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Employer Drug-Testing Policies Must Evolve With State Law

WRITTEN BY

Agustin E. Rodriguez | Tracey E. Diamond | Christina Sava

While many individuals are excited about the proliferation of state laws providing for medical and recreational use of marijuana across the country, inconsistencies in these state laws have made it difficult for employers to put in place consistent policies and practices on testing for marijuana as a condition of employment, upon reasonable suspicion, and post-accident. Employers are being forced to revisit their drug-testing policies not just because of changes to their state's laws regarding medical and recreational use of marijuana, but also because it is becoming increasingly difficult to find employees who have not used, or do not use, marijuana. If employers want to continue testing for marijuana in states where use is legal, policies must be drafted carefully to account for the continued evolution of the law in this area.

The Status of Federal and State Marijuana Use Laws

Marijuana remains a Schedule I substance at the federal level—manufacturing, distributing, dispensing, or possessing it is prohibited under the Controlled Substances Act (CSA). According to the CSA, Schedule I drugs have a high potential for abuse and do not have a currently accepted medical use. Nonetheless, for the last decade or so the federal government has taken a hands-off approach as states enact and enforce their own laws permitting medicinal and/or recreational use of marijuana.

Thirty-nine states and the District of Columbia have laws in place allowing the use of marijuana for medical purposes, and twenty-two states and the District of Columbia have made medical *and* recreational use of marijuana legal. The scope of these laws, however, varies state by state. In medical-only states, those wishing to purchase medical marijuana in dispensaries often must obtain recommendations from a doctor and register for a state-issued medical marijuana card. In recreational states, any adult over the age of 21 can purchase marijuana in a state-licensed dispensary.

As described further below, some states have chosen to amend their employment laws to account for the new marijuana regimes—or to address employment issues within their marijuana statutes—while others have not.

Traditional Drug Tests May No Longer Be Helpful in the Case of Marijuana

It's not just the patchwork of state laws that makes things complicated for employers, but also the nature of how marijuana interacts with the human body and the differing legal status of tetrahydrocannabinol (THC) products on the market. THC, the primary cannabinoid associated with the "high" users feel from consuming marijuana, can be detected by a drug test for up to 30 days, sometimes longer. Therefore, when an employee tests positive for marijuana, it does not mean the employee is currently impaired, or that marijuana use played a role in any on-the-job incident. Some states address this complication, but most leave it up to employers to decide how to determine on-the-job impairment.

Further, some forms of THC are considered illegal under federal law, while others are largely considered legal. On the one hand, THC that comes from "marijuana"—a cannabis plant with a 0.3% or higher concentration of delta-9 THC measured on a dry weight basis—is considered a Schedule I substance under the CSA. On the other hand, THC that comes from "hemp" —cannabis with a less than 0.3% concentration of delta-9 THC (on a dry weight basis) —in theory should no longer be considered a Schedule I substance thanks to the Agricultural Improvement Act of 2018, which legalized hemp and its extracts and derivatives. THC also comes in different isomers, such as delta-8, delta-9, and delta-10 THC. Many "hemp-derived" delta-8 and delta-10 THC products produce intoxicating effects but are ostensibly legal under federal law (we say "ostensibly" because there is debate as to whether these novel cannabinoids are "synthetic," in which case they would again be an *illegal* Schedule 1 substance).

In states where marijuana use remains illegal, an employer may have a "drug-free workplace" policy that defines drugs as any substances that are illegal under federal law, including marijuana. But an employee who is impaired from the use of hemp-derived delta-8 THC has not used a federally illegal substance. Given that most tests are not able to differentiate between delta-8 THC and delta-9 THC, much less establish whether someone is actually impaired in the moment by the THC, it is difficult for employers to know whether there is a legal justification for administering a marijuana test.

To make matters worse, some employees may test positive for THC after using cannabidiol (CBD) products that they believe are THC-free. CBD is a nonintoxicating cannabinoid in both hemp and marijuana that is believed to have therapeutic effects. Some manufacturers are selling CBD products that contain 0.3% or less THC, but this threshold can be highly misleading and problematic. The Cannabis Regulators Association has called this the "0.3% loophole" and stated: "While the threshold of 0.3% delta-9 THC (tetrahydrocannabinol) by weight is a small amount of THC in a hemp plant, when applied to hemp-derived products (e.g., chocolate bars, beverages, etc.) which can weigh significantly more, 0.3% by weight can amount to hundreds of milligrams of THC. For example, a 50-gram chocolate bar at 0.3% THC would have around 150 mg of THC (30 times the standard 5 mg THC dose established by the National Institute on Drug Abuse). A family sized pack of cookies weighing 20 oz can contain around 1700mg of THC using the 0.3% THC threshold."[1] There are even some commercial products that have been proven to contain more than the 0.3% threshold. Employees who have been fired for failing drug tests after using CBD products have sued product manufacturers, and, in some instances, employers, over this confusion.

