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Cannabis on Campus – The Personnel Edition

This latest edition of our series on cannabis related developments and issues in higher education addresses the impact of the widespread state level legalization of recreational and medicinal cannabis throughout the United States. As explained in our [prior article](#), cannabis – commonly referred to as marijuana – is now decriminalized and/or legal for recreational usage in 19 states and the District of Columbia.¹ Medical marijuana is also legal in 37 states and the District of Columbia.² Employers in these states have faced novel questions as they navigate the evolving landscape surrounding the legalization and decriminalization of recreational and medicinal marijuana, particularly given that marijuana remains a controlled substance under federal law. As large employers with employees working in a wide variety of positions, institutions of higher education are no exception.

Some employers' key questions with respect to recreational marijuana revolve around the permissibility of drug testing, the creation and implementation of workplace policies and disciplinary action in response to employees' use of marijuana. There is no shortage when it comes to medical marijuana either. For instance, employers often wonder whether employees' use of medical marijuana is protected under state and federal law prohibiting disability discrimination; or whether they must accommodate employees' use of medical marijuana. In most cases, the answer to these important questions will depend largely on applicable state law. However, while state law plays a significant role when it comes to the legality of marijuana use, federal law cannot be ignored. This is particularly true for institutions of higher education that tend to rely on federal funding.

Institutions of higher education that are federal funds recipients are obligated to comply with the Drug Free Schools and Communities Act (DFSCA). Generally speaking, the DFSCA requires educational institutions, including colleges and universities, that receive federal funding or financial assistance to "develop and implement a program to prevent the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees."³ Such institutions must also certify that such a program is maintained.⁴ For a more detailed review of the DFSCA's requirements please refer to our prior article, [Cannabis and the Campus](#). Simply stated, the DFSCA minimally requires institutions of higher education to adopt standards of conduct that prohibit the use, possession and distribution of illegal drugs on campus or as part of instructional activities.⁵ Marijuana is among the illicit drugs prohibited.⁶

1 <https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization#:~:text=Recreational%20marijuana%20is%20legal%20in,Washington%2C%20D.C.%2C%20and%20Guam>.

2 <https://www.forbes.com/sites/willyakowicz/2022/01/10/where-is-cannabis-legal-a-guide-to-all-50-states/?sh=21b861abd19b>.

3 Bradley D. Custer, Robert T. Kent, *Understanding the Drug-Free Schools and Communities Act, Then and Now*, 44 J.C. & U.L. 137, 140 (2019) (quoting *Higher Education Center For Alcohol And Other Drug Abuse And Violation Prevention, Office Of Safe And Drug-Free Schools*, U.S. Dep't Of Educ., Pub. No. Ed-04-Co-0137, *Complying With The Drug-Free Schools And Campuses Regulations* [Edgar Part 86]: A Guide For University And College Administrators at 3 (2006)); see also 20 U.S.C. § 1011i(a); 34 C.F.R. § 86.3.

4 20 U.S.C. § 1011i(a); 34 C.F.R. § 86.3.

5 20 U.S.C. § 1011i(a); 34 C.F.R. § 86.3(a).

6 https://archives.federalregister.gov/issue_slice/1990/8/16/33574-33601.pdf#page=8

Though institutions of higher education often focus on DFSCA compliance as it relates to students, it is important to bear in mind that the Act applies with equal force to campus employees. Thus, DFSCA compliant colleges and universities must maintain policies that prohibit campus employees from possessing or using marijuana while they are on school property even in states where the use and possession of marijuana is otherwise lawful. The DFSCA also requires institutions of higher education to provide employees with a clear statement of the sanction, up to and including termination, for violating the prohibition against the on campus use, possession or distribution of prohibited drugs, such as marijuana.⁷

These requirements give institutions of higher education the latitude to create workplace rules prohibiting campus employees from using marijuana on campus or bringing it on school premises. It also allows for the imposition of discipline, including termination of employment, in response to a violation.

Colleges and universities must also be mindful of the DFSCA's legislative relative, the Drug Free Workplace Act (DFWA). Not unlike the DFSCA, the DFWA requires employers that receive federal funding and/or contract with the federal government to maintain a workplace free from illegal substances, including marijuana.⁸ To comply with the DFWA, employers must publish a statement informing employees that the use, possession, manufacture and distribution of controlled substances is prohibited in the workplace. Employers restrained to comply with the DFWA must also create a drug-free awareness program aimed at informing employees about the dangers associated with drug abuse.⁹

While the DFSCA and DFWA give certain institutions of higher education the ability to implement policies and rules on employee drug use and possession on campus, neither addresses employees' off-campus use of marijuana in states where such use is protected by state law. This leaves several questions open about whether college and university employees working in states where recreational marijuana is legal may be prohibited from using recreational marijuana during personal time when they are off duty and not on school premises. These questions are complicated further with respect to remote workers. Given increasingly common remote work and hybrid work arrangements, there are questions about whether employers' policies on the use and possession of marijuana extend to employees working from home. Another question left open is whether employees who test positive for marijuana may be disciplined absent evidence that they were impaired at work or used or possessed marijuana on campus property. As indicated above, these questions are heavily dependent on state law. Counsel and human resources personnel supporting institutions of higher education in states that protect employees' use of recreational and/or medical marijuana must take care to understand the nuances of the applicable state law.

