

National and State Marijuana Laws Remain Hazy

BY TONY FIORE



Employers Need to Maintain Drug-Free Work Environments for All Employees

I grew up in the 70s, 80s and 90s. I don't remember how many times I heard former First Lady Nancy Reagan's "Just Say No" campaign against drugs, but it was a lot.ⁱ

"You're smoking something." I would have given you that answer when I was younger if you told me that marijuana would be legal in the future (either medical or recreational). That is still mostly true under federal law. Marijuana is a Schedule 1 drug under the Controlled Substances Act.ⁱⁱ Meaning that, per federal law, it has no medicinal value and has a high potential for abuse/addiction. That could change over the next four years.

The Biden administration supports decriminalizing marijuana. At an ABC virtual town hall on Sept. 14, 2020, Vice President Kamala Harris said, "we will decriminalize the use of marijuana, automatically expunge all marijuana-use convictions, and end incarceration for drug use alone."

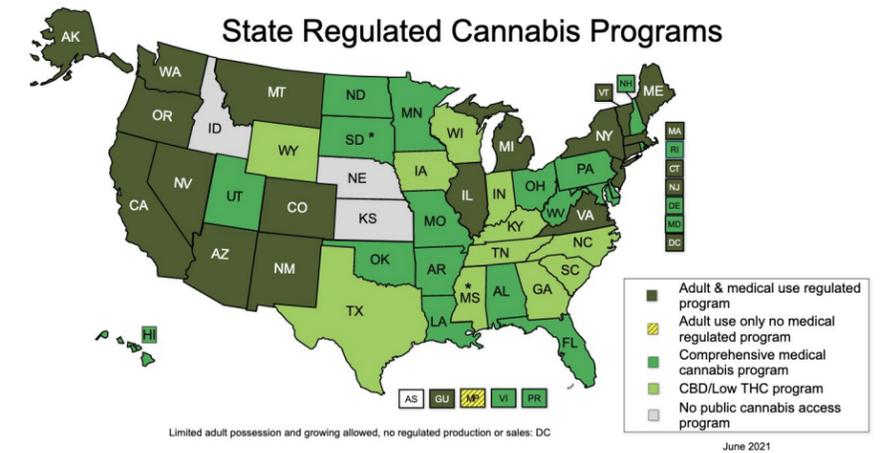
In July 2021, U.S. senators, including Sen. Cory Booker (D-NJ), Senator Ron Wyden (D-CO) and Senate Majority Leader Chuck Schumer (D-NY), proposed the Cannabis Administration and Opportunity Act legislation.ⁱⁱⁱ This bill would:

- remove cannabis from the federal list of controlled substances;
- provide cannabis industry businesses access to financial services, like bank accounts and loans;
- expunge federal non-violent marijuana crimes; and
- allow an individual currently serving time in federal prison for non-violent marijuana crimes to petition a court for resentencing.

Here is the current state of laws across the U.S.^{iv}

- Eighteen states and the District of Columbia have legalized marijuana for both medical and recreational use
- Thirty-six states and DC allow medicinal marijuana
- Forty-seven states have some form of cannabis allowances
- Only Idaho, Kansas and Nebraska prohibit use entirely

In Ohio, medical marijuana use became legal on Sept. 6, 2016, but the state began decriminalizing marijuana in 2015. Most of the recent law changes have focused on addressing the opioid epidemic's devastating impact across the state. Specifically, new laws signed by Governor Mike DeWine and enforced by Attorney General Dave Yost have focused on fentanyl-related compounds that have led to hundreds of opioid-related deaths across the state.^v



Source: NCSL

Decriminalization of Marijuana

Nationally, the Last Prisoner Project estimates that more than 40,000 Americans, many of whom are minorities, are in jail with marijuana-related charges.^{vi}

“ The bottom line is that Ohio is somewhat forgiving for first-time offenders possessing small amounts of marijuana... Other problems arise when authorized medical marijuana use (and even recreational use in the future) try to supersede an employer’s obligation to provide a safe work environment for all employees. ”

Ohio has decriminalized marijuana for possession of less than 100 grams. The graphic from Leafly helps visualize what that looks like.^{vii} Possession of such “small” amounts means no prison time or criminal record for first time possession, so it is much like a minor traffic violation. I use the word “small” generously, because if one gram of marijuana equals two joints, a person can possess around 200 joints and still only be charged with a \$150 fine and no jail time under Ohio law.



