

Recreational Marijuana: What Construction Employers Need to Know

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Presenter Bio

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Some Changes in 2023!

- Changes to definition of “drug” under state law
- The Consumable Products Act has been amended to include cannabis
- Changes to Drug and Alcohol Testing in the Workplace Act (“DATWA”) and drug and alcohol policies
- Changes to medical marijuana laws
- Designated smoking sections

Cannabis v. Marijuana v. Hemp

- “Cannabis” generally refers to all products derived from the plant (cannabis sativa)
- “Marijuana” generally refers to the product made from/portion of the plant containing THC
- “Hemp” generally refers to the product made from/portion of the plant containing CBD – by definition hemp contains less than 0.3% THC
- Marijuana = higher THC, lower CBD; Hemp = higher CBD, lower THC (can be lots of variations)
- Policies should refer to cannabis.

Definition of “Drug”

- “Drug” means a controlled substance but **does not include** marijuana, tetrahydrocannabinols, cannabis flower, cannabis products, lower-potency hemp, and hemp-derived consumer products.
- Marijuana removed from the Schedule I list of drugs (under state law)
- For purposes of policies, cannabis is now considered separate from drugs.

Consumable Products Act (“CPA”)

Minn. Stat. 181.938, subd. 2. Prohibited practice. (a) An employer may not refuse to hire a job applicant or discipline or discharge an employee because the applicant or employee engages in or has engaged in the use or enjoyment of lawful consumable products, if the use or enjoyment takes place off the premises of the employer during nonworking hours. For purposes of this section, "lawful consumable products" means products whose use or enjoyment is lawful and which are consumed during use or enjoyment, and includes food, alcoholic or nonalcoholic beverages, ~~and~~ tobacco, cannabis flower, as defined in section 342.01, subdivision 16, cannabis products, as defined in section 342.01, subdivision 20, lower-potency hemp edibles as defined in section 342.01, subdivision 50, and hemp-derived consumer products as defined in section 342.01, subdivision 37.

(b) Cannabis flower, cannabis products, lower-potency hemp edibles, and hemp-derived consumer products are lawful consumable products for the purpose of Minnesota law, regardless of whether federal or other state law considers cannabis use, possession, impairment, sale, or transfer to be unlawful. Nothing in this section shall be construed to limit an employer's ability to discipline or discharge an employee for cannabis flower, cannabis product, lower-potency hemp edible, or hemp-derived consumer product use, possession, impairment, sale, or transfer during working hours, on work premises, or while operating an employer's vehicle, machinery, or equipment, or if a failure to do so would violate federal or state law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations.

Consumable Products Act (“CPA”)

The Lawful Consumable Products Act is not about infringing upon an employer’s ability to control what happens on its own premises. However, it does protect what employees can do on their off time off an employer’s premises.

DATWA

"Drug" means a controlled substance as defined in section 152.01, subdivision 4, but does not include marijuana, tetrahydrocannabinols, cannabis flower, cannabis products, lower-potency hemp edibles, and hemp-derived consumer products.

DATWA

"Drug and alcohol testing" does "not include cannabis or cannabis testing, unless stated otherwise."

DATWA

- Cannabis is, generally, separate from drugs and alcohol— “cannabis testing” and “drug and alcohol testing”
- There are exceptions under which cannabis is still treated as a “drug”
- Reasonable suspicion testing, random (safety-sensitive positions), and treatment program testing primarily functioning the same

Applicants – New!

Limitations on cannabis testing. (a) An employer must not request or require a job applicant to undergo cannabis testing solely for the purpose of determining the presence or absence of cannabis as a condition of employment unless otherwise required by state or federal law.

(b) Unless otherwise required by state or federal law, an employer must not refuse to hire a job applicant solely because the job applicant submits to a cannabis test or a drug and alcohol test authorized by this section and the results of the test indicate the presence of cannabis.

(c) An employer must not request or require an employee or job applicant to undergo cannabis testing on an arbitrary or capricious basis.

(d) Cannabis testing authorized under paragraph (d) must comply with the safeguards for testing employees

Applicants Con't

- Remember the CPA prohibits employers from infringing upon off-duty, off-premises use of cannabis.
- For non-safety-sensitive positions (or other applicable exceptions), you should no longer be testing applicants for cannabis, and if it shows up, you should not take an adverse action based on that result.

Let's Talk Exceptions!