Notably, neither the DFSCA nor DFWA require or address drug testing. Similarly, neither law requires particular disciplinary or employment action in the event that an employee who is drug tested tests positive for marijuana use. While neither the DFSCA nor DFWA prohibit marijuana testing or related disciplinary action, colleges and universities should not rush to rely on either statute to justify its marijuana testing and discipline practices. In fact, depending on the law in the state where an institution of higher education is located, colleges and universities that take disciplinary action in response to an employee's positive test for marijuana may risk running afoul of state law.

7 20 U.S.C. § 1011i(a)(1)(E).

8 41 U.S.C § 8102(a).

9 *Id.*

Take, for example, the legalization of recreational marijuana in New York. Though marijuana is a controlled substance that remains unlawful at the federal level, New York employers are prohibited from discriminating against, terminating and/or refusing to hire individuals because of their use of recreational marijuana outside of work.¹⁰ Though there are limited exceptions to this general rule, they essentially provide that discipline, termination or refusal to hire because of an individual's positive marijuana test is permitted only when "required" by state or federal law or when an employee is impaired at work.¹¹ Because neither the DFSCA nor DFWA "require" termination, refusal to hire or other prescribed disciplinary action in the face of a positive test, there is a risk that taking such action will be deemed a violation of the New York Labor Law. While the particulars of every state law decriminalizing or protecting employees' use of marijuana is beyond the scope of this article, human resources personnel and counsel should proceed with caution when disciplining employees for off-campus marijuana use in states that have legalized marijuana. Understanding the state-by-state protections afforded to employees' use of marijuana will be of the utmost importance when faced with personnel issues of this nature.

The incongruence between state and federal law creates issues with respect to accommodating employees' use of medical marijuana as well. Many federal courts have held that employers are not required to accommodate employee's use of medical marijuana under the Americans with Disabilities Act.¹² However, the same may not be true under applicable state law if the use of medical marijuana is legal and protected.

While it is crucial to understand the laws of the state your institution is located within, federal law is abundantly clear with respect to one particular group of campus personnel – bus drivers and other employees subject to U.S. Department of Transportation (DOT) regulations. Employees who fall under the regulation of the DOT are subject to periodic drug testing, including a test for marijuana. In this situation, testing is clearly permissible. DOT-covered employees who test positive for marijuana use are typically prohibited from performing safety sensitive job functions, such as driving, until proof of a negative drug test is provided. Thus, while applicable state law may prohibit certain kinds of job-related marijuana testing and testing-related discipline, this is an area where federal law provides a clear exception. For example, although the New York Department of Labor has published guidance discouraging pre-employment and random drug testing for marijuana, that guidance would not govern employees in DOT covered positions.¹³

When it comes to employment-related considerations surrounding employees' use of marijuana in states that have legalized the substance, much will depend on applicable state legislation. While the DFSCA and DFWA set certain institutional expectations and require institutions of higher education to prohibit marijuana on campus, both laws leave many questions unanswered requiring counsel to carefully examine state legislation.

10 N.Y. LAB. LAW 201-d(4-a).

11 N.Y. LAB. LAW 201-d(4-a).

12 *Eccleston v. City of Waterbury*, No. 3:19-CV-1614 (SRU), 2021 WL 1090754, at *8 (D. Conn. Mar. 22, 2021) ("Courts that have considered ADA claims for failure to accommodate medical marijuana use have relied on the [Controlled Substances Act]'s classification of marijuana as a Schedule I illegal substance to conclude that using marijuana is not a reasonable accommodation." (collecting cases)).

13 <https://www.bsk.com/news-events-videos/nysdol-issues-faqs-regarding-recreational-marijuana>



General Counsel's Corner is a publication presented by one of Bond's former general counsels and academic administrators of higher education institutions: [Monica Barrett](#) (Rutgers); [Sandra Casey](#) (SUNY and Siena College); [Shelley Sanders Kehl](#) (Pratt Institute); [Barbara Lee](#) (SVP for Academic Affairs at Rutgers); [Gail Norris](#) (University of Rochester); and [Jane Sovern](#) (CUNY). In each issue, a different attorney from this team will share with you recent legal developments, tips, strategies and useful information to assist you with your daily work on campus.

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