



## UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

The Director

MEMORANDUM FOR: HEADS OF DEPARTMENTS AND AGENCIES

From: Kathleen M. McGettigan  
Acting Director

Subject: Assessing the Suitability/Fitness of Applicants or Appointees on the Basis of Marijuana Use; Maintaining a Drug-Free Workplace

Fifteen states and the District of Columbia have removed criminal prohibitions on medical and recreational marijuana use by adults age 21 or older, and an additional 33 states permit medical use of marijuana or of the cannabis-derived compound cannabidiol (CBD).<sup>1</sup> Nearly half (49%) of surveyed American adults say they have used marijuana, according to SAMHSA's [2019 National Survey on Drug Use and Health](#).<sup>2</sup> 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.<sup>3</sup>

As the Acting Director of the U.S. Office of Personnel Management (OPM) and Suitability Executive Agent, I am responsible for issuing standards and guidance to agencies to ensure that appropriate suitability determinations are made on applicants and appointees for positions in the competitive civil service and in other covered positions as defined in title 5, Code of Federal Regulations, part 731 (5 C.F.R. part 731). Agencies acting under delegated suitability authority must adhere to the requirements stated in 5 C.F.R. part 731 along with supplementary guidance. Further, Executive Order (E.O.) 13764 amended the Civil Service Rules so that I am responsible for minimum standards of fitness based on character and conduct for appointment in other positions in the excepted service of the executive branch,<sup>4</sup> and amended E.O. 13488 such that the heads of agencies shall exercise due regard to OPM's regulations when establishing criteria for determining fitness to perform work as a contractor employee or as a non-appropriated fund employee. I am also responsible for issuing guidance to agencies on maintaining a Drug-Free

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<sup>1</sup> As of December 2020. Congressional Research Service, *The Controlled Substances Act (CSA): a Legal Overview for the 117<sup>th</sup> Congress 25-26* & nn. 255-56 (Feb. 5, 2021), at <https://crsreports.congress.gov/product/pdf/R/R45948>.

<sup>2</sup> Table 1.3B – Types of Illicit Drug Use in Lifetime, Past Year, and Past Month among Persons Aged 18 or Older: Percentages, 2018 and 2019, at <https://www.samhsa.gov/data/release/2019-national-survey-drug-use-and-health-nsduh-releases>.

<sup>3</sup> This memorandum does not address consideration of marijuana use in determinations of eligibility for access to classified information or for employment in sensitive national security position, since the Office of the Director of National Intelligence is responsible for guidance on national security eligibility.

<sup>4</sup> Except for: (A) positions in any element of the intelligence community as defined in the National Security Act of 1947, as amended, to the extent they are not otherwise subject to OPM appointing authorities; and (B) positions where OPM is statutorily precluded from prescribing such standards.

Federal Workplace. The purpose of this memorandum is to provide updated guidance on agencies' consideration of how an individual's marijuana use may or may not adversely affect the integrity or efficiency of the Government and thereby impact their suitability or fitness for a position.

### **Assessing the Suitability/Fitness of Applicants or Appointees**

Agencies must base their suitability determinations on the presence or absence of certain factors set forth in 5 C.F.R. 731.202(b).<sup>5</sup> At least two of these factors could be implicated by an individual's use or possession of marijuana: (1) illegal use of narcotics, drugs, or other controlled substances without evidence of substantial rehabilitation; and (2) criminal or dishonest conduct. However, OPM's suitability regulations do not permit agencies to automatically find individuals unsuitable for federal employment based on either factor. 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.

In each instance, the agency must consider the following additional considerations of the individual's conduct to the extent deemed pertinent to the individual case:

- The nature of the position for which the person is applying or in which the person is employed;
- The nature and seriousness of the conduct;
- The circumstances surrounding the conduct;
- The recency of the conduct;
- The age of the person at the time of the conduct;
- Contributing societal conditions;
- The absence or presence of rehabilitation or efforts toward rehabilitation.

#### *Consideration of Marijuana Use under 5 C.F.R. 731.202(b)(6)*

As noted above, OPM's suitability regulations regarding illegal drug use do not permit agencies to automatically find individuals unsuitable for federal service on the basis of marijuana use prior to appointment. Even where an individual has illegally used marijuana without evidence of substantial rehabilitation, agencies cannot find an individual unsuitable unless there is a nexus between the conduct and the "integrity or . . . efficiency of the service." 5 C.F.R. 731.201.

To make this determination, agencies must consider all additional considerations outlined above that are deemed pertinent. As such, it would be inconsistent with suitability regulations to implement a policy of finding an individual unfit or unsuitable for federal service solely on the basis of recency of marijuana use. Past marijuana use, including recently discontinued marijuana use, should be viewed differently from ongoing marijuana use.<sup>6</sup> The nature and seriousness of

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<sup>5</sup> See 5 C.F.R. § 731.202.

