

International Journal of Research in Human Resource Management



E-ISSN: 2663-3361
P-ISSN: 2663-3213
www.humanresourcejournal.com
IJRHRM 2021; 3(1): 17-20
Received: 04-11-2021
Accepted: 18-12-2021

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Marijuana in the workplace: A survival guide for California employers

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DOI: <https://doi.org/10.33545/26633213.2021.v3.i1a.56>

Abstract

California's regulations regarding marijuana use have significantly changed in recent years and it is evident that it will continue to change as we move ahead. With the evolution of legislation surrounding the use of marijuana, California employers must be knowledgeable about the drug and understand its implications on the work environment. The legalization of marijuana in California has compelled employers to pilot through a reasonable balance between an individual's right to use marijuana and an employers' right to maintain a safe and drug-free workplace. This article presents a brief history of California regulations related to marijuana use and provides a comprehensive guide to employers by analyzing the effects of marijuana and discussing the issues associated with the legalization of substance use in California and its relations to workplaces. As these regulations evolve, employers must ensure that appropriate policies and processes are in place to address situations that arise from pre-employment testing and workplace conduct related to marijuana use.

Keywords: Marijuana, employment, workplace, employers, legalization

Introduction

Drug and substance abuse are among the critical issues that challenge the social constructs of sustainable and viable well-being. However, the usage of some drugs conveys controversial discussions about their relevance and associated impacts on people. Among the substances in concern is marijuana. Although scholarly studies portray the use of marijuana as impactful towards the health of users, some claim it to have medicinal values. But in workplaces, the conversation of recreational and medical applications of drug substances attracts more discussions. In California, the legalization of marijuana has influenced the substantial topical debate, which relates to the effects of the drug and regulations associated with the substance, specifically in rights to use and employers' consent to decline the usage within their workplaces. Therefore, the article will provide a comprehensive guide to employers by analyzing the effects of marijuana and discussing the issues associated with the legalization of substance use in California and its relations to workplaces.

Background History of Marijuana

Federal law: According to Medicalmarijuana.com (2020) ^[5], the government, through federal laws, specifically under the statutes of the Controlled Substance Act (CSA) (21 U.S.C. § 811), regulates the use of drugs. Consequently, the CSA regulations do not provide any specific guidelines on the use of marijuana, whether for enjoyment or medical purposes. Thus, any substance usage violates the federal policies on drug and substance use and is termed illegal. Furthermore, the act does not discriminate against individuals found in connection with the use of marijuana. As noted in a memorandum by the United States Chief Human Capital Officers Council (2015), it is illegal under federal regulations to be found in possession of marijuana to cultivate or supply the substance in any quantity deemed substantial by the government.

Consequently, as discussed by Medicalmarijuana.com (2020) ^[5], marijuana, just like any other substance controlled by the government, including heroin and cocaine, falls on the watch of the federal laws on drugs. Furthermore, since every other regulated drug is scheduled as per specific standards, such as potent abuse and its value in medicine, marijuana is also on a schedule. According to the United States Chief Human Capital Officers Council (2015) ^[3], marijuana is categorized as a schedule I controlled drug

substance in the Controlled Substance Act. Medicalmarijuana.com (2020) [5] notes that the principles of the categorization are based on the addictive nature of marijuana and that the federal government deems the substance of no convincing medicinal value. However, exceptions are made, and only doctors can provide recommendations through the First amendment act on substance use.

Nevertheless, the recommendations must be professional, and adherence to codes of conduct must be followed; otherwise, the practice would be considered unethical and violate professional standards of practice. Thus, based on Medicalmarijuan.com (2020) [5], since the Drug Enforcement Agency was mandated with the enforcement of federal laws on substance use, the department has extensively portrayed significant interests in the usage of marijuana as a medical drug with value to patients and caregivers. Furthermore, as more efforts get channeled to understanding the medicinal value of marijuana, the DEA, under the federal laws, carries its responsibilities and mandates without any contradictory perspectives of usage and cultivation.

State laws

In the United States, evidence of a collision between federal and state laws often occurs, and among the contradictions is the California state laws on the use of marijuana. According to California Cannabis Portal (n.d.), California, through a public initiative, voted into law the Compassionate Use Act, proposition 215 in 1996. As the first state to approve general usage of marijuana, California was also the first to sign into law guidelines on the use of medical marijuana through a public ballot campaign across the United States. In 2015 the California Cannabis Portal (n.d.) notes that through the California legislation department, the Medical Cannabis Regulation and Safety Act were inaugurated into law and incorporated three bills that provided state licensing guidelines and regulatory elements on the existence of a market for medicinal marijuana.

