

## 5 State Marijuana Mandates Throwing Employers For A Loop

By **Vin Gurrieri**

Law360 (November 25, 2019, 7:58 PM EST) -- As more states have legalized marijuana for recreational and medical purposes, employers have had to navigate a hodgepodge of different rules as they reevaluate long-standing workplace drug policies and assess their obligation to accommodate disabled workers.

While marijuana remains a Schedule I controlled substance on the federal level on par with heroin and LSD — substances the government considers to have no accepted medical use and a high potential for abuse — several dozen states have legalized it in some form.

But states and some local municipalities have enacted a wide range of rules and regulations themselves, leaving employers scratching their heads in figuring out how to deal with ever-increasing numbers of workers who legally use marijuana and with complying with rules that can vary wildly across jurisdictions.

"What you end up doing with clients in this area is you back into it based on where they have facilities," said Donald Lawless, a partner at Barnes & Thornburg LLP. "The law is changing frequently, and so you end up designing an approach for where [employers] have facilities in each state and sometimes municipalities."

Meanwhile, Wendy Lane, chair of Greenberg Glusker Fields Claman & Machtinger LLP's employment practice, said there is a growing gap between longtime company leaders who are "entrenched" in a zero-tolerance mindset and entry-level employees who "don't get what the fuss is about" and sometimes don't realize that marijuana use can be disqualifying.

"What we're seeing on the creative side, companies that are startups [and] companies that are in the creative space, is that some of the best candidates are being eliminated because they're testing positive," Lane said. "And they don't want to work for a company that has a very buttoned-up [approach toward] what they perceive to be a necessary policy toward a drug that [prospective employees] perceive to be legal because recreational use is legal in whatever state they are in."

Here, experts look at a handful of locality-specific issues that employers should know about.

### **Nevada and New York City Blunt Pre-Hire Drug Tests**

For many years before states started moving toward a relaxation of marijuana laws, it was common for businesses to have zero-tolerance workplace drug policies in place, which they enforced by drug testing employees and job applicants.

However, while employers are increasingly moving away from drug testing individuals who don't work in safety-sensitive positions, some jurisdictions have codified restrictions on drug tests, particularly for job seekers.

In Nevada, one issue that Reno-based McDonald Carano LLP partner Leigh Goddard said has created a "huge problem" for employers is a law taking effect in 2020 that prevents an employer from rescinding a job offer if the applicant tests positive for marijuana after the offer was made.

Goddard noted that there are some exceptions, such as jobs as firefighters or EMS workers, jobs in certain safety-sensitive positions, and jobs for federal contractors.

But businesses may get caught in a bind if they must comply with vendor contracts or regulations in other states that mandate drug-free workplaces that are based on a benchmark set by the U.S. Department of Transportation, she said.

"Here we have employers that don't fall within any of these exceptions and they're required to comply with the requirement, but they can't fire or revoke that offer of employment," Goddard said. "So we don't even really know how to deal with that yet, because we have no guidance and the law hasn't gone into effect. But that explains a bit of the struggle that employers are going through when they deal with things on a state-by-state basis; it's really difficult."

Meanwhile, lawmakers in New York City recently took the concept a step further, barring most employers from conducting marijuana tests at all during the hiring process.

Matthew Damm of Fenwick & West LLP called the soon-to-be-implemented ban one of the "major new laws" related to cannabis that is on the horizon.

Despite its exemptions for certain jobs and industries, Damm said it will generally block businesses in the city from being able to test workers for marijuana before hiring them even if they might otherwise do so at locations outside the city.

"That's going to throw everybody for a loop even further, including employers that might have an office in New York City and offices elsewhere in the state," Damm said. "Employers [in New York City] have some time to change their policies, but there it's going to be a flat ban on preemployment testing. Even if you have a desire to test an employee prior to them joining, you won't be able to."

### **More Leeway for Drug-Free Rules in California and Colorado**

Besides drug testing, another issue increasingly at the forefront of employers' minds is how much they must do to accommodate workers who use cannabis to treat medical conditions and the legal risk of not doing so.

