

With Wide-Spread Legalization of Marijuana, Has A Public Employer's Ability to Test for Marijuana Gone up In Smoke?

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As of the November 2018 elections, the District of Columbia and ten states have legalized marijuana for recreational or other permissible use. Canada also implemented nation-wide legalization of marijuana for recreational use as of October 17, 2018. These developments have left many employers wondering whether they may enforce the employer's drug policy with respect to employees or applicants who claim they visited one of the aforementioned locations and, upon return, test positive for tetrahydrocannabinol (commonly referred to as "THC")—the active ingredient in marijuana.

The answer ultimately is "yes," the employer may enforce the employer's drug policy with respect to such employees and applicants; however, there are a few legalities to be aware of.

The Wisconsin Fair Employment Act, Wis. Stat. §§ 111.321 and 111.322, prohibits an employer from taking employment action against or refusing to hire any individual on the basis of the employee's use of lawful products off the employer's premises during nonworking hours. While the WFEA does not define the term "product," court and administrative decisions suggest it refers to tangible items, and it seems likely that marijuana would qualify as a "product."

Nonetheless, Wis. Stat. § 111.35(2)(e) states that it is not employment discrimination to take employment action against or refuse to hire any individual on the basis of their use of a lawful product off the employer's premises during nonworking hours if such use conflicts with any federal or state statute, rule, or regulation. Wisconsin and federal law both classify THC as a Schedule I controlled substance. This means that it is illegal in Wisconsin under both state and federal law to use marijuana or other products containing THC. In turn, employers are permitted to draft and enforce zero tolerance drug policies with respect to employees and applicants who test positive for THC because they consumed it in another locality where recreational use is legal or brought it back to Wisconsin and used such product here.

However, public-sector employers must remain aware of the Fourth Amendment's prohibition on unreasonable searches. It is generally illegal for public-sector employers to conduct drug tests of employees unless the employer has reasonable suspicion that an employee is engaging in drug use that affects the employee's ability to perform his or her job responsibilities. That said, public-sector employers are permitted to conduct random drug tests of employees serving in "safety sensitive" positions and those employees who hold a Commercial Driver's License ("CDL"). The United States Supreme Court has held that "safety sensitive" positions are those "fraught with such risks of injury to others that even a momentary lapse of attention could have disastrous consequences." *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989). Police officers and firefighters would certainly qualify, and other positions may as well.

Whether you are conducting random or reasonable suspicion testing, it is imperative that you ensure the test is truly random or based on reasonable suspicion and that it adheres to your policies and procedures. With regard to reasonable suspicion testing, it is important to understand that an employee's trip to a state or country that permits recreational marijuana use does not by itself constitute reasonable suspicion. On the other hand, if an employee travels to such a state or country and then comes into work smelling of marijuana or shows other signs of impairment, reasonable suspicion exists and a test may be conducted regardless of the origin of the marijuana. With regard to random testing, if an employee recently traveled to a state or country with recreational marijuana, they may be tested upon return only if they are truly selected on a random basis. Failure to adhere to the random selection process could bring rise to a Fourth Amendment violation.

So, Now What?

1. Employers should review their policies to ensure they clearly state the presence of any controlled substance, including but not limited to, THC, in employees and applicants is strictly prohibited.
2. Employer policies should also clearly state that the presence of any controlled substance in an employee's system may result in discipline, up to and including, termination.
3. Employers should train employees to help those employees understand that even off-duty recreational use of marijuana in states and countries permitting such use may still detrimentally affect the employee's job if the employee fails to comply with the employer's policies.
4. Employers should reaffirm to employees that safe employment practices are paramount and that this valuable interest benefiting all employees must be remembered by all employees.
5. Employers should remind employees that off-duty behavior by employees that reflects negatively on the employer and brings the employer or employee into disrepute may be regulated by the employer. The employee's use of an otherwise "lawful" product does not shield the employee from behaviors the employee may engage in to the detriment of the employer's interests.
6. If questions arise as to whether a particular employee occupies a "safety sensitive" position, then the employer should contact legal counsel prior to including that employee in a random drug testing program.

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