As the amounts that an individual possesses increase, the law is less forgiving. Larger quantities likely mean the individual is selling, distributing or trafficking marijuana to other users. Ohio Revised Code 2925 lays out all of the various drug offenses. The Possession chart from the National Organization to Reform Marijuana Laws (NORML) summarizes the statutory provisions.^{viii}

Every state has a “driving under the influence of drugs” law. These laws criminalize “drugged” driving. Some states have enacted *per se* or zero-tolerance laws to their criminal traffic safety codes specific to marijuana. These laws forbid drivers from operating a motor vehicle if they have a detectable level of an illicit drug present in their urine or blood, regardless of level of impairment. Ohio’s law states, “No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation...the person is under the influence of alcohol, a drug of abuse, or a combination of them.” ORC Chapter 4511 establishes the 0.8 BAC standard that most of us know. It also establishes thresholds for amphetamine, cocaine, heroin, LSD and marihuana (not a typo, some spell it with a “j” and others with an “h”).

The bottom line is that Ohio is somewhat forgiving for first-time offenders possessing small amounts of marijuana. One issue is how that drug charge may affect current employment and future employment opportunities. Other problems arise when authorized medical marijuana use (and even recreational use in the future) try to supersede an employer’s obligation to provide a safe work environment for all employees and desire to maintain a drug-free workplace.

Drug-Free(ish) Workplaces

The General Duty Clause from the Occupational Safety and Health Act of 1970 requires that, in addition to compliance with hazard-specific standards, all employers provide a work environment “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”^{ix} A vast majority of state laws and courts have upheld an employer’s right to provide a drug-free workplace. In many instances, workers’ compensation laws and insurance policies actually provide lower rates/costs for doing so.

In Nevada, there are additional employee protections for employees’ medical or even recreational use of marijuana. However, in all other states, employees cannot bring their medical cannabis to work or work at a job where impairment may result in serious harm to others.

For example, any workers covered under the U.S. Department of Transportation rules, such as airline and rail workers, truckers, mass transit and similar safety-sensitive positions, cannot be impaired when so many lives count on their sobriety or abstinence

for safe transport.^x Regardless of state laws, federal law still requires government agencies, contractors and grant recipients to have a drug-free workplace policy. Therefore, the public will always favor some testing standards and zero-tolerance policies being the law.

Workplace Concerns with Marijuana Use

No employer cares (or should care) what you do outside of the workplace, unless such activity negatively affects work performance or company reputation, creates liability for the employer, or causes harm to any employee (including the one using marijuana).

The COVID-19 pandemic has created more problems for employer recruitment and retention efforts. Some employers have stopped pre-employment testing just to get otherwise-qualified applicants. Remote workplace policies raise additional questions as to whether employers need to test an employee at all, unless there is a concern over lack of performance or the safety of the employee or others is at stake.

