

Proliferation of Laws Providing Employment Protections for Marijuana Users Complicate Businesses' Efforts to Maintain Occupational and Public Safety

Article

May 18, 2022 | *Texas Lawyer* | 3 minute read

On the afternoon of January 4, 1987, the crew of a Conrail locomotive traveling near Baltimore, Maryland failed to respond to stop signals and hit an Amtrak train traveling from Washington, DC, to Boston, Massachusetts. Fourteen passengers on the Amtrak train were killed. Post-accident testing revealed that both the Conrail locomotive engineer and brakeman had been using marijuana.

This tragedy was part of the impetus for United States Department of Transportation (DOT) regulations mandating drug and alcohol testing for various categories of transportation employees.

At the same time, for the vast majority of workers holding safety sensitive positions throughout the United States, these mandatory transportation industry testing requirements are inapplicable. Whether employers of safety sensitive workers, outside of transportation industries, even have the right to test workers for marijuana use or prohibit marijuana use altogether is a function of state, and occasionally local, laws.

While Texas has no laws limiting employers' rights to conduct marijuana testing or prohibit employees from using marijuana altogether, other states, such as New York and New Jersey, have recently enacted laws substantially tying the hands of employers—even in the case of recreational use—with respect to marijuana use prohibitions and testing for positions not subject to DOT testing requirements.

For Texas businesses operating in multiple states, the adoption of state laws limiting employer actions has complicated their efforts to assure their employees are not impaired by marijuana use.

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State Law Protections for Marijuana Use

In March 2021, the New York Marijuana Regulation and Taxation Act became effective. This Act not only legalized recreational cannabis use but also prohibits employers from discriminating against workers for using cannabis outside of the workplace and outside of work hours.

The New York Department of Labor then issued guidance in October 2021 concluding that the Act effectively prohibits employers from testing for marijuana except when required by federal law, another New York law, or in the very limited circumstances where an employee, while on duty, exhibits “specific and articulable symptoms of cannabis impairment.”

The rationale for concluding that marijuana testing is generally unlawful in New York is that test results do not distinguish between whether the use occurred on the job or off the job. Cannabis advocates argue that if off-the-job recreational use is permissible, then employment actions based on positive marijuana tests that may have been caused by use at any time in recent days, or even weeks, inherently discriminate against persons lawfully using marijuana off the job.

While the number of states protecting employee use of recreational marijuana is currently small, there is no question that the number will grow.

A much larger group of states protect employees from adverse employment action for off-duty medical cannabis use. Some of those states, like New Mexico, Oklahoma, and Arkansas, with employment law protections for medical marijuana users also have broad exceptions to those protections for safety sensitive jobs.

A variety of other states, however, do not limit the employment protections for medical marijuana users with safety sensitive jobs. For instance, under Delaware’s Medical Marijuana Act, employers may not discriminate against registered medical marijuana users who use the drug consistent with state law. Delaware has no broad exception that allows employers to require those individuals holding safety sensitive positions to refrain from off-duty marijuana use.

Moreover, the creative argument by an employer’s attorney that the Delaware Medical Marijuana Act is preempted by the federal Controlled Substances Act in this context was rejected in 2018 by a Delaware court in *Chance v. Kraft Heinz Foods Co.* A number of other courts in other jurisdictions have declined to accept similar preemption theories based on the federal Drug-Free Workplace Act and the Americans with Disabilities Act.

Strategies for Employers Going Forward

For multistate employers, coping with state law employment protections for medical or recreational marijuana use will only become more difficult as more states legally shield off-duty marijuana users from adverse employment actions.

The question becomes how should businesses mitigate the risk to safety.

Potential strategies include:

- Remember that in all states with employment protections for marijuana users, businesses remain free to prohibit on-premises or on-duty marijuana use, possession, or impairment. Therefore, when an employer has solid evidence of on-the-job use, possession, or impairment, the employer is free to take adverse action and should generally do so.
- Bear in mind that permissive laws related to marijuana do not protect employees with regard to other unlawfully used drugs, such as cocaine, heroin, or opioids. Therefore, a vigorous testing program and strong use prohibition still makes sense for safety sensitive employers with regard to these commonly abused drugs.
- Recognize that some states that border Texas, including New Mexico, Oklahoma, and Arkansas, allow employers to uniformly prohibit marijuana use, even medical marijuana use, by employees holding safety sensitive positions.
- Employers often become concerned about potential drug use by an employee because of unsafe or otherwise unacceptable job performance by the employee. Remember that employers remain free to discipline and terminate employees for unsafe conduct or other poor performance or behavior itself.
- Consider that some business-friendly states, like Texas, are unlikely, at least anytime soon, to adopt these kinds of employment protections for marijuana users. For safety sensitive operations, that amounts to another argument for locating facilities in Texas or another state unlikely to adopt marijuana-friendly job protections in the near future.

Article originally published by Texas Lawyer on May 18, 2022.