



2024 International Client Seminar

February 29 - March 3, 2024

Faster, Higher? And Stronger

Evolving Global Marijuana Laws and Their Impact on Employers

Courtney Nichols

Moderator

PLUNKETT COONEY

Detroit, Michigan

cnichols@plunkettcooney.com

Jane Kim

WRIGHT LINDSEY JENNINGS

Little Rock, Arkansas

jkim@wlj.com

Global Landscape of Marijuana Legislation

The legal status of marijuana and/or cannabis cultivation and usage has dramatically changed over time. In the early 20th century, cannabis was considered an illegal substance by most countries, primarily because of its perceived addictive potential and negative impact on productivity and societal order. In the 21st century, and particularly in recent years, the global landscape of cannabis legislation has dramatically evolved.

Certain countries (including Canada and Uruguay) have fully legalized cannabis, while numerous others have decriminalized its use or legalized its use for medicinal purposes. In the United States of America, states and localities are continuing to trend towards legalization and utilizing the plant's potential benefits.

The trend is clear: momentum for drug policy reform has continued to build globally. From the issuance of the first licenses in the European Union ("EU") for nonprofit cannabis associations to the EU's largest economy taking steps towards legalizing marijuana for adults, a number of countries, especially throughout Europe and South America, marked drug reform milestones in 2023, which continue to bloom in 2024.

The following is a summary of the different statuses of cannabis legislation:

Fully Legal

As of the time of this presentation, countries that have legalized the recreational use of cannabis are: Canada, Georgia, Malta, Mexico, South Africa, Thailand, and Uruguay. 24 states, two territories, and the District of Columbia (in the United States) and the Australian Capital Territory in Australia have also passed recreational usage legislation. Commercial sale of recreational cannabis is legalized nationwide in three countries (Canada, Thailand, and Uruguay) and in all subnational U.S. jurisdictions that have legalized possession except Washington D.C.

Legal for Medicinal Use

Countries that have legalized medical use of cannabis include Argentina, Australia, Barbados, Brazil, Canada, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Finland, Georgia, Germany, Greece, Ireland, Israel, Italy, Jamaica, Lebanon, Lithuania, Luxembourg, Malawi, Malta, Mexico, the Netherlands, New Zealand, North Macedonia, Norway, Panama, Peru, Poland, Portugal, Rwanda, Saint Vincent and the Grenadines, San Marino, South Africa, Sri Lanka, Switzerland, Thailand, the United Kingdom, Uruguay, Vanuatu, Zambia, and Zimbabwe. Others have more restrictive laws that allow only the use of certain cannabis-derived pharmaceuticals. In the United States, 40 states, four territories, and the District of Columbia have legalized the medical use of cannabis, but at the federal level its use remains prohibited.

Decriminalized

Typically, decriminalization means no arrest, prison time, or criminal record for the first-time possession of a small amount of marijuana for personal consumption. In most decriminalized locations, such offenses are treated similarly to a minor traffic violation. States with partial decriminalization include:

Faster, Higher? And Stronger

Louisiana, North Carolina, and North Dakota. In addition, pending “decriminalization” bills are currently before the following state governments: Florida, South Carolina, Tennessee, and Wisconsin.

Ongoing Legislative Efforts

Germany is the largest country in the EU attempting to implement some form of marijuana legalization. On the heels of Malta’s marijuana legalization efforts, the German coalition government promoted a policy of implementing full commercial legalization, only to encounter a significant roadblock—the Single Convention on Narcotic Drugs, an international drug treaty to which almost all countries are a party. The Single Convention allows countries to pursue certain types of cannabis programs (i.e., medical and industrial use) but stops short at adult-use systems. While the Single Convention does not include a robust mechanism to enforce this prohibition (as Canada and Uruguay are aware), EU drug laws do, and are intertwined with Single Convention obligations. As such, Germany retreated from its plan of full commercial legalization, instead pushing forward with incremental reforms that include a two-phased approach: Phase 1: decriminalization and the establishment of social clubs; and Phase II: commencing adult-use pilot programs, similar to what commenced in Switzerland in 2023. Although this two-tier system falls short of a full commercial program, it is still an important evolution that is expected to advance similar efforts throughout the EU.

Elsewhere, 2023 saw the defeat of a two-year process to legalize marijuana in Colombia. During the eighth and final reading, the legalization bill fell short of the 54-vote threshold it needed for passage in the Senate. Nevertheless, many optimistic observers felt that this was inevitable since the current presidential administration did not introduce the legislation. Almost immediately after this failed vote, a new bill was introduced. In June, 2023, the proposed legislation was once again shot down. However, Columbia’s President continues to be a proponent of legalization efforts and has openly stated that lawmakers who voted to shelve a marijuana legislation bill yet again in December, 2023 were only helping to perpetuate illegal drug trafficking and the violence associated with the unregulated trade.

