

# Insights

## Key Considerations for Employers as Additional States Legalize Marijuana

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By: Virginia A. Talley and Kate Trinkle

For marijuana legalization, the 2020 election brought significant results with five states legalizing marijuana for recreational use, medicinal use, or both. Although marijuana use remains illegal on a federal scale, there are now 34 states that permit marijuana use in some form, and many other states have decriminalized marijuana and/or permit the use of cannabidiol (“CBD oil”). The legislative changes to this budding industry impact employers, especially multistate employers. As a result, employers should consider the effect of these legislative changes on general employment policies and procedures, particularly state-specific practices.

### Marijuana Legalization Post-2020 Election

Although the recent passage of the Marijuana Opportunity Reinvestment and Expungement Act (MORE Act) in the U.S. House of Representatives indicates there may be some federal inkling to legalize marijuana, the matter is currently left up to the states<sup>1</sup>. In November, voters in five states legalized the use of marijuana in some form or another. Three of the five states previously legalized medicinal marijuana and legalized the recreational use of marijuana in November. Out of the remaining two states, both previously prohibited all use of marijuana; one state legalized medicinal marijuana use while the other legalized medicinal and recreational marijuana use.

#### Legalization of Recreational Marijuana Use

*Arizona and New Jersey.* In both Arizona and New Jersey, marijuana was legalized for medicinal use in 2010. Following the November votes, the recreational use of marijuana will be legal for adults 21 and older in 2021.

*Montana.* Montana previously criminalized the recreational use of marijuana. Following the November election, the recreational use of marijuana will be legal in Montana for adults over the age of 21 and will take effect no later than October of 2021.

#### Legalization of Medicinal Marijuana Use

*Mississippi.* Before the November 2020 election, both Mississippi and South Dakota criminalized all uses of marijuana. By constitutional amendment, Mississippi will permit the medicinal use of marijuana.

#### Legalization of Medicinal and Recreational Marijuana Use

*South Dakota.* Before the November 2020 election, South Dakota prohibited any use of marijuana. By constitutional amendment, South Dakota voters legalized the recreational use of marijuana for adults over the age of 21 and required the South Dakota state legislature to pass laws providing a medicinal marijuana program and the sale of hemp no later than April 1, 2022.

## Implications for Other States

The piecemeal process of marijuana legalization presents challenges to states whose marijuana usage laws differ from their neighbors. These challenges arise in a number of areas, including law enforcement and employment. Since legalizing marijuana is a decision left to the states, these challenges will pervade until comprehensive marijuana legislation on a federal scale exists.

When a state legalizes marijuana in a medicinal or recreational capacity, surrounding states often feel pressure to evaluate their existing marijuana usage laws. With New Jersey's recent vote to legalize marijuana for recreational purposes, more states in the country's northeast, like Pennsylvania, Connecticut, and New York, may evaluate their existing marijuana laws and move toward legalization in the near future.

Although Indiana is surrounded by two states that have fully legalized marijuana usage (Michigan and Illinois), another state that has a comprehensive medicinal marijuana usage program (Ohio), and a state that is moving closer to passing legislation permitting medicinal marijuana (Kentucky)<sup>2</sup>, the Hoosier state is often cited as having some of the strictest marijuana laws in the United States. Several steps toward legalization have been taken to date, including the legalization of low- Tetrahydrocannabinol ("THC") CBD oil and an attempt to pass a bill to decriminalize marijuana possession.

With marijuana legalization growing across the nation, states surrounded by marijuana-friendly neighbors, like Indiana, are forced to either navigate the challenges of differing state laws or consider changing the marijuana usage laws currently in effect. If enacted, the MORE Act could eliminate some of these challenges.

## **States that Permit CBD Oil**

Following the November 2020 election, marijuana use remains fully illegal and criminalized in six states and is fully illegal and decriminalized in two states. For seven states, including Indiana, marijuana use is illegal, but the use of CBD oil is permitted. There are, however, some employment law issues that arise from employee use of CBD oil.

CBD oil is not federally regulated, leaving the states to regulate its production and use on their own. This again creates difficulties as states that permit the use of CBD oil impose varying THC percentage limits and quality standards. Thus, employees may use CBD oil thinking it is permissible in their specific state when it is actually prohibited. As a result, an employee may use CBD oil but fail a drug test. Employers are then left to determine the next steps for the specific employee. To navigate the challenges presented by varying marijuana and CBD oil laws throughout the states, employers may wish to consider the best practices below.

## **Best Practices for Approaching Legalized Marijuana and CBD Oil**

With the increased legalization of marijuana use, and permissible CBD oil use, employers are encouraged to reevaluate their current approach to employment policies, practices, and procedures. Additionally, employers may want to assess whether they should designate certain positions as being "safety sensitive," and whether alterations are needed for current drug testing policies.

### Employment Policies, Practices, and Procedures

With the varying state approaches to marijuana legalization and permissible CBD oil, employers may need to revisit policies and procedures and revise accordingly to align with state laws.

Specifically, employers located in states where marijuana or CBD oil is legalized and that do not work under a federal contract, could consider approaching legal marijuana or CBD oil use as they would other substances such as prescription drugs or alcohol. Likewise, multistate employers could consider adopting the same approach through the use of state-specific handbook addendums.

Additionally, employers that currently prohibit all use of marijuana should ensure that the prohibition is compliant with state-specific laws and that any policy describing the prohibition includes marijuana.

Employers should ensure that policies clearly state the situations in which an employee will have to undergo a drug test, and the substances that the drug test will include. Additionally, employers should make it clear that impairment on the job is strictly prohibited, and violation of the policy will result in discipline, up to and including termination.

Regardless of how employers choose to lawfully address the use of marijuana with employees, any policy, procedure, or practice should be clearly communicated to employees and consistently applied.

### Safety Sensitive Positions

For employers with safety sensitive roles<sup>3</sup>, which would justify certain employment screening measures, consider including that designation in applicable job descriptions and job advertisements. Additionally, consider including that employees in safety sensitive roles may be subject to drug testing. Doing so puts employees on notice that they may have to undergo drug testing and sets appropriate applicant/employee expectations.

### Drug Testing

As mentioned above, an employee's use of CBD oil or legal marijuana may present issues for drug testing. As a result, employers could consider limiting the individuals who are subjected to drug testing, such as those in safety sensitive positions or those who are involved in job-related incidents. Additionally, when it comes to marijuana use and the improper use of CBD oil, it may be effective for employers to train managers and supervisors on recognizing impairment while employees are on the job.

Employers with employees located in states that allow medicinal marijuana use should keep in mind that an employee's legal use of marijuana may trigger the Americans with Disabilities Act, and an employer may wish to consider whether the employee can safely perform the essential functions of the employee's job. The same could apply for employees who use CBD oil.

### **Takeaways**

The increasing number of states legalizing marijuana in one form or another and permitting CBD oil use presents challenges to employers, particularly multistate employers. Should you have questions about how state-specific changes may affect your policies and procedures, or any other questions related to the growing industry of marijuana and its effects on employment matters, please contact **Virginia A. Talley** or any other member of the Krieg DeVault LLP **Labor and Employment Law Team**.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.*

[1] For more information on the MORE Act, please **click here**.

[2] Kentucky's House of Representatives passed House Bill 136 in February of this year. The bill is currently in the hands of the State's senate. If the Senate passes the bill, Governor Beshear is expected to sign it into law, making the use of medicinal marijuana legal.

[3] Some states may have statutory language describing the criteria for a safety sensitive position. However, in most states, case law provides the criterion for a safety sensitive role.