Marijuana is illegal, sometimes. Until the Oregon Supreme Court decides Washburn v. Columbia Forest Products, you won't know for sure if it's illegal on the job. Here's what happened, and what employers can do while waiting for the decision.

Federally, marijuana cannot be prescribed or used. In June, the U.S. Supreme Court upheld the federal government's right to enforce the Controlled Substances Act regardless of the laws in any state.

Oregon permits certain individuals to use marijuana medically for conditions that defy other legal treatment. Although not intended to stand workplace substance abuse policies on their heads, that has happened.

Oregon's Medical Marijuana law says employers aren't required to accommodate marijuana "in any workplace." But in Washburn, the Court of Appeals did not think it could stretch "in any workplace" to forbid an employee from using marijuana off the job, such as right before work. "In the workplace," the Court thought, meant physically "in" it.

Oregon's 2005 Legislature considered but did not pass amendments to the Medical Marijuana law. The scope of employer substance abuse policies now rests on the shoulders of the Oregon Supreme Court, which is scheduled to hear argument in November.

In the meantime, as the Oregon Court of Appeals articulated in Washburn, here's what is at issue:

* An employer's substance abuse policy may not categorically prohibit marijuana;

* It isn't clear if work and marijuana use can be accommodated; and

* Employers might have to demonstrate an employee's on-the-job impairment, even though impairment cannot be measured.
Employers have to do something while they wait for the Supreme Court. Some tips:

* Follow all federally mandated testing requirements such as those for truck drivers; federal law supersedes state law, so employers may not be flexible.

* Does the employee have a disability? The medical marijuana user is requesting an accommodation in the form of adjustments to the employer's substance abuse policy. Employees requesting an accommodation must provide evidence of a disability, such as a doctor's letter. No disability, no accommodation.

* Is there an effective accommodation that does not involve marijuana use? An employee has a legal right to an effective accommodation, not necessarily the most desired accommodation.

* Does the employee present a "direct threat" to personal or public safety that an accommodation cannot reasonably reduce? Learn how to do this analysis at [http://www.eeoc.gov/policy/docs/guidance-inquiries.html](http://www.eeoc.gov/policy/docs/guidance-inquiries.html)

* Is there a reasonable accommodation for medical marijuana use? For example, could the employee be transferred to a position where safety isn't an issue?

* Participate in the essential "interactive process" of reasonable accommodation, that is, the dialogue between employer and employee that is intended to help both parties discuss concerns and identify solutions.

* Look carefully at safety. If the Oregon Supreme Court decides employers must treat marijuana like any other medication, don't expect a free pass on workplace safety. Workplace laws require employers to meet both sets of responsibilities: safety and non-discrimination.

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