

# Cannabis in the Workplace: What To Consider About Off-Duty Marijuana Consumption

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**Takeaway:** *The growing number of states legalizing marijuana means that companies must carefully navigate a myriad of seemingly conflicting federal and state rules and legislation — here's what you need to know.*

Almost 1 in 3 Americans now reside in states where either medical or recreational marijuana is legal — and that number is set to grow. During the November elections, New Jersey, Arizona, and Montana all passed ballot measures legalizing the adult use of recreational marijuana. Mississippi passed a measure allowing the use of medical marijuana and South Dakota approved both. Kansas, Kentucky, South Carolina and Alabama could join the group in 2021.

The federal Controlled Substances Act still classifies marijuana as a Schedule I drug. However, the growing number of states legalizing marijuana means that companies must carefully navigate a myriad of seemingly conflicting federal and state rules and legislation that are constantly changing.

That murkiness is compounded over the issue of off-duty use of legal and medical cannabis. Here is what employers should consider about off-duty marijuana consumption.

## **Recreational and Medical Marijuana**

Medical marijuana refers to the prescribed use of marijuana. Doctors prescribe it to treat various conditions including anxiety, chronic pain and even Alzheimer's disease. In most states, employees who have a prescription receive a medical marijuana use card.

Recreational marijuana, on the other hand, is used purely for personal enjoyment in the same way that alcohol is. Most laws and employment policies treat these two types of marijuana use very differently.

## **The Legal Landscape**

Despite the passage of state laws legalizing marijuana, federally, nothing has changed. Under federal statutes, marijuana use — whether workers are on duty or off duty — **is illegal**. The Americans with Disabilities Act (ADA) does not supersede these statutes. Department of Transportation (DOT) governed employers are still required to perform drug testing and ensure a zero tolerance drug policy. It is also important to note that no state currently has in place laws that force employers to tolerate the use of marijuana in the workplace or to tolerate employees who work under the influence.

Navigating the myriad of laws that apply to marijuana use can be tricky, and you must understand both the state and federal laws that apply to your company and workplace. If you operate under multiple jurisdictions, you need to be aware of all the rules that apply.

## **Legal Protections for Off-Duty Use**

Although legislators killed a recent Colorado bill designed to protect employees from being fired for off-duty marijuana consumption during its first hearing, there are currently about twenty states that offer some form of protection for off-duty use. The vast majority of these offer protections related to the use of off-duty medical marijuana use. Only one state — Maine — protects off-duty recreational marijuana use.

## **Reasonable Accommodations**

Despite the growing legalization of medical marijuana use, most states are still silent on the issue of accommodations. This means that employers must rely on local case law to guide their decisions.

Several of these states — notably Arizona and Delaware — do specifically require employers to reasonably accommodate workers who have been prescribed medical marijuana. These accommodations can include everything from moving the user to a non-safety sensitive position to allowing a worker to start later in the day if they must consume medical marijuana in order to sleep at night.

The important thing to remember about accommodations is that the employer must be able to implement them reasonably. For example, an employer is not forced to allow a medical marijuana user to drive a company vehicle.

## **Marijuana and Drug Testing**

Although DOT regulations require testing for marijuana, employers must proceed with caution regarding drug testing for non-DOT regulated employees, including those in safety-sensitive positions. THC metabolites can remain in the system for as long as a week after use. Employees who used marijuana while off the zero-tolerance drug testing policies job may be able to successfully challenge zero-tolerance drug testing policies.

## **Issues with Risk**

Although it may make sense to rethink a zero-tolerance drug testing policy, a zero-tolerance drug use policy at the workplace makes sense and will likely be upheld by the courts.

Researchers have established a link between the use of marijuana and workplace accidents. It can negatively impact body movement, thinking and problem solving, and memory, potentially impacting workplace productivity. These effects can linger even if the actual consumption was during off-duty time.