While marijuana users aren't afforded federal protection under the Americans with Disabilities Act, laws or court decisions in some states

prohibit employers from discriminating against medical marijuana users based on their disability. But other states still give employers plenty of leeway to continue enforcing zero-tolerance drug policies.

In the latter category are California — the first state to have legalized medical marijuana, more than 20 years ago — and Colorado, which legalized recreational marijuana in 2012.

In those two states, Nancy Delogu of Littler Mendelson PC says the law permits employers to have zero-tolerance workplace drug policies — meaning they can opt not to hire people based on their marijuana use if they can stomach the risk of shrinking their potential labor pool.

"In those jurisdictions, people can choose to use marijuana and their employer can choose not to employ them because they use marijuana," Delogu said. "As a practical matter, what has happened is the employers who deem it important to their business for whatever reason that they not have people using marijuana continue to test, and those who don't either don't test or have limited testing in place."

Similarly, in Colorado, employers can still enforce drug-free workplace rules, according to Toufic Saati of Barnes & Thornburg, who recently completed an analysis of marijuana rules in all 50 states.

"Colorado has held that the state's medical marijuana laws do not preempt an employer's zero tolerance policy," Saati said. "Their holding is that even though it's legal under state law, it's still illegal under federal law and that sort of preempts an employee's right to make [a disability discrimination] claim."

But Saati, highlighting the distinctly different approaches that states can take on the issue, noted that a state appellate court in New Jersey recently held that a disabled worker who was fired after testing positive for marijuana may have a claim under the state's anti-discrimination law. That case will soon be heard by the Garden State's highest court, he said.

### **Confusion Over Illinois' Medical Pot Law**

In Illinois, a law legalizing recreational marijuana that takes effect in 2020 will allow employers to maintain "reasonable" zero-tolerance policies and drug testing policies as long as they're applied in a consistent and nondiscriminatory way.

However, Delogu pointed out that a separate section of the state's law bans employers from taking any adverse actions against people based on their lawful use of products, including marijuana, on their own time.

"So, we're all kind of looking at that statute and wondering how those two disparate provisions will work together," Delogu said. "Is the law that you can have a zero-tolerance drug testing policy even if it may measure something that occurred away from work, or is it the law that you can't take adverse action because of someone's lawful, off-work use of marijuana? Employers are hoping for guidance from the state before Jan. 1 — I don't know how practical that is — but that's an interesting one to watch."

### **Cannabis Industry-Specific Rules**

Although discussions about marijuana laws in the employment context generally revolve around businesses' attempts to cope with changing mandates, Priya Sopori of Greenberg Glusker points out that those issues can be even more acute for companies in the heavily regulated but rapidly growing cannabis industry.

Those companies can face regulations in a wide range of areas such as taxes, real estate or the way certain employees are classified, according to Sopori, who heads her firm's cannabis practice group.

One example is that companies in the cannabis sector in California that employ delivery drivers must classify them as employees whereas drivers in other industries could be deemed independent contractors.

"There are a number of California laws that already limit an employer's ability to classify employees and/or independent contractors, which is a completely separate issue and applicable to California companies across the board," Sopori said. "That aside, cannabis companies' delivery drivers must be employees of the company itself."

### **Delaware's Broad Medicinal Pot Protection**

In Delaware, the state's medical marijuana law includes broad language that prohibits employers from discriminating against or penalizing people based on their marijuana use, according to Delogu.

While states like Pennsylvania and Connecticut have medicinal marijuana laws on the books that prevent employers from taking adverse actions against workers like firing them based "solely" on their marijuana use, Delogu said that Delaware's statute doesn't include many of the exceptions and carveouts adopted in other places.

As a result, employers in Delaware may be left if a bind when trying to meet their obligation to accommodate workers' medicinal marijuana use in jobs where safety is a concern.

"Delaware doesn't have any kind of conditional language, and it doesn't have any carveout for safety-sensitive roles," Delogu said. "So there's a couple of cases moving through their state courts right now, but employers are really concerned [about], 'Can we exclude individuals from safety-sensitive roles while they use marijuana?' That case is kind of an outlier, and I would say it hasn't been interpreted in any way that provides useful guidance one way or another."

--Editing by Brian Baresch and Aaron Pelc.