medical use of marijuana. A quarter-century later, the legal landscape and public perceptions of marijuana have shifted dramatically. Recreational adult use has been legalized in nearly 20 states, representing more than 40% of the US population, according to Census Bureau data.

While still illegal under federal law, what was previously considered a forbidden substance is now part of the mainstream. Many Americans are regular users of marijuana, and freely admit to being so. And, with the public's backing, states and municipalities continue to legalize or decriminalize its use or possession.

But for employers, which must consider state and federal laws and balance employees' rights against the imperative to maintain safe and drug-free workplaces, risks abound. Case law, legislation, and court rulings generally support employers' right to keep marijuana out of the workplace, with some limits. The question of whether to use marijuana as a form of treatment in workers' compensation claims, meanwhile, is still mired in confusion.

As public policy evolves, risk professionals must stay abreast of legal and political developments, review and update existing workplace policies, and carefully handle any workers' compensation, employment practices liability, and other insurance claims in which marijuana use may play a role.

## THE FEDERAL-STATE DIVIDE

Despite widespread legalization and decriminalization at the state and local levels, it remains illegal to cultivate, possess, use, or distribute marijuana under the federal Controlled Substances Act of 1970 (CSA). Federal laws and regulations, including the Occupational Safety and Health Administration's General Duty Clause and the Drug-Free Workplace Act of 1988, also explicitly bar the use of marijuana in workplace settings.

Additional scrutiny applies in some industries — notably, transportation. The Omnibus Transportation Employee Testing Act of 1991 requires drug and alcohol testing of drivers, pilots, and others in “safety-sensitive” jobs. The Department of Transportation's Office of Drug & Alcohol Policy & Compliance also considers the use of marijuana to be “unacceptable for any safety-sensitive employee” subject to DOT drug testing.







# “Federal enforcement of marijuana laws has been uneven.”

The split between federal and state laws has at times created confusion and conflict. In 2005, in *Gonzales v. Raich*, the US Supreme Court held that under Article 1, Section 8, Clause 3 of the US Constitution — commonly known as the commerce clause — the federal government can enforce the CSA even in states where medical marijuana use has been legalized.

Federal enforcement, however, has been uneven under Democratic and Republican administrations. In 2013, Deputy Attorney General James Cole issued a memo — which has become known as the Cole Memo — outlining the Department of Justice’s (DOJ) intent to enforce federal drug law but not challenge laws in states where recreational marijuana use had been legalized.

While then-Attorney General Jeff Sessions rescinded the memo in 2018, now-Attorney General Merrick Garland said during his confirmation hearings that he would allocate fewer resources to enforcing federal marijuana laws. Meanwhile, in March 2021, Senate Majority Leader Chuck Schumer announced that Democrats would soon introduce legislation to decriminalize marijuana at the federal level.

