

# MARIJUANA IN THE WORKPLACE?

## WEEDICULOUS!

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Has your zero-tolerance drug free workplace policy gone up in smoke with recent relaxation of marijuana laws? The answer is no. Washington and Colorado voters have recently passed ballot measures legalizing the recreational use and possession of marijuana. Nine states and the District of Columbia have also now allowed the use of medical marijuana, despite the fact that it is still illegal, listed as a schedule I controlled substance under the federal Controlled Substances Act. These state laws generally provide immunity from state and local *criminal* prosecution under certain circumstances. They do not provide employment protection, however. And they do not provide protection against federal criminal prosecution, so users would be wise not to light up or even possess marijuana on federal lands, including USFS, BLM, national parks, courthouses, military installations and wildlife refuges.

In Oregon, the issue was raised in the case of *Emerald Steel Fabricators v. Bureau of Labor and Industries*, 348 OR 159 (2010). In that case, an employee was asked to submit to a drug test. He pulled out his state-issued medical marijuana card and was fired on the spot. The employee filed a disability discrimination complaint with BOLI's Civil Rights Division and the Commissioner found in his favor, determining that the employer failed to engage in an interactive process to determine if there were alternatives to medical marijuana that would mitigate the employee's symptoms. The Court of Appeals affirmed, but the Oregon Supreme Court reversed, primarily for two reasons: 1. the medical marijuana law provides immunity from state and local

criminal prosecution but does not provide employment protections; and 2. the federal law has supremacy over the state law. Marijuana, even medical marijuana, is still unlawful to possess or consume under federal law. Neither state nor federal disability laws require employers to accommodate the use of illegal drugs at work or at home.

Does that clear the air? Still in a bit of a haze about all of this? That is understandable. Although simply stated, the current posture of employment law is filled with nuance. Good employers are fair and reasonable. That makes for good employment relationships and will hold you in good stead before courts and agency investigators. If an employee tests positive for marijuana and presents a medical marijuana card, consider having that interactive disability discussion even if the law does not strictly require it. Consider alternatives to medical marijuana, including leaves of absence, substitute medications or even Marinol (synthetic equivalent to delta 9 THC, the psychoactive ingredient in marijuana). Marinol is costly and has the same side effects, but is FDA approved and legal with a prescription in all 50 states. Be aware, too, that abusers can combine marijuana and Marinol and that testing to distinguish between them is expensive. If you have a drug free workplace policy, you should remind your employees (in writing) that it is still a violation of your policies to use marijuana on or off the clock. Be vigilant for signs that employees are under the influence and document your observations. Be careful about voluntarily accommodating employees' use of medical marijuana. Some studies link marijuana use to increases in workplace injuries and accidents. If the major contributing cause of the injury is marijuana, even medical marijuana, workers' compensation benefits may be denied unless the employer permitted, encouraged or had actual knowledge of such use. ORS 656.005(7)(b)(C). There is also the potential for third party claims if an employee causes injury to another while under the influence. Finally, employers with federal contracts may lose funding if they

do not provide a drug free workplace, and DOT regulations may also restrict your ability to accommodate the use of medical marijuana at work for some employees. Nevertheless, we are intruding on employee privacy by conducting drug testing at work. Drug testing is permitted, but should be done fairly and carefully. Give employees and candidates for employment fair warning that they are subject to testing well in advance so that they can conform their conduct to your reasonable expectations. It may take 30 days or more to clean out one's system. Have your policies and practices reviewed by an attorney. Stick to the letter of the policy. If testing is random, keep it truly random. If it is for cause, be clear in your documentation of the facts that establish cause. Otherwise, your well-intentioned policies may go to pot and you could be held liable for invasion of privacy!

For more information about this subject and a full schedule of seminars and other services provided by the Technical Assistance to Employers program, visit our website at [www.oregon.gov/BOLI/TA](http://www.oregon.gov/BOLI/TA) or call 971-673-0824.