The MCRSA act policies also led to establishing California’s regulatory and licensing authorities mandated

to oversee the use, sale, and cultivation of marijuana. As listed by California Cannabis Portal (n.d.), the authorities included the Bureau of Cannabis Control, Manufactured Cannabis Safety Branch, and Cannabis Cultivation Licensing authority. In 2016, another regulatory bill was passed as a California state bill. The bill, Adult Use of Marijuana Act, was voted in through proposition 64, and it was mandated to provide adults above the age of 21 years the legal right to use marijuana for recreational purposes (California Cannabis Portal, n.d.). Furthermore, the law granted users the right to have marijuana, sell, and cultivate. But in 2017, based on the records from California Cannabis Portal (n.d.), the integration of MCRSA laws with the Adult Use of Marijuana Act repealed the three bills in MCRSA to amend the regulations into Medicinal and Adult-Use Cannabis Regulation and Safety Act. Thus, under the single law, the state provides effective regulatory systems and guidelines on the adult usage of marijuana and as a substance with medicinal value.

Marijuana trends and statistics

Some of the most sobering statistics on the trends and use of marijuana are retrieved from the Substance Abuse Center and Behavioral Health Statistics and Quality agency. According to the agency, among the most abused and commonly used substances in the United States, termed as psychotropic, is marijuana and the drug, second to alcohol is a daily dose for usage among the young population in societies (SAMHSA, 2019) [10]. Based on data to support the Substance Abuse Center for Behavioral Health Statistics and Quality statistics, the National Institute on Drug Abuse reported in 2020 that in 2018, approximately more than 11.8 million young people, specifically young adults between grades 8 to 10, abused marijuana. Furthermore, based on the report, claims of daily usage from the surveyed population have recently increased and portray factual information on drug and substance use in the United States. As these young adults enter the workforce, California employers will not be immune from dealing with marijuana abuse in the workplace.

Table 1: Show the Drug and period and graders

Drug	Period	8 th Graders	10 th Graders	12 th Graders	
Any Vaping	Lifetime	24.1	41.0	47.2	
	Past Year	19.2	34.6	39.0	
	Past Month	12.5	23.5	28.2	
Vaping (Marijuana)	Lifetime	10.2	22.7	[27.9]	
	Past Year	8.1	19.1	22.1	
	Past Month	4.2	11.3	12.2	
	Daily	0.7	[1.7]	2.5	
Marijuana	Lifetime	14.8	33.3	43.7	
	Past year	11.4	28.0	35.2	
	Past Month	6.5	16.6	21.1	
	Daily	1.1	4.4	6.9	
Changes from the previous year					
Drug	Period	Ages 12 or older	Ages 12 to 17	Age 18 to 25	Ages 26 or older
Marijuana	Lifetime	45.3	15.4	51.5	47.8
	Past Year	15.9	12.5	34.8	13.3
	Past Month	10.1	6.7	22.1	8.6

Source: <https://www.samhsa.gov/data/report/2018-nsduh-detailed-tables>

How THC affects performance

According to the National Institute on Drug Abuse (2019) [10], marijuana as an organic substance contains chemicals

that activate the plant as a drug. Moreover, NIDA states that among the active agents in marijuana is THC which causes an individual to perceive the sensation of being ‘high.’ As

an active agent, THC quickly diffuses through the lungs to the blood, which is then transported to the brain. As described by the National Institute on Drug Abuse (2019)^[10], the consequences lead to significant effects, both short and long-term, on the brain. Furthermore, the diffusion of marijuana chemicals to other organs leads to side effects. As listed by the National Institute on Drug Abuse (2019)^[10], the side effects include;

- Hallucination
- Impaired body movement
- Changes in moods
- Altered sense of time
- Difficulty with logical thinking and problem solving
- Psychosis
- Delusional

Apart from the short-term effects of marijuana, clinical studies reveal substantial long-term impacts on users. Research conducted by Kaliszewski (2019)^[4] found out that among the most affected population and users of marijuana are teenagers. As the consequence of an underdeveloped brain, the effects include impaired thinking, memory incapacity, and learning function impairment. Despite the findings from scholars on the impact of marijuana, research on long-term and short-term effects is still underway to understand the substance comprehensively. An example of such research on the effects of marijuana, as discussed by the National Institute on Drug Abuse (2019)^[10], is a New Zealand study undertaken by scholars and researchers from the Duke University. The research found that users of marijuana who started using the substance at their teen ages portrayed a disorder related to the usage and had lost approximately 8 IQ points since age 13 to 38.

Consequently, the users lost their memory capabilities and but some who stopped the addiction recovered but not entirely to their capacity. However, based on a study by Meier *et al.* (2012)^[6], users of marijuana who started taking up the substance during their adulthood did not showcase any impact on their IQ levels. Therefore, the use of marijuana results in substantial impact, and in most cases, long-term effects are inevitable.

Failing a drug test due to secondhand marijuana smoke. Is it possible?

Some of you in the HR and employment world have probably heard this before where an employee comes in for a drug test and test positive but then tells you they did not smoke marijuana. Still, they were at a party where someone else was smoking, so it was probably passive smoking...

