Legal Matters®

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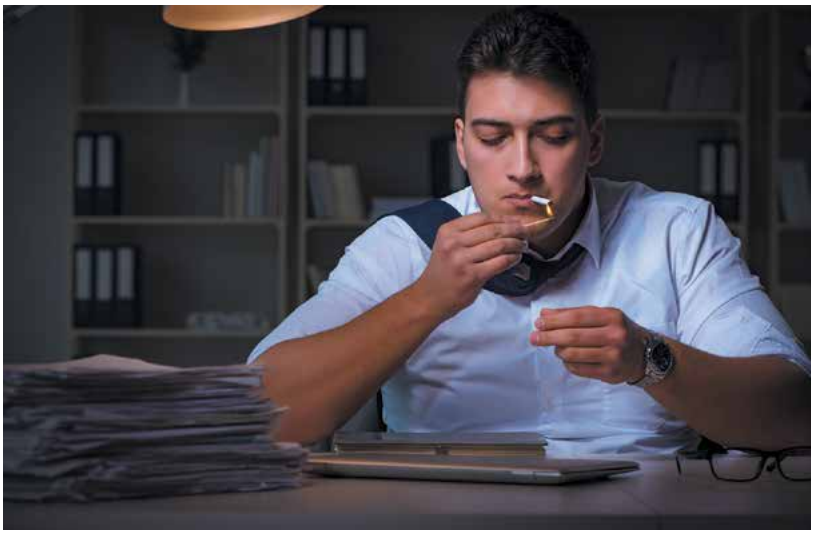
Marijuana and the workplace: What employers need to know

The landscape around marijuana use has changed dramatically over the past couple of decades. While possession of even a small amount of marijuana used to be a crime across the country, 33 states and the District of Columbia have legalized its use for medical purposes, and 10 states permit recreational use of marijuana as well. But marijuana is still technically illegal under federal law, which applies everywhere – although the feds don't seem to be going after pot users who follow the laws of their state.



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So what does that mean for you as an employer? Do you have to tolerate pot use among your employees?

The answer is that it depends on where you are and it depends on the context.

First off, it's pretty clear that employers still have the right to fire or discipline workers for being under the influence of marijuana at work, and even in states that have legalized marijuana for recreational use, the marijuana laws don't seem to prohibit employers from firing employers for off-duty use. Of course, if you're in one of those states, you might think hard before doing that. After all, if you go too far in seeking to regulate your employees' private lives — especially when they're not breaking state law or impacting workplace safety and productivity — you may run into morale and retention issues.

The issue of medical marijuana is more complex. In some states, the laws specifically say that employees can't be fired or discriminated against for off-duty medical marijuana use. But even those states generally allow employers to punish workers who are high during work hours.

In other states, laws permit employers to fire employees who use pot off-hours, even for medical purposes. Again, however, as an employer you should think hard about whether you want to impose your own

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Salesman's family can't recover for fatal accident during commute

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Generally if you're hurt in an accident commuting to or from work, you can't receive worker's compensation benefits. That's because of the "coming and going" rule which says such accidents don't occur "in the course of employment."

This rule has exceptions, of course. For example, many states have a "contractual duty" exception, which means the coming-and-going rule doesn't apply if the employee's contract entitles him or her to the use of a company vehicle for work-related travel. Similarly, the "traveling salesperson" exception applies in many states where the employee has no fixed hours or location and is making a journey on the employer's behalf.

A recent case in North Carolina, however, shows that there's a lot of grey area and even when on the surface it looks like an accident falls under the exception, that may not be the case.

In that case, the employee in question worked as an estimator for a security company. His job duties entailed visiting client sites to prepare estimates for the installation of security systems. Most days he would leave home in the morning and travel to the office before heading to a client site. Sometimes he would travel directly from home to a client site. He would usually visit the office again before returning home.

His employer gave him a company-owned work truck to do his job, and he used it for travel between job sites and for his commute from home and back. In 2016, he was killed in an accident at the end of his workday. His family put in a claim for worker's comp benefits. But the state industrial commission denied the claim under the "coming and going rule" since he was driving home.

A state court of appeals affirmed the decision. It found that the contractual duty exception didn't apply because the employer didn't provide the truck to the worker as a matter of right, it simply allowed employees to use company vehicles. The traveling salesperson exception didn't apply because even though the employee traveled a lot between job sites, he was on his way home at the time of the crash and had fixed hours and a home base.

The law may work differently in other states. Check with an employment lawyer to learn more about the law in your state.

Moonlighting workers deemed employees, not contractors

Many employers like to classify their workers as "independent contractors" instead of employees, so that those workers aren't subject to wage and hour laws and aren't entitled to other benefits like sick leave and vacation days that employees might be entitled to.

But before classifying any of your workers as contractors, you should talk to an employment lawyer. That's because you could be misclassifying them. If that happens, you can end up being sued under the very same wage laws you were trying to avoid in the first place. If you lose in court, not only will you have to pay back pay plus interest, you'll likely get stuck paying the workers' attorney fees, and the court may assess you multiple times their damages just to teach you a lesson.

So how do you know if workers can really be considered independent contractors? If they have the right to control how they do their work and are free to accept or reject projects, are providing their own materials, are free to offer the same services to others and have a written contract, there's a good chance they're contractors. But if you're exercising a significant amount of control over them, they're very likely employees and are entitled to employee protections.

These lines can get blurred, and a court won't necessarily interpret that situation in an employer's favor. This happened recently in Kentucky. A security company hired off-duty police officers to provide private security and traffic-control services to clients. When a worker accepted an assignment, he or she was told where to report and given the details of the assignment. The company classified the workers as independent contractors, assuming it was in the clear since they worked part time, were free to decide which work they would take and worked exclusively at client sites.

