

Workforce Compliance for Cannabis Businesses: A Legal Overview

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Agenda

- Why is Employment Law Important?
- Hiring and Managing Employees
- Background Checks
- Common Cannabis Wage and Hour Issues
- I-9 Compliance
- Surveillance Considerations
- Protecting Intellectual Property and Goodwill
- Employee Handbooks
- Employee Relations

Why is Employment Law important?

- Personnel can be an organization's greatest asset and its greatest liability
- Employees have a duty to do the tasks assigned
- Employers have a duty to:
 - Maintain a safe work environment
 - Maintain a work environment free from retaliation and discrimination
 - Appropriately pay employees for work performed
- Federal law, and state law, are both applicable to the relations:
 - "Compensation for such persons must not be structured as a means of evading the provisions of this rule. As employers, licensees are required to follow all applicable local, state and federal employment laws. including, without limitation, laws pertaining to workplace safety, hours and wages, and all other laws pertaining to the employment of persons in the State of Maine. Nothing in this rule shall be construed to exempt a cannabis establishment from the rights and responsibilities associated with being an employer." Ch. 20, 18-691; § 12(3).

Hiring and Managing Employees

- Over 21 years old
- Have or be able to obtain before the start of work an Individual Identification Card if they are going to:
 - Possess, cultivate, manufacture, package, test, dispense, transfer, serve, handle, transport or deliver cannabis or cannabis products;
 - Have the authority to access or input data into the inventory tracking system or a cannabis establishment point of sale system; or
 - Is a principal of the licensee or other person having a controlling authority or leading position in the license's operations.

Background Checks

- FCRA Standards and Expectations
 - If a third party/credit reporting agency is performing the background check, make sure that they are following the Fair Credit Reporting Act
- If you are simply doing a social media/on-line screening, have someone who is outside of the chain of command perform the check to decrease liability
- Check during the hiring process that the individual has the ability to obtain/already has an Individual Identification Card or Registry Identification Card



Wage and Hour Issues

- Complying with minimum wage and overtime laws
- Independent Contractors and risks of misclassification

Wage and Hour Issues

Minimum Wage and Overtime

- Federal law (Fair Labor Standards Act) and State laws
 - “Suffer **OR** permit to work” is the key phrase
 - There is no “volunteering” at a for-profit business
- Regular Pay Date
- Defining a Work Week
- Exempt/Non-Exempt; Full-Time/Part-Time; Year-Round/Seasonal
 - Common Exemptions
- Employee Contracts versus At Will Employment
- Overtime Policy
- Tracking Time Worked (Rest Breaks)

Wage and Hour Issues

Worker Classification: Why does it matter?

- Independent Contractor v. Employee (part-time/temporary/full-time/etc.)
- It is not enough to have a contract that says someone is an independent contractor. Courts and administrative agencies consider other factors that may override a written agreement between a business and a worker.
- If working with Independent Contractors:
 - Employers can avoid tax payments and insurance obligations on behalf of employees
 - Employers may avoid liability under certain employment laws (ex. Title VII, ADEA, ADA)
 - Federal and state wage and hour concerns (minimum wage, overtime)
 - Worker's compensation (what happens when an injury occurs)
 - General liability/ability to bind

Wage and Hour Issues

Worker Classification: Maine: 26 M.R.S.A. §1043(11)(E)

- **Step 1:** Does the individual have the right to control the means and progress of the work, except as to the final results?
 - No? STOP. The individual is an employee.
- **Step 2:** Is the individual customarily engaged in an independently established trade, occupation, profession or business?
 - No? STOP. The individual is an employee.
- **Step 3:** Does the individual have the opportunity for profit and loss as a result of the services being performed for the other individual/entity?
 - No? STOP. The individual is an employee.
- **Step 4:** Does the individual hire and pay his or her assistants (if any) and to the extent that these assistants are employees, supervise the details of their work?
 - No? STOP. The individual is an employee.
- **Step 5:** Does the individual hire and pay his or her assistants (if any) and to the extent these assistants are employees, supervise the details of their work?
 - No? STOP. The individual is an employee.
 - If Yes—Move to step 6.
- **Step 6:** Determine if the individual meets any of the 3 of the following elements:
 - The individual has a substantive investment in the facilities, tools, instruments, materials, & knowledge used by the individual to complete the work.
 - The individual is not required to work exclusively for the other individual/entity.
 - The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work.
 - The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual/entity prior to completion of the work.
 - Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual.
 - Such work is outside the usual course of the business for which the services are performed.
 - The individual has an IRS Determination (SS-8 of independent contractor status).
- **No:** if the individual meets less than 3 elements, STOP. The individual is an employee, not an independent contractor.
- **Yes:** If the individual meets 3+ elements; the individual is an independent contractor.

Wage and Hour Issues Executive Compensation

- **FLSA:** Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.
- **Maine:** Professional, administrative and executive exemption tests.

I-9 Compliance



What do I need to do to remain compliant? Is there more of a risk in the Cannabis industry?

I-9 Compliance Considerations for the Cannabis Industry

- According to the [Immigrant Legal Advocacy Project](#) (ILAP), non-citizens who:
 - Use Marijuana,
 - Work in a cannabis-related business, or
 - Invest in cannabis enterprises,

May face severe immigration consequences, such as being denied a visa, green card, or citizenship. These risks underscore the importance of caution when hiring immigrants in the cannabis sector.

