

JacksonLewis

Taking the High Road

Legalized Cannabis in the Workplace

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09.24.20

Jackson Lewis P.C., San Diego Office

CLE Credit Information

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**We are
honored to
be here.**



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About Jackson Lewis P.C.

As legal professionals **focused on the workplace**, we have a unique vantage point into the human condition.

It is our **privilege** to do work that affects real people.

It is our **calling** to craft policies that achieve the delicate balance between supporting diverse workers and the **businesses that employ them**.

Firm overview

- We represent management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation.
- As leaders in educating employers about the laws of equal opportunity, Jackson Lewis understands the importance of having a workforce that reflects the various communities it serves.
- With 61 locations and more than 950 attorneys, we offer local knowledge backed by the support of a national firm.
- We are founding members of L&E Global, a global alliance of premier employer's counsel firms.

National recognition



Recognized for excellence and ranked as a Tier 1 National “Best Law Firm” by *U.S. News — Best Lawyers*® for:

- Employment Law – Management;
- Labor Law – Management; and
- Litigation – Labor & Employment.

More than 70% of Jackson Lewis’ firm locations also received a Tier 1 Metropolitan designation in various labor and employment categories.



Recommended in *The Legal 500 United States 2019* for:

- Employee Benefits, Executive Compensation and Retirement Plans: Design;
- Immigration; Labor and Employment Disputes (including collective actions): Defense;
- Labor-Management Relations; and
- Workplace and Employment Counseling.



72 attorneys have been recognized in the 2019 edition of *Chambers USA: America’s Leading Lawyers for Business*. More than **200 attorneys** were selected for inclusion in the 2019 edition of *The Best Lawyers in America*®.



Designated as a “**Powerhouse**” in Everyday Employment Litigation in Complex Employment Litigation in *BTI Litigation Outlook 2019: Changes, Trends and Opportunities for Law Firms*.



Practices

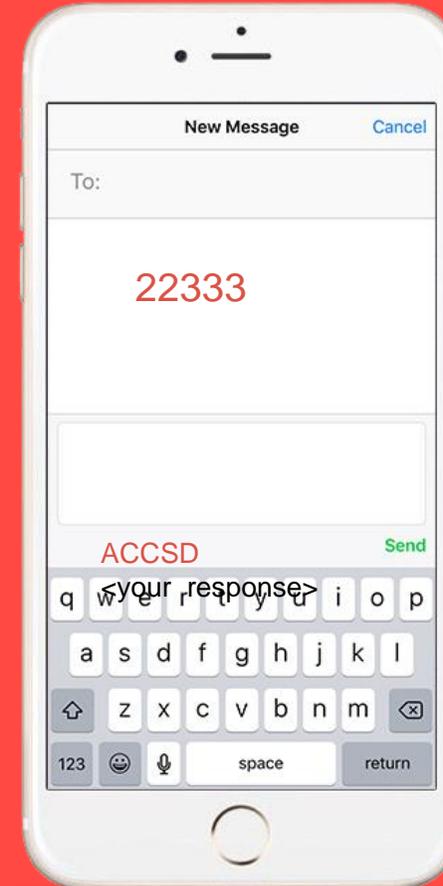
- Class Actions and Complex Litigation
- Collegiate and Professional Sports
- Corporate Diversity Counseling
- Corporate Governance and Internal Investigations
- Disability, Leave and Health Management
- Employee Benefits
- General Employment Litigation
- Health Law and Transactions
- Immigration
- International Employment Issues
- Labor and Preventive Practices
- Non-Competes and Protection Against Unfair Competition
- Privacy, Data and Cybersecurity
- Wage and Hour
- White Collar and Government Enforcement
- Workplace Safety and Health
- Workplace Training



Industries

- Automotive
- Chemicals
- Construction
- Energy and Utilities
- Financial Services
- Government Contractors
- Healthcare
- Higher Education
- Hospitality
- Insurance
- Life Sciences
- Manufacturing
- Media
- Professional Services
- Real Estate
- Retail and Consumer Goods
- Staffing and Independent Workforce
- Technology
- Transportation

Participating with Poll Everywhere



Text ACCSD to Number 22333

Legal Status of Marijuana and CBD

Federal Law

- Marijuana is still a Schedule I drug under the Controlled Substances Act.
- U.S. House Judiciary Committee recently approved a bill to legalize marijuana at the federal level.
- FDA approved the first CBD-based drug in 2018, to be used by individuals with severe epilepsy.
- 2018 Farm Bill – legalized industrial hemp containing no more than .3% THC.
- FDA still maintains that CBD is illegal.
- CBD products are being marketed and sold everywhere.

