

## **Cannabis and Workers' Comp: Employers Rights and Responsibilities**

In 18 states cannabis and Washington D.C.—also referred to as marijuana (pot or weed) as it is also known, is legal for recreational, as well as, medical use. In the majority of the rest of the country it is decriminalized in some way, in particular, for medicinal purposes. Nation-wide, cannabis sales have increased 67% as of 2020.<sup>1</sup> As a result of the growing legal acceptance of cannabis, and thus, greater use, staffing agencies, face increasing challenges to workplace safety. As an agency that supplies employees to numerous industries in both high and low risk categories, making sure employees are clean on the job is crucial to both the safety of workers and the costs of workers' compensation claims.

There is also the cannabis industry itself. It has grown significantly since full legal status in many states and is currently worth \$61 billion in the U.S. This includes retail, growing operations, and industry-specific supplies, and manufacturing, just to name a few. Those businesses are also making use of temporary workers and have their own workers' comp costs.

### **Cannabis: What Is It**

While it is different than the intoxicating effects of alcohol, it is a psychoactive and mind-altering drug. It can include high amounts of tetrahydrocannabinol (THC), which causes the pleasurable effects such as relaxation, focus and creativity. It's short-term effects include giddiness and an altered perception of time and events. But the side effects in some people, can include lack of coordination, delayed reaction time, anxiety, paranoia, and nausea. Cannabis that just contains cannabidiol (CBD), does not cause euphoria or intoxication—a “high.” It is legal in every state, and is mostly used for medicinal purposes to relieve such ailments or issues as migraines, anxiety, and insomnia.

Twelve percent of Americans are active marijuana users. If someone consumes cannabis with THC on an occasional basis, say on the weekends, even after the initial effects have worn off—an individual is no longer “stoned”—it can remain in the system for up to 30 days.

CBD should not be a problem in the workplace, unless its purity is compromised, that is, it contains more than 0.3% of THC. Pure CBD oil can remain in the system for 3-5 days. Sometimes up to two weeks. Unfortunately, there is no governing body that tests for purity. An employee may use CBD for help sleeping. If it contains just enough THC, an employee drug test will come back positive.<sup>2</sup>

The purpose of this paper is to discuss the risk of cannabis to employers, including staffing companies, in the workplace. This includes the legality and thoroughness of testing protocols, workplace safety in the world of legal marijuana—whether medical or recreational, the impact of cannabis use on workers' comp claims, and workers' comp coverage for staffing firms that provide employees for the cannabis industry.

### **Drug Testing by Staffing Companies**

In states, such as California, where it is legal for recreational use, it is problematic for employers and staffing companies. Using cannabis at home among friends can be relaxing and pleasurable because it's more likely to contain THC. In the workplace the effects can increase the risk of injury to the user and other employees.

Drug testing by staffing agencies is done on a fairly routine basis. The reason is because the client

wants the staffing agencies to do the testing. Staffing, especially on-demand staffing, is essential to many industries. Staffing agencies want to provide competent, and safe workers, but the legality of cannabis in many states makes it difficult to determine if an employee is simply a user of CBD for health reasons, or a user of cannabis with THC for recreational purposes.

Despite cannabis laws at the state level, the US government still classifies marijuana as a Schedule 1 drug under the U.S. Controlled Substances Act. There are efforts to change this, but currently, employers subject to *federal* standards must comply with the law. In other words, zero tolerance. Employers not subject to federal standards have a greater challenge.

The Occupational Safety and Health Administration recognizes the right of employers to maintain a drug-free workplace in the interests of health and safety. However, this only applies to the prescreening process. Once employed, employers, including staffing companies, will be governed by laws in states where they're located or where they provide employees. In some states there are restrictions on, if or when, an employer may do "random" drug tests. In California, an employer may only perform a random drug test under specific circumstances.

The employer may require a drug test as part of the application process. This preps employees ahead of time to be drug-free for a certain period of time (this is where "fake pee" is sometimes used. More on that later). In those incidences when an accident or injury occur, employers will conduct a drug test on the spot to determine if an employee was under the influence of marijuana or some other drug.

As for the responsibility of the staffing company, it must provide a rigorous pre-screening process to ensure that only clean employees are provided to the client. Rigorous means it must be clearly spelled how the testing was done and what protocols were used. There should also be an established chain of custody between the staffing agency and the laboratory. This should all be documented for liability purposes. If an employee chooses to use cannabis at any time while working for an employer, the staffing firm can prove on its end that it followed procedure. It can also pick up other issues or red flags that may have an impact on an employee's performance such as the use of steroids.

The most common test in the staffing industry for drug screening is a urine test. However, it is not always the most accurate. It can also pick up alcohol or prescription drugs. It can also be fooled (see fake pee). And as mentioned above, employees using CBD for medicinal purposes may test positive because its purity is compromised. It's recommended that backup methods such as the testing of hair and saliva be used to get the most accurate result.

Hair samples are the most accurate and thorough. It has a longer detection window and picks up a pattern of drug use going back months or even a year. But it can't isolate only sporadic drug use.<sup>3</sup> Considering the prevalence of legal, recreational cannabis, this may be too high a standard, unless the jobs being filled require it.

