Employment Law Corner

Monthly Report

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ATTORNEYS AT LAW

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October Updates

HR Myth Busting: 4 Myths That Get Employers into Trouble

FMLA Exhaustion Isn't a Finish Line — It's a Trigger

Service Animal or Emotional Support Animal? The Distinction That Trips Up Employers

Myth: "The NLRA Only Protects Union Employees."

Positive Test, Negative Outcome: Marijuana, Impairment, and the State Law Patchwork

Marijuana testing used to be simple. A positive result meant action. Today, in many states, it only raises more questions. With recreational marijuana legal in roughly half the country and medical use permitted in most states, employers are navigating a patchwork of rules that can turn a routine termination into a legal risk.

Here's what you need to know:

A Positive Test Is Not Proof of Impairment

Alcohol tests measure what's in your system right now. Most marijuana tests don't. Standard tests detect THC metabolites that can linger for days or even weeks, so an employee who used legally over the weekend may test positive midweek while completely sober on the job.

- **Detection** shows that someone used marijuana at some point in the past.
- **Impairment** means someone is under the influence while working.

There is no widely accepted real-time impairment test and no legal equivalent of a blood alcohol limit. That's why more states now require evidence of actual impairment, not just a positive result, before an employer acts.

Same Policy, Different State, Different Result

Federal law still treats marijuana as a controlled substance and does not require employers to permit use or stop testing. For most employers, though, state law is where the real rules live. Most states fall into one of three groups:

1. **Zero-tolerance.** No specific employee protections. Employers may test and discipline for marijuana use, including off-duty use.
2. **Medical-use protection.** Registered patients have some protection from discrimination, but on-the-job use and impairment are not protected.

3. **Off-duty use protection.** Lawful recreational use outside of work is protected, often with limits on testing.

Takeaway: A policy that is fully compliant in one state can be unlawful in the next.

Off-Duty Protections Are Growing Fast
In states that protect lawful off-duty use, employers may be:

- Prohibited from discriminating based on lawful off-duty cannabis use.
- Required to identify specific, articulable symptoms of impairment before acting.
- Barred from taking adverse action based solely on a positive cannabis test.
- Restricted from pre-employment marijuana testing for most positions.
- Required to consider accommodations for medical marijuana patients.

None of these give employees a right to be impaired at work. It shifts the focus from what employees do on their own time to how they perform on the job.

What Employers Can Still Do
In virtually every state, employers can:

- Prohibit marijuana use, possession, and impairment at work and on company property.
- Discipline or terminate employees who are impaired on the job.
- Maintain federally required testing, such as DOT testing for commercial drivers.
- Test based on reasonable suspicion, supported by documented observations.

What to Look for in Any State's Laws
Every state's law is different, but the same building blocks tend to appear:

- **Safety-sensitive exceptions,** often with a statutory definition that controls which roles qualify.
- **Federal compliance exceptions,** where protections yield to federal law or to federal contracts, grants, or licenses.
- **Testing limits** on pre-employment testing, testing methods, and which metabolites can be tested.
- **Medical patient protections** for registered cardholders.

Spot these, and you'll know where your policy needs state-specific language.

Your Action Plan to Continued Compliance
- Map your workforce by state and identify which rules apply in each location.
- Confirm your policy distinguishes between use, possession, and impairment.
- Identify which roles are safety-sensitive or federally regulated.

- Confirm that your testing methods and timing are permitted in each state.
- Train supervisors to recognize and document signs of impairment.
- Add a review step before acting on a positive test, especially for medical patients.
- Revisit your policy at least annually.

Marijuana laws are changing fast, and a one-size-fits-all policy rarely fits anyone.

Do You Have Questions?

Our **Employment Counsel On-Call Triage Service** is a perfect resource for employers of all sizes looking to receive guidance on employment law and HR-related questions. We work with clients day in, day out to help them navigate complex legal issues and implement best practices. We receive unique questions every day through the **On-Call Service** and are ready to tackle any issue where you need help!

Who We Are:

• We represent employers exclusively from coast to coast in all facets of employment law and litigation. Our mission is solving problems and anticipating issues so you can concentrate on your business.

• We are constantly searching for the trends and upcoming issues in the law that will impact our clients. We want our clients to be informed and ready. Our familiarity with the workplace and our approach sets us apart from other law firms, making us well equipped to handle your unique needs.

• We are not like other firms: Anyone can tell you what the law states and its limits. That is easy. We find creative solutions within those restrictions that move your business forward. We seek to minimize your risk so you can get back to business. Learn how we can help your business: **Foley & Foley PC attorneys specialize in Employment and Labor Law in the Public and Private Sectors (foleylawpractice.com).**

Meet Julia Pomella-Griggs



Julia has experience on a wide range of employment matters in the public, private, and nonprofit sectors. Julia's experience includes counseling clients, drafting and analyzing policies, managing workplace misconduct, and conducting trainings.

For more info, check out her full bio **here**!

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