

# **Navigating the Legal Environment of Cannabis Law: Considerations for a Workplace Policy**

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*American law governing cannabis usage continues to suffer from the lack of a uniform national standard, as regulation has largely been left to the lawmakers of individual states and localities. At a time when public acceptance of personal use is on a rapid rise, many employers find themselves with the task of complying with multiple conflicting laws, while still trying to meet management objectives. A viable and sustainable workplace cannabis policy must be crafted to comply with this complex legal environment, that balances priorities of safety and loss prevention with the need for staffing, positive employee morale, and a firm image.*

*Keywords: employment, cannabis, policy, balance, workplace, management*

## **INTRODUCTION**

American employers face a workforce with increasing social acceptance and personal use of cannabis for medical and recreational purposes. As cannabis loses its status as a gateway to hard drug use and as so many prior laws prohibiting and criminalizing use fall away, employers are left in an environment with no coherent national policy or uniform law regarding the drug. Instead, the legal regulation of cannabis has been largely left to states and localities. This makes a firm's task of formulating a workplace cannabis drug policy that complies with governing law challenging, especially for national and multi-location employers.

Aside from the need to comply with the law, employers' policy toward cannabis must strike a balance between one stringent enough to avoid accidental injury, lost productivity, tort exposure, and breach of contractual obligations, yet sufficiently tolerant and permissive to avoid negative impact on staffing, employee morale, and firm image, that could result from an excessively rigid cannabis policy. While no single policy will fit all employers, the firm should attempt a balanced approach that considers its priorities and employment objectives.

Part I of this article will review the changing legal environment of cannabis regulation, first considering the history of federal statutory treatment and federal agency regulations, then turn to developing state and local laws and trends in that regard. Part II will discuss studies about the possible impact that increasing legal acceptance of cannabis use may have. Part III will discuss implications for a workplace cannabis policy, suggest best management practices, and advocate for future study and improvement in the law.

## THE UNCERTAIN LEGAL ENVIRONMENT

### Current Federal Law

#### *Controlled Substances Act 1970 (21 U.S.C. Sec. 801 et. seq.)*

Federal law has no certain answer to cannabis use in the workplace. The only uniform federal law governing cannabis might not even be enforced in the firm's state of operation. It is the Controlled Substances Act of 1970, ("CSA"). Now over 50 years old, the CSA is part of the Comprehensive Drug Abuse Prevention and Control Act of 1970. A product of the Nixon era "War on Drugs", the law classifies cannabis in section one, as one of the most dangerous drugs in America, along with others, such as heroin. It earned this classification because Congress found cannabis "has a high potential for abuse and has no currently accepted medical use in treatment in the United States [and] there is a lack of accepted safety for use of the drug or other substance under medical supervision" (21 U.S.C 812(b)(1)) This finding was, based upon two significant assumptions, both now in doubt by medical experts and the American public in general: that cannabis has a very high potential for drug abuse, (i.e., debilitating addiction or a gateway drug) and that cannabis has no medical utility to outweigh the risks and otherwise justify its use. The statute declared cannabis use and possession a federal crime and established a federal prohibition of a widely accepted drug akin to that created for alcohol during the prohibition era. For decades, state and local criminal laws conformed with this federal law.

However, the original language of the CSA suggests that the states would be allowed to experiment with alternative regulations. States did so, beginning in 1996 with California. Since then, 19 states passed laws allowing medical cannabis use. While some courts struck down these state laws, as constitutionally preempted by the federal CSA, other courts have not, making the legal effect of the CSA's prohibition, for that reason alone, uncertain. (Caton, 2010).

In addition, the U.S. Department of Justice's enforcement of the CSA has been inconsistent, varying with administrations. Under President Obama, prosecutors were directed not to target personal use by adults if it was authorized by state law. While that directive was rescinded by President Trump, the DOJ currently will not prioritize criminal enforcement. (Busy, 2022).