Employment Law and Medical Marijuana Use

Most states have legalized—at least to some extent—the use of marijuana for medical purposes. The state statutes that implement these marijuana regimes have varying levels of protection for employees. On one end of the spectrum are states with broad protections for employees who are registered medical marijuana patients. These states recognize that registered patients may require employers to permit the use of marijuana off premises and

not on work hours as a reasonable accommodation. For example:

- New York recognizes certified patients who use medical marijuana as having a disability that may require reasonable accommodations.[2]

- In *Barbuto v. Advantage Sales & Mktg., LLC* in 2017, the Massachusetts Supreme Court held—despite an employer's established drug-free workplace policy—permitting an employee's off-site use of medical marijuana to treat her Crohn's disease may constitute a reasonable accommodation under the state's disability discrimination law.[3]

- The Nevada Supreme Court held that the state's reasonable accommodation statute provides an implied private right of action for employees' certified medical cannabis use if employers fail to permit such use.[4]

Other states have focused on expanding the rights of employees subject to marijuana testing policies, for example:

- Under Delaware law, employers are not permitted to assume patient employees are under the influence of medical marijuana because of the detection of marijuana in a drug test.[5]

- Under New Jersey's medical marijuana statute, employers are permitted to perform drug testing, but they must offer employees the opportunity to provide a legitimate medical explanation following a positive test result.[6]

- Pennsylvania law requires employers to accommodate impairment from medical marijuana unless the employee's conduct falls below the standard of care normally accepted for that position.[7] In addition, the Commonwealth Court of Pennsylvania has held that medical marijuana users may be eligible for employment benefits if they are fired after testing positive for marijuana.[8]

Employers must also be mindful of local ordinances. Three municipalities—Philadelphia, New York City, and San Francisco—have laws banning or restricting private employers from testing employees and applicants for marijuana.[9] Exceptions to these testing bans exist, but they are largely dependent on whether the testing occurs in certain industries.

On the other end of the spectrum are states that have legalized marijuana use in some form but continue to permit employers to decide whether to test for marijuana and whether to reject applicants who test positive for marijuana. Marijuana use has been permitted for medical reasons in Virginia since 2015 and the state also legalized adult use and possession (but not sale) in 2021. However, Virginia does not have any employment protections for medical or recreational marijuana users. Other jurisdictions that have not yet passed any laws allowing for the use of marijuana for any reason.

Employment Law and Recreational Marijuana Use

Many of the states that allow for recreational use of marijuana either prohibit testing for marijuana, protect

applicants and employees from adverse employment actions based on the results of a positive marijuana test, or require additional evidence of impairment. For example:

- Effective January 1, 2024, California employers are prohibited from penalizing a person for use of cannabis off the job and away from the workplace.[10]
- In New York, employers may not refuse to hire, fire, or otherwise discriminate against an employee's legal use of marijuana outside of the workplace, including the legal use of marijuana before an employee's work shift.[11]
- In New Jersey, the use of a Workplace Impairment Recognition Expert (WIRE) is required for an employer to detect and identify an employee's use of or impairment from marijuana.

State Restrictions on Employee Marijuana Testing

It goes without saying that crafting legally compliant marijuana testing policies presents a challenge for multi-state employers. The patchwork of different marijuana laws across the country, limitations of current drug tests to determine whether an employee is impaired, and issues surrounding the regulation and legality of CBD have all contributed to growing anxieties about crafting a legally-compliant policy.

That said, some patterns have emerged when it comes to the different degrees of restriction on marijuana testing in the employment space. Below are five lists to help you determine where state and local jurisdictions stand now, starting with the most restrictive laws for employers.

Employers cannot test employees or applicants for marijuana in:

- New York
- Philadelphia, Pennsylvania
- Nevada

Employers must provide a reasonable accommodation for authorized medical marijuana users (but not necessarily recreational users) in:

- Alabama
- Arkansas
- Delaware
- Florida

- Hawaii
- Louisiana
- Maryland
- Minnesota
- Mississippi
- Missouri
- New Hampshire
- North Dakota
- Ohio
- Oklahoma
- Pennsylvania
- South Dakota
- Utah
- West Virginia

Employers are not permitted to refuse employment or otherwise discriminate against authorized medical marijuana patients in:

- Arizona
- Arkansas
- Connecticut
- Delaware
- District of Columbia
- Maine

- Minnesota
- Nevada
- New Jersey
- New York
- Oklahoma (medical marijuana license holders)
- Pennsylvania
- Rhode Island
- South Dakota
- West Virginia

Employers are permitted to test for marijuana, but may not take adverse action against an applicant based solely on a positive marijuana test in:

- Arizona
- Connecticut
- Delaware
- Michigan
- New Jersey
- Oklahoma (only applies to medical marijuana license holders)

There are no marijuana testing restrictions on employers in:

- Idaho
- Indiana
- Kentucky
- Nebraska

- North Carolina
- Tennessee
- Texas (low-level THC authorized)
- Virginia
- Wisconsin
- Wyoming

Can employers count on any consistencies in the law across state lines when it comes to addressing employee marijuana use?