Source: NORML

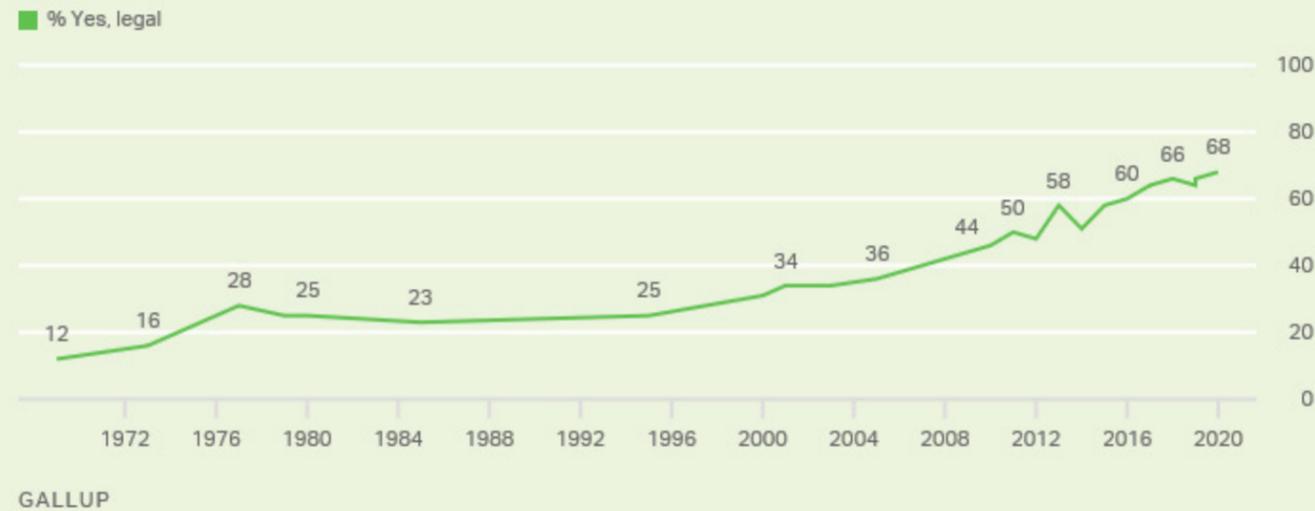
Offense	Penalty	Incarceration	Max. Fine
Possession			
Less than 100 g	Misdemeanor	N/A	\$ 150
100 - 200 g	Misdemeanor	30 days	\$ 250
200 - 1,000 g	Felony	1 year	\$ 2,500
1,000 - 20,000 g	Felony	1 - 5 years	\$ 10,000
20,000 - 40,000 g	Felony	5* - 8 years	\$ 15,000
More than 40,000 g	Felony	8 years*	\$ 20,000

* Mandatory minimum sentence



Americans' Views on Legalizing Marijuana Reach New High

Do you think the use of marijuana should be made legal, or not?



The Future of Marijuana

It is clear that public opinion in favor of legalizing marijuana has increased since the aforementioned Reagan Administration. In addition, there is no sign of it trending in the opposite direction, according to a Gallup poll that taken since the early 1970s. (See chart)

States, including Ohio, will continue to pass laws or ballot measures that legalize recreational marijuana. It is not a matter of if, but when such laws will be on the books (especially since our neighbor to the north did so in 2018). Regardless, employers need to have the ability to maintain drug-free workplaces. The question will be, "can governments and science determine an impairment limit similar to alcohol building off existing *per se* laws?" The battle between employers providing a drug-free and safe environment for all employees and an individual's ability to use marijuana is far from being resolved.

Best Practices

- Work with your legal counsel to make your drug-free workplace policy as clear as possible and apply it equally to all employees.

- Treat alcohol and marijuana the same – do not tolerate use of either at work.
- If state law allows, conduct pre-employment, random, post-accident and reasonable-suspicion drug tests.
- Make sure your employees, especially managers and other supervisors, understand the policy.
- Stay current on state and federal law developments.

ⁱ Reagan Library, *President Reagan's Remarks at the Signing for "Just Say No" Week on May 20, 1986*, YouTube (June 8, 2017), <https://www.youtube.com/watch?app=desktop&v=CYcRQIJRGzY>
ⁱⁱ 21 U.S.C. § 811 (2015)
ⁱⁱⁱ Senators Cory Booker, Ron Wyden, & Chuck Shumer, *Cannabis Administration & Opportunity Act (Discussion Draft)*, July 2021, <https://www.democrats.senate.gov/imo/media/doc/CAOA%20Detailed%20Summary%20-%20.pdf>
^{iv} Zoe Manzanetti, *Marijuana Legislation Continues to Grow: 2021 Laws Map*, Governing, Aug. 27, 2021. (Map using NCSL data from Governing)
^v *Record Surges in Opioid Overdoses Prompts AG Yost to Urge Vigilance*, Ohio Attorney General, Jan. 1, 2021.
^{vi} <https://www.lastprisonerproject.org/>
^{vii} Leafly Staff, *What does cannabis look like? A visual guide to cannabis quantities*, Leafly, Feb. 6, 2020.
^{viii} <https://norml.org/about-norml/>
^{ix} 29 U.S.C. § 654 (1970)
^x *Office of Drug & Alcohol Policy & Compliance*, U.S. Department of Transportation, <https://www.transportation.gov/odapc>



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