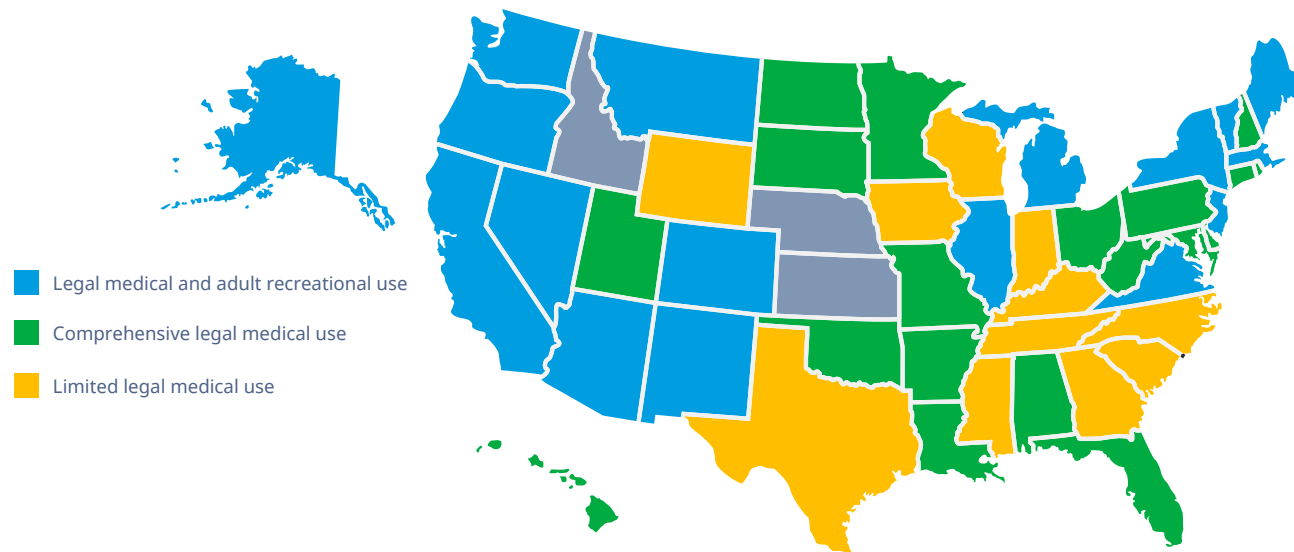


## EVOLVING LEGAL STATUS AND ATTITUDES

As of June 2021, 47 states, the District of Columbia, and four US territories have legalized at least some form of medical use of marijuana or its psychoactive ingredient, tetrahydrocannabinol (THC). Seventeen states and the District of Columbia — along with Guam and the Northern Mariana Islands — currently allow or have enacted laws that will eventually allow adult recreational use, typically with quantity restrictions (Figure 1).

A ballot measure to regulate adult use was approved by South Dakota voters in November 2020 but ruled unconstitutional by a state court in February 2021; as of this writing, the decision is under appeal. Meanwhile, a 2020 ballot measure to establish a comprehensive medical marijuana program in Mississippi was ruled unconstitutional by the state's Supreme Court in May 2021.

### 01| All but three states have legalized some form of marijuana use.

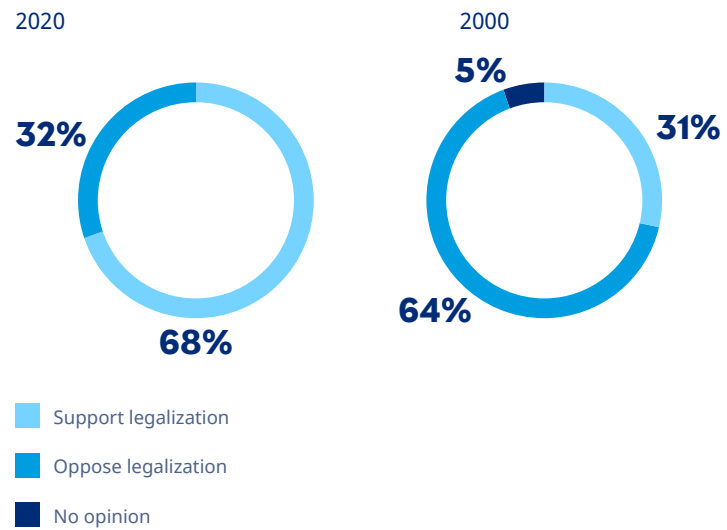


Source: National Conference of State Legislatures; as of June 2021





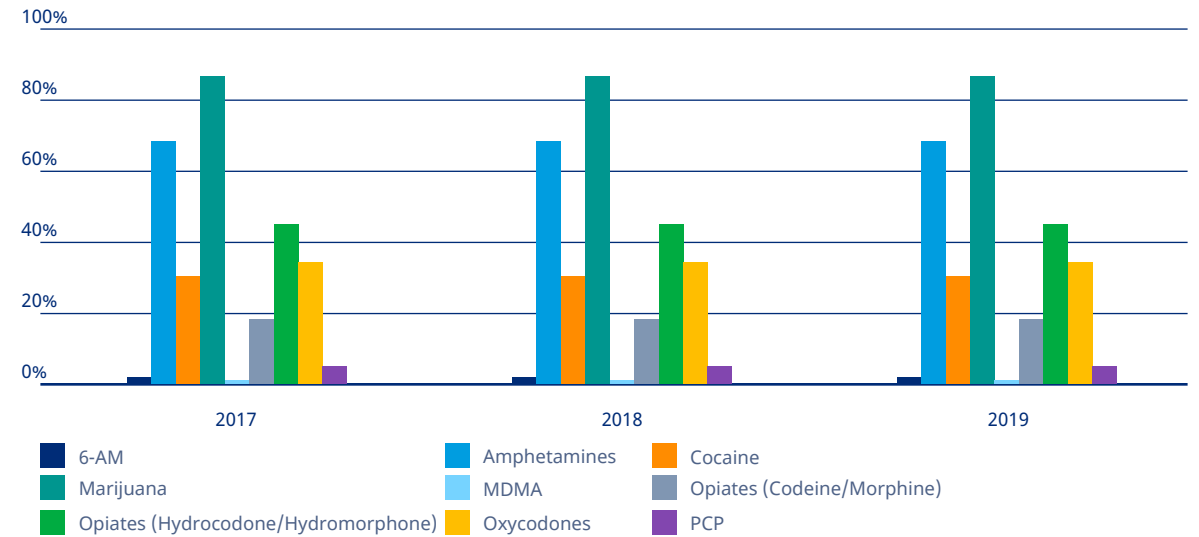
## 02| Americans' views on marijuana legalization has shifted over the last two decades.



