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Ohio employers confront marijuana use

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Ohio may be growing more open to marijuana use, but its businesses aren't.

But they don't really have much of a choice.

Tones could change if overarching state and federal laws related to use of medical cannabis do. But until then, laws are making it quite difficult for any employer to proactively write rules permitting staff to use it as a doctor might recommend once Ohio's medical marijuana program goes into effect in September 2018.

On one hand, federal laws still classify marijuana in the same category as heroin and LSD, and there are no federal laws requiring businesses to accommodate marijuana use. On the other, states across the country are increasingly passing laws permitting some kind of medical or recreational use. The laws simply don't jibe.

And those conflicting laws leave businesses in a conundrum when it comes to allowing use by employees as they're caught between old rules, like zero-tolerance policies, and changing laws and perspectives on medical marijuana.

As Ohio ramps up to its medical marijuana program, companies here are looking to legal counsel for guidance on tightening rules to make it clear that staff could still be drug tested and fired for having marijuana in their systems — regardless of state laws that might allow patients to use.

"What employers are doing right now, if they're being advised properly, is creating some type of workplace policy specific to medical marijuana usage," said Thomas Haren an attorney with [Seeley, Savidge, Ebert & Gourash](#) focused on Ohio's budding medical marijuana industry. "Broadly speaking, medical marijuana doesn't change Ohio employment law all that much. We are still an at-will employment state. You can still refuse to hire, suspend, terminate or take adverse employee action if they use medical marijuana in violation of policy."

If there's no clearly written policy and someone is tested and fired for marijuana use, they're potentially liable for unemployment claims, regardless of any doctor recommendation saying the drug would benefit the person (doctors, in fact, only recommend medical marijuana to patients, but don't prescribe it, because of federal laws. This is why a patient doesn't get their marijuana from a pharmacy.)

"But what about employers who don't want to necessarily say no? I have seen that," said Stephanie Trudeau, a labor and employment litigator with [Ulmer & Berne LLP](#). "They are torn over their desire to find a way to make the legalization of it blend together in a safe workplace in harmony. I've talked to some who are struggling over the idea of making employees choose between keeping their job or keeping a treatment the employee says is medicine that improves their quality of life."

A budding reality

As would be expected, states that have legalized marijuana in some form are, indeed, seeing sharp increases in failed drug screens. That means marijuana in the workplace will be a growing reality.

According to research company [Quest Diagnostics'](#) annual [drug testing index](#) released in May, marijuana positivity in the U.S. workforce has increased 75% in three years — from 5.1% in 2013 to 8.9% in 2016.

In Colorado and Washington, the first states to approve recreational marijuana use, the increase in urine screens showing marijuana outpaced the annual national average, according to the study. Colorado saw an 11% increase between 2015-2016, while Washington increased 9%. That marked both states' steepest year-over-year change since they passed their recreational laws. The national growth rate in that period is 4%.

Yet, there are a handful of companies who want to be proactive in terms of their own policies on marijuana, but their hands are tied.

A driving issue is that technology in testing isn't at a point yet that can distinguish whether a person is actually high at work versus having taking their recommended cannabis medication on their own time versus substances like alcohol. As Trudeau notes, "The science here is failing us."

"We have some clients that are leaning toward a marijuana 'friendly' approach — they are not concerned about employees using medical marijuana outside of work," said Stephen Zashin, a labor and employment lawyer with [Zashin & Rich](#). Companies he's currently working with include those in manufacturing, service, retail, hospitality, health care, life sciences and technology.

"However, the majority of our clients are very opposed to the idea that employees might come to work under the influence of any substance," Zashin said. "This gets complicated with respect to marijuana, which can show up in the user's system long after the effects wear off. Employers are all over the board on this and not one approach fits all."

He added that businesses in "safety sensitive" industries, like manufacturers, are naturally the most likely to take the most hard line on use — and there's quite a density of those in Northeast Ohio.

Fighting the stigma

And regardless of laws, there's still a stigma with marijuana use among some people. While companies talk behind closed doors about being proactive and accommodating, despite overall attitudes toward cannabis changing, all are still leery of how that might be perceived in the public. No one seems to want to embrace the tongue-in-cheek title of being the "stoner company."

All states allowing some kind of cannabis use are wrestling these issues.

Ohio is just the next line.

Zashin pointed to a recent ruling by the Massachusetts Supreme Court in *Barbuto v. Advantage Sales & Marketing LLC*. In that case, the plaintiff, who suffers from Crohn's disease and takes medical marijuana for her symptoms, argued she was a "qualified handicapped person" and she should be absolved from the company's policy of not retaining an employee who tests positive for marijuana. Massachusetts justices sided with her, ruling patients who use marijuana for medical purposes can file discrimination claims if they're fired for testing positive, and that allowing her to use it would constitute reasonable accommodation of a disability.

Meanwhile, in 2015, the Colorado Supreme Court ruled that a business can fire an employee for using medical marijuana even if the employee is off-duty and following state laws. That ruling was tied to a case involving a quadriplegic who was fired by Dish Network for using marijuana — as doctors recommended — outside of work.

So as states wrestle with marijuana use in the workforce, each is simultaneously and separately shaping their own approaches.

Haren suggests that states like Ohio could be more proactive themselves in helping support development of new technologies to test levels of impairment. Having the proper testing tools and technology could solve a lot of issues.

"It's easier to measure the impact of alcohol. But we're not there yet with cannabis," Haren said. "For us to get a better understanding of the ways cannabis impairs people, and how we actively measure that level of impairment, that would be a good thing."

But until then, expect companies to maintain hard lines of medical marijuana use, leaving some employees to undoubtedly face the difficult decision of choosing jobs over medicine.