#### *Drug-Free Workplace Act of 1988, ("DFWP")*

The DFWP was enacted during the Reagan administration and essentially mandates federal employers and contractors to make a good-faith effort to establish a drug-free workplace and awareness program as a precondition for federal contracts or grants. However, the DFWP is not cannabis specific and does not address key employer issues about drug testing or sanctions for a positive test. The law does not require a zero-tolerance drug use policy, use of drug screens or tests, nor address the issue of what employers can or need to do about a positive test for employee off-duty cannabis use. (Horton, 2018).

#### *CSA and DFWP vs State Medical Cannabis Laws*

Normally, courts find that federal statutes preempt inconsistent state statutes. However, preemption by both the CSA and DFWP of state medical cannabis laws has been uncertain for employers defending civil suits by employees for an adverse action arising from a positive test resulting from off-duty medical cannabis use.

In *Coats v DISH Network* (2015), a quadriplegic employee was terminated for failing an employment drug test due to the use of medical marijuana, when off duty, to relieve pain. Although the use followed the state's medical cannabis certificate program, the Colorado Supreme Court held the use was made unlawful by the CSA, negating his wrongful termination claim against the employer. Likewise, an employee using off-duty medical cannabis for his HIV/AIDS symptoms was terminated after a positive test. In upholding the employer's right to do so, the federal court in *Garcia v Tractor Supply Co.* (2016) held that to require employer accommodation for his off-duty medical use would conflict with the CSA, which it held preempted the state law.

However, in *Barbutop v Advantage Sales & Mktg L.L.C.* (2017) the Massachusetts Supreme Court came to the opposite conclusion, finding an employee fired for failing a drug test caused by duty use of

medical marijuana to treat her Crohn's disease, could sue her employer for refusing to accommodate her use to mitigate her disability.

Further, when a state medical cannabis statute specifically directs employers to avoid user discrimination and accommodate off-duty medical cannabis, courts more uniformly find the CSA does not preempt state law and allows applicants and employees to sue for adverse actions taken for a positive test. *Chance v Kraft Heinz Foods Company*, 2018) (discrimination); *Callaghan v Darlington Fabrics Corp.*, 2017) (failure to accommodate)

The DFWP poses the same problem. Like the CSA, courts are split on whether the DFWP can be used as an employer defense to employee suits for termination due to a positive test caused by off-duty medical cannabis. The court in *Noffisinger v. SSC Niantic Operating LLC* (2018) held that the DFWP did not preempt a state medical cannabis law and allowed suit because the law specifically forbids employment discrimination against off-duty medical cannabis users. Other cases have upheld a federal employer's decision to terminate for a positive test from medical cannabis, finding DFWP preemption. *Carlson v Charter Communications LLC*, 2018).

Further, while many modern state cannabis laws exclude their application when the employer is subject to conflicting federal or state safety laws and regulations, (Nieman, 2021) still state medical cannabis laws need special attention from employers in every state of firm operations. See Appendix 1.

### *Federally Regulated Activities and Industries*

Several federal agency regulations require employers to a drug screen and test workers employed in safety-sensitive jobs. Employers that are in safety and security-sensitive industries are also regulated.

Under the Omnibus Transportation Employee Testing Act of 1991, the Department of Transportation requires drug testing of all commercial driver's license holders operating vehicles used in trucking, mass transit, airline, and rail for cannabis and other substances.

For those employees, the issue is not impairment, it's a positive test from any use. Employees are subject to regular testing for cannabis use. Detection alone is frequently enough to mandate employer sanctions.

Employers in safety and security-sensitive industries are subject to additional federal regulations of the Departments of Defense, Homeland Security, and the Nuclear Regulatory Commission. Employers operating in the defense industrial-based sector, such as shipyards with defense contract work, will also be required to screen, and test all employees in safety-sensitive positions, or face loss of those contracts and even outright debarment. Applicants or employees who exceed certain levels of THC can be denied employment, sanctioned, or terminated. (SAMHSA, 2022). If applicable to the employment position involved, state and local safety laws may likewise mandate drug screening and testing, for off-duty cannabis use.