Saliva can't be tricked and can pick cannabis, cocaine, and opiates, which may be helpful as part of a drug-use evaluation. It can detect a more chronic drug user because it has such a small detection window-between-minute and a 48-hours.<sup>4</sup> It is incumbent upon the staffing firm to determine which testing procedure works best for the client and paints an accurate picture of drug-use. Once again, counsel should be consulted to ensure testing procedures are not in violation of any state laws. Because of the possibility of false-positives, a medical review process should be part of any drug screening guidance.<sup>5</sup>

Once an temporary employee is one the job, he/she might be subjected to a random drug test by the employer. Employees strongly under the influence of marijuana containing THC pose a significant threat to safety and possible litigation. But “here's the rub” writes Ryan McCoy, an attorney with Seyfarth Shaw, “...our Constitutional right to privacy generally protects against a random, suspicionless drug tests. Because an employer’s right to drug testing relies on a balancing test (is the employee’s privacy interest outweighed by the employer’s interest in keeping the workplace safe and drug-free?)”



There are work-a-rounds for pre-employment testing, especially in states where marijuana is legal for recreation. Potential job applicants, fearing a positive drug test, may make use of so-called “fake pee.” It can be purchased at smoke shops along with a device to keep it at the appropriate temperature. This is more likely to succeed if a temporary employee or new hire can go to any doctor, including a chiropractor to take the test. Staffing firms should direct the employee to a specific doctor with supervision. Once again it falls to the staffing firm to do all it can to provide new hires or current employees that won't fail a random drug test, regardless of whether random drug tests are likely to be performed or not.

Staffing firms should review their policies on this matter and update them as appropriate, depending on the states where they provide employees to companies. It's also a good idea to consult counsel to ensure that employees rights are not being violated, even for pre-screening. Most U.S. employers rely on staffing agencies to do rigorous drug testing per their contracts with the agency. Failure to take accurate, legal steps for testing can reverberate back on the staffing company.

McCoy goes on to say that courts will usually find there are less intrusive ways than random drug testing to protect employers. Employers face litigation for violating a worker's rights just as much as they might for injury to or death of employee, if a toxicology test proves the employee was under the influence.

If a staffing firm should happen to conduct random drug tests on the employees it provides, it's best to determine if the job is dangerous enough that safety is so essential to a job that a stoned employee threatens the life and health to themselves or others.

### Drug Testing in Times of COVID

If and when employees start returning to the physical workplace full-time, drug testing and its many protocols may start butting up against COVID-19 testing, and it's variants. During COVID, substance use and abuse increased. That included the use of cannabis. For staffing firms that provide employees in high-risk industries, pre-employment screening for drug use may require some extra scrutiny. Once

again because of the legalization of cannabis for recreational use, states will have different laws stating how, or even if, an employer can regulate cannabis use outside the workplace.

There is also the issue of where and when to get drug tested. There was and still is some reluctance to get drug testing done at facilities that also test for COVID because of the possibility of exposure.<sup>7</sup> Staffing firms should take that concern into consideration when establishing a drug testing policy.

## Cannabis and Work Injuries

The most obvious reason for pre-screening for temporary employees, is to lower the possibility of injuries in the workplace, and subsequent claims. An expensive workers' comp can lead to expensive medical costs, increased premiums, and an increase in experience modifications. For these reasons employers must be aware of legal challenges. Even if an employee is injured on the job while under the influence of cannabis, and it is confirmed by an on-the-spot drug test, the employer—in some states--has to prove that the drug use was the *direct cause* of the accident.<sup>8</sup> If an employee is impaired and falls off a ladder that can easily prove the work accident was the direct cause of the impairment. On the other hand, if an employee is under the influence of cannabis, and a poorly placed box falls on them, that *is not* the direct cause of the impairment.

This is important, as under many state workers' comp laws, the claim will be accepted, if there is no direct cause. The staffing agency just needs to be ready to provide documentation that it followed all its testing procedures. If the claim is not accepted there will be no impact on the staffing firm's workers comp costs. Staffing firms need to check the laws in the states they operate in, especially if there is a chance that the employee can collect “some” workers' comp, and determine if it would have an impact on premium.

There is also the employee under the influence of illicit drugs that injures another employee in the workplace. Because an individual under the influence of marijuana will have slow reaction times, accidents will happen. A forklift driver under the influence marijuana who hits an employee on the floor is easily the direct cause of the accident with an on-the-spot drug test to prove it.



Still, treating the injuries can increase workers' comp costs for the staffing agency in medical, X-Mods and ultimately premium. Although the data are not complete, the opposite is being posited in academic circles. Being under the influence of marijuana for pain management for older employees results in fewer mistakes, thus few accidents.<sup>9</sup> A discussion for later down the road.