Source: Gallup

A strong majority of Americans, meanwhile, support legalization efforts (Figure 2). Americans polled by Gallup in September 2020 supported legalization by a 2-to-1 margin, a reversal from a similar Gallup poll in 2000.

## 03| Marijuana is the most commonly detected drug in workplace testing.



Source: Quest Diagnostics

Perhaps unsurprisingly, given these trends, marijuana remains the most commonly detected illicit drug in workplace testing, far outpacing other major drug categories (Figure 3).





## WORKERS' COMPENSATION

As states legalize marijuana's medical and recreational use, employers face two critical questions:

1. Are injuries sustained by employees under the influence of marijuana compensable under state workers' compensation laws?
2. Can marijuana be used to treat workers injured on the job? And if so, should employers be required to pay for the costs of such treatments?

### The intoxication defense

Workers' compensation laws in most states allow an employer 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. This is commonly known as the "intoxication defense."

An intoxication defense, however, can be complicated by the fact that marijuana can stay in a person's system for months and affect individuals in different ways. There is also no consensus on the amount of THC needed in a person's blood to indicate intoxication. This makes it difficult for an employer to demonstrate that an employee was actually impaired at the time of a workplace injury.

Some states substantially reduce workers' compensation benefits for employees whose injuries occur while they are under the influence of drugs or alcohol. In other jurisdictions, however, an employer must generally prove that intoxication or impairment was the *sole or proximate* cause of injury to deny a workers' compensation claim.

In many states, contributing factors — for example, a wet floor, a falling object, or an equipment malfunction — could invalidate an intoxication defense. But workers' compensation coverage could still apply even if marijuana use is against company policy.

### Marijuana as medical treatment

Nearly three-quarters of all Americans live in states that have legalized comprehensive use of medical marijuana, according to US Census Bureau data. Research published in the journal *Health Affairs* noted that in 2016, chronic pain was the qualifying condition reported by nearly two-thirds of medical cannabis patients nationwide.

Advocates for marijuana's use in workers' compensation argue that it is effective in treating pain while being less expensive and less addictive than both opioids and alcohol. Marijuana, however, has not to date become a routine form of treatment in workers' compensation claims.

Despite indications of its therapeutic potential, however, there is reason for caution. Short-term use can impair memory and motor coordination, affect judgment, and contribute to paranoia and psychosis. Long-term use, meanwhile, can result in altered brain development, cognitive impairment, chronic psychosis disorders, and respiratory illnesses.

Research in the US on the effects of marijuana has been hampered because of its federal status as a Schedule I controlled substance. Although the Food and Drug Administration has approved some drugs derived from marijuana or containing synthetic versions of cannabis — to treat seizures, HIV/AIDS, and cancer, among other conditions — the FDA has not approved marijuana itself as a form of treatment.

In May 2021, the Drug Enforcement Agency — acknowledging the need for more research on the efficacy of cannabis — announced new guidance for marijuana growers, including best practices for producing, storing, and distributing marijuana for research purposes. This action should increase the available supply of research-grade cannabis with known quantities of THC, which is essential to conducting deeper research into its therapeutic potential.



Moreover, marijuana is not included in the Work Loss Data Institute's Official Disability Guidelines and the American College of Occupational and Environmental Medicine's Practice Guidelines, on which many states' workers' compensation drug formularies are based. Medical marijuana is also not available via pharmacies or pharmacy benefit managers; it is instead sourced from marijuana dispensaries, among whom no standard for dosing exists.

For these reasons, employers and insurers have generally been reluctant to reimburse medical marijuana expenses in commercial health and workers' compensation programs. But state legislation, workers' compensation board rules, and court rulings on reimbursement vary (Figure 4).