I-9 Best Practices

- Adopt Neutral Hiring Practices
 - Avoid inquiring about an applicant's immigration status during the hiring process.
- Conduct Regular Audits
 - Periodic internal I-9 audits can help identify and address errors before they escalate into legal issues.
- Seek Legal Guidance for any Complex Cases or Questions

Employment Law & Surveillance



Does having cameras in the workplace create risk?
How does this correspond with regulations requiring surveillance in Cannabis establishments?

LD 949 “An Act to Protect Workers from Employer Surveillance”

- Prohibits employer surveillance unless strictly necessary to ensure employee health and safety or for securing employer data.
- Requires surveillance be the least invasive means possible to accomplish its purpose, and that employees be notified in advance.

Maine Compliance Rules for Cannabis Establishments Requiring Surveillance

- 18-691 C.M.R., Chapter 30
- Employees should be notified in the handbook that they have no expectation of privacy at work, and that surveillance is in use.

Have in place a document retention policy

- Email us and we are happy to provide you with a form regarding what employment documents should be kept for what period of time.
- Have a document retention policy that sets forth:
 - Different documents/data which the Company may have
 - How long they will keep that information
 - Keeping everything for ever is not always best practice. Making sure you keep data for the full period required by law, however, is best practice.

Can your ideas walk out the door?



And if they do, do you have any legal recourse?

Protecting Intellectual Property and Goodwill

- Confidentiality and Proprietary Rights Agreements
 - An agreement between an employer and an employee concerning confidentiality and appropriate handling of the employer's commercially valuable information, compliance with relevant security rules and policies, and protection of the employer's intellectual property assets.
- Non-compete Agreements
 - Restrict employee post-employment conduct concerning an employee's ability to work with competitors.
 - Be careful based on state-specific laws/rules
- Non-solicitation Agreements
 - Restrict employee post-employment conduct concerning an employee's ability to solicit an employer's employees or customers.
 - Fewer restrictions

My culture is such that I don't need an employee handbook...



Understanding the ramifications of not having expectations in writing

Employee Handbooks: Behavior Policies

- What Our Expectations Are of Employees
 - Developing language to describe when expectations are not being met
 - Include both regulatory expectations as well as cultural expectations
 - IIC visible at all times
- Anti-Harassment/Discrimination
- Who To Complain To
- What You Can Expect When You Complain
- Anti-Retaliation Provisions
- Discipline for Employees Who Violate Expectations
- Common Cannabis Employment Issues

Employee Handbooks: Leave Policies

- Workers' Compensation (1)
 - Reporting Accidents/Injuries
- Americans With Disabilities Act and the Maine Human Rights Act (1)
- Family and Medical Leave Act and the Maine Family and Medical Leave Act (50/15)
- Maine Earned Paid Leave (11)
- Maine Act to Care for Families (25)
- Victims of Violence (1)
- PTO/Vacation/Sick Leave (you choose)
- Anti-Discrimination Policy (1)
 - How to Request Leave
 - What to Expect
- Unpaid Leaves of Absence (you choose)
- Attendance (you choose)

Managing the Employment Relationship Generally



A strong foundation help to build a strong employee base.

Use on the Job

- Can create liability for the organization as well as safety and health concerns
- Can be the basis for termination of employment, as there is no standard that requires you to permit the ingestion of cannabis at work

Employee Relations Complaints

- Duties under Title VII and the Maine Human Rights Act
- Sexual Harassment
 - Training and Posting Requirements
- Maine Whistleblowers' Protection Act
- Age Discrimination in Employment Act
- OSHA
- National Labor Relations Act

Employee Relations: Supervising Supervisors

- Don't Throw Around Titles
- Managers/Supervisors Bind An Organization
- Holding Everyone (Including Family) Accountable
- Explain the Liability for Behavior/Activities
 - Including working under the influence
- Maintenance of Personnel Files
 - Job description, tax forms, personnel training documents, I-9
 - Maine statute definition of personnel file
- Regular Training
 - Hiring Do's and Don'ts
 - Discipline and Reviews
 - Handling Difficult Employees
 - Responding to Harassment/Discrimination Complaints

Employee Samples—AU Only

(1) Employee Sampling. A licensee may provide samples of cannabis and cannabis products to its employees for the purposes of research and development or employee education. As authorized in this paragraph, employees of a cultivation facility, products manufacturing facility or a cannabis store licensee may be provided with samples of cannabis or cannabis products and:

(a) Under no circumstances may an employee be required to accept or consume samples from a licensee;

(b) Such samples must have passed all mandatory testing and be provided solely for the purpose of research and development of cultivars of cannabis or cannabis products not currently sold by licensee to another licensee; or in the case of a cannabis store licensee, for the purpose of providing education to its employees for the purpose of providing information to consumers regarding cannabis or cannabis products sold by the licensee;

(c) Such samples must be accounted for in the Department's inventory tracking system;

(d) Must be packaged and labeled in accordance with Section 5;

(e) May not be consumed on the premises of the licensee by whom the employee is employed;

(f) May not be sold or conveyed to any licensee, consumer or employee other than the employee identified in the Department's inventory tracking system; and

(g) No samples of cannabis or cannabis products shall be permitted to be sold or otherwise transferred or conveyed to employees or to other licensees, except as outlined in this paragraph. A licensee is limited to providing each authorized individual recipient employee no more than 90-day ounces of a combination of cannabis and cannabis concentrate, that includes no more than 10 grams of cannabis concentrate, in a 90-day period. A licensee may not provide any authorized individual recipient employee with a package of edible cannabis product that contains more than 200 mg of THC, which must be easily divisible into servings of 10 mg of THC or less.

Questions?

Thank you!

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