



Liability

# Lifeline



## Legalized marijuana

Guidance for dental practices as employers

**F**ederal law prohibits the possession and use of marijuana. When California's Proposition 64 went into effect in January of this year, the state became one of nine to legalize the use of recreational marijuana. Individuals age 21 and older are now allowed to carry, possess and transport up

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## Marijuana from page 1

to one ounce of cannabis and/or eight grams of cannabis concentrate and grow up to six cannabis plants at home in California.

If the federal/state conflict seems confusing to you, you're not alone. Medical marijuana has been legal to use in some states for well over a decade, accessible with a prescription from a licensed physician to help reduce pain and treat medical conditions such as epilepsy.

While people might legally use marijuana for recreational or medicinal use under state law, employers still have the right and necessity to maintain a drug-free work environment. Employees under the influence of any mind-altering substance, such as marijuana or alcohol, are a potential risk not only to themselves, but to patients, co-workers and employers.

"Well-managed dental practices that have clear drug-free workplace policies in place shouldn't have to do anything differently than what they are currently doing," Bernadette Bantly, an employment attorney with Bradley, Curley, Barrabee, Kowalski, P.C. in Larkspur, Calif. said in regards to Prop 64.

For dental practices that do not currently have a drug-free workplace policy in place, now is a good time to establish one. Practices that do have clear policies should review their guidelines to ensure they reflect current laws.

One of the best ways to protect your practice from employment risks is to confirm that all employees acknowledge their "at-will" status in writing. Employers generally have the freedom under the law to terminate

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an at-will employee at any time, so long as it is not for a discriminatory reason such as gender, race, religion, national origin, disability or age. However, the most appropriate time for termination is when there is sufficient documentation of a problem, like poor performance or noncompliance with practice policies.

Documentation can also help when implementing a new drug-free workplace policy, as "at-will" employers can typically change the terms and conditions of employment with little or no notice. If you should implement a new policy or revise an existing one, you are generally within your legal rights to terminate at-will employees who refuse to comply. Be sure to require staff to sign an acknowledgement for every employee manual or policy change.

You can also require a potential job applicant to pass a drug test as a

condition of employment. The most common drug panels screen for cocaine, PCP, opiates, THC (an active ingredient in marijuana) and amphetamines.

According to Herb.com, a cannabis-focused website, the more frequently someone uses marijuana, the longer it stays in their system. The more marijuana consumed, the more THC accumulates in the body. A heavy user of marijuana can have THC detected in urine for up to 77 days and in blood for up to one week. Single users will usually be in the clear after eight days for urine and 24 hours for blood. Should a potential new hire test positive for any substance, you can revoke your offer of employment.

Another way to protect your practice is to ensure your employee manual has a strict drug-free workplace policy and that every employee has read and understands the policy. A proper policy will cover what substances are not allowed, risks including termination if substances are brought onto the premises, drug rehabilitation and counseling options they can use and if your practice will conduct drug testing if substance abuse is suspected. [If practicing in California, you may want to revise your policy to expand upon "prohibits use of illegal drugs" as marijuana is no longer illegal.]

Even when used for medicinal purposes, you can prohibit employees from bringing marijuana to your practice. While some states do allow provisions for medical use, individuals still have no legal right to bring or consume marijuana at the workplace.

In *Ross v. RagingWire Telecommunications Inc.* (2008), the California Supreme Court held that employers do not have to accommodate

an employee's use of medicinal marijuana. Californians are now allowed to carry marijuana on their person, but not in public places. This means they have no legal right to bring or use marijuana in the workplace.

For practices located in California, a “no right to privacy” statement should also be included in the employee manual. This provision allows employers to inspect and search personal belongings, such as purses and workstations, if they believe an employee has brought drugs onto the premises.

In California, once an applicant converts to an employee it is generally inadvisable to subject them to random or routine drug testing. Some states allow employers to conduct random drug testing if their employee is enrolled in a drug rehabilitation program or their behavior rouses reasonable suspicion.

TDIC's Risk Management department cautions that if you suspect an employee is using narcotics, it's important to rule out any underlying health issues first and not jump to conclusions.

