



# PARTNER UPDATE

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## WORK PARTNERS

OCCUPATIONAL HEALTH SPECIALISTS

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### Recreational Marijuana in CA: Now What for Employers?

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California just became the fifth state, plus Washington D.C., to allow the recreational use of marijuana. Of course, California had already legalized marijuana for medical purposes, but does this new law change the landscape for employers? How does this affect workplace drug testing policies and employment actions that might occur as a result of a positive drug test for marijuana?

The paradox is that, while recreational marijuana use is now legal in California with certain restrictions, the cultivation, possession, or sale of marijuana is still illegal by federal standards. That makes it easy for employers with federal contracts that are required to comply with the federal Drug-Free Workplace Act. But it is not so clear for employers without such federal constraints.

Employers are obligated to provide a safe workplace for their employees. While we can all agree that being under the influence of drugs or alcohol while in the workplace is strictly prohibited, does medical or recreational marijuana use outside of the workplace pose a safety concern? Unfortunately, our data on this question are very limited. The data we do have, though, raise concerns that marijuana use may pose a safety risk in some industries.

A 2013 study by the National Institutes of Health (NIH) demonstrated psychomotor impairment in chronic, daily marijuana users as long as three weeks after beginning an abstinence period (Bosker, et al, 2013, PLoS ONE 8(1)e53127). These data may be striking, but note that the study subjects were very heavy marijuana users, and likely differ from a typical employee with occasional recreational marijuana use. A study of particular interest to employers is an analysis of job applicants to the US Postal Service published back in 1990 (Zwerling, et al, JAMA 1990). In this study, they tested about 2,500 job applicants for marijuana, hired them all whether they tested positive or negative, and then followed them for various employment outcomes. This study found that the marijuana-positive applicants had a 55% - 85% increase in workplace accidents, turnover, disciplinary actions, absenteeism, and workplace injuries, compared to the marijuana-negative applicants. Although this is an old study that has not been duplicated, it might give an employer pause, particularly if they are in an industry engaged in safety-sensitive activities.

But can an employer prohibit medical or recreational marijuana use outside of the workplace if such use is allowed in the State of California? Thus far, courts across the country have backed employers' rights to have a policy against

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illicit drug use, including medical and recreational marijuana, even if sanctioned by the state.

So, how does an employer balance a desire to allow workers the freedoms that are afforded by the state, with the obligation to provide a safe workplace for employees? Any workplace drug and alcohol policy should prohibit being under the influence while at the workplace, but “under the influence” is a hazy standard for marijuana. Can an employer really determine whether an employee is affected by residual effects of marijuana? Probably not. An employer can look at two characteristics of their business to help determine how to craft a drug testing policy. First, look at the likelihood of drug use in your industry. Entertainment, restaurants including bars, and construction, for instance, are industries with higher rates of drug use. Other industries, such as grade school teachers, are much lower. These data are available online from national drug testing laboratories such as Quest Diagnostics and LabCorp. Second, look at the safety-sensitive nature of your business. Are there safety concerns for workers (e.g., tree trimmers, roofers), safety concerns for the client (e.g., airplane mechanic), or safety concerns for the public (e.g., drivers)? If you are in an industry where there is a higher rate of drug use and a high safety concern, you may wish to have a drug testing policy that prohibits marijuana, on or off the job, whether medical or recreational. If you are in an industry that has a low rate of drug use and is not particularly safety-sensitive, drug testing may not be cost-effective.

In the end, an employer has three options for drug testing policies, including marijuana. The first option is Zero Tolerance: Any positive drug test, including medical or recreational marijuana, will result in an employment action proscribed by the company drug testing policy. The second option is to have a policy that ignores marijuana results. One effect of choosing this option is that a lenient marijuana policy could attract workers that cannot be employed elsewhere because of their marijuana use. The third option is a “Don’t Ask, Don’t Test” policy. Companies with this stance might consider a provision that prohibits being under the influence while at work, and a statement that individual lifestyle choices must not interfere with job performance.

Regardless of your company’s stance on recreational or medical marijuana, the company drug testing policy should be clear on this issue. Some employees that carry a medical marijuana card think that the card gives them a free pass around the company drug policy. If your company chooses to have a drug testing policy that precludes all marijuana use, make it clear that this includes both medical and recreational use.

WorkPartners does not offer legal advice, but we can help provide information regarding the current state of medical knowledge about marijuana use and the workplace.

### **WorkPartners Occupational Health Specialists**

Located in North San Diego County, WorkPartners clinics are full service Occupational Health clinics dedicated to supporting the health and wellness of local employees. Learn more at [www.WorkPartnersOHS.com](http://www.WorkPartnersOHS.com).

