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The 411 on 420: Can Employers Still Test for Marijuana?

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Manufacturers understandably are concerned about how new laws protecting employee off-duty marijuana use may undermine their efforts to avoid workplace injuries and deaths.

Understanding the changing legal landscape and the tools still available to employers to protect against safety risks is critical.

Sixty-eight percent of Americans support the legalization of marijuana. Still, marijuana use can create serious safety issues in a manufacturing environment such as impairing judgment around operating machinery and driving vehicles. According to the National Safety Council, "[s]tates with legal recreational or medicinal cannabis are reporting an increase in fatal motor vehicle crashes involving THC."

Employers must recognize that use of the drug, legal or not, impairs skills critical in a safety sensitive work environment. Under the General Duty Clause of the Occupational Safety and Health Act, employers generally have a duty to provide a safe workplace for their employees.

While OSHA has issued no standards for a drug-free workplace and does not typically cite employers over lax efforts to control the effects of drug use—including marijuana use—the agency nonetheless encourages employers to combat the impact of drug use on workplace safety. In a 1998 interpretation letter, the agency stated: "OSHA strongly supports measures that contribute to a drug-free environment and reasonable programs of drug testing within a comprehensive workplace program for certain workplace environments, such as those involving safety-sensitive duties like operating machinery."

The financial loss for manufacturers does not primarily flow from OSHA fines, but instead from other forms of harm such as personal injury costs, absenteeism and lost productivity.

Complicated State and Local Laws

Traditionally, manufacturers have used drug testing to identify employees' marijuana use. Drug urinalysis, and other forms of testing for marijuana use, however, do not effectively distinguish between whether detected use occurred on or off the job. Further, unlike with breathalyzer testing for alcohol, drug testing for marijuana provides little meaningful information about the employee's level of impairment at or around the time of sample collection.

For instance, with drug urinalysis, a positive marijuana test can result from use that occurred days or even weeks before the urine sample was provided. As the CDC has explained with testing for marijuana use, "attempts to correlate urine concentration with impairment or time of dose" are problematic.

Marijuana legalization advocates believe that employees should not be punished for off-duty use when the individual will not be impaired at work, and some jurisdictions are responding by barring employer testing for marijuana use or employer use of positive test results to take employment action.

For instance, in New York, the state's 2021 "Marijuana Regulation and Taxation Act," blocks employers from taking action against an applicant or employee based upon off-duty marijuana use. The New York Department of Labor followed with similar guidance. (Of course, federally mandated testing, such as Department of Transportation testing, is not impacted by state or local legal restrictions).

Under New Jersey's 2021 "Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act," employers are not expressly prohibited from engaging in marijuana testing, but an employer generally may not take action based solely upon a positive test for cannabis use—practically making some common forms of testing, such as random testing, no longer effective.

In Illinois, an amendment to the state's "Right to Privacy in the Workplace Act" protecting off-duty marijuana use as a "lawful" activity, already made employer actions against employees based upon a positive marijuana test arguably problematic. New proposed legislation that appears poised to be adopted by the Illinois Legislature would effectively further curtail workplace marijuana testing in that state.

Additionally, a number of other jurisdictions such as the City of Philadelphia and the State of Nevada specifically have restricted pre-employment marijuana testing by employers for most job positions.

Other states, such as California, have legislation pending that, if enacted, would either directly or effectively end most workplace marijuana testing.

What Can Employers Do?

Consider the following tools that remain available:

1. In all states restricting employer rights with regard to combating employee marijuana use, businesses remain free to prohibit on-premises or on-duty marijuana use, possession or impairment. Employers should focus on vigorously policing against those on-the-job activities.

2. Sophisticated training programs are available for employers to train management and safety personnel to detect on-the-job impairment from marijuana or other drugs or alcohol. Again, no state or local laws or ordinances protect on-the-job impairment. Moreover, in the vast majority of states imposing restrictions on employers, in most circumstances the business can still conduct reasonable-suspicion testing based upon

indications of impairment.

3. Businesses can still take action against an employee based upon unsafe behavior or unacceptable conduct that may stem from marijuana use. For instance, an employee who violates a safety rule still can, and should, be held accountable for that conduct directly—regardless of whether the employer can link the conduct to marijuana.

4. Some states providing protections for marijuana use are creating exceptions for employees holding certain safety-sensitive positions. Employers need to be familiar with the specific laws in the jurisdictions where they maintain operations.

5. Finally, remember that these new permissive laws relate only to marijuana and not to other commonly abused drugs such as cocaine, heroin and opioids. Accordingly, maintain vigorous anti-drug programs and testing as appropriate for other drugs of concern.

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