



Should Marijuana Be Removed from Pre-Employment Drug Screens?

Whether testing for pot or not, having a clear policy is most important, experts say

By Roy Maurer

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Employers are facing a conundrum. Should they stop testing applicants for marijuana use now that more states have legalized it for medicinal or recreational purposes and popular acceptance of the substance has spread?

Twenty-eight states and the District of Columbia have legalized medical marijuana. Eight of those states (Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Washington) and the District of Columbia have also legalized marijuana for recreational use.

But the drug remains illegal under federal law, and employers have the right to test for it, even in states where the substance is legal. Not only does federal law conflict with some states' laws, but state laws also vary, sometimes significantly, challenging multistate employers.

[SHRM members-only resource: Drug and Alcohol Policy (www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms_019908.aspx)]

"Employers [in states with legalized marijuana] can either follow federal law, which says it's illegal, or follow a state law, which says something different," said Kathryn Russo, an attorney in the Long Island, N.Y., office of Jackson Lewis.

"Employers will have to decide if they will take marijuana off their testing panel," said Josephine Kenney, senior vice president of compliance and senior compliance counsel for First Advantage, a global background screening firm based in Atlanta.

Surveys are showing that employers in states that have legalized the recreational use of marijuana are, in fact, gradually removing the substance from pre-employment drug testing panel (<http://herb.co/2017/02/14/pre-employment-drug-tests/>).

Marijuana testing by Colorado employers has slowly declined over the past two years; 7 percent of the state's employers dropped it from pre-employment tests while 3 percent removed it from all employment drug tests, according to results of a December 2016 survey by the Mountain States Employers Council.

About 10 percent of companies in the Denver and Boulder areas removed marijuana from their pre-employment tests and 9 percent of companies from Pueblo did the same.

"I've definitely seen a drop," Russo said. "Some clients have said it's too much of a headache to drug-screen applicants for marijuana now that it's legalized in their states. Employers have told me they've stopped doing pre-employment screening for marijuana because they think everyone's going to turn up positive."

Most companies represented by employment attorney James Reidy, in the Manchester, N.H., office of Sheehan Phinney, still test candidates for marijuana after a job offer, but he has also had employers tell him it's no longer feasible. An assisted living company with facilities in Florida and the Northeast no longer tests pre-employment because of a labor shortage in certain job classifications such as housekeeping,

Reidy said.

Another client, a commercial fishery with workers from Maine and Massachusetts—where recreational marijuana is legal—also no longer tests for marijuana pre-employment because the client assumes a majority of candidates will fail the test.

"But not testing pre-employment is still a minority," Russo said. "The majority are staying the course and drug-testing candidates as well as employees."

To Test or Not to Test?

HR should consider the nature of the job and the industry when contemplating whether to continue testing candidates for marijuana, experts agreed.

According to background screening and drug-testing provider HireRight, only 5 percent of employers say they accommodate marijuana use, 39 percent do not accommodate it and 52 percent say they don't have a policy either way.

"The most important consideration is what type of job is the applicant applying for?" Russo said. "Drug testing is about safety. If you have an applicant applying for a dangerous job, like driving a forklift, I doubt an employer will be OK with a recreational marijuana user in that role."

Reidy recommends that employers reserve the right to test for marijuana along with alcohol, prescription drugs and illicit drugs, given the employer's obligation to ensure a safe workplace.

"If there is going to be any give, it will be at the pre-employment stage, with noted exceptions of safety-sensitive positions or positions mandated to be tested," he said.

After considering jobs for their safety-sensitive nature, Reidy advised that HR look at legal requirements around testing, which typically come up under state law. He also cautioned employers to carefully consider how testing procedures are applied. "Are we going by position classification, and if so, are we being consistent or is there some disparate treatment toward protected groups? You want to avoid that and

instead conduct a benign testing program where you test consistently across the organization or job class."

Settle on a Marijuana Policy

Experts agree that whether or not employers decide to test for marijuana pre-employment, having a clear, well-thought-out drug-testing policy addressing marijuana is a good idea.

"As marijuana laws change across the country, it is vital for employers to have a comprehensive, legally acceptable drug policy that clearly addresses decriminalized marijuana use," said Dr. Todd Simo, chief medical officer for HireRight.

Russo added that some states require employers to have a written drug-testing policy. She recommends stating specifically what the organization's position is regarding marijuana, especially in states where it has been legalized in some form.

"Employers should also carefully watch state laws, and refrain from taking adverse action or imposing disciplinary consequences against a candidate without consulting legal counsel," Kenney said.

Ten of the 28 states with compassionate care statutes that allow marijuana to be used for medicinal reasons require employers to consider accommodating the user, Simo explained. In these states, it is against the law to disqualify someone from a job just because that person tested positive for marijuana.

"In these states in particular, having a policy in place to address how you go about vetting a candidate, and whether or not accommodation can be made, is vital to mitigate risk not only from employment lawsuits but also from workplace accidents and injuries," he said. "Although some states now allow recreational marijuana use, none of those states have any regulatory language that tells employers that they need to accommodate recreational users. That said, having an explicit policy is essential for defining job expectations from the start and eliminating any surprises for candidates."

Kenney suggested that employers consult with legal counsel familiar with the organization and its industry to review a drug-testing policy or create one with specific language on marijuana.

"I would clearly state that the company will not accept a medical marijuana, marijuana extract or recreational marijuana explanation for a positive drug test even where permitted by state law because such use is in violation of Schedule 1 of the federal Controlled Substances Act," she said.

But if employers decide against a zero-tolerance policy on marijuana, HR should assess a candidate's ability to perform the required job functions and review whether a reasonable accommodation is applicable or required by federal and state disability rights laws, experts said.

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