

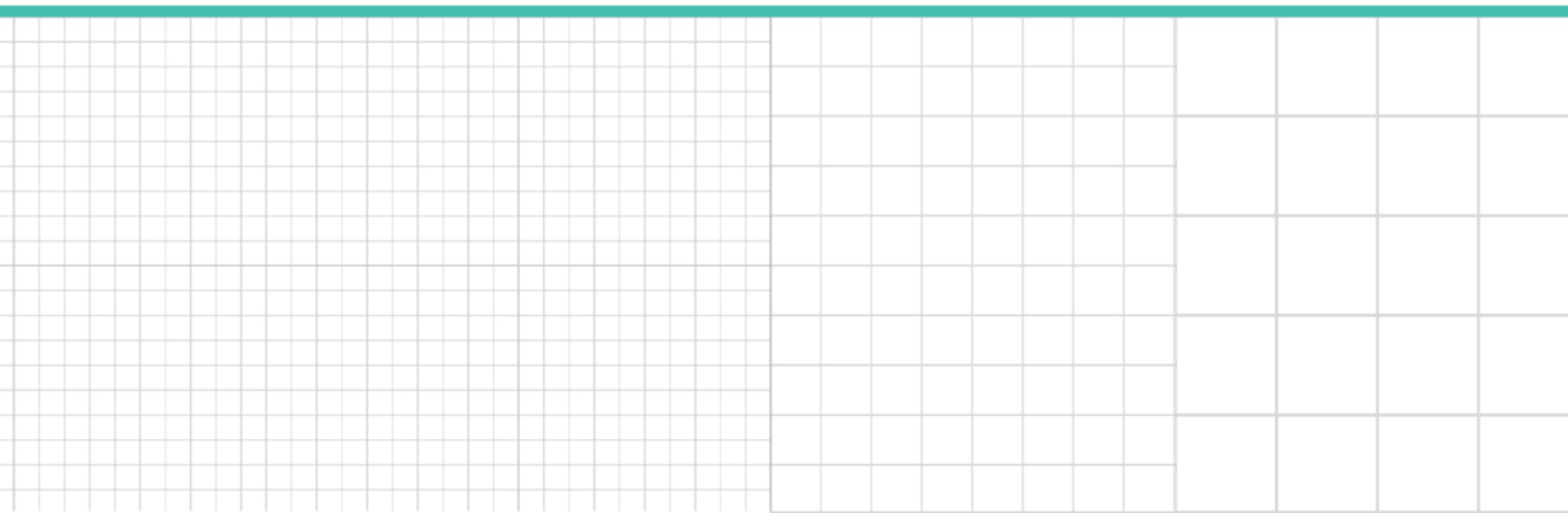


Professional Perspective

Strategies for Effective Workplace Cannabis Policies

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Strategies for Effective Workplace Cannabis Policies

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As cannabis laws trend towards legalization at the state level, the variety of cannabis products available to consumers has proliferated to a dizzying array. In many states, marijuana is readily available not only to smoke, but also to vaporize, eat, drink, take as pills, and apply to the skin. Meanwhile, cannabidiol or CBD, a cannabis-derived compound that will not get you high, but which many believe alleviates anxiety, pain, inflammation, and a variety of other ailments, has been infused into everything from food and dietary supplements to oils and lotions. Further, while marijuana remains illegal under federal law, the recent legalization of hemp at the federal level has fueled this proliferation even more.

The rapidly evolving landscape of laws and products has left employers and human resources departments struggling to keep up as they review their own drug use policies. Policies designed to address employees smoking marijuana may no longer be suitable to the range of other possibilities. This article strives to provide some clarity around these issues to assist employers in navigating their way through the burgeoning cannabis and CBD craze.

Federal Regulation of Cannabis

Under federal law, marijuana remains a Schedule I substance under the Controlled Substances Act. It is therefore illegal to use or possess marijuana or its derivatives, including CBD. Historically, federal law treated hemp as a controlled substance as well. But the 2018 Farm Bill removed hemp and its derivatives from prohibition under the CSA, meaning that hemp and hemp-based CBD is no longer illegal to use or possess. The result is that marijuana and hemp-based CBD receive entirely different treatment under federal law based on their origin.

Adding another wrinkle is the fact that the sale of hemp and hemp-related products remains regulated by the Federal Food, Drug, and Cosmetic Act. The Food and Drug Administration currently takes the position that the FDCA prohibits the sale of food or dietary supplements containing hemp-derived CBD in interstate commerce (though cosmetics containing hemp-based CBD do not violate the FDCA). To date, however, the FDA's enforcement efforts have been limited to products making outlandish health claims, such as curing cancer or Alzheimer's. Further, the FDCA does not regulate end users, meaning that it is not unlawful for an individual to use hemp products that are improperly sold or marketed.

