

The FDA Wants To Reschedule Cannabis. Does That Mean All Employees Can Soon Legally Use It?

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On May 21, 2024, the Drug Enforcement Agency (DEA) [issued a notice of proposed rulemaking](#) indicating that the U.S Food and Drug Administration (FDA) intends to transfer marijuana from Schedule I to Schedule II of the Controlled Substances Act (CSA). This notice is consistent with opinions from the Department of Health and Human Services (HHS) acknowledging that marijuana has currently accepted medical uses as well as HHS's views about marijuana's abuse potential and level of physical or psychological dependence. But assuming that the proposed rescheduling goes through, does that mean that cannabis is now federally legal, leaving employees free to consume cannabis like any other legal substances such as alcohol?

The short answer is “no.”

While rescheduling cannabis as a Schedule II drug may go a long way to opening doors for additional cannabis research and generally changing perceptions on cannabis use, such rescheduling does not make possession or use of cannabis “legal” at the federal level. The federal ban, though, is still against the weight of the direction many states are heading across the country. [Recreational cannabis](#) is now legal in 24 states and the District of Columbia. Considering that just 12 years ago there were only two states with legal recreational cannabis, it is not hard to see where the trend is heading. In fact, when accounting for medical cannabis programs, there are now only six states that do not offer any sort of legalized cannabis.

Perhaps unsurprisingly, recent drug testing data suggests that the increasing legality at the state level is resulting in increased cannabis use across the country. Positive drug tests for cannabis are on the rise. In Michigan, for example, positive cannabis drug tests have [more than tripled](#) since 2008. Notably, while cannabis positive tests are on the rise, use of other drugs such as opiates and cocaine have been steadily decreasing. Another study related to drug testing showed that employees are increasingly trying to thwart these drug tests. In 2023, drug tests with signs of [tampering increased an astonishing 633%](#) — the highest rate in more than 30 years.

With all these factors in mind, what might the “best practice” be for employers as it relates to the

treatment of cannabis among their workforce? Of course, the answer is not a “one-size-fits-all” issue. The decision will depend on a number of factors, including certain jurisdictions’ prohibition on testing for cannabis, anti-discrimination laws protecting the use of cannabis, laws **requiring** drug testing for certain jobs, and position-specific questions surrounding job duties (e.g., desk job versus operating heavy machinery or other safety-sensitive positions). Still, what many employers may have considered as a best practice for years is one that should be reconsidered in light of these rapid developments.

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