

Q&A: Can my employer fire me for legally using marijuana?

Associated Press

BOSTON — Changing marijuana laws aren't necessarily making weed more welcome in the workplace.

For now, many employers appear to be sticking with their drug testing and personal conduct policies, even in states where recreational marijuana use is now permitted. Others are keeping a close eye on the still evolving legal, regulatory and political environment.

Voters in California, Massachusetts, Maine and Nevada voted Nov. 8 to approve the use of recreational marijuana, joining Colorado, Washington, Oregon and Alaska, where it had previously been legalized. (A recount of Maine's close result is scheduled.) More than two dozen states have medical marijuana programs.

But the drug is still against federal law.

A closer look at what it all means for workers and businesses:

CAN MY EMPLOYER STILL TEST ME FOR POT?

Bottom line: You can't come to work high. You can still be drug tested. And you can still be fired — or not hired — for failing a drug test even if you're not the least bit impaired at work.

All the states with legalized recreational pot have exemptions for workplace drug policies.

In Massachusetts, for example, the law includes language stating that "the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees" is not changed.

"Yes, you may be able to have (marijuana) at home, but that doesn't mean it's OK in the

workplace," said Edward Yost, an HR specialist with the Society for Human Resources Management.

WHAT ABOUT WORKPLACE SAFETY?

Advocates for marijuana legalization said it was never their intention to compromise safety, a central reason offered by employers for drug testing.

"We don't want anyone to come to work impaired on any drugs," said David Boyer, campaign manager for the ballot initiative in Maine.

A 2013 survey by the employee screening firm HireRight found 78 percent of employers conducted drug tests either randomly, as a condition of employment, after accidents or for some combination of those reasons.

The federal government requires drug testing for some workers, including truck drivers and others in transportation.

Quest Diagnostics, which performed nearly 11 million laboratory-based drug tests for employers in 2015, said the percentage of tests coming back positive has shown a modest increase in recent years. Nearly half of all positive tests showed evidence of marijuana use.

CAN I GET FIRED EVEN IF I'M NOT HIGH?

THC, the psychoactive chemical in cannabis, can stay in a person's system for days or even weeks, experts say — long after the buzz has subsided.

"It's the equivalent of firing somebody who drank a glass of wine on Friday evening and then came to work on Monday," said Tamar Todd, legal director for the Drug Policy Alliance, who believes employers should reconsider



AP Photo/Brennan Linsley, File

In this Oct. 4 file photo, farmworkers inside a drying barn take down newly harvested marijuana plants after a drying period, at Los Suenos Farms, America's largest legal open air marijuana farm, in Avondale, southern Colo. Newly approved laws in four states allowing the recreational use of marijuana are seen as unlikely to change rules regarding use of the drug in the workplace.

zero-tolerance policies in light of changing laws and attitudes.

A number of efforts are underway to develop an accurate method, akin to the Breathalyzer for alcohol, to measure actual marijuana impairment. Such a test might be useful not only for employers, but also for police and prosecutors trying to determine what constitutes driving under the influence in states where recreational pot is legal.

WHAT SHOULD COMPANIES DO?

At a minimum, companies should review their current policies, make sure their managers are trained and make clear to employees that marijuana use on or off the job can still land them in trouble, said James Reidy, a New Hampshire-based attorney who advises clients around the country on drug testing issues.

information resource manager for the Colorado-based Mountain States Employers Council.

After Colorado became the first state to legalize recreational marijuana in 2012, surveys showed an uptick in workplace drug testing, Graves said, but that trend has begun to shift in the other direction.

"Employers who have a zero-tolerance policy maybe shouldn't apply that to non-safety sensitive workers, because if they do testing on them, they run the risk of inviting an invasion of privacy claim," suggested Amanda Baer, a Boston-area attorney who specializes in labor and employment issues.

WHAT DO THE COURTS SAY?

Adding to the uncertainty is the scarcity of legal precedent in states that have legalized recreational marijuana. But several cases involving employees with permits to use medical marijuana have reached the courts, and most have been decided in employers' favor.

The most widely cited case is a 2015 Colorado Supreme Court that upheld Dish Network's firing of a disabled man who used medical marijuana and failed a drug test. The court ruled that a state law barring employers from firing workers for off-duty behavior that is legal did not apply because pot remains illegal under federal law.

Similar rulings have been issued in other states including California, Montana and Washington.

As medical marijuana programs become more common even in states where recreational pot remains outlawed, some companies have begun to weigh accommodations for workers with permission to use marijuana for an existing health condition.

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CAROLYN OLSEN - BEND, OREGON

It was just before Christmas in 2008 when Carolyn Olsen of Bend spoke to her doctor. The news was bad: multiple myeloma, a cancer that attacks blood cells. Treating it meant traveling to OHSU. She'd have to be away from home for months. But she knew she could not be away from Dennis, her husband. Throughout her treatment, he was always with her. Reading to her, giving support, being there. According to Carolyn, being together made all the difference.

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"The new OHSU guest house will be very important, not just for patients, but also for their loved ones. So together you can concentrate on getting well."

- CAROLYN OLSEN



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