

# RECREATIONAL AND MEDICAL MARIJUANA CHALLENGES IN THE WORKPLACE

## An operational point-of-view



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**In 2020, New York State implemented laws in the state to legalize medical and recreational marijuana. The Marijuana Regulation & Taxation Act (MRTA) signed on March 31, 2021, legalized adult-use marijuana in New York State. While the majority of U.S. states have removed at least some of the penalties and restrictions related to the sale and use of marijuana, the use and sale of marijuana in New York State is now legal.**

This places a burden to municipalities, specifically in public works departments that now have to follow the state's new legalization of the use of marijuana while conforming to the existing Federal Motor Carrier Safety Administration (FMCSA), along with the Department of Transportation (DOT), requirements (29 C.F.R. § 40 (Part 40)), creating two different form of regulations.

### **HOW DID WE GET HERE?**

The majority of the changes in state laws sought to provide marijuana (cannabis) through federally-approved research programs administered by the states, using cannabis supplied by the National Institute on Drug Abuse.

Other states passed legislation allowing doctors to prescribe cannabis, or reclassifying cannabis in a state's internal drug scheduling system. These laws were largely ineffectual though, due to the continued prohibition of medical cannabis at the federal level.

A few states passed laws affirming the right of individuals to present a medical necessity defense at trial. The use of

marijuana, under federal law, continues to be illegal and classified as Controlled Substances under the Comprehensive Drug Abuse Prevention and Control Act of 1970. Now at least 33 states have a comprehensive medical marijuana program.

At the turn of the century, marijuana became a topic of discussion affiliated with justice reform which compelled states to address the issues of social justice. Today, many states have deregulated the criminality of possessing and consuming cannabis. Now at least 20 states have recreational marijuana laws.

### **CHALLENGES**

Despite where you stand on the issue, the challenges for any organization is the complexity of balancing the new legislation while continuing to conform old legislation. Despite the marijuana (cannabis) legislation, organizations must continue to provide under federal guidelines, several guarantees to employees such as drug-free workplace policies and a safe and healthy workplace, inclusive

of the employee(s) ability to safely perform his/her duties which may be impacted by his/her impairment. A violation or diversion from these regulations may expose an organization to potential and costly litigation.

Additionally, in New York the legislation does not allow the employer to test for cannabis nor deny an appointment, promotion or employee advancement due to the employee's use of marijuana. Furthermore, in an unique way when compared to other state's legislation, New York's legislation provides additional protection to the employee with the American Disability Act (ADA) component classifying marijuana consumption as an addictive disability, allowing for reasonable accommodation to factor in an employment condition.

### PROBLEM WITH MARIJUANA

Marijuana (cannabis) is derived from the hemp plant. Not all hemp is bad. Some claim that Cannabidiol (CBD) the second most prevalent of the active ingredients of cannabis (marijuana) has some health benefits. While CBD is an essential component of medical marijuana, it is derived directly from the hemp plant, which is a cousin of the marijuana plant. While CBD is a component of marijuana (one of hundreds), by itself it does not cause a "high." CBD is legal in all of the states and comes in a variety of forms from liquid to gases.

At best, Cannabidiol can produce some side effects including nausea, fatigue and irritability. CBD can increase the level in your blood of the blood thinner Coumadin, and it can raise levels of certain other medications in your blood by the exact same mechanism that grapefruit juice does.

Another ingredient of marijuana is Tetrahydrocannabinol (THC). Tetrahydrocannabinol is the principal psychoactive constituent of cannabis and one of at least 113 total cannabinoids identified in the plant. While many people smoke or vape it, you can also use marijuana as an ingredient in food, beverages, tinctures, or topical. No matter how you use marijuana, it can cause immediate and long-term effects, such as changes in perception and increased heart rate.

The main problem to the law is that unlike alcohol there is no universal acceptable articulable definition of what will be considered impairment. For example, Blood Alcohol Content (BAC) varies from state to state, however is a universal accepted measurement capable of being expressed, explained, or justified to determine if the person is "Legally Impaired" by the consumption of alcohol.

There are no universal acceptable articulable THC levels tests. At-home drug tests are available to screen for marijuana use. At-home marijuana testing may be conducted on samples of hair, saliva, or urine. Scientifically it is common to see claims of 25-30% THC levels in

marijuana. Usually, the very finest quality cannabis you will see is in the range 25%-30% THC. In the real world, any cannabis strain with over 20% THC should be considered very strong. These tests are not accepted in the industry, not because they can't effectively determine that there was use and consumption of marijuana, but cannot attest to levels, timing, intoxication and impairment.