If you do suspect your employee is abusing drugs, document your objective observations specific to job performance in the employee file. Note any indication of impairment such as slurred speech, lack of coordination, presence of alcohol on their breath or bloodshot eyes. If you believe office safety is at risk, arrange for transportation for the employee and have them leave your office for the remainder of the day.

“Employers have the right to have trust and confidence in their staff,” Bantly said. “If that trust is lost due to suspected or actual drug activity at work, that is typically a good reason to terminate.”

**Marijuana** continued on page 6

# Don't Count on Discounts

## How special offers can increase your risk

When considering ways to bring in new business and grow your patient base, you may be inclined to offer your services at a discounted rate. While providing promotions such as free initial X-rays or dental cleanings can potentially bring in more patients, there are repercussions to consider that far outweigh any incremental revenue you might receive.

Below are ways in which providing discounts can negatively impact your practice and alternatives to consider to help keep your reputation, and overhead, intact.

### The cost of care seems negotiable.

Discounting your services in advance can lead patients to believe their cost of care is negotiable. As a dentist, you are responsible for offering patients the best treatment options to meet their oral health needs. When cost becomes a leading factor, patients may refuse needed treatment or delay procedures until “a better deal” comes along, causing more damage in the long run. Their refusal of care can become a potential liability.

### One-time discounts make for one-time patients.

Discount sites such as Groupon or Living Social may seem like a great place to gain visibility and attract new patients

into your practice. Some practices offer full dental services for a fraction of the price. But the users of discount sites aren't necessarily looking for a new service provider. Rather, they're bargain hunters trying to secure the lowest price possible. Sure, they may purchase your discount offer today, but they'll move on to another discount deal when they need dental services in the future, compromising continuity of care.

### Perceived quality can be a reputational risk.

When businesses offer discounts, they inadvertently train consumers to delay purchases until the product or service goes on sale. To get more customers, they have to keep offering discounts. Being known as a “discount provider” can hurt a practice's reputation. If you continually provide discounts, consumers may no longer associate you as a dentist who provides quality care.

### You can't refund a trade.

Trading a service and receiving a service or good in exchange tends to work well for some skilled professions, such as an esthetician exchanging services with a hairdresser, but it is not advised for health care professionals. If a patient trades another service for dental care and isn't happy with the end result, it could make it difficult, if

**Discounts** continued on page 6



**Caution + control:**  
**Reducing  
employment  
liability**



**Changing employment laws and a litigation-conscious public can intimidate the most confident dentists.** Especially when practice employees are prepared to take legal action if they feel an employer breached their rights. With insights from Employment Practice Liability claims experience and calls to our Risk Management Advice Line, TDIC's seminar shows how to best handle employment concerns. Gain the caution and control to navigate past potential violations such as pregnancy discrimination, termination and sexual harassment.\*

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\*Due to the sensitive nature of the issues being addressed and our employer-oriented approach, this course is available to dentists and their spouses only.

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# Spring 2018 Risk Management Seminar Schedule

## Caution + control: Reducing employment liability

### Thursday, May 17

9:00 a.m. – 12:00 p.m.  
2:00 p.m. – 5:00 p.m.

### Friday, May 18

9:00 a.m. – 12:00 p.m.  
2:00 p.m. – 5:00 p.m.

### Saturday, May 19

9:00 a.m. – 12:00 p.m.

### CDA Presents – Hilton, Anaheim\*

Anaheim, CA

\*Must register through CDA Presents.  
Visit [www.cdapresents.com](http://www.cdapresents.com) to register, reserve  
guestrooms or for additional information.

## C.E. Details

- **20%** — 3.0 per session

To receive C.E. credit, registrants must be present for the entirety of the three-hour seminar. This seminar meets the Dental Board of California's requirements for 3.0 C.E. credits.

## Special Needs

If you or someone in your group requires special assistance to fully participate in the seminar, please call TDIC at 800.733.0633 or email us at [risk.management@cda.org](mailto:risk.management@cda.org).

## ADA CERP® | Continuing Education Recognition Program

The California Dental Association is an ADA CERP Recognized Provider. ADA CERP is a service of the American Dental Association to assist dental professionals in identifying quality providers of continuing dental education. ADA CERP does not approve or endorse individual seminars or instructors, nor does it imply acceptance of credit hours by boards of dentistry. CDA designates this activity for 3.0 continuing education credits. This continuing education activity has been planned and implemented in accordance with the standards of the ADA Continuing Education Recognition Program (ADA CERP) through joint efforts between CDA and TDIC.

