



The Impact of Legalized Marijuana Use for Nevada's Employers

By: Swen Prior

If he had lived, “Marlboro Man of marijuana,” Bob Marley, would have been 72 years old this week. I vividly remember listening to him sing Peter Tosh’s anthem “Legalize It” and thinking to myself – “Nope, that’s not going to happen.” I was wrong. On January 1, 2017, Bob Marley’s vision of legalized use of marijuana became a reality under Nevada and several other states’ (plus the District of Columbia’s) laws. To be clear, marijuana remains illegal under federal law, but marijuana has been decriminalized under Nevada law. So what does Nevada’s marijuana law do or change? And what, if anything, are Nevada employers now required to do with employees who use marijuana? What are the requirements and what are the restrictions on implementing employer’s drug testing policies? This article attempts to cut through some of the “haze” and explain the requirements of both Nevada’s recreational and medical use of marijuana and provide some general guidance to employers as they establish policies and procedures to address their concerns of legalized marijuana.

First, the federal Controlled Substances Act (CSA) still classifies marijuana as a prohibited Schedule I drug. This means that marijuana is illegal under federal law. Indeed, last year, the Drug Enforcement Administration announced it would keep marijuana illegal for all purposes. In doing so, the department reconfirmed its enforcement priorities of stopping distribution to minors and preventing marijuana sales revenue from being diverted to criminal enterprises. So, the distribution of marijuana is still a federal offense throughout the United States—Nevada included. While the Obama Administration took a laissez faire attitude with the enforcement of the CSA as to marijuana; it is unclear how the Trump Administration will respond, if at all, to the growing trend of states decriminalizing marijuana for both medical and recreational use. So, federal law and state law are still in conflict, and the courts have consistently upheld an employer’s right to enforce its strict drug testing policies under federal law. However, the interplay between federal and state laws regarding marijuana is the subject of several new lawsuits across the nation, including here in Nevada.

Second, Nevada voters approved the recreational use of marijuana last November 8th, despite being illegal for federal law. Under Nevada law, the purchase and recreational use of limited amounts of marijuana for Nevada residents 21 years of age and older is legal as of January 1, 2017. The law also requires the Nevada’s Department of Taxation to adopt all regulations necessary to execute and provide for the recreational use and purchase of marijuana by January 1, 2018. Given the inevitable increased demand for marijuana, Nevada employers are rightly concerned about ensuring safety of its employees and maintaining its quality standards in the workplace. Employers are also uncertain as to when and how they can restrict marijuana uses with regard to their employees. Importantly, the law does not prohibit a “public or private employer from maintaining, enacting, and enforcing a workplace policy prohibiting or restricting actions or conduct otherwise permitted under ... this act.” So, what is clear is both Nevada’s recreational and medical marijuana laws, permit employers to maintain and enforce the prohibition, possession, and consumption of marijuana on its premises and while the employee is on duty.

Despite the legal restriction on marijuana (from both federal and Nevada law), many employees mistakenly assume that carrying or even using marijuana at the workplace is allowed. Simply stated, it is not and these employees are wrong. Under both federal and Nevada law, employers can—and should—establish policies that notify the employee that marijuana is prohibited at work and that employees may not be under influence of marijuana, alcohol, or impaired by other drugs during their shift.

Next, the legalization of marijuana for off-duty consumption raises difficult practical and procedural issues for Nevada’s employers. For example, many employers have strict policies prohibiting their employees from being under the influence or otherwise impaired by a prohibited substance while performing their duties. The challenge then is determining when an employee is “under the influence” or “impaired.”

Unlike alcohol, there is no standardized level or way to quickly determine impairment. In practice, however, many employees will not have visible side effects from marijuana use. Even if they did, the side effects are not consistent and can fluctuate for each individual employee. To complicate matters, marijuana can stay in an employee's system for months at a time—especially if the employee is a chronic user. This means an employee could test positive at work at a time when they are not under the influence or impaired, yet a positive drug test can result. So, employers should consider prohibiting employees from working while being impaired or “under the influence.” However, they may want to exercise caution before concluding that the employee is “under the influence.” The employer may also want to document the circumstances and explain the reasonable suspicion for why the employer thinks the employee is impaired.

To complicate these issues a bit further, long before approving recreational use, Nevada changed its laws to allow marijuana for medical purposes. Medically recommended marijuana is governed under very different legal requirements than recreational use. Under Nevada's Medical Marijuana Act, certain registered individuals may possess and use marijuana for medical purposes. Under this Act, employers are required to “attempt” reasonable accommodations for an employee's off-duty use of medical marijuana. This requirement remains hazy because the state legislature did not provide any guidance. Further no court has yet explained what this law means when it states that employers are required to “attempt to make reasonable accommodations for medical needs.”

