

How Should HR Respond to Federal Marijuana Legalization?

By Roy Maurer
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Sen. Ron Wyden, D-Ore., introduced legislation in February to make marijuana use legal under federal law (<https://thehill.com/homenews/senate/429139-dem-senator-files-s-420-bill-to-legalize-marijuana>). Ten states and Washington, D.C., currently allow for recreational marijuana use, and 33 states and D.C. have legalized medical marijuana use (www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/Pages/What-Employers-Need-to-Know-About-Marijuana-Laws-.aspx?utm_source=Editorial%20Newsletters~NL%202019-2-1%20Workplace%20Compliance&utm_medium=email&utm_campaign=Workplace%20Compliance&mkt_tok=eyJpLjoiTIRCCE1EVXpNRFUOTXpZNCIsInQiOiJXNTZWV08zTGdubFJBbE9abVQ4bmRcL2NxUytUSihBenJLYVc1NGg5VWwxCV29RbIAzbdUNIiKSUcrVk9hQXhvY3VHanl6OVIOZ3NnRzkrbURRcU01bHBjdKz5bW5VaFZLMnZYY0tCN2RwM2VHQ0E0YTJWV3kyMm9xOHloSm1EK3kifQ%3D%3D).

SHRM Online discussed the bill's implications on employers' drug-screening policies with Dr. Todd Simo, chief medical officer at employment background screening firm HireRight, and Alonzo Martinez, associate counsel for compliance at the company.

SHRM Online: What does potential federal marijuana legalization mean for employers?

Martinez: In the case of this particular bill, it's silent on employers' need to accommodate marijuana use. From an employment standpoint, HR can simply build into its policy a blanket statement that says, "We as an employer will not accommodate marijuana use, period, unless required by state law." The federal standard would become the minimum standard, and states could adopt more-stringent standards. In this case, employers would have to develop an accommodation standard subject to state law.

Simo: If the [proposed] law is silent on accommodation, it would be up to employers to decide what they want to do. Employers would need to think about what their culture is and then base their policy on that and their safety sensitivity and, in certain industries, [on] any overriding federal safety regulations. Each state could respond to the federal statute, leaving employers in the same multistate patchwork situation they're in today.

The states with medical and recreational use statutes today can be grouped into three types:

- Those that say employers do not have to accommodate marijuana use at all.
- Those that say employers must consider accommodation of medical marijuana use.
- The state of Maine, which has moved the medical marijuana protection over to recreational users. A positive drug screen cannot lead to an adverse action like refusal to hire or termination solely based on that screen. There must also be a compelling business reason to take adverse action. For some employers, like the airlines and motor carriers, that compelling business reason is federally regulated; for other employers, the business reason may be taking action to address safety concerns.

Martinez: In addition, the bill does not seek to change the prohibition of marijuana in any safety-sensitive, regulated industries that have established specific drug-testing requirements, but the big difference would be for federal workers and federal contractors. The bill would ultimately prohibit federal job seekers, workers and contractors from being denied employment based on a positive marijuana test, which is

a dynamic shift for that population.

SHRM Online: How can companies prepare for potential federal legalization of marijuana?

Simo: Employers would be smart to be thinking about preparing for the eventuality of nationwide legalization. Having a reasonable-suspicion program in place that is defensible and allows management to articulate the observations of impairment on the job will be paramount. Even in states like Maine that have the greatest degree of protections for marijuana users, it is still an offense for a person to show up on the jobsite impaired. Training on how to react when someone is impaired on the job and having the tools in place to take an adverse action because of observed impairment should be put in place today.

Martinez: Another eventuality would be that the days of asking about candidates' past marijuana convictions would be over. The bill's provision on expungement of criminal records mirrors a lot of the text we've seen at the state level, particularly in California. Employment screening firms would no longer be able to verify and report on expunged crimes, and employers would no longer be able to rely on that information to assess a candidate's fitness for hire.

SHRM Online: With increased marijuana usage in recent years, it's likely that HR will encounter positive drug screens. How should they handle that?

Simo: The first thing I ask is "What's your policy?" A company must first know where it stands on decriminalized marijuana use. Will it accommodate [marijuana use] or not? If not, then what accommodations does the state require? Make sure that the policy squares with the relevant state statutes. Then, define your job categories to know which ones are safety-sensitive and will not be able to tolerate marijuana use. The defined basic job functions will be the articulable reason that an employer can't have a marijuana user in certain positions.

Martinez: Currently, with marijuana still illegal at the federal level, one thing employers must be conscious of is how they reconcile federal and state laws. In a recent case in Connecticut, a candidate for hire used medical marijuana lawfully under the state law, tested positive in a drug screen and was denied employment because the company argued that it is a federal contractor subject to the federal Drug-Free Workplace Act. The court agreed with the plaintiff, saying that the state created an anti-discrimination measure to accommodate medical marijuana users and employers can't simply rely on their status as federal contractors to deny employment.

Moving forward, this case teaches us that employers need to engage in a dialogue with individuals who test positive for marijuana. Employers must be able to individually assess them in the same way they would for criminal history.

We will see an evolution of the EEOC [Equal Employment Opportunity Commission] position on marijuana use and an evolution of individualized assessments. *[The EEOC has not published guidance on marijuana use but has taken an interest in whether employers are assessing accommodations under the Americans with Disabilities Act when an employee using medical marijuana fails a drug test.]* The EEOC will have to take a position and inform employers that automatic disqualification of an individual because of the use of marijuana is impermissible. HR will have to instead holistically look at the individual's background and determine whether or not they are fit for hire.

[Visit SHRM's resource page on Background Checks (www.shrm.org/ResourcesAndTools/Pages/Background-Checks.aspx)]

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