

Guidance for federal hiring and firing puts less emphasis on marijuana use as a disqualifier

By **Eric Yoder**



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Federal agencies should not automatically disqualify job applicants or take disciplinary actions against current employees for using or possessing marijuana, the government's central personnel agency said Friday.

A memo from the Office of Personnel Management lays out additional considerations for what the government calls "suitability" decisions related to marijuana for both new and continued employment.

Federal employees remain bound by a federal law defining marijuana as a controlled substance, even though growing numbers of state and local jurisdictions have decriminalized it for medical or recreational purposes.

"As more state laws have changed, federal agencies are increasingly encountering individuals whose knowledge, skills, and abilities make them well-qualified for a position, but whose marijuana use may or may not be of concern when considering the suitability or fitness of the individual for the position," the memo says.

The guidance for federal hiring and firing puts less emphasis on marijuana use as a disqualifying factor, attorneys who specialize in federal employment issues said.

The memo says that use or possession of marijuana can disqualify an applicant or merit the firing of a current employee on grounds of illegal use of a controlled substance or of criminal conduct. "However, OPM's suitability regulations do not permit agencies to automatically find individuals unsuitable for federal employment based on either factor," it says.

Similarly, it said that for job applicants, those regulations "do not permit agencies to automatically find individuals unsuitable for federal service on the basis of marijuana use prior to appointment."

"Rather, when agencies consider the suitability or fitness of an applicant or appointee for a position, the individual's conduct must be evaluated on a case-by-case basis to determine the impact, if any, to the integrity and the efficiency of the Government," it says.

In an emailed statement, OPM said the memo "does not represent a change to OPM's suitability/fitness policy. However, it does affirm that regulations do not permit agencies to automatically find individuals unsuitable for federal employment based on use or possession of marijuana."

The guidance from the Biden administration updates a policy in place since 2015 that also told agencies to make case-by-case judgments, based on the nature and seriousness of the conduct, the circumstances and "contributing societal conditions."

The new memo adds considerations including the nature of the position the person is applying for or is employed in; when the conduct occurred; the age of the person at the time; and whether the person has made “efforts toward rehabilitation.” Such efforts can include “evidence that use will not occur again, the passage of time without use, or completion of (or current participation in) treatment or counseling.”

It adds that agencies are to take those factors into account even regarding the issue of criminal conduct, telling them to “exercise special care before making a determination of unsuitability” on those grounds.

John Mahoney, a District-based lawyer who represents federal employees, said that when taking actions against employees for positive drug tests, agencies already consider a range of factors but that some “are pretty hard-core in disciplining employees.”

“It is significant in that OPM is putting less emphasis on past marijuana use in terms of suitability determinations,” he said in a phone interview. “This does mark the beginning of a trend in the federal sector of moving toward a less strict standard vis-à-vis marijuana use, and I expect that trend to continue.”

He added, though, that federal applicants and employees still should understand that under the government’s drug-free workplace policy, current marijuana use is prohibited and could be the basis for firing.

The OPM policy does not apply to determinations of eligibility for access to classified information or for employment in sensitive national security positions. A stricter policy issued in 2014 by the Office of the Director of National Intelligence applies in those cases.

The guidance opens paths to more “adjudication of suitability issues once marijuana use is disclosed. However, until the security clearance rules change, this is a non-starter for many federal employees,” said John Gniadek, a senior associate with the Tully Rinckey law firm in the District.

“The next crack to appear will come in the medical use category, whether employees using cannabinoids solely for medicinal purposes can be [suitable] for employment. Until that hurdle is cleared, it is unsafe for federal employees or applicants to smoke,” he said in an email.

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