

## Biz & Tech

# Can your boss stop you from smoking medical marijuana at work?

By Kathleen Pender

February 6, 2015 Updated: February 7, 2015 6:15pm



Your employee comes to you and says, “I have a medical marijuana card for anxiety, the deadline on this project is giving me a panic attack. I need to smoke some weed on my break so I can calm down and get my work done.” Do you...

- (1) Verify his doctor’s recommendation and tell him to do it outside in the designated smoking area?
- (2) Tell him to go smoke at home and don’t come back until the effects wear off?
- (3) Send him to get drug tested and terminate him if he tests positive?

As more states legalize medicinal marijuana, questions like these are becoming more common. The answer varies by state, and it’s not always clear-cut.

In California, employers must accommodate employees with medical conditions or disabilities, but they do not have to let them use weed in the workplace, even if a doctor has recommended it to treat their condition.

“Neither federal nor state law prohibits employers from disciplining or terminating employees for marijuana use, even when the drug is used to treat a disability in accordance with California’s medical marijuana law,” said Jinny Kim, director of the disability rights program with the Legal Aid Society-Employment Law Center.

The state’s Compassionate Use Act ensures that people who use marijuana for medical purposes, upon the recommendation of a doctor, are not subject to criminal sanctions or prosecution.

But a 2008 [California Supreme Court decision](#), in *Ross vs. RagingWire Telecommunications Inc.*, made it clear that the Compassionate Use Act does not apply to employment, and that marijuana, even for medical use, remains illegal under federal law. “Under California law, an employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions,” the court said.

“Ross gives great discretion to employers,” said Oakland attorney Robert Raich, a medical marijuana expert.

Employers can prohibit employees in California from possessing, using or being under the influence of marijuana at work, just as they can forbid them from being drunk on the job. But they cannot fire or refuse to hire workers because they have a medical condition they are using marijuana to treat, and that’s where things get hazy.

### **Disability rules**

Federal and California laws prohibit nearly all employers from discriminating against workers or applicants because of a mental or physical disability. They must make reasonable accommodations for the disability, unless it would pose an undue hardship, or unless the disability poses a health or safety threat. What qualifies as an undue hardship depends on the size of the employer, the cost of the accommodation and other individual factors.

The federal Americans with Disabilities Act defines disability as “a physical or mental impairment that substantially limits one or more major life activities.” The California Fair Employment and Housing Act defines it more broadly, as an impairment that makes performance of a major life activity “difficult.” Neither act lists conditions that meet the disability test.

With that in mind, what is the best answer to the question posed above?

It depends on the employer’s policy, if it has one.

An employer could choose No. 1 — let employees who have medical marijuana cards use it at work — but most don’t. Employers “nearly without exception” prohibit marijuana use at work because “it impacts productivity” and could pose a risk to others, says Felicia Reid, an attorney with Hirschfeld Kraemer who represents companies.

It is also “difficult to control. You don’t know from one smoking session to the next what the reaction will be,” said Todd Wulffson, an attorney with Carothers DiSante & Freudenberger who also represents employers.

No. 3 — sending the employee for drug testing — is also problematic. In California, employers can require job applicants to pass a drug test as a condition of employment. But they generally cannot test a current employee unless they have a reasonable suspicion the worker is under the influence.

Random testing of unsuspecting employees is allowed in only a few cases. Federal law requires random testing of certain transportation industry employees. California law allows it for certain safety-sensitive jobs, but there are many rules and safeguards. San Francisco bans random testing in employment, except when required by federal law, said Robert Pattison, an attorney who represented RagingWire in the Supreme Court case.

“Random testing is risky in most settings,” Pattison said. Employers should have a policy that says, “We test employees for drug use under these circumstances,” to ward off complaints that the drug test was an invasion of privacy.

## **Employer advice**

Wulffson says the “closest correct answer” is No. 2. He advises employers to adopt a policy that says, “We do not tolerate use of any illegal drug during the workday, including medical marijuana. If you have a condition for which you are being treated, you need to talk to HR about any possible accommodations.”

If an employer has a zero-tolerance policy, or no drug policy, and an employee with a medical marijuana card for anxiety says he needs to smoke, he should be sent home, Wulffson said.

“To the extent that his request is one seeking accommodation for his anxiety, the company can discuss any reasonable accommodation he might need, which could include modifying his work schedule. But first he needs an assessment from his health care practitioner that he has anxiety and that it is affecting one or more major life activities,” Wulffson said. “If the employee was complaining of glaucoma, cancer or some other condition that is unquestionably disabling, I think you would move immediately to the discussion of what accommodation is needed.”

Pattison agreed that the best answer is 2, send the employee home, but not necessarily to smoke.

“Your obligation under the ADA and California law is to talk to the employee: Is there some other way we can get the work done that won’t interfere with your ability to perform and allow you to be productive? The courts do not require employers to do the one accommodation the employee asks,” he said. Getting him some assistance or taking away some duties are potential accommodations.

Kim, who represents employees, said she has heard that some employers have policies that prohibit discrimination based upon a person’s status as a registered medical marijuana cardholder.

One company that had such a policy is Kohl’s Department Stores, according to a lawsuit filed against the retailer by a former employee who said he was fired after testing positive for trace amounts of medical marijuana he had used off duty.

The plaintiff, Justin Shepherd, was hired in June 2006 as a material handler at Kohl’s distribution center in Patterson (Stanislaus County). In 2011, he was diagnosed with acute anxiety and was issued a “valid prescription fully compliant with the California Compassionate Use Act,” the complaint says.

On Jan. 13, 2014, he was injured on the job and his supervisor told him to go to the company's health care provider for workers' compensation, the complaint says. There, a clinician allegedly told him it was Kohl's policy that any employee injured at work must submit to a drug test before receiving medical treatment, and he agreed to the test. Four days later, he was told that he had tested positive for "minimal amounts of marijuana metabolites," which resulted from his "legal and off-duty use of medical marijuana," the complaint says. His attorney, Anthony Sperber, said Shepherd used the drug at home, four days before his work shift.

### **Kohl's case**

On Jan. 21, 2014, in a meeting with Kohl's managers, he showed them his "medical marijuana prescription that had been signed by his physician." Two days later, he got a voice mail stating he had been terminated.

Kohl's employment policy prohibits employees at work from possessing or consuming alcohol or illegal drugs, or being intoxicated, the suit says. It attempts to address off-duty behavior by prohibiting conduct "which adversely affects an Associate's job performance or adversely affects other interests of the company."

However, Section K, which applies to Kohl's operations in California and other states with medical marijuana laws, states, "No person will be discriminated against in hiring, termination or in imposing any term or condition of employment or otherwise be penalized based upon either (a) the Person's status as a registered medical marijuana cardholder; or (b) A registered medical marijuana cardholder's positive drug test for marijuana components or metabolites."

The suit said Kohl's violated state law prohibiting disability discrimination and that its drug test violated his constitutional right to privacy, along with other allegations.

The case was filed in Superior Court in Stanislaus County in October. At the request of Kohl's, it was moved to U.S. District Court in Fresno in December, Sperber said.

Kohl's did not return multiple calls and e-mails requesting comment.