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to explore convenient eLearning options.

## Fees

- Dentist: **\$50**
- Part-time\*: **\$25**
- New TDIC Policyholder: **Free** (within the first policy year)

\*Must have a TDIC part-time Professional Liability policy to be eligible for this discount.

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\*TDIC policyholders who complete a seminar or eLearning option will receive a two-year, 5 percent Professional Liability premium discount effective their next policy renewal. To obtain the two-year, 5 percent Professional Liability premium discount, Alaska, Hawaii, Illinois, Minnesota, New Jersey, North Dakota and Pennsylvania dentists must successfully complete the seminar by December 31, 2018. Dentists who complete the seminar after October 26, 2018 will receive a revised invoice reflecting the discount. Arizona, California and Nevada dentists must successfully complete the seminar by June 30, 2018. Dentists who complete the seminar after April 27, 2018 will receive a revised invoice reflecting the discount. Any eLearning tests received after the deadline will not be eligible for the discount until the following policy renewal. Non-policyholders who complete a seminar or eLearning option and are accepted for TDIC coverage will also be eligible for this discount.

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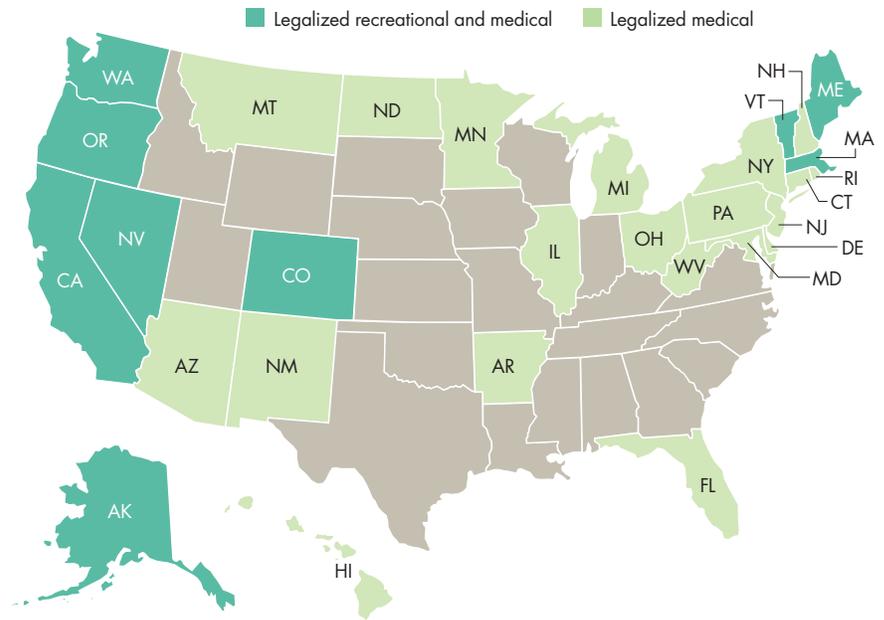
Having clear policies and guidelines in place isn't always enough, you also need to enforce them.

“Overlooking employees bringing marijuana to work, even if they are not consuming it at work, can send the wrong signal to other employees,” Bantly said.

Any illicit drugs in the workplace can pose a huge liability issue for practices. In the unfortunate circumstance where there is a patient injury or malpractice allegation, the presence of illicit drugs on the premises may create serious potential liability. “A health care office is no place for recreational drugs that could impair an employee’s judgment,” Bantly said.

No matter what state you practice in, you can offer services for employees who are dealing with substance abuse problems. If you find the employee has been honest in their transgressions and you don't want to terminate them, you can consider making rehabilitation programs available and their employment conditional on their

## States where marijuana is legal



Consult with an employment attorney when creating a drug-free workplace policy and before terminating any employee to ensure such action does not conflict with state or federal laws  
Map graphic resource: [www.businessinsider.com/legal-marijuana-states-2018-1](http://www.businessinsider.com/legal-marijuana-states-2018-1)

completion and follow-through with those programs.