As a result, employers subject to these regulations have the least managerial discretion, but the most legal certainty as to screening and testing for employee cannabis use. Free information on employer coverage by federal and state safety/security laws is available online. (Screensoft, 2018). The advice of legal counsel should be sought to determine applicability and compliance. Still, such laws do not address drug policy issues for most employers in the private sector. Those employers have to look for guidance elsewhere.

### *Federal Agencies With Broader Application*

Federal agencies created to broadly administer laws governing most private sector employers are charged to guide, regulate, and require fair employment practices and safe working conditions. Yet none have provided substantial guidance to help employers fashion a workplace cannabis policy.

### *EEOC*

The Equal Employment Commission enforces the nation's federal civil rights laws including the Americans with Disabilities Act, ("ADA"). It previously took the position that a user of medical cannabis from a California-licensed dispensary was protected by the ADA. The Ninth Circuit Court decided

otherwise, holding the use was made unlawful by the CSA. (*James v. City of Costa Mesa*, 2012). Since that decision, the Commission has found disability discrimination when the true reason for an employee's termination was an underlying disability, rather than a workplace violation due to a positive cannabis test from medical cannabis use. (*EEOC v Pines of Clarkston*, 2015). However, the EEOC has not interpreted the federal civil rights laws to require employers to accommodate off-duty medical cannabis use nor offered guidance suggesting it. By comparison, it has issued employment guidance regarding workplace opioid addiction, as a covered disability that employers must accommodate under the ADA. (EEOC, 2022).

### *NLRB*

The National Relations Board regulates fair labor practices and has found an employer's implementation of a workplace drug testing rule or any changes to it constitute mandatory items for bargaining before they can be enforced on workers. (*Union-Tribune Pub. Co.*, 2008). However, it has issued no reported case that involved workplace cannabis or a cannabis policy of a unionized employer.

### *OSHA*

Many employers are subject to regulations of the Occupational Safety and Health Administration, aimed at the goal of workplace safety. The obligation under the OSHA general duty clause to provide a safe workplace necessarily would include preventing the risk of employee cannabis impairment. Yet there is no specific OSHA safety rule concerning workplace cannabis.

### *Congressional Proposals*

Intensive efforts have been made in Congress to consider legalizing cannabis at the federal level. Many bills have been introduced in the House since 2019. Most recently the Marijuana Opportunity Reinvestment Act, ("MORE") passed the House in April 2022. As its title suggests, the MORE act would go beyond removing cannabis from the list of criminalized drugs under the CSA. Given the history of racially disproportional criminal enforcement and imprisonment for cannabis use, the bill has a substantial racial justice component. Under the proposed law, federal courts would be directed to expunge prior marijuana convictions, conduct resentencing hearings for those still serving time, and authorize a 5% sales tax to fund job training, substance abuse, and loans for qualified small businesses to enter the cannabis industry. (Norml, 2022)

With the lower enforcement and incarceration costs together with new tax revenues, the Congressional Budget Office estimated the act would reduce the federal deficit by \$3 billion over the next decade. (Weisman, 2022). However, the MORE has met resistance along party lines and stalled in the Senate in March 2022. (Gibson, 2022).

All considered, there continues to be no uniform federal directive for most employers to rely on in making policy decisions about drug screening or testing of employees for cannabis use. Instead, they must look for legal guidance elsewhere, and currently, that will come only from the array of varying and rapidly changing laws of state and local government.

