



# WORLDWIDE INTO THE HAZE:

## WHAT EMPLOYERS NEED TO KNOW AS MEDICAL MARIJUANA HITS THE WORKPLACE

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As Nevada's first medical marijuana dispensaries recently opened in both the northern and southern parts of the state, employers are again wondering what to do about the use of medical marijuana by their employees. Can employees use medical marijuana, against an employer's policies, without threat of termination? As many have noted, the law is unclear on that point, so we have to fall back on the old lawyer response of, "it depends."

### Nevada's Medical Use of Marijuana Act (MUMA)

Nevada's medical marijuana state statutes are amongst those that do more than just exempt the use of medical marijuana from prosecution. The Nevada statute does offer some protection to employees, so Nevada employers must be prepared.

There is some good news for employers: NRS 453A.800(2) provides that there is nothing within the medical use of marijuana statutes to "require an employer to allow the

medical use of marijuana in the workplace." Therefore, use of medical marijuana at work is still prohibited. Further, the statute provides that there is no requirement for "an employer to modify the job or working conditions of a person who engages in the medical use of marijuana that are based upon the reasonable business purposes of the employer..."

Yet, it can't be that easy... Can it? Unfortunately, no, it can't. Here's the caveat: the statute does require an employer to "attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card, provided that such reasonable accommodation would not:

- a. Pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or
- b. Prohibit the employee from fulfilling any and all of his or her job responsibilities." NRS 453A.800(3).

Therefore, while the employer does not need to modify the job or working conditions of the employee (as long as those requirements are based upon the reasonable business purposes of the employer), they do need to make reasonable accommodations for card-carrying employees. What does this mean for employers?

The statute states that the medical needs of an employee must

be accommodated unless such accommodations would pose a threat to others, constitute an undue hardship, or would prohibit the employee from fulfilling his or her job duties. Employers should concentrate on the medical condition of the employee rather than the use of medicinal marijuana. Presumably, such a medical condition is protected under the Americans with Disabilities Act. So, employers should engage in an interactive process with the employee to determine if the employee can perform the essential functions and/or responsibilities of the position with or without a reasonable accommodation. An evaluation would then be done to determine whether or not the requested accommodation would be reasonable or would constitute an undue hardship to the employer. The bottom line is that each case should be evaluated separately.

### Nevada's Lawful Use Statute

Nevada's lawful use statute provides that it is an unlawful employment practice for an employer to discriminate "because the employee engages in the lawful use in this state of any product outside the premises of the employer during the employee's nonworking hours, if that use does not adversely affect the employee's ability to perform his or her job or the safety of other employees." NRS 613.333(1). Therefore, employees may claim their use of medicinal marijuana is lawful and subject to this statute.

While Nevada courts have yet to address this statute as it relates to medical marijuana, the Colorado Supreme Court has addressed a similar statute and found that medical marijuana use is *not* lawful, as it is still prohibited by federal law. See *Coats v. Dish Network, LLC*, 350 P.3d 849 (S. Ct. Co. 2015). The Colorado lawful use statute provides that “[i]t shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee’s engaging in any lawful activity off the premises of the employer during nonworking hours.” CRS 24-34-402.5(1). The Colorado Supreme Court found that the use of medical marijuana was not a “lawful activity,” thus, the employee could not make a claim under the statute. Notably, the Colorado Court of Appeals’ dissent argued that the term lawful in the statute refers only to Colorado state law, under which medical marijuana use is “at least lawful.” *Coats v. Dish Network, LLC*, 303 P.3d 147, 157 (Co. Ct. App. 2013) (Webb, J., dissenting). The Colorado Supreme Court, however, disagreed, finding that the term “lawful” is not restricted in any way, and would not “engraft a state law limitation onto the term.” See *Coats*, 350 P.3d at 853. Therefore, if it is illegal federally, it is not a “lawful activity” in Colorado.

Nevada’s lawful use statute, however, is a bit different. Specifically prohibited is discrimination based upon “the lawful use in this state...” of any product. It begs the question: Is the medicinal use of marijuana lawful in Nevada? The Nevada MUMA simply exempts card-carrying medical marijuana users from prosecution. It does not specifically state that such use is lawful, and given its illegality under federal law, use even in this state could be deemed unlawful. However, since there is no Nevada case to date, employers need to be aware there is a risk that employees might make claims under Nevada’s lawful use statute.

## Best Practices in the Smokey Haze of Medical Marijuana

So, what is an employer to do? Employers should expect that, at some point, an employee will test positive for marijuana and come forward with a medical marijuana card. The key is to plan for that eventuality. Employers should look at their job descriptions, policies and procedures, and make sure that they adequately address the

potential use of medical marijuana by their employees. Thereafter, each such positive drug test should be evaluated on a case-by-case basis.

### 1. **Drug Free Workplace Policies**

Employers should review their drug free workplace policies. Reiterate to employees that use of illegal drugs is prohibited and can subject the employee to discipline up to and including termination.

### 2. **Review Job Descriptions**

Such job descriptions should cover not just the essential functions of the position, but also all job duties and responsibilities. Under the ADA, the court will focus on if an individual is able to perform the essential functions of the position, with or without reasonable accommodations. However, Nevada’s MUMA states that a reasonable accommodation of the medical needs of an employee who engages in the medical use of marijuana cannot “prohibit the employee from fulfilling any or all of his or her job responsibilities.” It is important, therefore, that the job description accurately states all of the employee’s job responsibilities.

### 3. **Review Drug Testing Programs**

Determine if your program utilizes a Medical Review Officer (MRO). An MRO is a licensed medical doctor with special training in substance abuse. The MRO will review lab results and, when a test is positive, he or she will contact the employee to determine if there is a legitimate medical explanation for the positive result. Some employers in federally regulated businesses are required to have an MRO in place; for those that are not, be sure to know what the MRO will report to you. Coordinate with your testing organization to make sure your testing program has all the appropriate releases required (for example, HIPAA releases), so that all necessary information may be reported.

### 4. **Update Hiring Policies and Procedures**

Employers should not ask whether an employee has a medical marijuana card during the hiring process. Under MUMA, to obtain a medical marijuana card, an individual must have a medical condition. The ADA does not protect

the use of medical marijuana, but it does protect the applicant with a medical condition. Therefore, employers should follow the standard practice of not asking about medical conditions, focusing instead on the essential functions of the position and inquiring whether or not the applicant can perform the essential functions required with or without reasonable accommodations.

### 5. **Train Supervisors to Recognize Symptoms of Impairment**

Marijuana use (medicinal or otherwise) is not permitted at work. As such, if an employee is using while on the job, termination is appropriate. However, it is rare that an employee is caught with the drugs in hand. It is important to train supervisors to notice the signs and symptoms of impairment. In particular, after an accident, once first aid has been provided, supervisors should take note of all signs of impairment. Supervisors should not make any conclusions regarding the cause of the impairment, but just document their observations: making note of what they saw, heard or smelled and of any other signs and symptoms.

Given Nevada’s medical marijuana law’s lack of clarity, the best employers can do is be prepared and evaluate each positive marijuana drug test on a case-by-case basis. Thoughtful decisions will go a long way toward preventing future claims. **NL**



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