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2023 Trends: Legalization of Recreational Marijuana and Therapeutic Psychedelics

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Three more states legalized adult recreational marijuana use in 2022, and it may only be a matter of time before such use is legal across the country.

Also growing in acceptance is the use of therapeutic psychedelics, such as psilocybin. Two states have legalized their use, some cities have decriminalized their use and more states may adopt laws legalizing them in the future.

But while use of these drugs may be legal, employers still do not have to permit employees under their influence to work.

Here's how these laws are causing change in the workplace.

Implications of Legalization of Recreational Marijuana

Despite three states—Arkansas, North Dakota and South Dakota—rejecting in 2022 the legalization of adult recreational marijuana use, three other states—Maryland, Missouri and Rhode Island—legalized such use.

"I think the legalization of marijuana is inevitable nationwide; it's just a matter of how and when," said Dillon McGuire, an attorney with Pashman Stein Walder Hayden in Holmdel, N.J.

Recreational marijuana is now legal in 21 states plus the District of Columbia.

The employment law implications are twofold—legal and practical, said August Heckman III, an attorney with Morgan Lewis in Princeton, N.J.

Some statutes prohibit employers from basing an adverse employment action on an individual's lawful, off-duty use of recreational marijuana, unless the employee came to work impaired, he noted. Consequently, employers with prehire or random drug-testing programs that test for THC—the psychoactive component in cannabis—may be at risk because they are not testing for impairment but for whether the employee has THC in their system, Heckman explained. "As a result, basing a no-hire or termination decision on the results of a prehire or random test can give rise to an employment claim," he said.

Cannabis can be detected in blood and urine for up to a month after use and detected in hair for much longer periods, said Ruth Rauls, an attorney with Saul Ewing in Princeton, N.J., and New York City. "Thus, if an individual uses cannabis regularly outside of work, he or she will likely always test positive for the drug," she added. "If an employee tests positive for cannabis, there is no definitive way to tell based on the drug test alone whether the positive result is due to cannabis use within the prior hour, day or month or if the employee is impaired at the time of the test."

Employers that rely on drug tests for adverse employment actions may run afoul of state laws that protect certain off-duty cannabis use, she cautioned.

For this reason, employers should update and implement impairment assessment forms that document why an employee was suspected to be impaired, such as through behavior, appearance and performance, Heckman said.

Employers with employees in different states will need to know the law in every state where their employees are situated, said Christopher Duke, an attorney with Akerman in West Palm Beach, Fla., and Boca Raton, Fla. Businesses should reconsider zero-tolerance policies as more employees test positive in a state where cannabis has become legal, he added.

Nonetheless, employers should remember that even though their state may allow recreational or medical cannabis use, state laws don't impact or alter the fact that cannabis remains illegal at the federal level as a Schedule I drug under the Controlled Substance Act, Duke noted. "This is critically important for employers that contract with the federal government or receive federal grants, as the federal government continues to prohibit cannabis use among its contractors," he said.

Employers in all states should keep an eye on federal legislation that would decriminalize cannabis use nationally, Duke said, adding that this would "be a major game changer for employers." President Joe Biden already has [pardoned all people convicted of simple marijuana possession](#) under federal law.

"He encouraged state governors to follow suit," noted James Reidy, an attorney with Sheehan Phinney in Manchester, N.H.

State law may restrict certain categories of employees from using recreational marijuana—for example, employees who operate heavy equipment or have other safety-sensitive roles, such as police officers, firefighters or other first responders, said George Voegelé Jr., an attorney with Cozen O'Connor in Philadelphia.

Therapeutic Psychedelics

In the U.S., the use of certain psychedelics in a facilitated, supervised setting is lawful in Colorado and Oregon, noted Lauren Carboni, an attorney with Foley & Lardner in Denver, and John Litchfield, an attorney with Foley & Lardner in Chicago.

In November 2020, Oregon became the first state to regulate therapeutic psilocybin sessions for adults 21 and older in licensed, clinical settings.

Psilocybin is the psychoactive compound found in what is referred to as magic mushrooms, explained Christine Lamb, an attorney with Fortis Law Partners in Denver.

The state begins accepting applications for licensure of facilities to administer its regulated psilocybin services program on Jan. 2, 2023.

In November 2022, Colorado voters approved a similar measure. By Sept. 30, 2024, the Colorado Department of Regulatory Agencies must adopt implementation rules.

These laws could result in increased concerns by employers over employees working under the influence of psychedelic drugs, said Zachary Kobrin, an attorney with Akerman in Fort Lauderdale, Fla.

A growing number of cities—including Ann Arbor, Mich.; Denver; Detroit; Oakland, Calif.; San Francisco; Seattle; and Washington, D.C.—have decriminalized the personal adult use of certain entheogens, known as psychedelic plants and fungi. "However, decriminalization does not

necessarily mean legalization," Carboni and Litchfield added. "Rather, the simple possession of certain entheogens for personal use will have the lowest enforcement priorities."

Employers in Colorado and Oregon will have to decide whether they are going to continue drug testing workers for psychedelics and fire someone who is using them under medical supervision to treat a mental health disorder, Lamb noted. In her opinion, employers lawfully can but may choose not to due to severe worker shortages.

"It would be surprising if we do not have a quickly growing group of states with some form of legal psychedelics market in the next five years," said Brett Gelbord, an attorney with Dykema in Detroit.

About the Author: Allen has worked at SHRM since 2005. For the previous 11 years, he was a writer and editor at Thompson Publishing Group, editing the ADA Compliance Guide and The Leave & Disability Coordination Handbook and writing articles for their accompanying newsletters. He earned his law degree from the University of North Carolina School of Law and undergraduate bachelor's degree in history from Davidson College cum laude.

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