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Employee Drug Testing in the Age of Medical and Recreational Marijuana

The decriminalization of marijuana use and possession at the state level has made it increasingly difficult to implement one-size-fits-all drug testing programs for multi-state employers without employment-related risks. This article provides a summary of the current state legal landscape related to employee drug testing and considerations on how to best manage drug testing programs to comply with this evolving area of law.

Overview of Current Drug Testing Methods and Practices

Employment drug tests take three forms: urine, saliva, and hair. Urine testing is the most common, least expensive, and has a low "detection window," i.e. it is effective at detecting substances used very recently by the employee. Saliva testing has similar characteristics as urine testing but less risk of adulteration of samples compared to urine testing, since the sample collection is more easily observed. Hair testing has a more lengthy detection window—up to 90 days—and as a result is better equipped to detect habitual users. Of course, hair testing can be a challenge for employees who lack hair to test. It does not effectively detect recent drug use.

Drug tests that detect marijuana test for THC metabolite. THC is marijuana's primary pharmacologically (and psychoactive) component. Because of how the body absorbs THC, drug tests with short detection windows, like hair and saliva testing, do not reliably detect whether a person is currently under the influence of marijuana. Depending on the frequency of the tested person's use, a urine drug screen that is positive for marijuana can detect use as recently as one day prior to the test to as long as 30 days after. Hair tests can detect THC metabolites from up to 90 days following use.

Employers typically have some combination of three scenarios in which they administer drug tests to employees in the workplace. The first scenario is pre-employment, where employees who test positive are denied employment on that basis. Post-accident testing is used by employers as well, particularly where employees must operate vehicles or machinery or otherwise perform safety-sensitive tasks. Finally, employers also test based on "reasonable suspicion" where the tested employee's conduct and behavior has led to a reasonable suspicion that the employee is under the influence of alcohol or an illicit substance.

The challenges in effective detection of marijuana use through drug testing, in combination with increasing state regulation of employment actions based on employee marijuana use has led many employers to rethink how and whether they test for marijuana in their drug testing programs. The following section describes this state-law regulation and its potential to impact employment decisions in the workplace.

State Law Regulation of Employment Actions Related to Marijuana Use

1. Discrimination Protections for Medical Marijuana Patients and Cardholders

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Most states[1] (currently 35) and the District of Columbia permit use of medical marijuana via a registration or card-issuing process. Thirteen (13) of these states prohibit discrimination by employers against applicants and employees based on their registered patient or cardholder status. These include **Arizona** (Ariz. Rev. Stat. § 23-495.05), **Arkansas** (Ark. Const. Amend. 98, § 3(f)(3)(A)), **Connecticut** (Conn. Gen. Stat. Ann. § 21a-408p,), **Delaware** (Del. Code Ann. tit. 16, § 4905A(a)(3)), **Illinois** (410 Ill. Comp. Stat. Ann. 130/40), **Maine** (Maine Rev. Stat. Ann. tit. 22, § 2430-C(3)), **Minnesota** (Minn. Stat. § 152.32 subd. 3(c)), **New Jersey** (N.J. Stat. 24:6I-6.1), **New Mexico** (N.M. Stat. § 26-2B-9), **Oklahoma** (Okla. Stat. Ann. tit. 63, § 425(B)), **Pennsylvania** (35 Pa. Cons. Stat. Ann. 10231.2103(b)), **Rhode Island** (R.I. Gen. Laws § 21-28.6-4), and **West Virginia** (W.Va. Code § 16A-15-4(b)(1)).

Some medical marijuana laws, like Arkansas, expressly prohibit employees or applicants from bringing a private right of action against employers related to an adverse employment action due to their status as a cardholder. However, in the absence of an express ban on lawsuits, courts generally support such lawsuits. These include courts in **Arizona** (Whitmire v. Wal-Mart Stores Inc., 2019 WL 479842 (D. Ariz. Feb. 7, 2019)), **Delaware** (Chance v. Kraft Heinz Foods Co., 2018 WL 6655670 (Del. Sup. Ct. Dec. 17, 2018), **Massachusetts** (Barbuto v. Advantage Sales & Mktg., LLC, 148 F. Supp. 3d 145 (D. Mass. 2015)), **New Jersey** (Wild v. Carriage Funeral Holdings, Inc., 205 A.3d 1144 (N.J.Super.A.D.2019) (currently on appeal to N.J. Supreme Court), and **Pennsylvania** (*Palmiter v. Commonwealth Health Sys.*, Lackawanna County C.C.P. Docket No. 19-CV-1315).

2. Recreational Marijuana Usage and "Lawful Off-Duty Conduct" Statutory Protections

Fifteen (15) states[2] and the District of Columbia currently permit recreational possession and use of marijuana by adults. In recreational marijuana states, as well as the 33 states that legally permit medical marijuana, existing statutes may also prohibit adverse employment actions taken because of applicants' or employees' lawful off-duty conduct. These statutes, originally designed to protect users of tobacco, exist in the recreational marijuana states of **California** (Cal. Lab. Code § 96(k)), **Colorado** (Colo. Rev. Stat. § 24-34-402.5), **Illinois** (820 Ill. Comp. Stat. Ann. 55/5), **Maine** (Maine Rev. Stat. Ann. tit. 22, § 2430-C(1)), **Nevada** (Nev. Rev. Stat. § 613.333), and **New York** (N.Y. Lab. Law § 201-d). These laws could certainly be interpreted to protect lawful off-duty use of marijuana—and by extension, prohibit denying employment to applicants or terminations of employees who test positive for marijuana.

