

# Can Transportation Companies Continue to Provide Safe Drivers With All The New Laws Permitting Marijuana Use?

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Employers around the country have a bumpy road to follow as they navigate the ever-changing marijuana laws and regulations.

Pre-employment and post-accident drug testing have been challenged in courts in almost every state where medical marijuana has been legalized. These differing state laws create uncertainty for enforcing a drug-free workplace, even for safety-sensitive positions. In the transportation industry, these permissive state laws run directly afoul of federal requirements to keep the public highways and skies safe and drug-free. How can transportation companies manage drivers, pilots and other safety-sensitive workers while adapting to the increasingly legal use of cannabis-medical or recreational?

## The Scales Have Tipped in Favor of Some Marijuana Legalization—at Least at the State Level

Thirty-three states have now legalized medical marijuana. Ten have legalized recreational marijuana. More are soon to come. Although employers certainly can continue to enforce their workplace drug-free policies when marijuana use is purely recreational, the road to enforcing their policies against *medical* marijuana use is much more challenging. Indeed, each state's particular law is unique to that state and the first cases decided by that state's courts.

Medical marijuana statutes, even those drafted to protect employers from liability for terminating or disciplining employees who test positive for marijuana, have been successfully challenged. Earlier this year in *Wild v. Carriage Funeral Holdings, Inc.*, a New Jersey court held that a former driver could contest his termination for a positive post-accident drug test under New Jersey's Law Against Discrimination. The court permitted the employee to proceed with his claim even though New Jersey's Compassionate Use Medical Marijuana Act expressly provides: "Nothing in this act shall be construed to require ... *an employer to accommodate the medical use of marijuana in any workplace.*"

In another 2019 case, an Arizona court, in *Whitmire v. Walmart*, found in favor of a former employee who was terminated for a positive post-accident drug test resulting from her legal medical marijuana use. Ms. Whitmire's concentrations for marijuana metabolites were, in fact, at the highest level that a urine test could detect. Walmart contended that she was in a safety-sensitive position and had violated its policy prohibiting employees from reporting to work under the influence of medical marijuana. Ms. Whitmire had sued under several statutes, including the Arizona Medical Marijuana Act, which prohibits employers from discriminating against a "patient" in hiring, termination, or other terms and conditions of employment based on the patient's positive drug test for marijuana

components or metabolites, unless the patient used, possessed or was impaired by marijuana at work during business hours.

These two cases continue the trend of other recent court decisions in states like Delaware (2018), Connecticut (2017), Massachusetts (2017) and Rhode Island (2017), where courts have expanded workplace protections for medical marijuana users. However, employers that are subject to DOT Drug and Alcohol Testing regulations must continue to comply with those regulations because marijuana is still listed in Schedule 1 of the Controlled Substances Act.

The DOT has made it clear that the regulations in 49 C.F.R. Part 40 do not authorize medical marijuana under a state law to be a valid explanation for a transportation employee's positive drug test result. Indeed, Medical Review Officers are prohibited from verifying a test as negative based on a physician's recommendation that the employee use a drug listed under Schedule 1. Commercial Drivers' License holders need to be aware that DOT drug tests require laboratory testing for marijuana, even if it is considered legal in their state of residence. The DOT's stance is based on its concern for providing a safe transportation system for the traveling public. According to the DOT's official blog, the number of drivers killed in crashes who tested positive for marijuana doubled from 2007 to 2015.

Under the Federal Motor Carrier Safety Regulations, a person is disqualified from physically driving a commercial motor vehicle if the person uses any Schedule 1 drug, including marijuana. Moreover, the Regulations prohibit a driver from possessing, or being under the influence of, any Schedule 1 drug while on duty. Similarly, motor carriers are prohibited from permitting drivers to be on duty if they possess, are under the influence of, or use marijuana, including a mixture or preparation containing marijuana. Keep in mind that DOT-regulated trucks and drivers are also legally barred from carrying marijuana and marijuana products.

Federal Aviation Administration regulations also prohibit persons from performing safety-sensitive functions for a certificate holder while having a prohibited drug, including marijuana and marijuana metabolites, in their system. Pilots who have a verified positive drug test for marijuana on a required DOT/FAA test will be disqualified from holding an FAA-issued medical certificate.

### **Are Employers In a Holding Pattern?**

Until the federal government changes the classification for marijuana, employers, in general, will have to navigate both state and federal workplace laws when determining whether, and when, to drug test employees for marijuana. Transportation companies should likewise keep abreast of the changing views on the use of medical marijuana, but still abide by their federally mandated drug testing requirements. In states where medical marijuana is legal, they should reconsider whether their zero-tolerance policies should apply to non-safety-sensitive positions. They should also consider tailoring their post-accident testing to situations where there is reasonable suspicion of actual impairment. Their HR or safety managers should train their other managers and supervisors on how to determine when an employer or driver appears impaired. They should also ensure that their safety-sensitive positions are properly designated.

Keep in mind that proving actual marijuana impairment will continue to be a challenge given currently available testing methods. Medical marijuana users who ingest it at night, for example, may still have marijuana metabolites or components in their system the following morning when they

report to work, but may not be impaired. Presently, there are no guidelines for private, non-DOT employers to follow in conclusively establishing impairment levels for medical marijuana.

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