



# MANAGING SUSPECTED CANNABIS USE IN THE WORKPLACE

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The legalization of cannabis for medical and recreational use in many states has created new challenges for employers. While employees may legally use cannabis outside of work, employers still have the responsibility to ensure a safe, productive, and drug-free workplace. One of the key challenges under evolving cannabis laws is determining how employers should respond when they suspect an employee is under the influence of cannabis during work. Employers often question whether

drug testing is permissible, how to conduct such tests, and how to balance workplace safety with an employee's legal right to use cannabis outside of work. The situation is further complicated by varying state laws, with some jurisdictions explicitly prohibiting termination based solely on a positive marijuana test unless on-the-job impairment can be proven.

The first and most important step for employers is to adopt a strong, well-defined employment policy addressing substance

use in the workplace. While no law requires employers to allow on-the-job intoxication, state laws uphold the right to maintain a drug and alcohol-free environment. Thus, employers should address cannabis use in zero-tolerance policies. However, an employer should be careful to ensure that any such policies are not so overbroad that they cause confusion over whether state or federal law applies, especially since marijuana is still classified as a Schedule I illegal substance at the federal level. Employers should

also ensure that policies cover all forms of cannabis to avoid loopholes. A strong policy should prohibit the use, possession, or impairment of cannabis during work hours and on company premises, define “impairment” in practical terms, state that employees may be subject to reasonable suspicion testing and disciplinary action, address all forms of cannabis (smoked, ingested, vaped, topical), outline consequences for violations (warnings, suspension, termination, Employee Assistance Program referrals), and include state-specific compliance notes. A sample policy provision is as follows: “The company maintains a zero-tolerance policy for the use or impairment from drugs, including smoking, ingesting, vaping or topically applying cannabis, during work hours or on company property. Employees suspected of impairment will be subject to evaluation and possible drug testing in accordance with applicable law. ‘Impairment’ means being physically or mentally unable to perform work functions safely and effectively. Any violation of this policy may subject an employee to disciplinary action, including immediate termination.”

In addition to a clear policy, employers need a formal process for identifying and addressing impairment. The courts require a reasonable suspicion standard, and workplace observations should be reported and recorded. The written reports should include all observations because, under the law, a single observation is usually not enough; thus, employers and management staff should be counseled that multiple observable signs are required. Observations should be specific, timely, and based on factors such as appearance, behavior, speech and odors. Thorough documentation is critical both for supporting decisions and defending against potential claims.

Common indicators of cannabis impairment include physical signs, such as a flushed, sweaty or pale face, red or blood-shot eyes, droopy eyelids, dry mouth or lip-smacking, and a disheveled appearance. A strong odor of marijuana can be important corroborative evidence. An employer should also look at behavioral signs, including lack of coordination; disorientation, confusion or euphoria; incoherent, rambling, repetitive or slow speech; excessive yawning; the inability to operate equipment; extended breaks; overconsumption of junk food; and unusual use of sunglasses. Employers should also consider the employee’s history, past performance issues, recent accidents, safety violations, and possession of drug paraphernalia. Corroboration from credible sources, particularly supervisory employees, can be strong support for establishing reasonable suspicion. Gathering

a significant amount of corroborative evidence is key in both the determination of cannabis use and in protecting an employer from possible future claims.

The above may seem overwhelming to an employer. Employers may retain a Drug Recognition Expert (DRE), who is a certified professional trained to detect drug and alcohol impairment. A DRE must successfully complete all phases of training requirements for certification as established by the International Association of Chiefs of Police and the National Highway Traffic Safety Administration. A DRE is also skilled in identifying the category or categories of drugs causing the impairment. Another option is to designate and train a supervisory staff member to assist in making reasonable suspicion determinations. While state guidance may allow internal designees, hiring an independent, certified DRE often provides greater protection and credibility.

If impairment is confirmed, employers may request a drug test. However, THC detection presents challenges, and the presence of THC does not necessarily indicate current impairment. In addition, THC can be detectable long after use, and detection windows vary by sample. For example, THC can be detected in hair samples for up to 90 days, in urine for one day to over one month, in saliva for up to 24 hours, and in blood for up to 12 hours. The route of consumption (smoked vs. ingested), frequency of use, and personal metabolism also influence the results. Employers should use certified testing facilities and preserve and document the chain of custody.

If there is a positive drug test, the employer should then determine what disciplinary action should be imposed. Disciplinary measures depend on the situation and are fact-specific. Options range from mild discipline, such as a written warning or probation, to more severe discipline, such as suspension or termination. Supportive discipline could include mandatory counseling, treatment programs, or referral to an Employee Assistance Program (EAP). These procedures should be outlined in the employee handbook to provide clarity and reduce legal risks. Employers should also ensure that the disciplinary process is consistent with company policy, clearly communicated to employees, and applied uniformly to avoid discrimination claims.

A practical application of the above law is illustrated in *Layne v. Kanawha County Board of Education*, No. 16-0407, 2017 W. Va. LEXIS 112 (Supreme Court of Appeals, Feb. 17, 2017). In that case, the petitioner was a middle school sign language interpreter who was observed behaving erratically by five employees. Specifically, the

employees observed the interpreter sitting in her car and waving her arms as if she was fighting with someone, chasing pieces of paper across the school’s parking lot, staggering and tripping in the classroom, and leaving a bathroom that smelled like something had been set on fire or was burning. She was also late to work that morning and never signed in. These observations were reported to the school principal, who then met with the interpreter and made her own observations, which included the following: the inability to sit still; glassy eyes; dry mouth; rambling speech; being overly talkative and displaying exaggerated politeness; displaying quick-moving actions and body contortions; the inability to hold her pen in her hand; messy hair; fixation on items in her bag; and repeatedly asking the principal whether she appeared to be coherent. The principal was familiar with the petitioner’s customary behavior, and she concluded that the petitioner’s behavior on the date in question was “drastically different and unusual.” The petitioner refused a drug test, the consequences of the refusal were explained, and she was suspended without pay. Her probationary contract was not renewed, and she then engaged in the grievance and appeal process. The non-renewal and suspension were upheld by the court, which found that the facts constituted a sufficient basis for reasonable suspicion drug testing and resultant disciplinary action. This case highlights the importance of thorough, well-documented evidence to substantiate reasonable suspicion and justify disciplinary action related to drug use.

In summary, a comprehensive policy, combined with structured procedures, trained personnel, and clear documentation, enables employers to manage suspected cannabis use effectively, safeguard workplace safety, and minimize discrimination claims. Best practices for compliance with such policies include regularly updating policies to reflect changes in state laws, providing annual supervisor training on impairment recognition and documentation, maintaining confidentiality in all investigations and disciplinary actions, and consulting with legal counsel before implementing major policy changes.



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