How many states have medical marijuana laws?



States That Allow Medical Marijuana

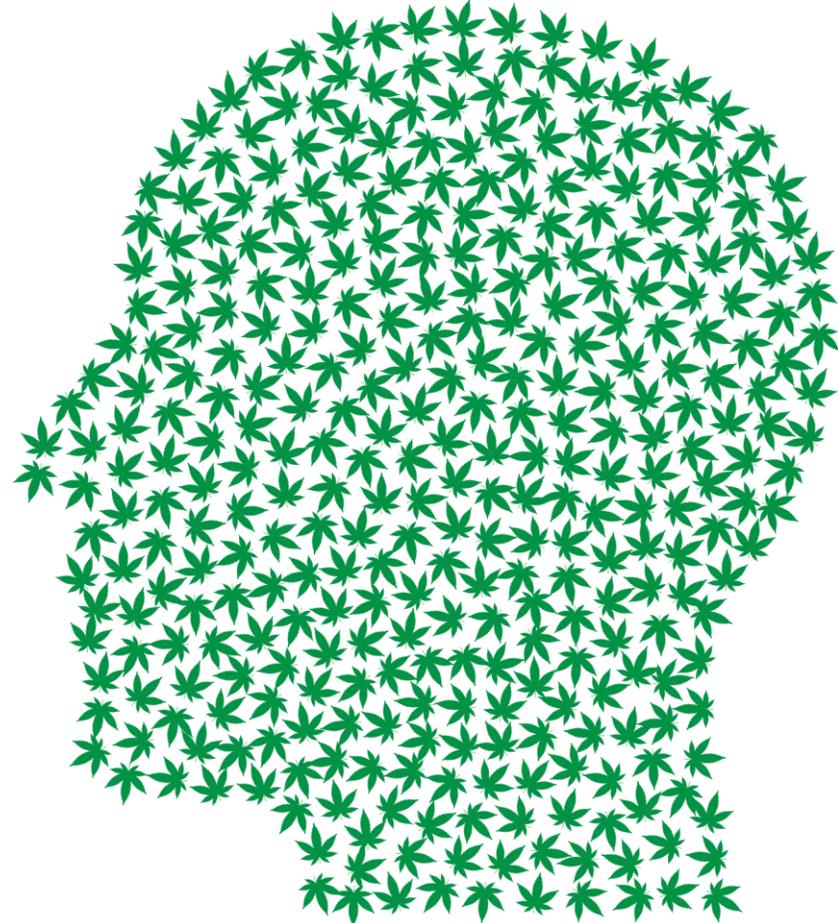
- Arkansas
- Arizona
- California (also recreational)
- Colorado (also recreational use)
- Connecticut
- District of Columbia
- Hawaii
- Illinois
- Maine
- Maryland
- Massachusetts
- Michigan
- Montana
- Nevada
- New Mexico
- New Jersey
- Oregon
- Rhode Island
- Vermont
- Washington (also recreational use)

California's Compassionate Use Act

- Makes it legal under state law for individuals to use marijuana for prescribed medical reasons
- The California Supreme Court has held the California Fair Employment and Housing Act (FEHA) does not provide protection for current marijuana use, even if it is taken for medicinal purposes.
- Bill current pending in California legislature to expand employment protections for medicinal marijuana use. Similarly bill was proposed in 2018 but failed.

Adult Use of Marijuana Act

- Legalized recreational marijuana use for individuals over 21
- Codifies that employers may “maintain a drug and alcohol-free workplace”



Off-Duty Conduct

California provides a constitutional right to privacy—which restricts employers from monitoring off-duty conduct.