As the courts closely monitor the legalization of marijuana in California and litigation as it impacts individual

rights and employment laws, TDIC's Risk Management Advice Line is available to counsel you on drug-related practice issues. Call 800.733.0633 for confidential guidance from an expert analyst.

**Discounts** from page 3

not impossible, to refund their service or good. Or, they may think their trade is worth more than yours and demand more free services.

While discounts aren't the best option to highlight your services, there are proven alternatives to increase your patient base.

### Focus on value.

Highlight what you offer, not the prices you charge. According to CSIMarket.com, many brick-and-mortar

shops are closing yet Nordstrom is gaining market share thanks in part to impeccable customer service. People are willing to pay full price when they know the product they are buying is made of better quality. Set yourself apart based on the quality of care you and your staff provide for each and every patient.

### Reward loyalty.

Recognize and show appreciation toward your current patients. Reward people who always arrive for their appointments on time or practice good oral hygiene at home. While you cannot

provide monetary compensation for patients who refer friends and family to your practice, you can acknowledge their support in other ways, such as providing coffee and treats in your lobby or hosting a patient appreciation day. Your referral reward program can be creative as long as it aligns with Dental Board regulations. One dentist in Sacramento, Calif., holds monthly raffles and gives away movie tickets or gift certificates to local restaurants to demonstrate patient appreciation. It doesn't take a lot to say "thank you" and your recognition can go a long way.

# Questions and Answers

TDIC's Risk Management Advice Line helps dental professionals navigate difficult situations when dealing with potential claims from patient or employee situations. The real-world calls detailed below illustrate how the Risk Management analysts have helped more than 17,000 callers in the past year.

**Q. An elderly patient called today about a broken full denture that I originally fabricated six months ago. The patient attempted to repair the denture herself before calling our office. I usually offer to repair it at no cost if the denture fails prematurely. The patient is expecting me to provide her a new denture at no cost. Am I obligated to fabricate a new denture for free?**

**A.** The patient may deny making repairs at home and blame the quality of your work for the denture failure. Your refusal to replace the denture may provoke the patient into taking further actions such as filing a complaint with the dental board, pursuing a small claims action, posting negative online reviews or even filing a lawsuit. Finding a way to meet the patient halfway is a wiser and less expensive solution. Offer to charge her half price to replace the denture, reminding her politely that she made it impossible for you to make the usual repairs by attempting the repairs at home. Another option would be charging her the lab fee only.

To prevent this problem in the future, consider making your agreement of free repairs conditional. Advise patients that your agreement is void if they attempt to make any repairs themselves and

recommend that they contact the office immediately if they have any issues with the denture.

**Q. Am I allowed to reschedule a patient who appears to be using marijuana?**

**A.** TDIC recommends practice owners develop a policy regarding the treatment of patients who are impaired due to drugs or alcohol. The policy should clearly outline that impaired patients will not be treated, and any patient who presents while under the influence of alcohol, drugs or other mind-altering substances, including prescription drugs, will be asked to reschedule and return when sober.

You can inquire about the individual's use of marijuana and whether the patient takes it for medicinal purposes (then consult with their physician) or recreational use. Request — as with someone who drinks alcohol — that they not use/consume prior to treatment as intoxication may impair their ability to provide informed consent for treatment. Initiate this dialogue with patients by requesting they update their health history at every visit.

If recreational marijuana is legal in your state (see map on page 6) and the patient admits to occasional use, note this in the treatment record and advise the patient of your office policy accordingly.

It's important to realize that the smell of marijuana in and of itself is not an indication that the patient actively uses the drug or is currently under the influence. Be careful not to discriminate against any individual you suspect may use or abuse a substance. Ask questions to access knowledge that will help you make an informed decision about provision of care. Document observations that lead you to believe the patient is impaired; deal with the facts and not your perceptions.

**Be careful not to discriminate against any individual you suspect may use or abuse a substance.**

If a patient is under the influence, staff should encourage the patient to remain on-site and make alternative transportation arrangements, such as calling a taxi or ride-share service, or notify the emergency contact listed on the health history form and ask them to pick up the patient. Should the patient become belligerent or abusive, notify security or law enforcement.



# Liability Lifeline

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