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Cannabis Alert

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Testing more than the waters as legalization expands: Should employers screen for cannabis?

By Hillary Baca and Kimberly K. Harding

Businesses can reap the benefits of expanded applicant pools by reconsidering drug-testing policies, but companies must consider the risks as well as the rewards.



What's the Impact?

- / Certain industries and job classifications must continue to comply with applicable federal rules and regulations regarding cannabis
- / In some locations, strategic advantages may be achieved by making modest updates to cannabis-testing policies

Employers understandably have long been inclined to maintain drug-free workplace and drug-testing policies. However, the pressures of the recent labor shortage and the changing attitudes toward cannabis across the nation have caused many employers to rethink this arguably outdated strategy for workforce management. In addition to the practical benefits of expanding the applicant pool, employers trending toward elimination of drug-testing policies may actually reduce legal risk. Some considerations for employers seeking to re-evaluate drug-testing policies are outlined below.

Employers should maintain cannabis-testing policies if:

They are subject to federal drug-testing regulations.

Although there is much activity and energy at the federal level supporting cannabis legalization, to date, cannabis remains a controlled substance prohibited by federal law. Employers with employees in safety-sensitive jobs regulated by the federal Department of Transportation, contracted by the Department of Defense, and/or regulated by the Federal Aviation Administration accordingly must continue to comply with applicable federal rules and regulations regarding cannabis testing.

They can be leveraged to achieve necessary discounts on workers' compensation premiums.

Because positive drug test results can, at times, defeat workers' compensation claims, some states have encouraged the implementation of such policies, including by offering discounts on workers' compensation premiums. To the extent workers' compensation premiums have become excessive or significant burdens, such discounts may be financially attractive to employers.

Employers may wish to reconsider cannabis-testing policies if:

Their pre-employment drug screens are overbroad.

While the Americans with Disabilities Act generally does not prohibit an employer from performing pre-offer drug screens, such screens may be considered unlawful if they elicit information related to legal drug use (including lawfully prescribed prescription drugs and, in some states, recreational and/or medicinal cannabis). By ceasing pre-employment drug testing, employers eliminate the risk that their screen is collecting unnecessary medical information and could be deemed unlawful.

Their disciplinary processes do not include procedures for documenting specific symptoms of present cannabis impairment and/or their supervisors are not trained on recognizing such symptoms.

Unlike blood alcohol tests, which can measure present impairment from alcohol, existing tests for cannabis can merely detect the presence of the chemical tetrahydrocannabinol (also known as THC), which causes marijuana's psychoactive effects. Current tests generally cannot detect a level of present impairment.

For this reason, reliance on cannabis detection tests alone may be insufficient should it become necessary to defend an employee's termination for on-the-clock cannabis impairment. It also may generally increase the likelihood that an employee is inadvertently terminated for off-duty cannabis use. Such terminations create legal risk for all employers in states like New York, where off-duty recreational and medicinal cannabis users are specifically protected from adverse action on this basis by statute. These terminations also create legal risk for many unionized employers located in states where cannabis use is legal, especially given the uncertainty surrounding an employee's level of impairment may jeopardize the employer's ability to prove just cause for discipline under the applicable collective bargaining agreement.

Similarly, the limitations of today's testing methods can create difficulties for employers under the Occupational Safety and Health Act. Specifically, in 2016, the Occupational Safety and Health Administration (OSHA) published a final rule that included a provision prohibiting employers from retaliating against employees for reporting work-related injuries or illnesses. See 29 C.F.R. § 1904.35(b)(1)(iv). In connection with this publication, OSHA suggested that certain post-incident drug-testing policies would violate this rule, particularly, if an employer performed the drug test to penalize an employee for reporting a work-related injury or illness rather than performing it for the legitimate purpose of promoting workplace safety and health. Drug tests that are unable to accurately identify a present cannabis impairment (as opposed to cannabis use at some time in the recent past) may be more likely to be deemed punitive and retaliatory and in violation of OSHA's rule.

They are a multi-state employer.

No state requires an employer to permit an employee to be under the influence of cannabis while at work or during work hours. Beyond this absolute, however, states have created a patchwork of laws, which vary in the tolerance for cannabis, employers must maintain. For instance, some states criminalize cannabis, while other states have decriminalized the substance but do not provide any employment protections for off-duty cannabis users. Still other states require employers to permit off-duty use of cannabis products for medical purposes only; while others require employers to permit off-duty recreational use. With such significant variation, confusion abounds, and, particularly for multi-state employers, it can be difficult not only to keep pace with the dynamic legal landscape but also to maintain fairness and consistency across any company.

When it comes to cannabis, there is no uniform approach for all employers. Yet as cannabis gains increasing momentum, strategic advantages may be achieved by making even modest updates to their cannabis-testing policies. Therefore, it is none too soon for employers to re-evaluate their risks and rewards.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

[Hillary Baca](#)

415.984.8393

hbaca@nixonpeabody.com

[Kimberly K. Harding](#)

585.263.1037

kharding@nixonpeabody.com
