

# Legal marijuana and the workplace: Legally high, legally fired for pot use

## Legal weed brings workplace burdens, benefits

By Lee Bowman, Scripps News | wptv.com

Julie Tappero sees job prospects go up in marijuana smoke every day at the temporary staffing company she owns outside Seattle.

Since December 2012, when Washington state legalized recreational use of the drug, positive marijuana tests among West Sound Workforce's job applicants have more than tripled to about 15 percent. That means headaches for Tappero and many other companies struggling to maintain a drug-free workforce in drug-legal states.

These days, she has to bring in a larger pool of candidates and spend more time screening to rule out those who can't pass or won't take a drug test. She estimates that each of her four full-time recruiters is working an extra two hours a week filling jobs because of drug issues, most related to marijuana use.

"I don't think a lot of job seekers understand yet that they're still going to be tested," said Tappero said. "We're seeing more job seekers who are very candid and upfront about their use of marijuana, which they wouldn't have admitted to in the past."

Workplaces in Washington and Colorado are adjusting to noticeable shifts -- some cumbersome, others unexpectedly profitable -- since marijuana became legal for adults 21 and older in those states more than a year ago.

Courts continue to uphold a company's right to maintain a drug-free workplace, and many of the scores of businesses interviewed by Scripps News in both states say they haven't budged from that stance. Most said they've experienced no problems since legalization. For others, however, employee confusion over a company's right to draw a line against marijuana has become a business burden.

Significant jumps in positive drug tests at some companies are resulting in firings, higher turnover and rejected applicants.

"I get calls almost every day from people who were fired for off-the-job use of legal or medical marijuana," said Rachel Gillette, an attorney and executive director of the Colorado Chapter of National Organization for the Reform of Marijuana Laws. She co-chairs a coalition pushing for drug testing reform that gives greater protection to workers for off-job use.

David Vine, of Swingle Lawn, Tree and Landscape Care in Denver, is getting a glimpse of the problem, and says it may get bigger once he starts seasonal hiring this spring.

“I’ve interviewed some people who didn’t know what was legal -- 18-year-olds who thought it was OK for them to smoke,” says Vine, the company’s human resources manager. “They’re not getting hired.”

Because he has crews who “work 60 feet up in trees with chainsaws,” he says drug testing is not negotiable. “We’ve always done it and still do.”

Other companies are discovering benefits with legalization. The rise in positive drug screens means a boom in business for some testing labs. And for staffing agencies like Tappero’s, the flipside to the hassle and cost of more testing is an uptick in new clients as employers confront complex new hiring issues and hand off the chore. Some businesses seem downright liberated -- openly accepting workers using pot.

Jeremy Ostermiller says marijuana is integral to the free-wheeling creativity of his hip, young workforce at Altitude Digital, a Denver-based web advertising firm ranked by Inc. magazine as the 54th fastest growing company in the U.S. over the past two years.

As the company’s 34-year-old founder and CEO, Ostermiller says he strives to provide an innovative environment for his 20-something employees. There’s no place in it for drug testing, and it’s never been required in the firm’s six-year history.

“I know a good portion of our staff do smoke -- they’re pretty open about it,” he says. “We don’t encourage it at work, but we don’t frown upon it.”

Many employers are also opting not to hire workers who use tobacco, fearing the impact on health costs. But those hiring policies are subject to state laws, since tobacco, unlike marijuana, is legal under federal law.

Workers who think legalized marijuana will compel companies to accommodate their marijuana use are abruptly realizing otherwise.

“Right now, there’s a great deal of confusion. People are surprised to learn they can lose their jobs,” said Denver labor-law attorney Danielle Urban.

The experiences of Colorado and Washington are being closely watched nationally, as efforts to liberalize medical marijuana laws are before voters or legislatures in at least 15 more states, and 18 others already have therapeutic marijuana laws on the books.

“The issue is bubbling and no one knows how it’s going to play out,” said David Warner, an employment law expert in Virginia. “I doubt that Colorado and Washington will be the only ones to legalize, but marijuana still continues to be an illegal drug under federal law and employers can’t be required to tolerate it.”

Besides legal minefields, many companies are looking for improvements to the science of pot testing. Unlike alcohol, which typically disappears from the system in hours, trace elements of THC, the active ingredient in marijuana, can remain in the system for months. And while

drunkenness can reasonably be measured from blood alcohol levels, experts say there is no way currently to gauge impairment from marijuana.

Jan Haire, executive director of the Colorado Staffing Association, which represents many of the state's job placement firms, said legalization is "a horrible dilemma for our members, because there's no way to know if someone's impaired."

To meet the requests of clients -- some who want drug-free workplaces, and others willing to be more tolerant -- "we're scampering around trying to figure out how to best protect ourselves (from liability)," she said. A recent workshop on the issue drew 30 companies -- "one of the hottest sessions we've ever had."

"Ultimately, I think everyone's going to have to work on stricter policies for testing than many have now."

