

## Business Risks of Marijuana Legalization

Over the past decade, many states have been moving toward the legalization of both recreational and medical marijuana. While this substance remains illegal at the federal level, evolving state-specific marijuana laws have created numerous challenges for businesses across industry lines—especially regarding employee safety risks, workers' compensation issues, commercial auto concerns and employment practices liability (EPL) exposures. As marijuana legalization continues to develop, it's critical for employers to fully understand these laws and adjust their workplace drug policies and procedures accordingly.

This article provides more information on the current landscape of marijuana laws, how such legislation can impact businesses and what employers can do to mitigate marijuana-related exposures.

### Current Landscape of Marijuana Legislation

As it stands, more than one-third of the country (18 states) permits the use of recreational marijuana among adults ages 21 and older. Additionally, 37 states have legalized the utilization of marijuana for medical purposes. This means that the majority of Americans currently have access to this substance in some form. Several states also have legislation in progress that could further propel marijuana legalization in the future.

Yet, it's important to note that marijuana is still illegal at the federal level. Specifically, this substance is currently listed as a Schedule I drug under the Controlled Substances Act. Such classification means that marijuana

has been deemed to lack medical value and pose an elevated potential for abuse. For marijuana to be legalized at the federal level, congressional action is required.

President Joe Biden's administration has pledged to decriminalize marijuana. Nevertheless, efforts to do so through the Marijuana Opportunity Reinvestment and Expungement Act were ultimately unsuccessful, as this legislation was unable to advance past the U.S. Senate. As such, the possibility of federal marijuana legalization remains uncertain.

### Impact on Businesses

As a rising number of states legalize marijuana, changes in legislation have posed a range of difficulties for employers, forcing them to reevaluate their existing workplace drug policies and procedures. In particular, marijuana legalization has resulted in the following challenges for businesses:

- **Employee safety risks**—Although existing research on the correlation between marijuana usage and employee injuries is low, some data has shown that using the substance can elevate workplace safety exposures. Primarily, certain [studies](#) have linked marijuana usage to impaired judgment, reduced concentration and slowed motor skills—all of which can increase the likelihood of potential safety incidents (especially among employees who work with dangerous equipment or heavy machinery). Furthermore, recent research from the National

---

Provided by Wheeler & Taylor Insurance

# Business Risks of Marijuana Legalization

Institute on Drug Abuse found that employees who tested positive for marijuana were involved in 55% more industrial accidents and 85% more injuries when compared to those who tested negative.

- **Workers' compensation issues**—Because marijuana usage may increase the likelihood of employee injuries, it could subsequently result in elevated workers' compensation claims. What's more, some state-specific legislation has created various workers' compensation challenges for employers. Namely, the lack of a widely recognized impairment level has made it difficult for state legislatures to approach workers' compensation benefits for employees who become injured and test positive for marijuana on the job. Compounding these complications, marijuana can also remain in an individual's system for months after use, making it increasingly difficult to determine whether an employee's marijuana usage contributed to a workplace injury. Further, many state courts remain undecided in whether employees should be reimbursed by their workers' compensation programs when using medical marijuana to treat occupational injuries. Currently, just six states either allow or require such reimbursement, while an additional 10 states are in the process of reviewing the matter.
- **Commercial auto concerns**— As more adults are able to legally use marijuana and other cannabinoids, there have been concerns over how such legalization could impact road safety, especially among commercial drivers. After all, research from the Insurance Institute for Highway Safety showed that crash rates surged in several states following the legalization of recreational marijuana. The National Highway Traffic Safety Administration data also found that cannabinoid use among fatally injured drivers has more than doubled over the last decade. And if commercial drivers who use marijuana contribute to road incidents, their respective employers could be held liable for the

resulting damages. In response to these road safety concerns, some states have adopted zero-tolerance policies, meaning drivers are prohibited from having any trace of marijuana or other cannabinoids in their systems while on the road (with some exceptions for medical marijuana users). On the other hand, some states have attempted to establish legal limits regarding how much marijuana drivers can use before getting behind the wheel. However, many enforcement obstacles still exist due to minimal drug-detecting technology and the lack of a widely recognized impairment limit. Looking ahead, more states are expected to address marijuana usage within their drug-impaired driving programs—making employer compliance crucial.

- **EPL exposures**—Although many businesses conduct drug tests during preemployment screenings and following workplace accidents, some states have enacted legislation restricting an employer's ability to perform such tests for marijuana. Additionally, several state court cases have ruled in favor of the employee in recent employment lawsuits related to marijuana usage. According to the latest loss data from Advisen (a Zywave company), 40% of marijuana-related EPL claims have stemmed from wrongful termination allegations—such as an employee getting fired for a positive drug test, even though they were legally using marijuana away from work. Employers' drug testing protocols could also lead to discrimination allegations and subsequent EPL claims if employees face workplace consequences of testing positive after using medical marijuana to treat certain disabilities (e.g., Crohn's disease, epilepsy, anxiety or depression). In fact, several states have put specific employment protections in place for authorized medical marijuana cardholders to prevent potential discrimination concerns. With this in mind, businesses with outdated policies and procedures regarding marijuana testing and usage could face an increased risk of EPL claims.

# Business Risks of Marijuana Legalization

---

## Steps Employers Can Take

Despite the challenges created by marijuana legalization, businesses can implement the following measures to minimize their exposures:

- Educate employees on the safety risks associated with marijuana usage in the workplace. Doing so will help promote a more safety-conscious work culture.
- Adopt an appropriate marijuana usage policy aimed to prevent impairment issues on the job and provide proper support for employees. Such a policy may define when legal marijuana use is acceptable (i.e., outside of work hours) and establish a zero-tolerance approach for employees in safety-sensitive positions (e.g., commercial drivers and those who operate dangerous equipment or heavy machinery). This policy should also outline procedures for reporting instances of marijuana usage in the workplace.
- Train supervisors and managers on how to detect and respond to potential marijuana-related impairment in the workplace.
- Ensure workers have access to an effective employee assistance program (EAP). This EAP can assist employees who are struggling with marijuana-related drug abuse problems.
- Review workers' compensation program offerings alongside trusted legal counsel to ensure compliance with all applicable federal and state-specific legislation as it pertains to employees' marijuana usage. Pay close attention to compensation requirements regarding benefits for employees who get injured after testing positive for marijuana on the job as well as reimbursement for employees who use medical marijuana to treat occupational injuries. Make workers' compensation program adjustments as needed.
- Consult trusted legal counsel to determine whether conducting workplace drug tests for marijuana or basing employment decisions on an employee's

marijuana usage are compliant with any applicable federal and state-specific legislation. Update drug testing protocols and related employment practices when necessary.

- Inform employees in a timely manner whenever marijuana-related workplace drug policies, procedures and program offerings change.

For more risk management guidance, contact us today.