<sup>6</sup> See E.O. 12564, sec. 1(c), 51 Fed. Reg. 32889 ("Persons who use illegal drugs are not suitable for Federal employment") (emphasis supplied).

the use and the nature of the specific position for which the person is applying are also likely to be important considerations. It is also necessary to assess all possible indicators of rehabilitation, which may include, among other things, evidence that use will not occur again, the passage of time without use, or completion of (or current participation in) treatment or counseling. A commitment to not use marijuana going forward may represent evidence of rehabilitation which may be mitigating, even in cases of recent use, when considering the totality of the information regarding the individual's use.

*Consideration of Criminal Conduct Related to Possession of Marijuana under 5 C.F.R. 731.202(b)(2)*

Under 5 C.F.R. § 731.202(b)(2), criminal conduct — including a violation of the Controlled Substances Act — may be the basis for an unfavorable suitability determination. However, agencies should exercise special care before making a determination of unsuitability for criminal conduct based on marijuana possession. Agencies must consider whether the employment of an individual with a criminal history related to the possession of marijuana would adversely impact “the integrity . . . or efficiency of the service.” 5 C.F.R. 731.201.<sup>7</sup> Agencies must also apply the considerations under 5 C.F.R. § 731.202(c) where pertinent. Depending on the circumstances, a marijuana possession offense might not be incompatible with employment in the position sought.

### **Maintaining a Drug-Free Federal Workplace**

Marijuana continues to be categorized as a controlled substance under Schedule I of the Controlled Substances Act (CSA); federal law on marijuana remains unchanged.<sup>8</sup> Further, the mandates of E.O. 12564, Drug-Free Federal Workplace, remain in place, specifically that (a) Federal employees are required to refrain from the use of illegal drugs; (b) the use of illegal drugs by Federal employees, whether on or off duty, is contrary to the efficiency of the service; and (c) persons who currently use illegal drugs are not suitable for Federal employment. The E.O. emphasizes, however, that discipline is not required for current employees who seek counseling or rehabilitation and thereafter refrain from using illegal drugs.<sup>9</sup>

Heads of agencies are expected to continue advising their workforce that legislative changes by some states and the District of Columbia do not alter Federal law or Executive Branch policies

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<sup>7</sup> As defined in the Controlled Substances Act, 21 U.S.C. § 844(a), simple possession has no element of felonious intent, so concerns may arise regarding inadvertent or innocent violations. Such concerns are heightened in states where marijuana use has been decriminalized or legalized as a matter of state law; in such states, individuals could reasonably be confused or misinformed about whether their use of the drug constitutes criminal conduct.

<sup>8</sup> The exception is for cannabis-based products that do not exceed .3% THC (once dried) concentration. The Agriculture Improvement Act of 2018 classified such items as hemp, not marijuana, and therefore not illegal under the CSA. Federal employees should be aware, however, that the FDA does not certify the level of THC in these products and the percent of THC cannot be guaranteed. Use of a mislabeled product actually containing greater than .3% THC could create a risk of a positive results on drug tests, for positions that require them. *See* SAMHSA, Memorandum to Federal Agency Drug Program Coordinators, Federal Medical Review Officers, and Federal Partners, *Marijuana, Marijuana Oils, Marijuana Infused Products and Hemp Products* (July 24, 2019), at <https://www.samhsa.gov/sites/default/files/workplace/hemp-products-csap-memo-072419.pdf>.

<sup>9</sup> Likewise 41 U.S.C. §§ 8102 and 8103 continue to impose drug-free workplace requirements for Federal contractors and grant recipients.

regarding a drug-free workplace. An individual's disregard of Federal law pertaining to marijuana while employed by the Federal government remains relevant and may lead to disciplinary action.

It is important to note that it is also the policy of the Federal Government to offer appropriate prevention, treatment, and rehabilitation programs and services for Federal civilian employees with drug problems. Federal agencies must establish and maintain such programs to assist employees with these problems, consistent with 5 C.F.R. § 792.105.

Agencies may direct questions pertaining to this memorandum as follows:

- Suitability Regulations: [SuitEA@opm.gov](mailto:SuitEA@opm.gov)
- Misconduct and Disciplinary Actions: [employeeaccountability@opm.gov](mailto:employeeaccountability@opm.gov)
- Drug-Free Federal Workplace Guidance: [worklife@opm.gov](mailto:worklife@opm.gov)

cc: Chief Human Capital Officers, and Human Resources Directors