## **Safety and Contractual Obligations**

The Drug-Free Workplace Act of 1988 requires federal contractors and grant recipients to guarantee a drug-free workplace as a condition of receiving government contracts and grants. Since marijuana continues to be a restricted drug under federal laws, that includes the use of cannabis, whether legally prescribed or not. Department of Transportations (DOT) regulations also have drug testing requirements which include testing for marijuana.

Employers with designated safety-sensitive positions may want to consider their additional legal obligations to keep workers, worksites, and the public safe. This may include protection from the long-term or lingering effects of off-duty marijuana use by employees in those safety-sensitive positions.

The legal and safety ramifications of off-duty marijuana use are continually shifting as states consider new regulations and courts weigh in on these laws. There also remains a lot of a gray area as yet untested by courts. As an employer, though, you also must keep your workers and the public safe. This is especially true of safety-sensitive positions.

These complications mean it's critical to stay current on these laws and to seek legal counsel before implementing any policies in your workplace that address off-duty marijuana use **-END-**.

Written by [Jennifer Crump](#)



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[Full Bio](#)



## MARIJUANA/THC CARVE-OUT DIRECTIVE

The above company has retained FORENSIC Drug Testing Services, Inc., DBA: CAL-TEST Drug Testing Services to assist in the management of their Drug Prevention & Employee Testing Program, as outlined within their written Policy and Procedure documents. Their current and active Policy currently requires testing for the most commonly abused drugs, to **include** Marijuana/THC. In consideration of recent changes in State Law, weakening Federal prohibition and ever increasing legal challenges facing employers, the above Company is hereby directing FORENSIC Drug Testing Services, Inc., DBA: CAL-TEST Drug Testing Services to cease and immediately discontinue screening or testing for THC, MARIJUANA, CANNABIS, CBD and any THC/Marijuana related analog, compound or metabolite, on all Non-DOT testing, per their directive, listed below.

The above Company acknowledges and fully understands the additional risks to public and employee safety, and the increased potential liability exposure caused by their removal or modification of their THC, MARIJUANA, CANNABIS & CBD screening and testing procedure. Such risks have been fully reviewed and considered by the above Company's D.E.R., Company President and their Board of Directors have deemed removal of THC/Marijuana from their testing program to be an "acceptable risk" and have chosen to immediately remove Marijuana/THC from the below listed test types. Please, review these, and any other available website links, before electing to "carve-out" marijuana testing from your Drug Prevention & Employee Testing Program:

- <https://www.youtube.com/watch?v=tgkqMqwabdM>
- <https://www.ndwa.org/marijuana/thinking-about-dropping-marijuana/>
- <https://www.natlawreview.com/article/cbd-use-workplace-resolving-state-and-federal-law-conflicts>
- <https://www.youtube.com/watch?v=MJba1wvjWNg>
- <https://www.youtube.com/watch?v=9kwP0ldDYGo>

After careful consideration of the above website information and careful review of the existing criminal prohibitions outlined within the Federal Controlled Substance Act, current Federal Regulations and the State's Health & Safety Code. the above company hereby directs, after consultation with their own legal counsel, to "carve-out" MARIJUANA/ THC from their Drug Prevention & Testing Program. REMOVE THC testing from the following test types:

### **Pre-Employment & Random Only**

### **ALL Test Types, to include testing after an Accident & Reasonable Suspicion/Cause.**

## COMPANY DIRECTIVE TO FORENSIC DTS, INC.

*The Company, listed above, hereby directs and orders Forensic Drug Testing Services, Inc. DBA: CAL-TEST Drug Testing Services to remove marijuana/THC from it's Non-DOT Drug Prevention & Testing Program, as directed above.*

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Company President or D.E.R.

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Kevin Odenbaugh, President/CEO

\_\_\_\_\_  
Company President/DER PRINTED NAME

\_\_\_\_\_  
TODAY's DATE

**PLEASE COMPLETE AND FAX TO: 760-770-0806 or E-Mail to: INFO@FDTSI.COM**  
*Marijuana/THC may not be "Carved-Out" without receipt of this directive...thank you*