

WHAT IS THE ROLE OF OSHA WHEN POT IS LEGAL?

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Increased Legalization of Marijuana

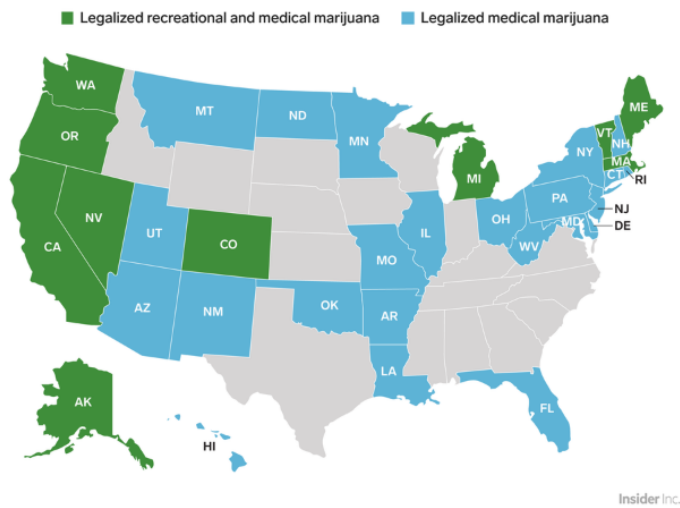
- Recreational marijuana is now legal in 10 states; medical marijuana is legal in 33
- As a result of the November 2018 elections, Michigan, Missouri and Utah have all legalized some form of marijuana
- However, marijuana remains illegal under federal law
- As recently as August 2016, the DEA restated that marijuana has no acceptable recreational or medical purpose and should remain a Schedule I controlled substance
- STATES (Strengthening the Tenth Amendment Through Entrusting States) Act: would amend the Controlled Substances Act such that the law would not apply to individuals or entities acting in compliance with state marijuana laws

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States where marijuana is legal



Skye Gould/Business Insider

Source: <https://www.businessinsider.com/legal-marijuana-states-2018-1>

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Where Does Wisconsin Stand?

- Governor Tony Evers supports fully legalizing marijuana
- He has indicated that his proposed budget may include a provision addressing medical marijuana
- Lawmakers likely will take any marijuana provision out of the budget because they want to limit the amount of policy in the state's spending plan
- Wisconsin voters supported legalization in referendums held in 16 counties during the November 2018 election

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Liability under OSHA

- Under the Occupational Safety and Health Act, employers must furnish “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees”
- Employer tolerance of an employee known to use a federally illegal drug, even for medical purposes, may create an impermissibly harmful environment under current federal law
- To date, OSHA has not promulgated a standard requiring a drug-free workplace, but the General Duty Clause may be applicable

The General Duty Clause

Employers can be cited for violation of the General Duty Clause if a recognized serious hazard exists in their workplace and the employer does not take reasonable steps to prevent or abate the hazard. The General Duty Clause is used only where there is no standard that applies to the particular hazard. The elements of a violation are:

- the employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
- the hazard was recognized;
- the hazard was causing or was likely to cause death or serious physical harm; and
- there was a feasible and useful method to correct the hazard

Duty to Accommodate Use of Medical Marijuana

- Depending on how broadly a state's statute is drafted, employees using legal marijuana may be protected from termination or require an accommodation
 - Some states' statutes (*i.e.*, Minnesota and Illinois) are broadly drafted, stating that patients using medical marijuana shall not be denied any right or privilege on the basis of their medical marijuana use
- Accommodations under the ADA
 - ADA expressly excludes from its definition of "qualified individual with a disability" those individuals who currently engage in the illegal use of drugs

Drug Testing Rules under OSHA

- 2016:
 - OSHA publishes final rule on discrimination and injury and illness reporting
 - OSHA interprets this rule broadly to prohibit mandatory post-accident drug testing, concluding that such tests discriminate against employees on the basis of injury and illness reporting
 - Result: no blanket post-accident drug testing

Recent Changes on Drug Testing under OSHA

- October 2018:
 - OSHA issues a clarification on the 2016 guidance that prohibited blanket post-accident drug testing
 - The clarification states that most instances of workplace drug testing are permissible

Examples of Permissible Drug Testing

- Random drug testing
- Drug testing unrelated to the reporting of a work-related injury or illness
- Drug testing under a state workers' compensation law
- Drug testing under other federal law, such as a U.S. Department of Transportation rule
- Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries

Additional OSHA Updates

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Renewed Life for Safety Incentive Programs

- The 2016 rules also prohibited safety incentive programs
- The 2018 guidance permits those programs to continue but requires the employer to take certain steps to avoid any inadvertent deterrent effects:
 - an incentive program that rewards employees for identifying unsafe conditions in the workplace;
 - a training program for all employees to reinforce reporting rights and responsibilities and emphasizes the employer's non-retaliation policy; and
 - a mechanism for accurately evaluating employees' willingness to report injuries and illnesses

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Recent Changes to Electronic Reporting

- January 2019: OSHA rescinds the requirement for establishments with 250 or more employees to electronically submit information from OSHA Forms 300 and 301
- Establishments will continue to be required to maintain those records on-site, and OSHA will continue to obtain them as needed through inspections and enforcement actions

New Electronic Reporting Deadlines

- The revised rule requires:
 - By March 1, 2019, establishments with 250 or more employees that are required to keep the injury records must submit information from their 2018 Form 300A Summary
 - By March 2, 2019, establishments with 20-249 employees in certain High Risk Industries must electronically submit their 2018 Form 300A
 - In addition to the Form 300A requirement, employers will have to provide OSHA with their Employer Identification Number

Best Practices for OSHA Inspections

- How to prepare **BEFORE** OSHA arrives
- Know employee rights regarding OSHA interviews
- Opening conference
- Provide documentation
- Keep track of documents provided
- Take photographs of what the inspector photographs
- Keep the investigation focused
- Take notes and transcribe immediately after the inspection
- Immediately correct violations that can be corrected on the spot
- Hold a closing conference

Questions?



Thank You!

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