### RESEARCH

The City of Albany's approach to adjusting and balancing this challenge was to engage with other states that had previously enacted such laws and ask them how they addressed those challenges. States included in this inquiry comprised of Colorado-Boulder DPW, New Mexico-Albuquerque-Solid Waste Department, Municipality of Anchorage-DPW, Arizona- Phoenix DPW and Wash. DC- DPW.

This research discovered three (3) consistent baseline approaches:

1. **Public Safety** - (Mostly Police departments) are exempt from regulatory conformance since their policies and regulations are usually directed by the state's Attorney General's office. In almost all of the policies reviewed police officers cannot use, sell, and consume marijuana (cannabis), mimicking the federal guidelines.
2. **Articulate definition** - All of those examined policies and procedure relied on a measurement capable of being expressed, explained, or justified. The methodology varies, but all have an articulable definition.
3. **Policy** - The individual department's policy becomes pivotal in how the enforcement and conformity to the law is enforced and decreed.

As per inconsistencies, the research found the articulable definition being inconsistent. Different states differentiate in how they approach the determination of "Impairment." There is really no rhyme or reason of the difference. However, a unsubstantiated indication is that states with "Right to Work" rules are more apt to consider "Performance" as an indicator versus the "Unionized States" using a more direct quantifiable method such as the "Reasonable Suspicion" method.

There is no right or wrong to the approach as long as a method exists and the approach can be measured, expressed, explained, and justified.

### THE CITY OF ALBANY'S APPROACH

The City of Albany chose the reasonable suspicion approach. We felt that "performance" is an after-the-fact or a consequence of being impaired since the law allows an employer to discipline or discharge an employee if the employee is impaired by marijuana (cannabis) while working using specific articulable symptoms that show a decrease in the employee's performance of the duties or tasks. Again, there is no right or wrong, it is how your organization feels

most comfortable justifying its action.

The city developed a clear difference of the two systems, one for federal compliance and one for non-federal conformity. Obviously the federal component specifically identifies the Federal Motor Carrier Safety Administration (FMCSA), along with the Department of Transportation (DOT), requirements (29 C.F.R. § 40 (Part 40)).

Our non-federal cannabis rules is structured to create four main components to protect our organization by:

1. **Observation** - observe the condition of the employee.
2. **Confirmation** - that the employee appearance, behavior, speech and/or odors are consistent with signs and symptoms of misuse of drug, marijuana or alcohol use based on the training provided by the department. In this component we included that the confirmation shall be done by two independent different competent persons to avoid bias.
3. **Documentation** - documenting the observation by using the department approved form (Supervisor's reasonable suspicion checklist).
4. **Resolution** - Upon confirmation of "Impairment" the employee must immediately be removed from all safety sensitive functions and the evaluators must discuss with their employee, in a confidential setting, the results of the observations.

Additionally the city included cause and effect clauses. This component allows for the employee to take the day off (using their benefits) and clear guidelines for multiple occurrences and failure to being able to perform duties.

### FORECASTING

The industry is awaiting for developments in the cannabis testing. Many laboratories are currently in research and development to help with the future of marijuana testing. Those "In the Know" are predicting five to seven years in the making for some sort of "Acceptable" testing. More time will also be needed for the legislative changes that each state would need to accept and adopt of these testing discoveries.

There is still a long way to go. The New York State Department of Labor's (NYS DOL) statements and announcements on the new regulations essentially say nothing has to be edited based upon their guidance document. The DOL action was more of an affirmation to the legislation of March 31, 2021, as a foundation for future recommendations or actions.

### CONCLUSION

These new laws present both challenges and opportunities. Many departments and municipalities are trying to address the issue of an aging workforce by appealing to a younger generation of workers. The chances are that the pool of potential employees is more likely than ever to use medical or recreational cannabis. Denying them employment may compound the labor shortage.

The fact is that a growing number of prospective and current employees enjoy the use of marijuana (cannabis) while some rely on legally obtained marijuana to treat, alleviate or counteract a range of medical conditions. For that reason and others, many organizations may not return to marijuana testing. Supporting evidence is that many departments have dropped pre-employment testing.

However, your organization must continue to prohibit employees from being under the influence of alcohol or drugs while performing their jobs and test employees under the Federal Motor Carrier Safety Administration (FMCSA) regulations. Conforming to the new laws for those not effected by federal regulations all while struggling to ensure workplaces are safe and staffed, is unquestionably an operational nightmare.

Protect your organization with a policy to serve as a guideline with articulable methods and hope for future guidelines, court decisions and new regulations to provide clarity on this complexed and interconnected (federal and state) piece of legislation.



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