While the law does not explain what affirmative steps employers are required to take, it is clear about what steps an employer is not required to take. For example, under the state marijuana laws:

- An employer is not required to accommodate recreational use of marijuana.
- An employer is not required to accommodate employees' medical use if they do not have a Nevada issued and valid registry identification card. So before any discussion of accommodation even takes place, the employer should determine whether the employee has a valid registry identification card.
- Under the medical marijuana law, employers are not required to modify the marijuana user's job or working conditions when the working conditions “are based upon the reasonable business purposes of the employer ...”

- Importantly, employers are also not required to provide accommodations that would: pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or prohibit the employee from fulfilling any and all of his or her job responsibilities.

Employers' policies and restrictions, based on the legitimate need for workplace safety, will likely be sufficient reasons to not accommodate marijuana use of an employee. Also, as noted above, the Act also allows employers to maintain a drug-free workplace and employers can prevent medical use of marijuana in the workplace. As an aside, employers that are governed under federal laws and regulations such as the Department of Transportation regulations and the federal Drug-Free Workplace Act of 1988, present unique

circumstances. So, given that marijuana is still classified as a schedule I drug under the CSA, employers subject to federal laws are limited in how much they can accommodate their employees' use of marijuana for medical purposes.

If, the employee has a valid registry identification card, the employer needs to determine whether they can reasonably accommodate the employee's medical use of marijuana and medical needs based on the safety and performance issues noted above. Employers may want to engage in

an interactive process with an employee, who holds a valid registry medical marijuana card, to both document the steps taken and outline the reasons for the approval or rejection of the accommodation. It makes sense to have some basic documentation before terminating the employment due to the employee's off-duty marijuana use. The interactive process is a bit cumbersome; however, if the employee can perform all of the assigned duties without posing a “threat of harm or danger to persons or property” then the employer can accommodate the employee's medical marijuana use.

In short, the Nevada's marijuana laws—along with existing federal law—preserve Nevada employers' rights to maintain a drug-free workplace. Nevertheless here are some simple, take away guidelines:

- Now is a good opportunity for employers to review their workplace drug policies and revise them to reflect that the use and possession of marijuana on work premises or while on duty is prohibited.
- Employers should consider including in these policies a general statement that the company does not allow or tolerate drug or alcohol use and/or abuse in the workplace,

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this policy could also outline what constitutes an infraction of the policy regarding substance abuse, and explain the disciplinary measures that may occur if there is a violation.

- Employers may also want to institute training programs for their employees, about their drug-free workplace policy and other related policies and procedures.
- Nevada employers are allowed to conduct workplace drug testing under various circumstances including:
 - after a contingent offer of employment;
 - after an on-duty vehicle accident;
 - when returning from a treatment program;
 - when there is reasonable suspicion of impairment; and/or
 - when there is any applicable federal law that requires testing.

Importantly, the act does not prohibit a “public or private employer from maintaining, enacting, and enforcing a workplace policy prohibiting or restricting actions or conduct otherwise permitted under ... this act.” So, Nevada’s legalization of recreational and medical marijuana will hopefully have a minimal impact on Nevada employers. The conflict between federal and state laws remains a complication; however, consistent application, documentation, and training of drug testing policies under both state and federal laws appears to remain valid as long as the marijuana is still classified under the CSA as a Schedule I drug.

Shannon Bond, The Financial Times, New York, “Bob Marley: Marlboro Man of marijuana?” November 18, 2014 at: <https://www.ft.com/content/01da3e7e-6e81-11e4-a65a-00144feabd0>.


Robert Nesta “Bob” Marley, was born on February 6, 1945. Legalize It is an album and song by Peter Tosh. Legalize It was Tosh’s debut album as a solo artist after leaving The Wailers. It was recorded at Treasure Isle and Randy’s, Kingston, Jamaica in 1975 and released in Jamaica in the same year. Released 1976; Recorded: Treasure Isle and Randy’s, Kingston, Jamaica, 1975; Label: Virgin (UK), Columbia (US); Producer, Peter Tosh

About The Author




Swen Prior is an attorney at the law firm of Snell & Wilmer and has called Nevada his home for 12 years. He began his legal career in 2004 serving as a law clerk to The Honorable Robert Clive Jones in the United States District Court of Nevada. His practice focuses on defending employers, including Fortune 500 companies in a wide variety of litigation arising under common law and numerous employment-related statutes. He represents and counsels clients in many industries, including hospitality, health care, manufacturing, construction, higher education, telecommunications, waste management, transportation, warehousing and distribution, financial services, and retail.

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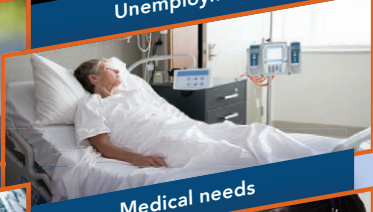
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