

# What Employers Must Consider Before Allowing Weed At Work

By **Jennifer Mora and Adam Young**

With the legalization of recreational cannabis in many states, some employers with permissive alcohol regimens are confronting whether they will treat cannabis the same way they treat alcohol. How will they address workplace use and impairment?

In the heyday of the two-martini lunch, employers regularly tolerated alcohol in the workplace or employees presumably impaired by alcohol returning to work. Over the succeeding decades, employers began to concentrate on the business and legal liabilities imposed by alcohol use and impairment in the workplace — including increased absenteeism, mistakes, sexual harassment, workplace violence and accidents/injuries.



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Employers also discovered that their insurance companies claimed exemptions for certain claims if the employee that created the issue had been consuming alcohol at work. As a result, employers largely began to adopt policies that prohibited employees from using or being under the influence of alcohol and drugs while at work. Most employers since have prohibited alcohol and drugs entirely or restricted alcohol to occasional company Christmas parties and social functions.



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While we have not seen a mainstream resurgence of alcohol consumption in the workplace, we have noticed a distinct trend of some collaborative and creative workplaces, including co-working environments, to expand access to alcohol in the workplace, often with bars and kegs on-site.

Employers who elect to allow drinking at work are well-advised to implement policies regarding such use and consider a variety of safety and other issues that could result, including how to handle intoxicated employees, whether to provide transportation for employees to drive home, tracking and limiting consumption, defining the times during the day when drinking is and is not allowed, and handling complaints lodged against employees.

But, what about cannabis, which remains illegal under federal law? Even with state laws legalizing cannabis for medicinal or recreational use, employers have the right to prohibit its possession and use as well as the right to demand that employees not be under the influence or impaired in the workplace or while on company time.

But some employers — often in creative fields — are considering relaxing their prohibitions on cannabis or even allowing cannabis in the workplace. They often hope to attract newer generations of workers who may have a positive impression of cannabis and its contributions to creative and productive output in the workplace.

Employers must consider: Are the liabilities that potentially result when an employee uses cannabis at work the same as or greater than those associated with alcohol use? Can an employer even allow this if it wants to?

To what extent weed at work starts to become as mainstream as alcohol at work remains to be seen, but there are several considerations that employers might want to ponder.

One way in which alcohol and cannabis are the same is in the context of occupational safety hazards. Cannabis is a psychoactive drug that impairs decision-making, motor skills and response time.

According to the National Safety Council, employees who are impaired by cannabis present a safety risk in the workplace, particularly if they work in positions that are safety-sensitive, where an impairment will put the employee, coworkers, clients or third parties at a risk of serious physical harm or death. On account of the risks to occupational safety and health posed by workplace cannabis use, the National Safety Council advises that employers adopt a zero-tolerance policy for cannabis use in safety-sensitive positions.

Employers subject to the federal Drug-Free Workplace Act cannot allow employees to use any controlled substance in the workplace lest they risk losing their government contract. Although more states are enacting recreational and medical cannabis laws, cannabis still is illegal as a matter of federal law and, thus, employers with government contracts should not consider permitting the use of cannabis or controlled substances at work.

Employers may have better control of alcohol consumption at work if they make the alcohol available and have a procedure in place to ensure that only a certain amount of alcohol is consumed. Indeed, some employers use what's called a kegbot app that requires employees to log in each time they get a drink, which helps the employer track what and how much the employee drank.

Some employers have a bar with a server that tracks and monitors consumption. If an employer allows employees to consume cannabis while at work, there simply is no way for the employer to know the strength of the cannabis being consumed or how much.

While well-intentioned, this approach may be inadvisable with cannabis products. Importantly, the employer providing or dispensing cannabis at work may be committing felonious possession with intent to distribute a Schedule I controlled substance under federal law.

Under the federal Occupational Safety and Health Act's general duty clause, employers must furnish "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees." If an employer knowingly tolerates the use of an illegal and impairing drug, such as cannabis, even for medicinal purposes, while an employee performs hazardous tasks (e.g., driving a forklift), this might create an impermissibly hazardous environment and potential liability for a general duty clause violation.

We have not yet seen a similar citation issued under the Occupational Safety and Health Act or a state plan. Some state plans also have regulations that prohibit employees from being under the influence of drugs or alcohol, which could be the basis of a further citation.

Accordingly, employers are struggling to address the new hazards of widespread use of recreational cannabis and its many risks to the workplace. Employers that intend to maintain a drug- and alcohol-free workplace should consider reviewing their policies to ensure their stance on the subject is clearly communicated to employees, especially in states where cannabis is legal.

While not all employers are continuing drug testing for cannabis, especially in the context of a preemployment drug test, employers that may be contemplating a more relaxed approach to cannabis in the workplace should first evaluate whether they can do so without running

afoul of any legal or contractual requirements and take steps to mitigate any possible safety risks.

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