## EMPLOYMENT PRACTICES LIABILITY

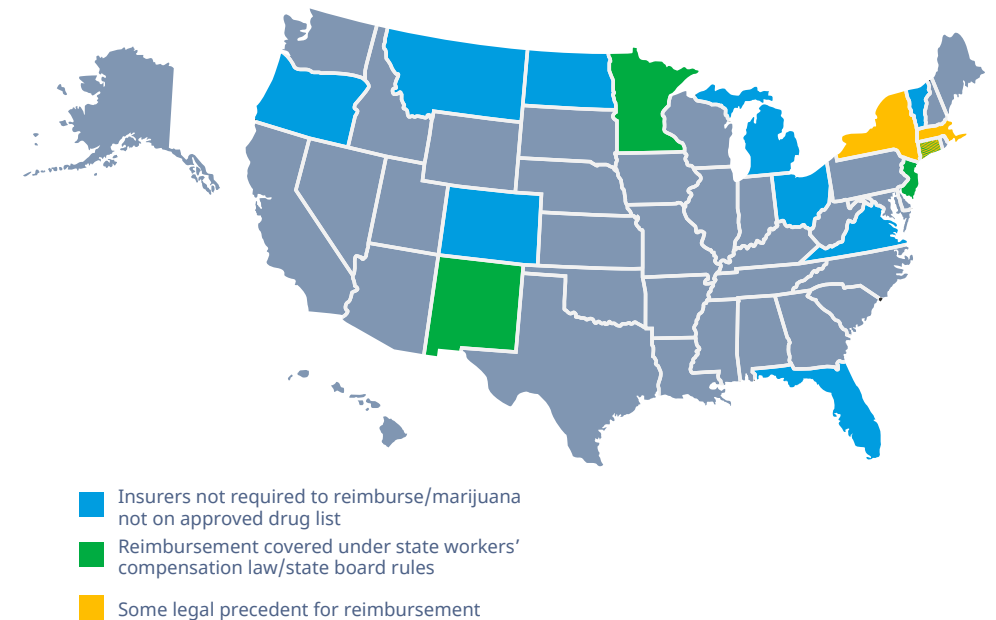
Generally, an employee's status as a medical marijuana patient cannot be grounds for discrimination by an employer when it comes to hiring, firing, promotions, and other terms and conditions of employment. However, there are some exceptions:

- DOT guidelines prohibit the use of marijuana for drivers, pilots, and other employees in "safety-sensitive" jobs. This means that employers may be able to refuse to hire applicants for such positions based solely on their status as medical marijuana patients. Other federal and state agencies might also have similar prohibitions.
- Employers may also decline to hire applicants who voluntarily disclose the use of prescribed medication that would preclude them from safely performing the jobs in question.

As of May 2021, at least 20 states provide varying levels of employment protections for medical marijuana users, with protections for employees' off-duty recreational use growing. For example, New York's adult use bill — enacted in March 2021 — provides a private right of action for employees claiming discrimination based on their legal use or possession of recreational marijuana products.

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

### 04| Public policy and case law on the reimbursement of medical marijuana in workers' compensation claims varies by state.



Source: Mitchell International; as of April 2021



## GENERAL LIABILITY AND AUTO LIABILITY

Marijuana's adverse effects on memory, motor coordination, judgment, and cognitive ability raise concerns about the potential for employees under its influence to injure others, including customers. An employer could be held responsible for damage and injuries stemming from an auto collision involving an employee who tests positive for marijuana.

A general liability policy may provide a defense and indemnification to an employer for alleged injuries to customers or other third parties on company premises. The facts of a collision, meanwhile, will ultimately determine whether an auto liability policy will provide coverage for an injury to another driver or damage to a third party's vehicle or other property.

A particularly acute concern surrounding marijuana legalization is its potential effect on road safety. In 2018, the Insurance Institute for Highway Safety reported that "The legalization of retail sales in Colorado, Washington, and Oregon was associated with a 5.2% higher rate of police-reported crashes compared with neighboring states that did not legalize retail sales."

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, however, have zero-tolerance policies, meaning that any presence of THC is unlawful, although some states make exceptions for medical marijuana patients.

## ENFORCING DRUG-FREE WORKPLACES

Federal employment laws do not protect, or allow for the use of, medical marijuana in the workplace, and it is generally clear that employers are free to terminate employees for being under the influence of marijuana at work.

Off-duty use is another story, however. In 2018, Maine became the first state to explicitly protect off-duty recreational use of marijuana; several other states have since enacted similar protections.

Meanwhile, a trend of employee-friendly court decisions involving employment claims brought by medical marijuana users, which began a few years ago, continues to gain momentum. An increasing number of courts have interpreted state laws to prohibit adverse action against individuals who use medical marijuana in connection with treating a disability. Courts have also noted that the CSA and/or the Drug-Free Workplace Act and state medical marijuana laws do not necessarily conflict.

For example, New Jersey's State Supreme Court found in 2020 that an employee who used medical marijuana to treat a disability could pursue employment litigation for unlawful termination. Although the court agreed that the employer was not required to accommodate the use of medical marijuana in the workplace, it found that the employer was not permitted to discriminate against an employee for off-site use.