State Legalization

Despite the continued federal prohibition of marijuana, the trend at the state level is towards legalization. Currently, 33 states and the District of Columbia have legalized medical marijuana. Twelve of them have further legalized marijuana for recreational use. See Bloomberg Law's Cannabis in Focus page for an [interactive map](#) of state legislation.

Because federal law trumps state law, marijuana technically remains illegal throughout the U.S. The policy of the federal government, however, has been to not enforce its laws with respect to the sale and use of marijuana and its derivatives permitted under state law, allowing the state-legalized marijuana industry to flourish.

In states that have legalized marijuana for medical or recreational use, that legalization generally extends to hemp and its products as well. A number of other states that have yet to legalize marijuana permit the sale and use of low-tetrahydrocannabinol or THC cannabis (i.e., hemp) or CBD for certain medical conditions, and in the case of Indiana, for recreational use as well. Only three states—Idaho, Nebraska, and South Dakota—prohibit cannabis use entirely in all its forms.

But in the employment setting, state legalization of marijuana does not necessarily mean that employees are protected vis à vis their employers should they choose to partake. As the following examples illustrate, even among states that have legalized both medical and recreational marijuana, there is significant variation in whether employers may prohibit legal use by employees.

- In California and Oregon, employers may still prohibit employee use of marijuana both on the job and outside of work, even if the use is medically prescribed.

- In Massachusetts, employers must accommodate employee use of medically prescribed marijuana outside of work, but may otherwise prohibit employee use of marijuana at and away from work.
- In Maine, an employer may not prohibit off-duty marijuana use, whether recreational or medical, but may still prohibit use at work.

State laws likewise vary with respect to when and under what circumstances employers may test for marijuana or other drug use. Notably, currently available tests detect only THC, not CBD.

Crafting Effective Workplace Cannabis Policies

This rapidly evolving legal landscape and expanding consumer market for cannabis products creates numerous challenges for employers. Effective policies should take into account their legitimate interests in maintaining a safe and lawful workplace, as well as the realities of modern society where cannabis use in various forms is increasingly accepted and commonplace.

The first step for employers is to consider whether or the extent to which they wish to regulate employee use of cannabis at all. While most employers presumably do not want their employees under the influence at work, some may not desire to concern themselves with their employees' cannabis interests outside of work. Employers may likewise wish to distinguish between recreational and medical use.

Employers should also be cautious about relying on "illegal substances" policies that do not specifically address cannabis, especially those that require "zero tolerance." Particularly in states that have legalized cannabis, confusion is likely to ensue over whether the policy defines legality based on state or federal standards, or the extent to which it is intended to address cannabis at all. Likewise, employers run the risk of inconsistent application of the policy if they take action against an employee who brings a joint to work, but not, for example, an employee who keeps a jar of hand lotion infused with marijuana-based CBD at his or her desk. Thus, employers are well-advised to address cannabis clearly as part of any broader substance policy.

Next, employers should consider whether they wish to distinguish between various forms of cannabis and their derivative products. For example, an employer that does not want its employees smoking marijuana even outside of work may not care about employees using CBD products. Likewise, employers who understandably do not want their employees high on the job or bringing marijuana onto work premises may not feel the same way about an employee using a CBD hand cream at work. Employers might also wish to distinguish between marijuana-based and hemp-based CBD, especially if their policies are grounded in whether a substance is legal at the federal or state level.

Employers who may consider allowing CBD use at work should also consider whether such use is consistent with job requirements and safety. Although CBD will not get employees high, it may have other side effects, such as drowsiness. These effects may be unacceptable for certain job positions, such as those involving the operation of heavy machinery or motor vehicles.

All the while, employers must consider the specific cannabis laws of the states in which they operate. For example, employers may have an obligation to accommodate medical marijuana use in certain states, and in others may be prohibited from taking action against employees who use marijuana or other cannabis products recreationally outside of work. Even if not required to do so, employers may choose to be more permissive of cannabis use in states where it has been legalized, where employee expectations and social norms around cannabis may be different. A multi-state employer may wish to devise different cannabis policies for different states.

Employers may also want to train human resources and other key personnel on their cannabis policies, and the distinctions between the various cannabis products they may encounter. For example, a human resources manager may be called upon to distinguish psychoactive marijuana products from CBD, marijuana CBD from hemp CBD, and recreational use from medically prescribed use, while at the same time being mindful of any state-specific rules that may apply.

Finally, given the complexities and nuances involved, it is recommended that employers consult with experienced employment counsel in drafting their cannabis policies and developing appropriate training.