

Recreational Marijuana Legalization, Drug Testing Trends, and Considerations for Employers

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by Joshua Hughes

Minnesota is now the 23rd state (in addition to Washington D.C. and Guam) to legalize recreational marijuana in some form or another. Minnesota joins a growing list of states taking action on marijuana policy. With nearly half of the states now permitting adult-use of marijuana, what trends and laws should employers consider when revising or adopting drug testing policies?

To provide background, more Americans have access to legal recreational marijuana than any time before. While possession or use of marijuana remains illegal at the federal level, 162 million Americans now live in a jurisdiction that allows adult recreational use. That figure does not include the millions more who live in states with robust medical marijuana programs, or places where limited amounts of THC (the psychoactive component of cannabis that produces a “high”) is permitted in certain CBD products (the *non*-psychoactive ingredient derived from cannabis). And the 2018 Farm Bill, which legalized the production of industrial hemp as an agriculture product, set a national standard allowing products with up to 0.3% THC by dry weight to be sold nationally.

Needless to say, the status of marijuana as a consumable product has changed dramatically since Colorado and Washington became the first states to legalize recreational adult use of the product in 2012. Because use and possession of marijuana has only been legalized on a state (and not federal) basis, employers with nationwide footprints have adjusted to various statutory schemes enacted in the states as it applies to drug testing for marijuana. While no state requires that employers let employees consume, possess, or produce marijuana at work, the similarities in approach end there.

Least Restrictive Approaches. Many states enacting recreational marijuana laws have taken a “hands-off” approach to employment drug testing. These states, including Alaska, Arizona, Colorado, Delaware, Maine, Massachusetts, Michigan, Missouri, New Mexico, and Oregon, allow employers to continue to take adverse employment actions on the basis of employee drug tests showing THC. While marijuana is recreationally legal in these states, employers largely retain discretion to prohibit use of marijuana by

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employees and test for it accordingly. Of course, employers must continue to abide by state-specific drug testing laws, many of which are highly technical statutes requiring strict compliance. However, in these states, the status quo allowing employers to test for marijuana is essentially intact.

More Restrictive Approaches. Another slate of states have adjusted their workplace drug testing statutes, or separately provided for workplace considerations when legalizing recreational marijuana. A common approach among these “middle-tier” states is to prohibit employment actions based on an employee’s lawful, off-site, non-working hour use of marijuana. Illinois and Maryland have both adopted this approach, which appears aimed at balancing an employer’s legitimate interests in ensuring no drug use at work against an employee’s state right to consume marijuana products recreationally.

Other states have begun to move away from pre-employment testing (or employment actions based on those tests) for marijuana altogether. For example, New York and Minnesota employers generally may not test for marijuana unless specifically authorized by statute to do so. In New Jersey and Nevada, an employer may continue to test for marijuana, but cannot base employment decisions on the results of a positive marijuana drug test.

New Testing Limitations. Finally, a few states have chosen to take a different approach by limiting “traditional” drug testing itself in favor of “active impairment” drug testing. By way of background, when an individual consumes cannabis, the metabolic or digestive process creates non-psychoactive cannabis metabolites (“NCM”). These non-psychoactive metabolites are essentially a by-product of the “high,” leaving a substance that remains in an individual’s system even after the individual no longer is actively experiencing the effects of cannabis. The presence of NCM in a person’s drug testing sample will usually trigger a positive result in most “traditional” drug tests. However, because NCM can stay in a person’s body for days, weeks, or even months after the last use of cannabis, testing for NCM doesn’t necessarily establish if a person is actively impaired.

Recognizing this, California and Washington have enacted laws prohibiting “traditional” drug testing that tests for the presence of NCMs. Instead, employers in California and Washington (beginning on January 1, 2024 in both states) will need to use different tests, which detect for the presence of THC in an individual, which would establish active impairment.

General Exceptions. Even as states move to curtail drug testing for marijuana in some or all circumstances, it’s important for employers to always consider the usual laundry-list of exceptions that allow employers to test and make employment decisions based on the results of a positive drug screen. For example, many states (such as New Jersey and New York) have express carve-outs on their testing restrictions when an employer is party to a federal contract. Many states also permit or require testing in specific trades, usually healthcare, childcare and education, and certain transportation industries. And of course, employers subject to United States Department of Transportation’s drug testing requirements must continue to comply, regardless of state law stating otherwise. For

each general rule limiting an employer's right to drug test, understand there are typically numerous exceptions and carve-outs, all different on a state-by-state basis. Additionally, many states otherwise limiting an employer's right to conduct pre-employment drug screens for marijuana continue to permit reasonable suspicion or random testing for marijuana in some cases.

Takeaways. In light of the constantly changing legal landscape surrounding recreational marijuana and testing for it, employers with nationwide workforces face difficult decisions. Employers have a few options to consider when revising or implementing new drug testing policies:

- Is testing for marijuana important for your organization? Due in part to the rapid advancement of marijuana legalization and the corresponding increase in public acceptance of cannabis use, some companies—such as Amazon, the NBA, and Caesar's Entertainment—have chosen to abandon marijuana testing altogether. Of course, before making the jump to voluntarily end marijuana drug testing, employers should consider whether any employees face *mandatory* testing under state or federal law. In addition, some employers will need to consider safety implications of moving away from cannabis drug screens. Some employers may also wish to continue marijuana drug screens out of an abundance of caution, given cannabis remains federally illegal.
- What happens when an individual *does* test positive for marijuana? Employers should consider their own approach when employees or applicants actually *do* test positive for marijuana: What laws apply? (In Minnesota, for example, employers are prohibited from taking an adverse employment action based only on a positive marijuana result.) Further, is it an automatic deal-breaker? Or does the organization frequently decline to take adverse action on that basis? One question to ask is, what information have you learned about the individual based on the test result? It is no longer the necessarily the case that a marijuana test reveals whether someone is “law abiding.” Overall, it may be worthwhile and cost-effective to remove marijuana from testing panels.
- Can you manage a workplace without testing for marijuana? For some employers, a pre-employment drug screen and the potential for future random or reasonable suspicion testing was an effective performance management tool. But given the restrictions on “traditional” drug testing and the highly specialized requirements across several states, some employers are looking to manage employee performance without drug tests. For example, some employers are addressing workplace cannabis impairment through performance management approaches. Where an employee is frequently late to work and their work product quality decreases, there is a clear performance issue, whether it is caused by workplace drug impairment or not. Employers who move to this more “holistic” approach to managing performance should be careful to establish objective guidelines of performance that are unacceptable, whether caused by drug use or not.

Although the law of marijuana legalization and drug testing is constantly changing, employers should remember the principles that have *not* changed: performance management need not always include drug testing, employers have a right to maintain a safe and drug-free workplace, and drug testing for marijuana is still required for some industries and job titles under state and federal law.