The fact that marijuana can stay in a person's system for months can complicate marijuana-related employment decisions, because an employee who is legally prescribed marijuana may test positive for the drug even if he or she is not impaired at work. This means that terminating an employee based solely on a positive drug test — with no evidence of actual impairment at work — could lead to a claim of discrimination based on:

- Medical marijuana patient status.
- The underlying disability or illness for which the drug is prescribed.
- Protected class status if testing could be perceived as singling out certain protected groups of workers.

As more states and cities legalize or decriminalize the use of recreational marijuana, it follows that employers may be precluded from testing for marijuana use as a condition of employment. In fact, an increasing number of jurisdictions — such as New York City, Philadelphia, New Jersey, and Nevada — have passed laws restricting pre-employment drug screening for marijuana and/or THC, with limited exceptions.

These new laws notwithstanding, many employers are opting to equate marijuana use with alcohol consumption, taking the view that responsible, off-the-clock use does not concern them.

# Recommendations



## UPDATE EMPLOYEE POLICIES

- Review applicable substance abuse, testing, and background check policies to address recreational and/or medical marijuana use.
- With the proliferation of new legislation and case law in mind, tailor policies to state laws where relevant.
- Policies should:
  - Specifically describe what is prohibited — namely, that the use of marijuana and other drugs is not permitted on company premises.
  - Outline responsibilities for supervisors, managers, and human resources personnel. Specifically, these employees should know to be on the lookout for potential signs of intoxication and be empowered to take prompt action as warranted, including sending employees home.
  - Address potential accommodations for medical marijuana patients — for example, changing an employee's duties to eliminate driving requirements (or transferring an employee to another position that does not require driving) or modifying an employee's hours — and the criteria for granting them.
  - Establish procedures for handling employees' drug-related arrests and convictions, including the possibility of suspension or termination. Such policies should be developed in conjunction with human resources and in-house and/or outside counsel.
- Provide information — to both employees and family members — regarding any applicable drug abuse program, support, or employee assistance program (EAP) hotline that is available.
- Describe any safety-sensitive positions and any special procedures relating to such positions. Employers should be mindful that they can prohibit marijuana use for federally identified safety-sensitive roles.
- Consider whether to apply testing and zero-tolerance policies only to employees working in safety-sensitive positions or where otherwise mandated by law as states enact and expand protections for medical marijuana users.
- Continue to observe and document objective factors that support a good faith belief that an employee is impaired at work — and such impairment is not for lawful reasons or medically necessitated — before beginning disciplinary or termination processes.

## DRUG TESTING BEST PRACTICES

As marijuana use in America becomes more commonplace, employers have been challenged to update or even rethink drug testing protocols. One prominent large employer, for example, recently announced it would no longer test new hires for marijuana.

If a company continues to engage in drug testing, it is vital that their workplace policies establish clear methods and protocols, and the circumstances under which nondiscriminatory testing may be performed. Such employers may also wish to reevaluate whether positive tests should result in adverse action — for both medical and recreational marijuana users, but particularly for those who test positive and have valid medical marijuana cards while not demonstrating any signs of workplace impairment.

Drug testing policies should be communicated to any medical review officer who has oversight of testing programs. Those officers should advise employers when a valid medical marijuana card is presented to explain a positive drug test.





## FOCUS ON TRAINING

Teach managers and supervisors:

- About medical and recreational marijuana laws, applicable anti-discrimination and anti-retaliation provisions, accommodation processes, and special procedures for employees in safety-sensitive roles.
- To recognize and document signs of impairment.
- To appropriately implement workplace safety measures.
- How to direct employees to applicable EAP processes and begin disciplinary proceedings, if necessary.



## CONSIDER TECHNOLOGICAL SOLUTIONS

Emerging technology solutions can enable employers to periodically and quickly test the cognitive alertness and potential impairment of employees. Through new technologies — for example, a series of puzzles or other tests — employers can assess employees' fitness for duty at the start of their shifts or before performing critical and potentially dangerous tasks. Such tests can be completed quickly, often in less than two minutes, and can identify impairment caused by drug and alcohol use, a lack of sleep, emotional distress, illness, and more.



## MONITOR LEGAL, REGULATORY, AND INDUSTRY SHIFTS

Work with insurance brokers, in-house and outside counsel, third-party administrators, and other advisors to stay informed about:

- Marijuana, privacy, and applicable drug testing laws at the state and federal level, as well as any other laws governing the workplace and off-duty employee conduct.
- How courts are interpreting statutes that could affect employees' rights and liability and responsibilities for employers.
- Changes in political headwinds and industry attitudes toward marijuana, particularly as a potential form of treatment.



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