Even in companies where there should be no doubt that marijuana remains off-limits, it has noticeably filtered into the workplace. Federal law requires all interstate truckers to undergo drug testing, and they know they'll be regularly, randomly screened.

Despite that, several Colorado trucking companies reported a spike in positive random tests in January, said Patti Gillette, vice president of the state's Motor Carriers Association. At one company with 400 drivers, the advent of legal pot apparently proved particularly tempting, with fifteen of the 100 checked testing positive, she said.

"That's a lot of drivers off the road," Gillette said. "There's been a lot of education to make sure that drivers know just because it's legal in the state doesn't mean it's legal in our industry."

West Sound's Tappero said six of her clients in the manufacturing field expected legalization would increase the risk of marijuana use among workers and decided to begin screening job candidates for drugs. Many other companies say they took the precaution of issuing reminder notices to employees that their policies against marijuana hadn't changed. In some cases, firms took tougher action.

At a Denver parcel delivery company last December, supervisors suspected their loading dock workers were smoking pot on the job, according to the company's head of human resources, who asked that both she and the company remain anonymous for fear it would reflect badly on the firm. The company had a zero tolerance policy, and drugs had never before posed a problem, she said. But managers took action after noticing a rise in worker mistakes and the occasional aroma of marijuana around the docks.

They locked down the area one day and tested the entire crew. Of 19 workers, 15 tested positive for marijuana and were fired, she said.

"They felt empowered and thought they wouldn't get in trouble, even though we had made it very clear," the manager said. "They knew we were drug free....we're only going to babysit them so much."

Losing so much staff at once with 5,000 packages scheduled for delivery meant a big logistical problem. Managers worked through the night to organize and deliver all the parcels.

That kind of hassle is why some employers, especially those in retail, hospitality, restaurants and software businesses, simply opt not to test, said Curtis Graves, an employment law attorney with the Mountain States Employers Council.

“If every employer starts to enforce their rights and if they terminate all the people who test positive, the turnover costs will be enormous,” Graves said. “They’ve taken marijuana off the things they test for, and simply said ‘we don’t want to know.’”

Altitude Digital’s Ostermiller agrees that subtracting testing from the employment equation is partly practical. If he were to screen and eliminate anyone who tested positive for pot, he says, “we would lose half of our company.”

A January survey of more than 300 employers across Colorado by Mountain States found most companies sticking with existing drug testing policies and continuing to screen for marijuana. About three quarters drug test (a majority are required to test by federal law) and of those, about one-in five said they made their policy more stringent.

The question Denver employment lawyer Kate Raabe says companies should be asking themselves is “How much risk, how much liability are you willing to take on for a worker that may be impaired with a substance that’s still illegal under federal law?”

The parcel delivery company’s decision was to hold the line on the rules and turn over the hiring, testing, and firing duties to a staffing agency.

“It takes time to get all the paperwork done and do the tracking so you can prove you’ve been fair,” said the company manager. With a placement company now handling all of that, she said, “they’re taking the responsibility.”

Many believe the message will quickly sink in with the workforce.

“You test positive, you lose your job -- and no one wants to lose a well-paying job,” said Gillette, of the motor carriers group.

Among those enjoying the business benefits of legalization is Jo McGuire, director of compliance and corporate training for Conspire!, a Colorado Springs testing company.

Her company had expected that legalized pot would mean workplace testing would decline or stay flat. Instead, business is up 30 percent from a year ago. They’ve hired four additional employees and may hire two more in the next few months.

Their test numbers tell the story. Positive results from urine samples, the most common type of test, had been at 7 or 8 percent since medical marijuana became widely available in Colorado

five or six years ago. But last year, that percentage shot up to 15.4, a rate McGuire said held steady in January.

“The volume is so huge, and I attribute it to the fact that employees think, ‘You can’t test me, it’s legal now,’ ” she said.

Many of the positive tests are coming from workers in transportation, manufacturing and construction jobs, “where there’s a clear zero tolerance policy and they know that,” says McGuire. “I had one guy, a sheet metal worker, come in with a THC level of 4,433. Remember, the cutoff threshold is usually 15.”

Terry Johnson, president of Vancouver, Wash., ARCpoint labs, said he’s seen at least a 25 percent increase in marijuana positives in the past six months.

Whenever his lab has to confirm a screening, he said, “it drives our price up anywhere from 7 to 10 times over what the initial test would have cost us.”

“When that’s passed on to the customers, that’s what will drive the decisions to ignore or eliminate THC from their testing programs,” he said. “The bigger companies may be able to hold the line longer.”

For now, many workers are learning the hard way.

Barry Sherman, executive director of the National Electrical Contractors Association’s Puget Sound Chapter in Washington, tells the story of an acquaintance who applied for an administration job. The man had smoked pot for 25 years before stopping six years ago. He started up again three months before applying for the new job, and flunked the drug test.

“Here he was jeopardizing a good job, kind of defying common sense,” Sherman says. “And when I asked him why, he said, ‘They made it legal, man.’ ”

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