This question was answered negatively for marijuana users, however, in Colorado. Its Supreme Court interpreted Colorado's lawful off-duty conduct law to apply only to federal drug laws, thus not protecting employees legally using marijuana under state law. Coats v. Dish Network, 350 P.3d 849 (Colo. 2015); *see also* Curry v. MillerCoors, Inc., 2013 WL 4494307 (D. Colo. Aug. 21, 2013) (reaching the same conclusion).

Impact of State Regulation on Today's Employer Drug Testing Programs

With the patchwork of varying state requirements described above, testing for marijuana in the hiring process has become increasingly risky. Taking action on the basis of a drug test that is positive for marijuana could be outright prohibited or create unnecessary risk created by the knowledge of a positive drug screen. For example, an applicant's marijuana use may

[1] In the November 2020 elections, Mississippi and South Dakota passed ballot initiatives to create medical marijuana markets. The South Dakota Ballot initiative mandates that employers treat medical marijuana cardholders identically to employees who have other prescriptions. The South Dakota measure also instructs that a small amount of marijuana in an employee's system cannot be used as evidence of impairment.

[2] In the November 2020 elections, Arizona, New Jersey, Montana, and South Dakota created new legal cannabis markets. Of those four, only the Montana initiative mentions employers and does not prevent employers from taking adverse action against employees because of an employee's use of marijuana.

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be fully protected under state law if he or she is a registered cardholder for medical marijuana, and many states protect such individuals from discrimination in employment based upon that status (revealed by virtue of the positive test result) or based solely upon a positive test result. In addition, as noted above, current drug testing technology is somewhat ineffective at testing whether a person is under the influence of THC at the time the test is administered.

The following six (6) states now prohibit employers from denying employment to applicants who test positive for marijuana: **Delaware** (Del. Code Ann. tit. 16, § 4905A(a)(3)), **Illinois** (410 Ill. Comp. Stat. Ann. 130/50), **Minnesota** (Minn. Stat. § 152.32 subd. 3(c)), **Nevada** (A.B. 132), **New Mexico** (S.B. 406), and **Oklahoma** (Okla. Stat. Ann. tit. 63, § 425(B)). A few of these states, such as Arizona, Illinois, and Oklahoma provide exceptions for safety-sensitive positions, risks of professional malpractice, or loss of federal contracts. Effective April 9, 2020, **New York City** prohibits pre-employment testing for marijuana entirely (Int. 1445-2019, to be codified in N.Y.C. Admin. Code § 8-107).

By contrast, some states permit employers, by express statute or case law, to take adverse employment actions based on positive marijuana drug test results, even if the individuals lawfully use medical or recreational marijuana. These states currently include **California** (Ross v. RagingWire Telecomm., Inc., 174 P.3d 200 (Cal. 2008)), **Colorado** (Coats v. Dish Network, 350 P.3d 849 (Colo. 2015)), **Michigan** (Mich. Comp. Law § 333.27954, *see also* Casias v. Wal-Mart Stores, Inc., 695 F.3d 428 (6th Cir.2012)), **Ohio** (Ohio Rev. Code § 3796.28), and **Oregon** (Emerald Steel Fabricators, Inc. v. BOLI, 230 P.3d 581 (Ore. 2010).

Even where testing for marijuana is permitted, the knowledge that an applicant uses marijuana for a medical condition creates risks of discrimination claims based on his or her status as a medical marijuana user or cardholder (in states that provide such protection) or on the basis of an underlying disability that the marijuana treats. By way of further complication, New Jersey applicants must be provided notice, an opportunity to show a legitimate medical explanation for a positive marijuana test result (which would trigger an interactive process), and the opportunity to re-test at their own expense. Other states like Nevada expressly require reasonable accommodations relating to medical marijuana use. While the topic of accommodations for medical marijuana use are not addressed here, they are a further area of increasing regulation and evolving case-law interpretations.

Considerations & Conclusion

Although the increased regulation of employment actions related to marijuana use has added significant complexity for employers, they can take comfort that virtually every state expressly allows employers to prohibit its employees from possessing, distributing, using, or being under the influence of marijuana within the workplace or while performing job duties.

Some key considerations in making drug testing policy decisions include (1) the terms required in contracts with governmental entities or federal contractors related to marijuana testing, if any; (2) whether employees' use of marijuana creates risk related to safety (e.g. operating machinery) or professional malpractice; and (3) the state(s) in which the employer operates and the degree to which the employer's actions related to marijuana use are regulated, if at all. Increasingly, employers have begun to consider alternatives that include eliminating all testing for marijuana (but maintaining a within-the-workplace prohibition on use, possession, and distribution), training its managers to detect when employees may be under the influence of marijuana (in lieu of a potentially unreliable drug test), limiting testing to safety-sensitive positions, and even expressly allowing employees to use medical marijuana with parameters similar to those for other medications, such as documentation from health care providers about the impact that use may have on the employees' ability to perform their essential job functions.

In sum, drug testing for marijuana is becoming increasingly risky to the point that many employers are opting out in the absence of significant countervailing business considerations. As states begin to further loosen use of cannabis products and courts interpret these newly-passed laws, this area will continue to rapidly evolve and require close attention by multi-state employers.

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