### **State and Local Laws Trend Toward Legalization**

Nearly all states and many localities have passed laws relaxing cannabis regulation. Beginning with Colorado and Washington, which created personal use programs, 47 states now allow cannabis use under some circumstances. The state and local legislative movement legalizing cannabis has also accelerated, in keeping with the accompanying politics that has recognized constituents' increased acceptance. In 2010, about half of Americans favored the legalization of cannabis, though none of the 50 state legislatures had legalized cannabis for recreational use. By 2022 with more than two-thirds of people surveyed favoring legalization, (Dumas, 2022) total U.S. cannabis sales are projected to be nearly \$20 billion, with recreational use now exceeding medical use. (McCarthy, 2022).

These state and local measures differ considerably in the degree of tolerance toward cannabis use and specific issues addressed. Differences frequently reflect underlying local political, social, and economic differences. 18 states legalize cannabis for medical use, 19 states, D.C., and two territories allow both

medical and recreational use, and 10 states also allow cannabis products such as cannabis oils without psychoactive properties. This leaves only Idaho, Kansas, and South Dakota that fully prohibit cannabis use. (Nagele-Piazza, 2022). See Appendix 2.

For forecasting purposes, employers should note the apparent path many states have chosen to take in legalizing cannabis. The first step is frequently legislation decriminalizing use and possession, followed by or in conjunction with a medical cannabis program. States follow up with law permitting adult recreational use and possession, and ultimately a statutory scheme for state licensing, control, and taxation of retail sales. As the pattern of legalization becomes more universal, converging state laws could lead to states adopting a uniform state cannabis law, if there is no uniform federal approach. Still, given the velocity of change and existing variation of state and local law, employers will have to monitor the law in each situs of firm operations-an especially arduous and expensive processes for multistate and national firms.

## **IMPACT OF STATE RECREATIONAL CANNABIS LEGALIZATION**

Recent studies on the effects of cannabis legalization are few. However, they offer a more positive picture for employers than might have been expected.

### **Modest Increased Use**

According to the Center for Disease Control, (“CDC”) over 48 million people used cannabis at least once in 2019, making it the most-used federally banned drug. And cannabis use has not been harmless, with 3 in 10 users developing use disorders.

However, two studies published in the Journal of the American Medical Association of Psychiatry, (“JAMA”) both using national surveys of drug use and health data across the US population, show only modest increases in use and disorders caused by state-legalized recreational cannabis. One study (Magdalena, et. al., 2019) found that from 2008 to 2016, there was an increase in frequent use, from 2.13% to 2.62%, and use disorders from .9% to 1.23%. A second study using similar data found the same modest increases also varied by race and ethnic groups. (Martin, et. al, 2021). Both suggest the trend toward legalized recreational use by states may not lead to a dramatic increase in workers off-duty use.

### **Workplace Safety and Productivity**

Long-term cannabis use has been found to affect brain functions of memory, learning, attention, decision-making, coordination, emotion, and reaction time. (Filbry, 2014) However, several Canadian studies of workers in a country where cannabis has been legal for some time did not show a significant increase in workplace accidents, (Edward, 2020) unless it was used at work or shortly before the beginning of a shift. (IWH, 2022) Another study showed no loss of workplace performance. (Bernerth & Walker, 2022). While more study is needed, so far none conflict with these results.

### **Adverse Societal Effects**

A 2021 policy analysis by CATO Institute, (“CATO”) confirms earlier conclusions that the impact of legalization of the recreational use of cannabis had only minor adverse effects on substance abuse, public health and suicides, road safety, and economic conditions: “In previous work, we found that the strong claims made by both advocates and critics are substantially overstated and in some cases without support from existing legalizations: mainly state legalizations have had minor effects.” The single area that did show a significant impact was increased tax revenues in states that imposed taxes and fees for the sales and distribution of legalized cannabis. (Dills, et.al. 2021)

Yet, other studies show converse findings. For instance, a new statement issued by CDC warns there are inherent risks of vehicular accidents caused by workers driving under the influence of cannabis. (CDC, 2021). Certainly, further study will be forthcoming. Still, data to date suggest employers in the states with fully legalized recreational cannabis may anticipate only modestly higher off-duty use by applicants and employees, with little adverse effects on workplace safety, productivity, or employer’s societal concerns.