But the workers sued, arguing that they'd been misclassified and should really be considered employees. They argued the employer had violated the federal Fair Labor Standards Act by failing to pay them overtime.

A federal appeals court agreed with the workers, focusing on the fact that the job required no specialized skill. and the workers didn't invest in equipment or tools and worked hourly with no opportunity to increase their profits. This case shows that you can't bank on workers being "contractors" just because they work remotely or on their own schedule. Talk to a lawyer first.

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morals on your workers outside the workplace, especially if they have a valid medical reason for using cannabis.

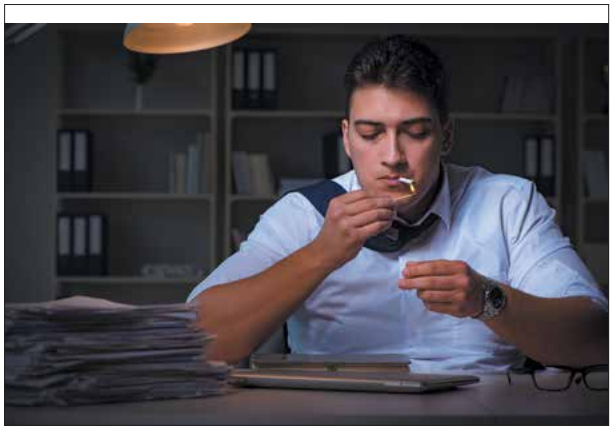
Some states' medical marijuana laws don't address this question at all, which means the courts end up deciding the issue, and different states' courts can reach different conclusions.

For example, a few years back a cable company in Colorado fired a quadriplegic employee who used medical marijuana to control his leg spasms. He only used marijuana during nonworking hours and he had a valid prescription. The employee sued, arguing that his employer had violated Colorado's "off-duty conduct" law, which bars employers from firing employees for engaging in lawful activities outside the workplace.

But the Colorado Supreme Court ruled that since marijuana was still illegal under federal law, the employee wasn't engaging in a "lawful" activity. Similar decisions followed in Oregon, California and Washington state.

More recently, the Michigan Court of Appeals ruled that a public employer could rescind a job offer after the candidate tested positive for THC in a drug screening that was part of the hiring process. The worker used pot for medical purposes, but the court ruled that Michigan's medical marijuana law doesn't protect a medical marijuana cardholder from a public employer's "zero tolerance" drug policy.

On the other hand, the highest court in Massachusetts ruled in 2017 that a woman who was hired for a marketing position contingent upon passing a drug test (and who told the employer that she was prescribed medical marijuana to treat Crohn's disease, that she didn't use it daily and that she wouldn't use it before or at work) could bring a disability discrimination claim against the company for firing her after her drug test came back positive. Rhode Island's state supreme court also recently ruled that pre-employment drug screenings as applied to medical marijuana could be disability discrimination.



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If you're in a state that's legalized medical marijuana use but you're concerned about its impact on your workplace, talk to an employment lawyer to discuss the best ways to proceed.

Resume-screening programs could raise discrimination concerns

If you're a desirable employer in a competitive job market, you probably get dozens if not hundreds of applications when you post an opening on a job board like monster.com or indeed.com.

Thankfully "artificial intelligence" (AI) computer programs exist to make sifting through these resumes a lot easier. Many of these programs use algorithms to identify the resumes that provide the best match, based on training, education or experience. Some can mine job candidates' social media activity to learn about their political beliefs and social connections, and some can go a step further and generate information about candidates' spending habits or voter registration. But that's not all. We're moving to a place where human interviewers can be replaced by a virtual "AI" interviewer (called a "chatbot") to ask questions and evaluate candidates' facial expressions, speech patterns and word choices.

If you think this sounds great, you also should be aware that these programs could potentially set you up for discrimination claims by rejected candidates. First of all, the programmers who design these applications and the project managers in your own organization who work with the programmers to customize them for your needs may have cultural biases that make their way into the software in a manner that disproportionately favors candidates from certain racial or ethnic groups. Additionally, the algorithms might tend to hurt minority groups even if this isn't intentional, such as by eliminating applicants with GEDs instead of traditional high school diplomas.

This isn't to say that you shouldn't consider taking advantage of cutting-edge recruiting software. Just be aware of this issue, discuss it with your software vendor, and discuss it with an employment attorney.

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Employer's failure to stop gossip may constitute sex discrimination

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Most employers know that Title VII of the federal Civil Rights Act prohibits workplace discrimination and harassment based on race, sex, religion and ethnicity. An employer can be held accountable for failing to investigate and address discrimination and harassment that it knows about or should know about. But many employers might not realize this includes stopping false and malicious rumors about workers from circulating throughout the workplace.

A company in Virginia didn't realize that and now may end up facing serious legal consequences.

The employer in that case fired a female employee who'd complained that male workers spread a false rumor that she'd been promoted because she slept with a high-ranking supervisor. The senior manager apparently not only knew of the gossip but helped spread it himself by discussing it at a meeting. When the employee filed suit, a federal judge dismissed the claim, describing the gossip as "offensive" but not based on sex and thus not illegal.

But a federal appeals court reversed the decision, finding that the employee could bring her case to a jury. According to the court, the rumor played into stereotypes of women using sex to get ahead, making this a legitimate sex discrimination claim. The court also pointed out that the rumors persisted for several weeks, making the conduct pervasive enough for the employee to show that the rumors created a "hostile work environment."

If you're concerned that your managers aren't aware of the different types of behavior that can constitute discrimination and harassment, or how to address them when they arise, it's a good idea to talk to an employment lawyer about how to get your staff properly trained.