In the United States, 13 states currently have proposed bills to legalize cannabis for adults: Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Nebraska, New Hampshire, North Carolina, Pennsylvania, South Carolina, Tennessee, and Wisconsin. In addition, it is anticipated that other states – such as Florida and South Dakota – could have citizen initiatives to legalize cannabis on the ballot in 2024.

CBD Legalization

CBD and THC are two of many cannabinoids present in the cannabis plant. Although they have similar structures, they interact with different receptors. As such, only THC causes the high people associate with cannabis. With the enactment of the Agriculture Improvement Act (also known as the 2018 Farm Bill), CBD oil products containing less than 0.3 percent are fully legal for U.S. residents to buy, sell, possess, and consume; however, state governments can individually regulate the manufacture and distribution of CBD oil through their legislation.

Similarly, while CBD is legal in many countries, certain countries have outright banned the sale and use of CBD. For example: in Europe, Albania, and Serbia have maintained a complete ban. Asia, Singapore,

and Russia have similar prohibitions.

Effects of Growing Marijuana Usage and Legalization on Employment

Workplace Injuries

One of the most common criticisms of expanding marijuana legalization is increasing the frequency and severity of workplace accidents and injuries. In 2018, researchers studied the association between legalizing medical marijuana and workplace fatalities.ⁱⁱ

A study published in the Canadian Journal of Public Health in August, 2023, followed 2,745 Canadian workers in safety-sensitive and non-safety sensitive positions over two years, analyzing the 11.3 percent of those in the sample who experienced a workplace injury during that time period. The researchers found that among all respondents, 10.2 percent of those who were hurt on the job fell into the non-user category, 11.14 percent were classified as off-duty consumers and 20.13 percent reported using marijuana either two hours before or during work. This study supports the finding that off-duty use does not increase the potential for a claim, while on-duty use certainly does.ⁱⁱⁱ

Prohibiting Discrimination

Within the United States, certain states have gone further than merely legalizing marijuana use but have passed measures making it unlawful for employers to discriminate against a person in hiring, termination, or any term or condition of employment because of the person's use of cannabis off the job and away from the workplace. These states currently include California, Nevada, New York, New Jersey, Connecticut, Montana, Rhode Island, and Minnesota. Notwithstanding these protections, each one of these states permit employers to enforce policies that prohibit an employee from performing work while under the influence of marijuana or from consuming marijuana during working time or on an employer's property.

As a result of the legal framework in these jurisdictions, employers are permitted and possibly required to take adverse action against employees for on-duty use of marijuana, but prohibited from taking adverse action against employees for protected off-duty recreational use of marijuana. The difficulty for employers arises from distinguishing between the two scenarios. Some commentators have contended that unlike an alcohol breathalyzer test, current marijuana drug testing technology cannot confirm that a person is under the influence of marijuana at the time of the test. Instead, various toxicology labs indicate that their tests can only confirm whether the individual has used marijuana in the past, without specifying exactly how far in advance of the testing such use occurred. Based on these limitations, employers can expect employees in applicable jurisdictions to assert that a positive drug test is an unreliable indicator of current impairment.

To combat the question of "impairment", it is generally recommended that affected employers do the following: (1) revise employee handbooks and other policies to ensure these materials align with applicable laws concerning recreational marijuana use, drug testing, and the use of the results of any drug test; (2) carefully document the physical evidence of marijuana use or impairment in instances where an employer suspects an employee may have used or been impaired by marijuana while on the employer's premises and/or during working hours; (3) arrange for one or more employees to receive

Faster, Higher? And Stronger

training and certification as a “Workplace Impairment Recognition Expert” to enhance the evidence of impairment by an employee suspected of using or being impaired by marijuana while on the employer’s premises and/or during working hours; (4) monitor technological developments in the marijuana impairment testing market for well-supported and well-established inventions that reliably detect current impairment; and (5) closely follow federal and state legislation along with local regulations in this area and consulting with outside counsel to the extent necessary to respond to any changes.

ⁱ For additional information regarding cannabis legalization worldwide, you can visit:

<https://www.cannabisbusinesstimes.com/article/cannabis-legalization-world-map/> or <https://cannabislegality.com/>.

Additionally, Westlaw regularly contains a 50-state map for the United States with up-to-date information regarding legalization status.

ⁱⁱ D. Mark Anderson, Daniel I Reese, Erdal Tekin, *Medical marijuana laws and workplace fatalities in the United States*, October 6, 2018,

<https://pubmed.ncbi.nlm.nih.gov/30092547/#:~:text=at%20conventional%20levels,-,The%20association%20between%20legalizing%20medical%20marijuana%20and%20workplace%20fatalities%20among,482%2D>. Surprisingly, the study found that legalization of medical marijuana was

associated with a 19.5% *reduction* in the expected workplace fatalities among workers aged 25-44. The association was not statistically significant at conventional levels among workers aged 16-24.

ⁱⁱⁱ Canadian Journal of Public Health, *Workplace and non-workplace cannabis use and the risk of workplace injury: Findings from a longitudinal study of Canadian workers*, December 1, 2023,

<https://pubmed.ncbi.nlm.nih.gov/37523062/>