If correct, employers have flexibility, within applicable legal constraints, to craft a workplace cannabis policy that best fits all firm employment objectives.

## **BEST PRACTICES FOR CANNABIS POLICY MANAGEMENT AND ADVOCACY**

The policy should answer the following questions:

- Will the firm have a zero-tolerance policy that requires hiring screens of applicants and drug tests of existing employees, or one that recognizes and permits employee off-duty medical and/or recreational use, and limits tests to certain events
- How will employees' prior criminal records related to cannabis be treated?
- Upon what events should an applicant or employee expect a drug test? If a zero-tolerance policy is used, will testing be scheduled, and used randomly? If a permissive policy is chosen, will testing be confined to impairment or accident? What type of drug tests will be used for what event?
- What behaviors or events will constitute reasonable suspicion of impaired performance? Specific examples should be given. Will employees have a duty to report coworker impairment?
- If medical use is authorized by state law, what procedures will be required by the employer and the user employee, to prevent nondiscrimination or accommodation? Will medical cannabis be treated like other pharmaceutical drugs?
- If recreational use is authorized by state law, will off-duty cannabis use be treated the same as alcohol, or will there be more restrictions or limitations? Those should be specified.
- What employee actions will constitute a violation of policy? Besides workplace use or possession, a positive test, or cannabis caused impairment or accident, what other employee actions violate policy?
- What sanctions can be expected for a positive test or other policy violation? Will there be progressive discipline short of termination for cannabis use? Will there be any probationary or second chance policies for a violation?
- What drug training and education programs will be used and will attendance be required?

### **Practices for a Balanced Management Approach**

The cannabis policy should be communicated throughout the firm and enforced without discrimination. It should make clear that workplace cannabis use, possession, or impairment due to off-duty use will be sanctioned and in what way. Standards for impairment should be established, supervisors should be trained to detect impairment, and employees should be required to report coworker use and impairment.

Without a uniform cannabis law, the firm must comply with governing law in each state of operations, any applicable preemptive federal regulations, or contractual constraints. So the policy should be drafted and administered accordingly. Firm in-house or retained counsel should guide the process.

The cannabis policy must also further conflicting firm objectives. Management interests in workplace safety, loss prevention, and tort exposure, must be balanced with staffing needs, employee morale, and a positive firm image, especially considering the increasing acceptance of off-duty cannabis use by current and prospective employees.

If the law allows, best practice calls for a firm cannabis screening and testing policy narrowly tailored and limited to accident and economic loss prevention. Each job should be evaluated for those risks. For no or low-risk positions, the firm should consider eliminating hiring drug screens and tests, and reserve them for cases of obvious impairment and accident investigations. (Lytle, 2019) If legally required by law, regulation, or contract to subject employees to additional drug screens and tests, the firm should consider adopting probationary or second-chance drug policies that allow applicants to reapply and employees to be reinstated after a violation.

While not legal advice, which should be sought in formulating firm cannabis policy, some policy provisions to consider that address the issues and practice discussed are contained in Appendix 3.

### **Consider Advocacy for Further Study and Better Law**

The firm should monitor all current scientific studies on the effects of cannabis use and misuse as they relate to employee health, accident causation, and lost productivity. The policy should be modified accordingly.

It should also support and advocate for improved laws governing cannabis, to provide a more certain legal environment and a fairer workplace cannabis policy. Improvements could include:

- Congressional passage of a federal statute removing cannabis from the CSA schedule one and legalizing adult use and possession throughout the country. If unsuccessful, a uniform state law for adoption by each state legalizes use and possession could be proposed.
- Updated federal and state agency regulations for employers in regulated safety and security industries to clarify if, how, and when those rules supersede other federal and state laws.
- A new EEOC guidance for employers' workplace cannabis policy and administration addressing rights and obligations, and a cannabis-specific workplace safety guidance by OSHA.
- Tort reform measures that provide immunity and affirmative defenses from tort and employment discrimination claims when employers act in compliance w/ existing legal mandates.

