



# POLICY BEST PRACTICES FOR CANNABIS



BY SHARON BOTTCHER

Legalization of marijuana continues to be a trending topic of debate in the United States as well as other countries worldwide. Despite your opinion on this matter, the reality is that cannabis legalization continues to grow. The acceptance of marijuana has led an abundance of states to legalize medical and recreational cannabis and employers are faced with decisions on how to deal with cannabis use in the workplace.

## Preparing your workplace for legal marijuana

As with all other drug testing program decisions, testing for cannabis must be discussed in advanced and decisions pinned down regarding the company's position on marijuana used to treat a health condition or marijuana positives in state(s) that allow for recreational cannabis use. Employers have a fair amount of flexibility to determine cannabis related practices for their company, but since states decide on marijuana laws, it is not feasible to have one general policy. Policies must be tailored, where applicable, on a state-by-state basis.

So, depending on state laws, employers in some states can choose to drug test their employees including testing for cannabis, with very few restrictions. On the other end of the spectrum, there are medical and/or recreational laws that give certain protections to employees and applicants and require employers to implement specific conditions that determine how you must structure your testing program. Under federal law, the Department of Transportation (DOT) does not currently allow any flexibility for a THC positive test. These regulations prohibit THC positive results regardless of any applicable state medical or recreational laws.

### State laws can make your policy complicated

For instance, in Nevada, employers are prohibited from failing or refusing to hire prospective employees because a drug test indicates the presence of marijuana metabolites. The law does not prohibit employers from testing for marijuana for pre-employment purposes, it only prohibits taking action based on a marijuana positive test under certain circumstances (i.e., safety-sensitive positions in the following position/industries:

- Firefighter (as defined in NRS 450B.071);
- Emergency medical technicians (as defined in NRS 450B.071);
- Any position requiring an employee to operate a motor vehicle and for which federal regulations or state laws require the employee to submit to drug and alcohol testing; and
- Any position that, in the employer's opinion, could adversely impact other's safety.

In New Jersey, an employer may not penalize an individual solely based upon the presence of cannabinoid metabolites in the bodily fluids of a person engaged in conduct permitted under state law. A drug test for cannabis must include a physical evaluation to determine an employee's state of impairment. The physical evaluation will be conducted by an individual with necessary certification to opine on the employee's state of impairment, or lack thereof, related to the usage

*This information is provided for educational purposes only. Reader retains full responsibility for the use of the information contained herein.*



of a cannabis item in accordance with state law. Also, it is required to provide applicants and employees with a post-testing written notice of the individual's right to explain a positive cannabis test result. Upon receipt of the written notice, the applicant or employee has three days to submit information to the employer explaining the cannabis positive test result, and, if applicable, a medical marijuana authorization from a health care practitioner or proof of registration with the medical marijuana commission indicating a valid medical reason for a marijuana positive test result. In addition, an applicant or employee with a confirmed positive marijuana test may request a confirmatory retest of the original sample, but it is their responsibility for costs associated with the retest. All these specific state requirements must be included in your workplace policy to remain compliant.

### Creating your policy

Regardless of the state or states involved, each company must first decide how to proceed with marijuana as part of its testing program. The decision may be determined by several factors such as the company philosophy, type of industry, or employee positions within the company weighing the risks or safety features of employee positions.

A company will either decide to accept or deny marijuana as a legitimate explanation for a positive THC test result. In some circumstances, it is possible for individuals using CBD to test positive for THC and employers can treat CBD oil the same as medical marijuana. Most state marijuana laws either specifically permit employers to restrict marijuana use by employees or do not mention employers or workplace at all.

After making the decision on the company's position regarding marijuana, crafting a policy to include the details of marijuana testing requirements is the next logical step. Overall, there are four fundamental choices that reveal the appropriate language to incorporate in a policy for marijuana. They are:

1. General language that addresses the basic requirements to accept/deny medical marijuana violations.

2. General language that addresses the basic requirements to accept/deny recreational marijuana violations.
3. Custom language that addresses the specific requirements to accept/deny marijuana related violations for each applicable state law.
4. General language that addresses the requirements for marijuana under federal DOT regulations.

Determining the language for each of the above four categories is where it becomes a bit more complicated. A thorough review of the marijuana laws must be performed for every applicable state while simultaneously considering the type of program. According to the examples above, policy language must be created with regards to prohibited conduct and consequences for marijuana violations, CBD violations, violations of the DOT regulations, and guidance specific to each state regarding marijuana violations. In addition, if a company should decide to limit marijuana testing in certain circumstances or remove it all together, the decision should also be addressed in the policy.

### Conclusion

When writing or reviewing a policy, it is a necessity to keep up with changes to medical and recreational marijuana laws. Companies that successfully navigate compliance do so by tracking marijuana laws in the states where they conduct business, following trends in surrounding states, and by keeping their policies, especially regarding marijuana in the workplace, current. Marijuana laws are actively changing, and companies need to stay vigilant and partner with experts in the industry to ensure company policies are clear, concise and compliant.

**Most state marijuana laws either specifically permit employers to restrict marijuana use by employees or do not mention employers or workplace at all.**