An employee posts on social media about baking brownies containing marijuana and eating them over the weekend.

Can you discipline the employee for violating the Company's drug and alcohol policy?

No, the Company cannot prohibit legal off duty behavior.

Yes, the Company policy says that employees may not use marijuana.



What if the same employee brings the brownies to work and and you see she is eating them on a meal break. Can you discipline the employee?

No, because things that happen on a
meal break constitute off duty
conduct.

Yes, because the employee is breaking
Company policy by being under the
influence when she returns to work.

California Employer Drug Testing

Pre-employment Screening

A large, stylized illustration of a hand holding a magnifying glass is positioned in the upper left quadrant, focusing on the text. Below the magnifying glass, a line of four business professionals (two women and two men) are standing, each holding a briefcase. The background is a light blue gradient.

- Permitted to condition offer of employment on taking a drug test.
- Offer must be extended prior to drug test results.
- Recommended start date is after results received.

Drug Testing of Current Employees

Employers may require a drug test of existing employees only in the following circumstances:

- Reasonable grounds or suspicion exist and justify a drug test.
- There is a clear and present physical danger to the employee, other employees or members of the general public.
- Employees are granted the opportunity to have drug test samples tested a second time by another drug testing facility.

Implementing routine testing in annual or periodic physical examination



Ensure the position qualifies as safety-sensitive or other position that would permit routine testing.



Develop a written policy with clear guidance to employees.



Implement the testing/examinations in a consistent manner.



Ensure procedures protect employees' right to privacy.

When is it appropriate to perform random drug test?

- Federal authorities' requirement random testing.
 - Department of Transportation
 - Federal Motor Carrier Safety Administration
 - Federal Transit Administration
 - Pipeline and Hazardous Safety Administration
 - United States Coast Guard
- Employee works in a “safety-sensitive position” and if allowed to work under the influence would pose “imminent” safety or health threat with “irremediable” consequences.
 - Nuclear power plant workers
 - Correctional officers
 - Aviation personnel



What constitutes reasonable suspicion for a drug test?

- Reasonable suspicion means that the employer has a genuine reason to believe that an employee has been taking drugs.
- It should not be a guess.
- It should not be based on the report of another employee.
- Unless a supervisor who has been trained in signs of usage.

Attendance Verification Code

1863



An employee arrives at work and has blood shot eyes, smells like marijuana, and is having difficulty standing upright. Would this be sufficient for reasonable suspicion?

Yes

No



Joe reports to a supervisor he overheard Bob talking to Sally about smoking marijuana prior to his shift. Is this enough for reasonable suspicion.

No, not without other evidence.

Yes.

Recommendations for Handling Reasonable Suspicious



Observe the Employee



Remove Employee from Safety-Sensitive Areas



Document Observations



Assess the Situation



Meet with the Employee



Prepare Transportation for employee to be tested



Respond to employee's refusal to take test



Respond to negative or positive test results

Evaluating next steps after test results

If Negative

- The manager or HR should contact employee and return the employee to work as soon as possible.
- Some employers pay the employee for shifts/hours missed while waiting for results.

If Positive

- Refer to Company policy – be consistent!
- If organization has an employee assistance program – provide contact information.
- May offer “Last-Chance Agreement” allowing the employee to seek treatment and can return to work with the understanding if he/she is found to be under the influence again they will be terminated.
- Immediate termination is an option too.

When is a post-accident drug test is permitted?

- Always permitted.
- Recommended the employer have a written policy requiring testing post-workplace accident
- **BE CONSISTENT!**



Written Policies Regarding Marijuana

- It is permissible to prohibit use and possession of marijuana at work, as well as being impaired at work.
- Consider including in your policy a requirement that safety-sensitive employees must advise the company about warnings accompanying lawfully prescribed or obtained medications if it may impact the ability to perform the job safely, **before reporting to work under the influence of such substances**

Written Policies Regarding Marijuana

- As with all policies ensure you are applying uniformly.
- If not, may appear that the company allows for use.
Or is discriminatory in how it applies policy.

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Thank **you.**