### **CONCLUSION**

American law governing cannabis will be in conflict until comprehensive national standards are established. Employers must comply with the law as it is. That will require continued vigilant attention and adjustment to changing laws, particularly difficult for employers with a national or multistate presence.

Employers' screening and testing policies should be driven and justified by safety and loss concerns. Policies should be narrowly tailored to avoid staffing, morale, and other management issues, and balanced to prevent harm to other firm concerns.

Finally, employers should advocate for further scientific study on cannabis effects on safety and loss concerns, and for uniform national law and regulatory guidance.

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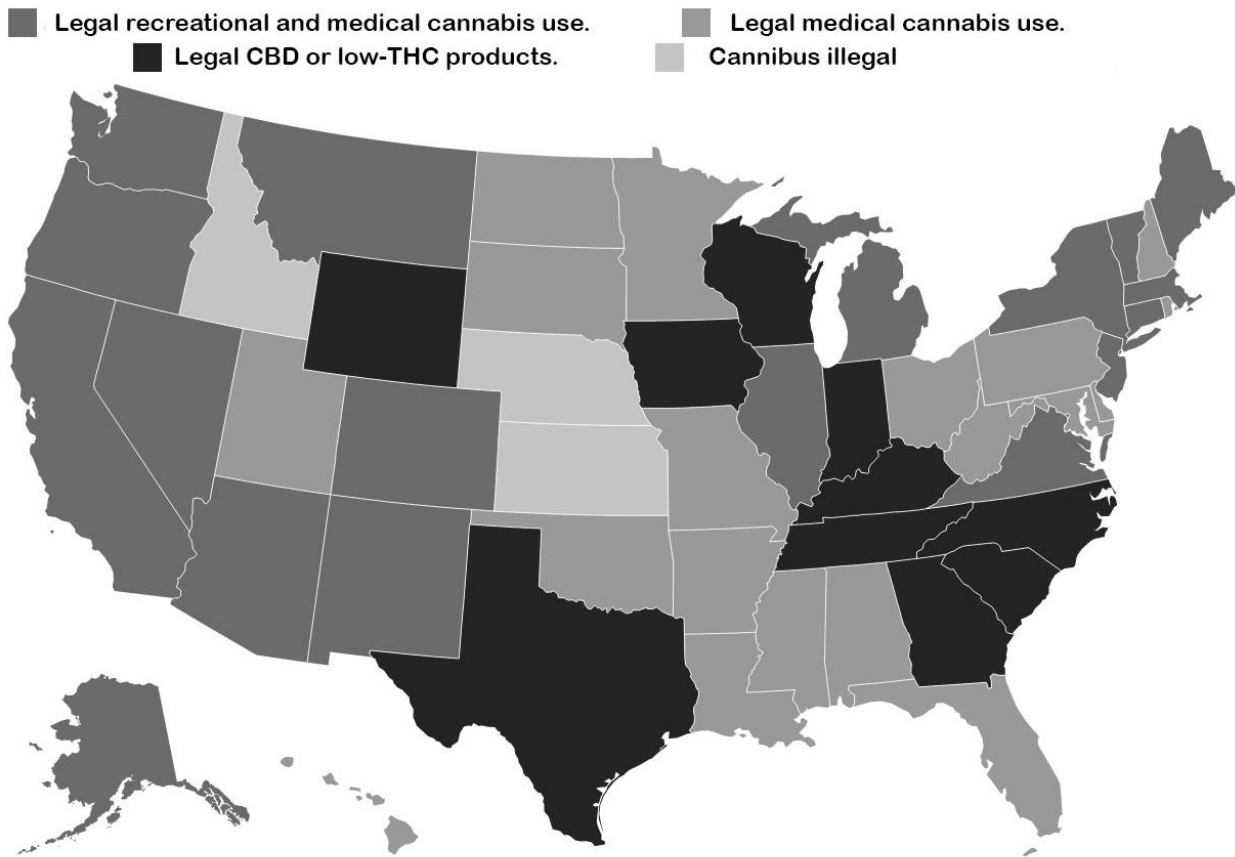
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## APPENDIX 1: MEDICAL CANNABIS INFORMATION

