

The SESCO Report

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Your “Human” Resource Since 1945

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Marijuana at Work: What Employers Need to Know

It may seem hard to fathom but, in 2019, marijuana is legalized for medical use in 34 states and the District of Columbia and 10 states plus the District of Columbia have legalized recreational marijuana use. Further, legalization efforts will continue as marijuana use in the United States increases. As such, what are employers to do when crafting drug-free policies and ensuring productive and safe workplaces? Unlike other drugs, marijuana’s precarious position between legal (states) and illegal (federal) makes it different than other impairing substances.

Marijuana is Both Legal and Illegal in Most States

Despite the wide-spread wave of marijuana legalization in the United States, marijuana remains an illegal drug on a federal basis. The federal government has held firm in classifying marijuana or cannabis as a schedule I drug.

While marijuana is illegal at the federal level in the United States, the

federal government has generally chosen **not** to prosecute those who possess and distribute marijuana in compliance with state laws. Thus, marijuana inhabits an in-between zone of legality: legal and illegal at the same time. While the federal government generally does not prosecute federal marijuana possession laws, it also does not budge on treating marijuana as an illegal drug for purposes of oversight, distribution, federal disability law protection, etc. Further, federal requirements for drug-free workplaces still require that employees test negative for marijuana along with other illegal drugs. This places employers in a “no win” situation in trying to balance federal and state laws as well as limiting liability associated with workplace liabilities, worker’s compensation and productivity/quality expectations.

Marijuana – The Facts

The National Safety Council published the following statistics employers should be aware:

- Car crashes involving marijuana went up 300% between 2010 and 2013, and they continue to rise as more states legalize the drug.
- Marijuana is 10 to 20 times stronger today than it was in the 1960’s and 70’s.
- Marijuana is an addictive drug.
- Employees who tested positive for marijuana had 55% more industrial accidents, 85% more injuries

and 75% greater absenteeism compared to those who tested negative.

- Employers spend about \$7,000 per year on an employee who abuses drugs.
- About one (1) out of five (5) employees has a substance abuse problem.
- A statistic from SESCO’s employee satisfaction survey reveals that an overwhelming amount of employees (over 90%) want and expect a safe place to work.

These facts surrounding marijuana use cannot be simply “ignored” by employers as the risks and liabilities associated are significant. Regardless of the “trends” of marijuana use, an employer’s priority must be on providing a safe and healthy workplace for its employees, visitors and customers.

Best Practices for Employers – SESCO Staff Recommendations

Because marijuana inhabits the in-between zone of legality: legal and illegal at the same time, it is of utmost importance that all employers draft and communicate a compliant substance abuse policy to include marijuana. The Occupational Safety and Health Administration and National Safety Council both strongly recommend employers’ policies should restrict marijuana use to the extent permitted by law. Employers need to

Inside This Issue

Marijuana at Work: What Employers Need to Know.....	1
No-No's for Employment Interviewing	2
SESCO's Personnel File Documentation Checklist	3
Featured SESCO Client	4
This Month's SESCO Client Questions	4

MARIJUANA AT WORK

consider compliance to and enforcing workers' compensation, OSHA, DOT, drug-free workplace and other legislation when drafting and communicating employment and substance abuse policies. Policy considerations need to include:

- Test for marijuana and THC, especially in safety-sensitive positions or when federal or state law requires, i.e. DOT, Drug Free Workplace, etc.
- Use a testing method such as Oral Fluid Testing, which indicates recent use as opposed to historical use.
- In states where medical marijuana users receive protection from workplace discipline, policies should require employees to verify their medical marijuana authorization. Additionally, employers in these states should only take adverse action against employees where the testing takes place after reasonable suspicion of impairment.
- Managers and supervisors should be trained carefully on how to identify impairment and what to do when an employee is suspected of impairment on the job.
- Policies should contain a zero tolerance for marijuana use by employees in safety-sensitive positions.
- Employers should carefully consider whether or not to include random testing as part of their policy – be careful what you ask for.
- Policy should contain immediate termination where states allow and not provide for “multiple chances” as the recidivism rate is in excess of 90%.
- Always consider relevant state laws and cases.

SESCO will assist you in ensuring not only a compliant, but also an effective substance abuse policy which will consider states who have implemented specific regulations. Please feel free to contact SESCO to review your current policy and/or to draft policy to ensure that your organization is prepared to address any issue which may arise in the workplace concerning substance abuse including marijuana.

No-No's for Employment Interviewing

Any inquiry that results in a disproportionate screening out of minorities is considered discriminatory. Thus, every inquiry must be defensible and support the fact that it is "job-related" and does not screen out a disproportionate number of minorities. The following questions, in light of EEOC enforcement policy, may prove troublesome in meeting these two tests:

1. How would you get to work?
2. Would family interfere with working overtime?
3. What do you do outside of work?
4. How long have you lived at this address?
5. Are you single or married?
6. What was your maiden name?
7. How many children?
8. What are their ages?
9. What does your spouse do for a living?
10. Ever declared bankruptcy?
11. Had wages garnished?
12. Do you own or rent?
13. Do you own a car?
14. Any previous union activities?
15. Where were you born?
16. When did you become a citizen?
17. What language do you normally use?
18. What is your religious preference?
19. What clubs do you belong to?
20. How old are you?
21. Do you have friends or relatives working here?
22. What is your sexual orientation?
23. What do you do about childcare?
24. How did you learn to speak Spanish?
25. Do you live with your boyfriend?

