

Legal Pot Now a High Priority Among Contractors

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By Mark Shaw in Denver

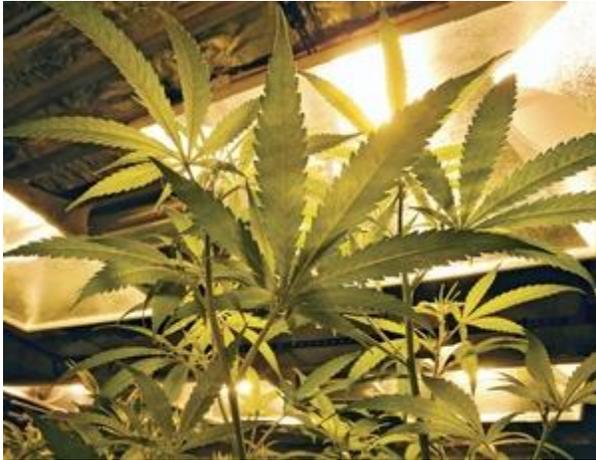


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leaves of grass Legalized use of marijuana in states presents new safety and human-resource challenges for the construction industry.

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Contractor employees in Colorado and Washington hoping to follow the old adage "Smoke 'em if you've got 'em" and fire up a now-legal joint should know that puts their jobs at risk, even if they do it away from work and on their own time.

Voters in both states legalized private marijuana use in November 2012, and Colorado began retail sales of pot on Jan. 1.

Washington will soon follow suit, with at least five other states—Alaska, Tennessee, Arizona, Kentucky and Florida—reportedly considering legalization. Alaska's OK could come in August.

Still, the message to employees from contractor-employers in Colorado, Washington and other states is "Just say no."

Even the limited personal use of pot, legal or not, runs afoul of the industry's stringent safety and drug-use policies and will likely result in termination—despite the fact that two-thirds of Americans say they disapprove of firing employees for off-the-job pot use, according to a Nov. 13 Huffington Post-YouGov poll.

Nearly the same percentage say an employee should not be fired for off-the-job alcohol use.

But the safety concerns of construction are unique because jobsites are inherently risky places, say most safety experts.

"Do you really want the person working next to you on the jobsite to be impaired? Even if he hasn't smoked anything in the last day or two?" says Rick Reubelt, director of environment, safety and health at Denver's Haselden Construction. "No contractor can afford to take that chance."

Attorneys advising contractors offer basically the same counsel. "Marijuana is still illegal under federal law, so, for now, stick with your current drug-use policies and procedures as long as they are carefully written," says Bob Miller, a construction attorney with Denver's Fisher & Phillips.

"For us, it's business as usual," says Dave Alberts, CFO at Saunders Construction, Denver. Saunders will continue to apply its pre-hire drug screening, conduct "a half-dozen or so" random tests throughout the year, and test after accidents and "for cause."

But Alberts says most firms in Colorado need to recognize "the probability of more employees smoking pot went up exponentially" after legalization.

"But Colorado still has a lawful off-duty-conduct statute that makes it OK to test," says Gene Commander, an attorney with the Denver office of Polsinelli. Many firms, especially those that do a significant amount of federal work, maintain a zero-tolerance policy.

Employees who test positive the first time are terminated immediately, no exceptions.

But others—such as PCL Construction and GH Phipps Construction Cos., both of Denver—apply a "two strike" policy in which employees who test positive the first time are offered education and rehabilitation through some form of an employee-assistance program; then, they can be cleared to return to work. A second positive test brings dismissal.

Attorney Miller says he recommends his contractor clients explore a "hybrid policy" that offers more flexibility in testing than zero tolerance. Such policies maintain strict new-hire procedures and more testing for newer employees but offer longer-term workers a second chance.

"They ought to know better, but you may not want to lose a 10-year employee based on one mistake," he adds.

Kurt Klanderud, president of GH Phipps, says, "We will, of course, apply our procedures, but we are aware of the need for some flexibility as situations come up."

Many firms will not discuss their drug-testing protocols, and some won't comment on legalization at all. "We're going forward like it hasn't happened," says a human-resource director for one Colorado firm.

However, most experts caution against denial.

"Legalization doesn't change employers' rights, and it shouldn't change employee practices, at least not in Washington," says Scott Gingras, an attorney with Winston & Cashatt, Spokane, Wash. But he encourages firms to remind employees more often about company drug policy, federal law and the dangers of impairment.

"There is honest confusion with some employees who ask, if it's legal, how could it be in violation of company policy?" Miller says.

Many also are asking what constitutes "impairment." Under Colorado and Washington driving laws, impairment means having five or more nanograms of THC (delta 9-tetrahydrocannabinol) in the bloodstream.

The testing limits for many construction firms are based on that amount, although some, such as Haselden, set the limit at four nanograms. "Science has not caught up with this issue," Miller says. That's because marijuana can stay in the body for four or six weeks, even if an employee hasn't toked in that time.

Firms such as PCL say they may increase random testing.

"Not many people out there care whether someone lights up on their own time as long as they're not impaired on the job, but we have to," says Rich Baldwin, PCL director of health, safety and environment.

"We are aware that the workers who wanted it before [legalization] were getting it anyway."