Employers are generally under no obligation to accommodate marijuana possession and use in the workplace or during work hours—and this principle holds true even if an employee has a medical marijuana prescription or the employer's place of business is located in a state that has legalized recreational marijuana use.

In addition, employers generally are permitted to take adverse employment actions against employees who are under the influence of or impaired by marijuana at work, absent any reasonable accommodation requirement for medical marijuana use under the ADA or state law. The issue becomes whether, and under what circumstances, an employer is permitted to test for marijuana and rely on a positive drug test as indicative of present impairment.

Some state laws consider employees impaired or under the influence if the employer has a good faith belief that an employee exhibits specific, articulable symptoms—like irrational behavior, carelessness resulting in injury, or changes in speech—that negatively affect work performance. In these states, a positive drug test alone is not enough to constitute an articulable symptom of impairment. In New Jersey, for example, an employer may not take adverse employment against an employee based on a positive drug test. The test must be coupled with a physical examination by a Workplace Impairment Recognition Expert (WIRE) for signs of cannabis impairment. Even where there are specific articulable symptoms, the employer may need to allow impairment as a reasonable accommodation under the ADA if the employee is using marijuana pursuant to a valid prescription or marijuana medical card

Best Practices for Employers

Now that marijuana legalization and decriminalization laws have become the new norm, employers are scrambling to understand how to implement drug-free workplace policies. While employers are not required to tolerate marijuana possession and use on the job in most instances, as explained above, marijuana testing in the employment space is strictly restricted or prohibited in some states. In other states, marijuana test results must be combined with some other evidence of impairment before employers may take an adverse job action, an issue that can be especially tricky when the employee is working in a remote environment.

In the face of rapid changes in the law, some multi-state employers have abandoned marijuana testing altogether and instead base employment decisions on observations about employee performance and conduct, regardless of metabolic state. That said, here is a list of recommendations for employers to consider when implementing or adjusting marijuana testing policies:

- **Make sure you are aware of current law in the jurisdiction where you have employees and keep on top of legal developments**. Employers who wish to continue testing for marijuana must be aware of state and local restrictions on the ability to test at various stages of employment – whether the testing is occurring pre-employment, upon reasonable suspicion, post-accident or randomly. If your office is in Philadelphia, for example, do not implement a drug screening for all prospective employees—that would be a violation of a municipal ordinance. If you have employees in New Jersey, you may not use a positive marijuana test to reject an applicant for employment and must combine a positive test with a physical exam from a WIRE before taking adverse job action against a current employee.

- **Create a clear written policy for employment-related drug testing—and stay away from vague language**. The written policy should include details such as a prohibition against using or being impaired by marijuana while at work or on Company property and the consequences of a positive test. It should also include definitions of "impairment" and "under the influence." If your policy distinguishes between medical use and recreational use, be sure to spell it out clearly.

- **Ensure your policy does not discriminate against medical marijuana cardholders**. Employers with employees in states that have legalized the use of marijuana for medical purposes should be sure to have a statement in their policy- consistent with their practice- that the company does not discriminate against employees who are medical marijuana cardholders.

- **Treat all employees who test positive for marijuana consistently.** Employers should avoid singling out individuals to avoid claims of discrimination.

- **Make sure that your testing method and recording of results is compliant with applicable law.** In addition to laws restricting the use of marijuana test results, some states have guardrails on the methods used to test individuals, including that the testing take place in a private area and that the results are kept confidential.

Our Cannabis Practice provides advice on issues related to applicable federal and state law. Marijuana remains an illegal controlled substance under federal law.

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[1] *See* https://www.cann-ra.org/news-events/sx2s63c2fudq9n0zmk4ekviku9747f.

[2] *See* N.Y. Cannabis Law § 42(2).

[3] *See Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37 (Mass. 2017).

[4] *See Freeman Expositions, LLC v. Eighth Judicial Dist. Ct.*, 520 P.3d 803, 808-09 (Nev. 2022).

[5] 16 Del. C. § 4907A.

[6] N.J.S.A. § 24:6I-6.1.

[7] 35 P.S. § 10231.2103(b).

[8] *See Jack Lehr Electric v. Unemployment Comp. Bd. of Review*, 255 A.3d 712 (Pa. Cmwlth. 2021).

[9] *See* Phila. Code §§ 9-5501-9-5503; N.Y.C. Admin. Code §§ 8-102 and 8-107, subd. 31; S.F. Police Code art. 33, § 3300A.5.

[10] *See* A.B. 2188.

[11] N.Y. Lab. Law § 201-d(2).

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