According to the National Institute on Drug Abuse (2019)^[10], though failing a drug test after being a passive smoker is possible, in most cases is not likely to happen. However, the NIDA claims that a very minute amount of the active ingredient in marijuana, THC, gets exhaled out to the open-air during an active smoking session. Based on Röhrich *et al.* (2010) and Cone *et al.* (2015) conducted parallel research, the findings claim that people are not likely to fail in drug tests unless they were passive smokers in an enclosed environment active smokers for hours on edge. Furthermore, the findings state that though some active ingredients of marijuana like THC would be found in the blood test, failing the drug test will be very unlikely.

How does this all tie to employment?

There is currently a contentious debate in California related to the passing of proposition 64 (AUMA) for recreational use and employment-related laws. According to Sheeler (2021)^[11], a recent bill AB-1256 introduced by Assemblyman Bill Quirk in the California state legislature to bar California workplaces from using records of past marijuana usage to decline employment opportunities to people, through evidence gathered from a urine or hair test as a reason.

But, Title III of the Americans with Disabilities Act (ADA) protects people from discrimination based on disability (United States Department of Justice and Civil Rights Division, n.d.). Thus, a person using medical marijuana to treat a medical condition recognized as a disability should be allowed to use it if such use is otherwise allowable. The employer can reasonably accommodate the disability without eliminating the essential functions of the job. It is crucial to first consult with your HR department or legal counsel before taking any adverse actions against the employee or applicant. Accommodation of the use of marijuana is not required if it would create a safety issue or the use of it would cause intoxication, therefore, impairing the individual's ability to perform the essential functions of the job. Thus, adults in California have the right to smoke marijuana, but drug abuse, specifically smoking for an extended period, can significantly affect their performance.

According to the California Chamber of Commerce (2020)^[2], the current law on drug-free workplaces permits an employer to maintain a drug-free organization through policies and by conducting drug tests before employment, in case of any suspicion of impairment and post-accidents. Furthermore, the California Chamber of Commerce (2020)^[2] notes that employers in California working with the federal government must adhere to the federal Drug-Free Workplace Act, which expects employers to maintain drug-free workplace policies. It is also expected that the regulatory laws in California regarding the recreational use of marijuana and medicinal purposes comply with the employers' right to have drug-free workplace standards.

Can i do a drug-test on a current and/or new employee?

The short answer is yes but with limitations. According to Nagele-Piazza (2018)^[7], Pre-employment drug tests are generally permitted if they are conducted in a just and consistent way and administered to all applicants. If you have a drug-free policy and provide a drug test to all new hires, you may do so without fear of violating any laws. If a new hire does show up positive for marijuana, employers have the right to maintain a drug free workplace to ensure the safety of all in the workplace. However, if the new hire uses it for medicinal purposes, then remember that you must follow the interactive process if the candidate is a qualified individual with a disability under the ADA. You must then determine if the candidate has a recognized disability; the employer may be required to accommodate. However, accommodation is not necessary if it would pose a safety risk or if the employer must eliminate essential functions of the position for safety reasons. Just remember to consult with your HR department and legal counsel, so you follow the process correctly.

You should never perform a “random” drug test for current employees because you may not be able to justify the company’s “random” intentions without infringing on the employees’ right to privacy. Nagele-Piazza (2018) ^[7] states California offers a constitutional right to privacy that refrains employers from monitoring off-duty practices and activities of their employees. Instead, you must base your needs for a drug test on observable impairment and intoxication of the individual employee. Furthermore, the same concept applies to both Alcohol and Drug abuse.

Unlike alcohol, marijuana may stay in your system for up to 30 days, so a drug test needs to be tied with an observed intoxication occurrence. Remember that intoxication (feeling high) may only last 1.5 to 2.5 hours (degradation of performance may last 4-6 hours). Keep in mind that there are no tests for intoxication levels similar to a blood alcohol content test. The test results will not identify how much THC there is; the test will only tell you if traces of THC were detected in their system (the test will not tell you if they are high, only that THC traces are present). The concept means the test cannot tell you if the employee used marijuana 2 hours ago, or 20 days ago, which is why you must tie the test results with visual intoxication and impairment.

According to the California Chamber of Commerce (2020) ^[2], the California Supreme Court, based on the consensus of *Ross v. Ragingwire Telecommunications, Inc.* (2008), proclaimed that employers were not forced to tolerate the use of marijuana in their workplaces, regardless of use as a medicinal drug or for recreational. The federal statutes support the consensus under proposition 215, which illegalizes any use of marijuana.

Therefore, as discussed by the California Chamber of Commerce (2020) ^[2], despite Ragingwire preceding Proposition 64, the regulations speculate the standards required within a workplace. The consensus generally found that Ragingwire’s logic to be the governing policies in California. But through the Fair Employment and Housing Act, the California Chamber of Commerce (2020) ^[2] claims that substantial propositions towards the consensus try to influence Ragingwire’s statute to be rewritten. Hence, it will be possible for employers to allow the use of marijuana in workplaces based on regulations that provide users the right without intimidation from their workplaces.

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