For the following positions, cannabis and its metabolites are considered a drug and subject to the drug and alcohol testing (for applicants and employees):

1. a safety-sensitive position;
2. a peace officer position;
3. a firefighter position;
4. a position requiring face-to-face care, training, education, supervision, counseling, consultation, or medical assistance to:
 1. children;
 2. vulnerable adults; or
 3. patients who receive health care services from a provider for the treatment, examination, or emergency care of a medical, psychiatric, or mental condition;
5. a position requiring a commercial driver's license or requiring an employee to operate a motor vehicle for which state or federal law requires drug or alcohol testing of a job applicant or an employee;
6. a position of employment funded by a federal grant; or
7. any other position for which state or federal law requires testing of a job applicant or an employee for cannabis.

Potential Issues with Drug Testing

- Commercial drug tests aim to pick up THC, not CBD
 - But “false positives” can happen
 - CBD products can have THC in them because of the lack of regulation
- THC can remain in the system for thirty (or so) days
 - It is stored in body fat, which then slowly releases into the bloodstream
 - Unlike alcohol, there is no generic rubric about consumption v. impairment

What About Drug and Alcohol Policies

- One primary danger is that your existing policy is overbroad (or not specific enough)
- Consider the following examples:
 - The policy prohibits the use of controlled substances unless prescribed by a physician
 - The policy prohibits the use of illegal drugs and alcohol
 - The policy prohibits the use of drugs, cannabis, and alcohol while employed with XYZ Company
- What is the intent of the policy?

Additional Limitations for Cannabis

An employer may discipline, discharge, or take other adverse personnel action against an employee for cannabis flower, cannabis product, lower-potency hemp edible, or hemp-derived consumer product use, possession, impairment, sale, or transfer while an employee is working, on the employer's premises, or operating the employer's vehicle, machinery, or equipment as follows:

- (1) if, as the result of consuming cannabis flower, a cannabis product, a lower-potency hemp edible, or a hemp-derived consumer product, the employee does not possess that clearness of intellect and control of self that the employee otherwise would have;
- (2) if cannabis testing verifies the presence of cannabis flower, a cannabis product, a lower-potency hemp edible, or a hemp-derived consumer product following a confirmatory test;
- (3) as provided in the employer's written work rules for cannabis flower, cannabis products, lower-potency hemp edibles, or hemp-derived consumer products and cannabis testing, provided that the rules are in writing and in a written policy that contains the minimum information required by section 181.952; or
- (4) as otherwise authorized or required under state or federal law or regulations, or if a failure to do so would cause an employer to lose a monetary or licensing-related benefit under federal law or regulations

Medical Cannabis

Minn. Stat. 342.57, subd. 5. Employment. (a) Unless a failure to do so would violate federal or state law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based on:

- (1) the person's status as a patient enrolled in the registry program; or
- (2) a patient's positive drug test for cannabis components or metabolites, unless the patient used, possessed, sold, transported, or was impaired by medical cannabis flower or a medical cannabinoid product on work premises, during working hours, or while operating an employer's machinery, vehicle, or equipment.

(b) An employee who is a patient and whose employer requires the employee to undergo drug testing according to section 181.953 may present the employee's registry verification as part of the employee's explanation under section 181.953, subdivision 6.

Subd. 7. Action for damages. In addition to any other remedy provided by law, a patient may bring an action for damages against any person who violates subdivision 3, 4, or 5. A person who violates subdivision 3, 4, or 5 is liable to a patient injured by the violation for the greater of the person's actual damages or a civil penalty of \$100 and reasonable attorney fees.

Designated Smoking Areas

The new cannabis law adopts the Minnesota Clean Indoor Air Act, which prohibits smoking in places of employment.

An individual may not “use cannabis flower, cannabis products, or hemp-derived consumer products in a manner that involves the inhalation of smoke, aerosol, or vapor at any location where smoking is prohibited under the clean air act.”

Remember an employer does not have to permit cannabis on its premises, so you don't have to allow cannabis smoking just because you permit cigarette smoking in designated areas.

****Duty to post signage in accordance with the Minnesota Clean Indoor Air Act remains.**

Federal Contracts

Marijuana is still illegal under federal law, so employers regulated by federal contractor or federal drug testing requirements (or federal DOT regulations) must comply with federal law.

Unions – Collective Bargaining Agreements

Largely unchanged:

DATWA “shall not be construed to limit the parties to a collective bargaining agreement from bargaining and agreeing with respect to a drug and alcohol testing or a cannabis testing policy that meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection provided in those sections.”



Questions?

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