



Your compliance resource for staying out of hot water.

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## The 411 on 420: Marijuana, Drug Testing, and the Workplace



Can you fire someone for testing positive for marijuana in the workplace? With pot dispensaries outnumbering Starbucks in cities like Denver, and websites like [weedmaps](#) popping up on the web, it's a legitimate question. Maintaining a drug free workplace has been somewhat complicated by the legalization of marijuana (aka cannabis, or just plain old "pot") in the states. Legalization and or de-criminalization of marijuana is a growing trend. The federal government has stepped back from enforcement of marijuana offenses, in part because of the actions of the states. All of this leaves some employers scratching their heads—wondering, when it comes to pot, what's legal and what's not?

Legalization comes in a few different forms. In [over 20 states](#), some form of medical marijuana is legal or decriminalized. California passed an initiative to allow medical cannabis in 1996. In other states, like Colorado and Washington, pot is legal for not only medicinal purposes, but recreational use as well. In other states, use of pot is still not legal *per se*, but possession of the drug has been decriminalized or fines are so low as to be nominal. The question for employers is, do they have the right to regulate and conduct substance abuse testing in the workplace in order to prohibit activity that is otherwise perfectly legal?

### Recreational Use

If you're looking for work in the State of Colorado, you better know what 420 means. The street-slang for marijuana use is 420, and [some employers are seeking out pot-friendly candidates](#) who want to work in a pot-friendly workplace. While employers have historically touted the benefits of a "drug free" workplace, others are now looking for the opposite—employees who will go with the flow, and not make noise or lodge complaints against the company or employees who want to partake in a toke.

Employers who allow pot smokers or recreational use on the job may find themselves in the unique situation of having to defend policies in light of complaints from other workers claiming a negative health impact. Much like second-hand cigarette smoking, employees may claim that overt or even tacit approval of marijuana use is a health threat.

On the other end of the spectrum, now that some states say it's legal to smoke pot just for fun, employers want to know if they can still enforce drug free workplace policies. Now that recreational use is legal in a few states, why couldn't an employee claim that their actions are legal, and therefore not grounds for termination?

So far, employers have had the upper hand. Take Colorado, for example. C.R.S. § 24-34-402.5 prohibits an employer from terminating an employee "due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours." The statute creates a cause of action for intentional discrimination. See [Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371, 375 \(Colo. 1997\)](#).

So in a state where recreational use is legal, why wouldn't a job candidate or employee be protected? In a 2013 case in Colorado District Court, *Curry v. MillerCOORS*, the court held that the protected activity had to be lawful at both the state and federal level. Since marijuana is still illegal *per se* under federal law, the state protection for "lawful" activity failed. See also *Coats v. Dish Network*. Look for more cases on this point going forward, as I expect the law to continue to face challenges.

## Medical Marijuana

As the medical benefits of marijuana become more widely recognized, more people are invoking the Americans with Disabilities Act to protect their personal use of marijuana. Medical marijuana is [legal in 20 states plus the District of Columbia](#). So despite its status as a federally controlled substance, some workers are making discrimination claims under the ADA after being terminated for using pot.

In April of 2014, a New Jersey Transit authority employee sued for disability discrimination after he was suspended and sent into rehab despite the fact that he is a registered patient with the state's medical marijuana program ([tip: The Practical Employer](#)). The worker, who suffers from renal failure, claims to have been "bumped" from a senior position, and offered to apply for a "non-safety sensitive position" if his medical marijuana use was a problem. He was ordered to get a drug test, and was then fired.

In weighing the rights of the individual against those of the employer, employers have been winning this argument in the courts. In 2012, the U.S. Court of Appeals for the Sixth Circuit sided with Wal-Mart (*Cassius v. Wal-Mart Stores Inc*), which had fired a worker with cancer who had registered with the state medical marijuana program.

The courts have consistently held that private employers have the right to set their own policies. Medicinal marijuana laws, in general, do not limit an employer's right to set anti-drug policies in the workplace. As such, it's acceptable for an employer to have a written drug policy and to terminate an employee as the result of a drug test showing the presence of marijuana in the employee's system during working hours.

Even if the employee alleges discrimination, as in the MillerCOORS case, anti-discrimination law does not protect an employee from an employer's standard policies against employee misconduct. As long as the employer is applying the drug-free policy in a neutral manner, courts have held that banning drug use on the job is not discriminatory.

Moreover, privacy arguments have also failed to protect medical marijuana users. The Colorado court in MillerCOORS ruled that the plaintiff's privacy rights were not violated by the drug test, and the employer has the right to test for substance abuse.

## What's the upshot for employers and job candidates?

With recreational use on the rise, some employers who want to preserve a drug-free environment will simply choose to do more drug testing. Safety concerns are a factor. Unlike with alcohol, marijuana stays in your system for weeks at a time. The long residual presence of marijuana in someone's system makes it difficult, if not impossible, to test for impairment.

That doesn't mean that employers should readily terminate people who test positive. The new laws are blurring the lines for both sides.

- **Do** review your drug-free workplace policy and [substance abuse testing program](#) with your legal counsel.
- **Don't** stop enforcing your drug policy solely because of state marijuana laws.
- **Do** apply your drug testing policies fairly and consistently.
- **Don't** terminate or disqualify someone without careful consideration and adherence to policies, particularly in light of medicinal or "legal" recreational use.
- **Do** consider the health and safety of all of your workers in the application of your drug screening policy.

The Society for Human Resource Management (SHRM), has a model [Drug and Alcohol Testing Policy](#) available on their website. For another perspective, check out NORML's (the National Organization for the Reform of Marijuana Laws) [model policy](#).



The advertisement features a blue and green color scheme. On the left, the text reads: "Learn About Top Trends in Employment Background Checks" in bold blue font, followed by "Download EmployeeScreenIQ's 2014 Survey Report Today!" in a smaller blue font. Below this is a green button with the text "Download The Results Today!". On the right, there is a graphic of the survey report cover, which includes the EmployeeScreenIQ logo, the title "SURVEY REPORT 2014", and a subtitle "The Unassailable Truth: 2014 Top Trends in Employment Background Checks". The cover also features a stylized illustration of three people in a blue-toned environment.

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