

Minnesota Has Gone “All In” on Marijuana Legalization — What Does This Mean for Employers?

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Around this time last year, Minnesota legalized edible products containing hemp-derived tetrahydrocannabinol (THC). Now, Minnesota has gone “all in”—becoming the 23rd state to legalize the recreational use of marijuana and cannabis products.

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While personal use is not legal until August 1, 2023, several employment provisions in the bill take effect on July 1, 2023. The legalization of recreational marijuana involves significant amendments to two Minnesota statutes: the Drug and Alcohol Testing in the Workplace Act (DATWA) and the Consumable Products Act (CPA). The DATWA outlines how and when employers can require employees to undergo drug or alcohol testing, and the CPA protects employees against discrimination or discipline if a drug or alcohol test comes back positive for off-duty use of lawful consumable products.

As employers prepare for the impacts of legalization, here are some answers to frequently asked questions:

1. Are any jobs exempt from the new restrictions on drug testing?

Yes. Although the 2023 amendments to DATWA specifically exclude marijuana and cannabis products from the statute’s definition of “drugs,” several jobs are exempt from this amendment. This means that cannabis and its metabolites are still considered a drug under DATWA for certain employees and employers (and of course, marijuana is still illegal under federal law). The following positions are unaffected and may still be subject to testing for cannabis under the amended Minnesota law:

- Peace officers,
- Firefighters,
- Positions where impairment would threaten a person’s health or safety,
- Positions within the health care, child care, education, and social work industries requiring interaction with patients, children, or vulnerable adults, and
- Positions created by federal grant, regulated by the Department of Transportation, contracted by the federal government, or otherwise governed by federal drug testing

requirements.

2. Can employers still conduct pre-employment cannabis testing for new applicants?

No. Employers are no longer allowed to screen job applicants for cannabis as an employment condition unless otherwise required by state or federal law, and they cannot discriminate against or refuse to hire an applicant solely because of a positive test result for cannabis.

3. Can employers still include cannabis in random drug screens for existing employees?

Yes. In Minnesota, employers may only randomly screen 1) employees in safety-sensitive positions and 2) professional athletes who are subject to certain collective bargaining agreements. These covered employees may still be subject to random testing for cannabis, drug, or alcohol use.

4. Is there any situation in which an employer can test employees for marijuana or cannabis products?

Yes. Employers are allowed to prohibit the use, possession, or distribution of cannabis products, including medical marijuana, while working or on work premises. So, even though employers are not allowed to discriminate against employees or applicants for off-duty marijuana use under the CPA, there are certain circumstances where testing for cannabis products is allowed. An employer may test employees when it has a [reasonable suspicion](#) that an employee:

- Is under the influence of drugs or alcohol;
- Violated **written** work rules contained in the employer's drug testing policy which prohibit the use, possession, sale, or transfer of cannabis and certain related substances; or
- Caused or sustained an injury or work-related accident.

The 2023 amendments do not require employers to permit employees—even employees enrolled in the medical cannabis program—to be under the influence of marijuana or cannabis products at work. Critically, all cannabis testing **must** be done pursuant to an employer's written, DATWA-compliant policy.

5. Should employers revise their written drug and alcohol policies?

YES! If an employer wishes to discipline an employee for cannabis use, possession, or distribution while at work, the employer must have a clear and written policy that conforms to DATWA requirements.

At a minimum, drug and alcohol policies must define:

- Who is subject to testing under the policy;
- When drug or alcohol testing may be required or requested;

- The rights of employees or applicants to refuse testing and the consequences of refusal;
- What disciplinary or other personnel actions can be taken based on positive test results;
- The rights of employees or job applicants to explain any positive results or pay for a confirmatory retest; and
- All appeal procedures.

Once a policy is adopted, employers must provide written notice of their drug and alcohol policy to all job applicants and employees, including notice that a policy was adopted posted “in an appropriate and conspicuous location on the employer’s premises.”

Because marijuana will become a “lawful consumable product” under Minnesota law effective August 1, 2023, employers who wish to discipline employees for on-the-job cannabis use will need to revise their policies accordingly.