

Marijuana and the Workplace

The American Staffing Association's 2019 Staffing Law Conference featured a panel of experts to address safety, insurance and legal issues arising from states' medical and recreational marijuana laws. Following are key takeaways from this discussion and recommended practices for staffing firms:

Legal

In the last two years, the courts have moved from pro-employer to pro-employee decisions, a trend that is expected to continue. The recent case examples cited found that employers:

- must provide "reasonable accommodation" for off-duty medical marijuana use
- cannot refuse to hire an individual solely due to disclosure of medical marijuana use
- cannot terminate an employee for a positive drug test without proof of actual impairment during working hours (since drug tests only prove *recent* use)

In states that allow medical marijuana, employers should assess their ability to make reasonable accommodations for registered medical marijuana users on a case-by-case basis, through an interactive approach. That said, employers are **not** required to tolerate marijuana use at work or employee impairment while working.

Safety

The safety discussion focused mainly on the cannabis industry, including a review of hazards present in cultivating, processing and selling marijuana. The cannabis industry is expected to nearly double during the next seven years, from \$13.5 billion in 2018 to nearly \$25 billion in 2025, and its seasonal nature makes the use of temporary workers "ideal."

OSHA rules and guidelines for joint responsibility of staffing companies and host employers to ensure protection of temporary workers from workplace hazards apply to the cannabis industry as to any other industry. So far, California is the only state to tie cannabis licensing to OSHA regulations, requiring all license applicants to complete a Cal OSHA 30-hour safety class.

Insurance

Marijuana positivity in drug testing is on the rise, most strikingly in states that have legalized recreational use. In response, "many staffing companies are opting to take marijuana off the drug screens" to maintain their ability to fill job orders, but this can lead to safety issues and an increase in accident and workers compensation claims.

Insurance companies look for zero-tolerance drug use policies but recognize that legal use of medical marijuana brings disability statutes and reasonable accommodations into play. As a common-sense rule, staffing employers should not assign known marijuana users to safety-sensitive positions.

In addition, employers should be physically observant and alert to potential signs of impairment such as red eyes, poor coordination, lack of focus, slowed reaction time, distorted perception or sudden mood swings. The distinctive smell of marijuana may also signal recent use.

Within the cannabis industry itself, most major insurers are taking a wait-and-see attitude, and only a few carriers are writing insurance for growers and distributors. Most brokers are not prepared to answer employers' questions or provide proper class codes.

Staffing experience in the cannabis industry is limited, if any. Staffing firms with interest in this industry are creating separate companies to "house the exposures" of making placements.

Recommended Practice for Staffing Firms

As a best practice, staffing companies are advised to develop a drug policy designed to:

1. Create awareness
2. Educate both candidates and employees about the legal landscape and applicable drug screening policies and procedures
3. List acceptable activities, screening procedures and enforcement provisions.

In drafting drug policies, employers should focus on prohibiting impairment due to marijuana use rather than marijuana use itself. Policies should also require employees to report any medical-related marijuana use to their employer for the purpose of determining reasonable accommodation.

The company's drug policy should be communicated regularly to candidates, employees and client employers.