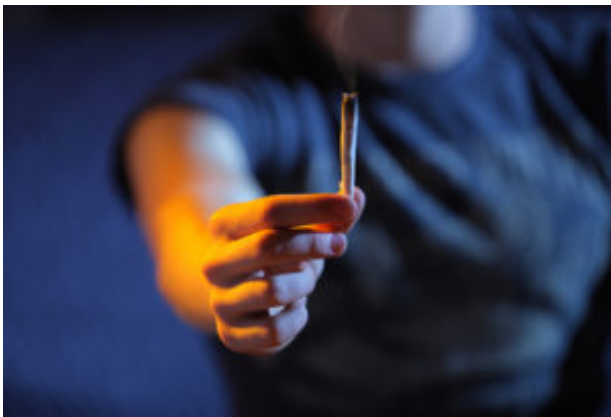


Work Comp Roundup

Reduce Your Workers Comp Costs

3 Actions to Weed Out Marijuana-Related Workers' Comp Challenges

Michael B. Stack · Thursday, March 2nd, 2017



The trend of legalizing marijuana for medical and/or recreational use is growing and may soon affect nearly all states. The recent election brought the number of 'medical marijuana' states to 28 plus the District of Columbia; while eight states now allow it for recreational use. Add to that the fact that several states have seen cases that allow injured workers to obtain the drug through their workers' comp systems, and you've got a

veritable nightmare for employers — especially those in multiple jurisdictions.

But employers don't have to sit by and watch your workforce go up in smoke. You can — and should — take steps to keep your workers, property and the business itself safe.

Drug testing

The most effective way to prevent drug-related workplace injuries and illnesses is to avoid hiring drug users. While passing a drug test certainly doesn't guarantee an employee won't use marijuana or other drugs down the road, it is at least a way to eliminate habitual users from entering your workforce.

Even in states where marijuana is legal — for medicinal or recreational purposes — private employers still have the right to test conditionally-hired job applicants. How

you handle a positive test result, however, likely differs among states; so it behooves you to understand the laws in your jurisdiction.

Beyond pre-employment testing, employers may also do drug testing randomly, based on reasonable suspicion, for return-to-work screening and post-accident. OSHA's new injury reporting rule has raised many questions about whether employers that conduct post-accident drug testing may run afoul of the agency.

OSHA has tried to clarify the confusion by saying drug testing policies should be limited to situations where drug use is "likely to have contributed" to the incident, and for which the test can "accurately identify impairment." Injuries such as bee stings, repetitive strain injuries or one caused by a machine malfunction would not qualify for mandatory testing, under OSHA's explanation. Federal drug testing has not changed.

There are generally three types of drug tests:

- **Urinalysis.** The first and still most widely used, this is less expensive than some other test methods. It detects most drug use for the previous 2-3 days and is the only type allowed for federal testing. On the downside, it is easily manipulated and cannot measure the frequency of drug use.
- **Oral fluid.** These are collected under supervision, making tampering impossible. It determines drug use for up to 48 hours and is generally inexpensive. It also does not measure frequency of use.
- **Hair.** Perhaps the best for pre-employment tests, as its detection window is generally 3 months. However, it is the most expensive type of test. Also, it typically takes longer — up to 10 days versus 1 or 2 — for the results.

Create/Update Drug-Free Workplace Policy

Lower job performance, reduced productivity, absenteeism and higher workers' comp costs are among the results of workers who abuse drugs. As an employer, you are obligated to provide a safe work environment for all employees. Those are among the biggest reasons to have a workplace drug and alcohol policy — and communicate it clearly to your workers. A policy can include the following:

- **Basic assumptions.** The policy should spell out why the company is establishing it, what is expected of employees and the consequences for violations, including dismissal.
- **Broad statement.** The policy should clarify that employees may not perform their job duties under the influence of alcohol, illegal drugs, or mind-altering prescription medications — including marijuana. In states where marijuana is legal you should include a section with clear guidelines devoted to that drug.
- **Drug testing.** If your company conducts drug tests, that should be included with the specific procedures outlined. It should also say that workers with prescribed medical marijuana may not use the drug while at work. The policy should be similar to that for narcotic prescriptions.

Workers in states that have medical and/or recreational marijuana laws on the books are likely confused about their rights to the drug in the workplace. Therefore, you should train supervisors on it and ensure all employees understand it. Employee handbooks, posters, intranet messages and other technology-related approaches are ways to disseminate the policy.

Know the law

Before drafting or changing a policy you need to understand the specifics of all the jurisdictions in which you operate. Much like the workers' comp system itself, marijuana laws vary by state. Statutes may have vastly different provisions, especially when it comes to the workplace.

In states where the drug is legal, courts have taken different actions as to whether marijuana is reimbursable through the workers' comp system. Following several court rulings, New Mexico passed a reimbursement rule.

In other states, however, laws say workers' comp payers are not compelled to pay for the drug. They include Arizona, Colorado, Michigan, Montana, New York, Oregon and Vermont.

In some states, employers that can prove the drug is the cause of a work-related injury are off the hook for reimbursement. In others, the injured worker may be entitled to payment even if the drug caused the accident.

Summary.

The laws surrounding marijuana are changing rapidly. Employers are well advised to stay abreast of this constantly changing situation through legislation and case law; review and update workplace substance abuse policies often; and consider drug testing — at least for pre-hiring.

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