- Legal Authority- 37 states, DC, some localities
- Application- all firms in location unless employer exempt or position excluded due to federal or state safety/security laws
- User Population – est. 3.6 million
- Use Demographic – most frequent user is male 35-45 but with diversity of users
- Medical Benefit – pain and symptom relief from numerous medical and mental conditions
- Employee Obligations – comply with state law to become certified user, inform employer of status, and request any needed accommodation for use
- Employer Obligations – waive drug screens/tests, nondiscrimination and other use accommodation, as required by medical cannabis law. Underlying condition may require ADA accommodation

Source: Rosenthal, M.S. Demographics, Perception, and Use of Medical Marijuana among Patients in Florida. Retrieved September 9, 2020, from <https://www.karger.com/Article/FullText/512342>

## APPENDIX 2: STATE OF CANNABIS LAWS



## APPENDIX 3: WORKPLACE CANNABIS POLICIES-PROVISIONS TO CONSIDER\*\*

### Zero Tolerance/Drug Free Workplace Policy

- **General Rule and Legal Basis:** Applicants and employees will be subject to testing as required by applicable federal/state safety /security laws and regulations
- **Scope:** All employees, (employer option to limited testing to specified high risk positions/ activities)
- **Violations:** Any workplace use or possession, a positive test or refusal to submit, off duty use caused impairment of workplace safety or performance, or failure to report same of coworkers. (Examples of impairment given).
- **Drug screens and tests:** Applicants and employees will be subject to drug testing:
  - Applicants will be screened when hired and employees periodically tested, as required by law or at firm direction. (Testing of medical cannabis users may be waived, if required by law)
  - Additionally, testing can be expected upon an event of workplace impairment or accident.
  - Type of Tests Used: (medical advice should be consulted for proper test options.)
- **Employees obligations:** All employees must submit to and pass tests, report witnessed coworker impairment, and participate in continuing drug education and training.

- Sanctions for violation: Termination. (Depending on governing safety/security law, or contract terms, employer may have option of progressive discipline such as warning, fine, suspension w/ or w/o pay, subject to reinstatement)
- Criminal Records (if state law requires): Employer will not inquire about nor take adverse employment action based upon prior arrest or convictions, from personal use or possession.

### **Medical/Recreational Uses Policy**

- General Rule and Legal Basis: Applicants and employees testing as limited by state law
- Scope: All employees, (possible option to limit testing to specified high risk positions/ activities)
- Violations: Any workplace use or possession, a positive test or refusal to submit, off duty use caused impairment of workplace safety or performance, or failure to report same of coworkers. (Examples of impairment given).
  - Drug screens and tests:
    - Employee medical use of cannabis will be treated like other prescription drugs.
    - Employee recreational use of cannabis will be treated like alcohol.
    - However, testing can be expected upon an event of workplace impairment or accident.
- Type of Tests Used: (medical and legal advice should be consulted for proper test options.)
- Employees obligations: All employees must report witnessed coworker impairment and participate in drug education and training. For medical use- user to provide certificate and participate in interactive process for possible accommodation that complies with ADA.
- Sanctions for violation: Termination. (Employer not restricted in option of progressive discipline by warning, fine, suspension w/ or w/o pay and reinstatement.)
- Criminal Records (if state law requires): Employer will not inquire about nor take adverse employment action based upon prior arrest or convictions, from personal use or possession

\*\* This article and exhibits do not constitute legal advice. Legal counsel should always be consulted when formulating firm cannabis policy.