SESCO Client Feedback

"Hi Bill, I have forwarded this to our President, Todd Walters and his son Brandon Walters. I hope they reach out to you, because I feel this is an excellent deal. We had an issue come up yesterday involving a drug screening/accident that we totally could have used this service for. I have always enjoyed working with SESCO in the past and bragged about you guys!!" ~ Valerie Mills - Valley Landscaping

"Good afternoon. Mr. Ford, thank you so much for speaking with me today and providing very useful information. I've ordered the book you recommended and I have received the documents from Ms. Tester. I am very appreciative of your time and information." ~ Jessica Bell - B.E. Brown & Company Mortuary

SESCO's Personnel File Documentation Checklist



Required Personnel File Documentation

- Immigration Reform and Control Act (I-9 Form)
- New Hire Reporting (State)
- COBRA – Initial and Terminal Notices
- Federal/State Tax Forms
- Background/Credit Check Authorizations
- Americans with Disabilities Act – Define Essential Functions and Physical, Mental and Sensory Requirements
- Americans with Disabilities Act – Job Accommodation Documentation
- Insurance Applications/Offer of Enrollment
- Harassment Training (Management and Employees)
- OSHA Documentation (Form 300/Injuries)
- Child Labor/Work Permits
- Fair Labor Standards Act – including:
 - Name and full home address
 - Sex
 - Date of birth, if under 19 years of age
 - Job title or primary occupation within the organization

- Time of day/day of week the employee's workweek begins and ends
- Regular hourly rate or amount of salary per week
- Hours worked each day/total hours worked each week
- Total weekly straight-time earnings
- Total weekly overtime earnings for hours worked over 40
- Total additions to or deductions from earnings each pay period
- Total wages paid each pay period
- Date of employment and period covered by the payment
- If applied, appropriate Fluctuating Workweek Letter of Understanding

Recommended Personnel File Documentation

- Application Form
- Interview Notes
- Performance Appraisals/Performance History
- Employment History
- Disciplinary Reports
- Commendations
- Attendance Records
- Educational Certifications/Training
- Special Achievements
- Reference Checks and Screening Forms/Interview Notes
- Background Checks/Credit Checks
- Job Descriptions

- Compensation History
- Employee Handbook Acknowledgement Form Showing Receipt of Handbook
- Orientation/New Employee Records

Upon Separation

- Separation Documentation/Notes
- Exit Interview Form
- Final Paycheck Documents

Note: This checklist does not include required documentation to comply with OFCCP 11246 guidelines (Affirmative Action Plans for federal contractors) or other specific federal and state regulations such as DOT. Contact SESCO as additional documentation may be required for specific industries and/or states.

Special Thanks to New SESCO Clients!

- MCH Concepts, LLC
Midlothian, VA
- Integrum Advisors
Richmond, VA
- Eastern Shore Community Services Board
Tasley, VA
- Hilb Group
Richmond, VA
- New River Retreat, LLC
Draper, VA
- Americare Senior Living
Sikeston, MO
- Murray Automotive
Powhatan, VA
- Harriman Housing Authority
Harriman, TN
- Hepner Tire & Auto
Woodstock, VA



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RETURN SERVICE REQUESTED

Featured SESCO Client



SESCO is very proud to be retained by Meade Tractor. Meade Tractor is a family-owned and operated company with over 60 years of combined industry experience. Their goal is to provide exceptional customer service and product support to their clients. Meade serves farm, home and construction customers across Virginia, Tennessee, North Carolina, West Virginia and Kentucky. In addition to being recognized as one of the nation's largest and most successful dealers, Meade is exceptionally active in supporting the communities that they serve to include a number of charitable organizations. SESCO wishes continued success to this valued client.

This Month's SESCO Client Questions

Question: Effective 7/29/2022, DOL required Prime Contractors to meet the Service Contract Act (SCA). To start the process of ensuring that we are assigning Wage Determinations to the correct jobs, we need our Job Descriptions reviewed to ensure they have the correct exemption status. Can I send our Job Descriptions in for review?

Answer: SESCO conducted a thorough audit of exempt and nonexempt positions with follow-up report.

Question: We have two (2) Ukrainians wanting to work for our construction company. What do we need to do to ensure they are legal?

Answer: SESCO provided immigration and payroll requirements.

Question: We have become aware of a consensual relationship between two (2) managers. What are your recommendations?

Answer: SESCO provided a customized dating agreement to reduce liability.

Question: Employee provided notice of their intent to resign with an effective date of two (2) weeks out. Do we have to honor that request?

Answer: No. Employers can always choose the effective date of a resignation or other separation of employment.

Question: Marijuana use and possession is legal in my state. Do I have to allow possession or use of marijuana on work premises or during hours of employment?

Answer: No. Federal or state law does not give any employee the right to use or possess marijuana on work premises or during the hours of employment.