State laws are also inconsistent regarding the use of medical marijuana. Because cannabis use is prohibited under federal law, employees with a medical marijuana exemption will not be covered by the federal Americans with Disabilities Act. Despite federal law, there are a patchwork of state laws that prevent discrimination against the use of medical marijuana. Staffing firms should talk to their



brokers and legal counsel regarding medical marijuana and workers' comp coverage.

## **The Cannabis Industry and Workers' Comp Coverage**

Due to the legality of cannabis throughout the United States at the state level, the cannabis industry including the growing and the selling of cannabis and related products has taken off, the various facets on the industry are required to follow all safety regulations and carry all insurances. Failure to do so will result in inspections and fines from insurance departments and occupational and safety and health agencies.

It's improving but many marijuana growers and retailers are lax in safety standards and certain regulations. According to experts studying the industry there has been more of an emphasis on growing the business than enforcing safety regulations <sup>10</sup>. This, despite the fact, that employees in the cannabis industry have the same occupational safety and health issues as other industries, including the slip/trip and fall, repetitive motion injuries, and injuries caused by exposure the toxins. <sup>11</sup>

Some cannabis shops and growing operations might be reluctant to approach OSHA or a state safety regulatory agency because of the illegality of marijuana at the federal level. They're also going from a business that operated illegally to a legal business. They may think that the laws and regulations don't apply to them. <sup>12</sup> For this reason, work-related accidents can be more frequent and less likely to be reported. Make sure the client employer carries workers' comp insurance. Because staffing firms are in a joint employment arrangement with their clients, both must carry it. Injuries due to lax safety standards can reflect negatively on the staffing firm, and its experience modification.

## **Class Codes and Stigma**

According to workers' comp underwriters who focus on the cannabis industry, businesses are wrongly reporting class codes is a pervasive problem. For those who obtain workers' comp insurance, some of the operations grow so quickly they also forget to update their payrolls, an oversight that can result in calculating the wrong workers comp premium. Payroll and class codes are part of calculating the premium, as they are used to determine the risk associated with the various jobs performed.

Most rating bureaus now include cannabis in classifications related to growing, cultivation, products, manufacturing, and packaging for distribution. The Workers' Compensation Insurance Rating Bureau of California includes cannabis in several different classifications. For example, it classifies cannabis retailers as stores-retail 8017(1). If the buds are trimmed but not packaged for individual sale, 0035 is assignable. Baked goods such as brownies and cookies are classified under 2003—Bakeries and Cracker Mtg. <sup>13</sup>



Other categories include cultivation, pharmaceutical preparations, sales outside retail stores, cannabis infused beverages, manufacturing, drivers, and, a very important occupation for the cannabis

industry—security. These are an important part of premium. As the industry evolves, staffing agencies supplying temporary employees to various businesses, need to be up-to-date on all of them.

The cannabis industry isn't always getting it right. For example, there are cultivators using class codes for manufacturers and trimmers to classify some of their risk when they should be using growers for the entire operation. Another example is retailers who will use clerical codes when they should be using retail stores to classify risk. <sup>14</sup>

“It's a question on every single new venture....Let's say its a multi-state, multi-faceted business with manufacturing, class codes are a main topic of discussion, and moving to existing accounts...accounts that have been with other markets and consider coming to us, and we look at these past accounts, these past policies just to see how they were classified, I'd say one and four are mis-classified,” says Cameron Ward, vice president of commercial services for Canjun Insurance, an underwriter focused on the cannabis industry. <sup>15</sup> This can change the premium from \$50,000 to \$100,000. This maybe a matter of simply forgetting to add new risks as a cannabis operation grows to include new facets of the trade. Depending on how the risk is mis-classified, the insured could be paying too much premium, or not enough.



It's imperative that staffing agencies are up to speed on which classification codes go with each risk for the temporary employees they're supplying. They also need to make sure that the grower or retail

establishment knows that state safety regulations apply to them and that they're being enforced. Drug testing also plays a roll, as many of the employees may be users. For staffing agencies that provide employees to the cannabis industry, they need to be extra diligent in requiring thorough and secure pre-employment drug testing.

Even when the cannabis industry tries to obtain workers' comp insurance there are roadblocks. Cannabis is still a stigma regardless of its legality. For this reason, insurance companies may be reluctant to provide coverage to staffing companies that specialize in that area, due mainly to federal law. The same is true of banking. It will be assumed that individuals working in that industry are more likely users, and associate the entire industry with unhealthy and reckless behavior—a business run by and employing individuals who are “stoners.” It will be assumed that employees under the influence are likely to get injured.

But states are stepping up the game in response to the explosive growth of cannabis. In 2018, the California Department of Insurance endorsed and helped rollout a program encouraging insurance carriers to provide workers' comp coverage to the cannabis industry. As the encouragement by states continues to grow, more carriers are getting on board. <sup>16</sup> An experienced staffing workers' comp broker can assist in both finding workers' comp coverage and meeting safety requirements.

Cannabis as a thriving industry is here to stay. As it becomes more acceptable other states may legalize it for recreational purposes. Staffing firm brokers and employers should be prepared, not only for the increased possibility of frequent users in the workforce, but the need for temporary employees every facet of the industry.

#### Notes

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