

HR Insights

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Reviewing Preemployment Drug Testing Policies to Comply With Marijuana Laws

There's currently a patchwork of marijuana-related laws throughout the United States. While marijuana, including medical marijuana, remains illegal under federal laws, many states have legalized medical and/or recreational marijuana, decriminalized the drug or enacted workplace protections for its usage. As more states legalize marijuana and expand workplace protections regarding its usage, ensuring compliance with federal, state and local laws remains a challenge for employers.

Moreover, attitudes throughout the United States surrounding marijuana use have shifted, causing some employers to change their drug testing policies. Many organizations have altered their marijuana testing policies in recent years. Five years ago, many employers would likely have terminated an employee for testing positive for marijuana; today, state and local laws, as well as other considerations, are forcing organizations to proceed with more caution. As a result, many employers are reevaluating their preemployment marijuana drug testing policies.

This article outlines considerations for employers when reviewing their preemployment drug testing policies. Due to the complex nature of marijuana-related laws, employers are encouraged to consult with local legal counsel regarding any questions or concerns.

Increased Protections for Marijuana Usage

In addition to states that are either legalizing or decriminalizing marijuana use, an increasing number are

adopting workplace protections for employee marijuana use. While the protections vary, these laws may require employers to treat marijuana usage like other medications. As a result, employers may need to accommodate employee marijuana usage or be prevented from taking adverse action based solely on a positive drug test.

Importantly, state laws vary on when a positive marijuana drug test can be used to discipline or as the basis to refuse to hire an individual. The laws can limit or determine what actions an employer can take before adversely impacting the employment of an individual who has tested positive for marijuana. For example, New York City and Philadelphia prohibit preemployment drug testing for marijuana. Additionally, Nevada bans employers from taking an adverse employment action based on a positive preemployment marijuana test result. Therefore, it's vital that employers familiarize themselves with all applicable state and local marijuana laws as well as drug testing requirements. Additionally, they should review their workplace drug policies and procedures to ensure they comply with any state and local legal requirements.

Marijuana Testing Issues

Marijuana presents certain challenges for employers in terms of drug tests, as it can often produce inaccurate or unreliable results. Currently, most drug tests can only show the presence of tetrahydrocannabinol, or THC—a psychoactive compound found in marijuana—in a person’s system at the time of testing; however, they are not able to accurately determine the level of an individual’s impairment or intoxication. For instance, marijuana can stay in urine samples for up to a month or longer and in hair samples for a year. Additionally, individuals metabolize cannabinoids differently, and drug tests cannot capture or process these differences, leading to unreliable test results. Further, cannabinoid components, including legal substances such as CBD, can produce false positive results, making it difficult for employers to be confident in test results.

To address these issues, some employers rely on objective indicators and observations in addition to positive drug test results. This can include the following:

- Unusual behavior
- Dizziness
- Strong odors
- Dilated eyes
- Impaired speech
- Blank or confused facial expressions

Saliva tests have been shown to be more accurate at detecting marijuana usage within 24 hours. As a result, employers are increasingly relying on these tests. Even the U.S. Department of Transportation has recently changed its drug testing requirements to use saliva tests to detect marijuana.

Workplace Safety Concerns

Even in states that have legalized or decriminalized marijuana usage, there are certain exemptions regarding workplace protections for marijuana usage. These typically include carve-outs for safety-sensitive positions or jobs involving driving or piloting vehicles. However, in many cases, preemployment drug tests

may not be a reliable indicator of potential future workplace safety issues. Instead, employers are implementing reasonable suspicion and post-accident drug testing policies to address workplace safety issues. Organizations can also develop separate workplace policies for safety-sensitive positions. Under these policies, job positions are treated differently based on whether their requirements and duties involve legitimate safety concerns, such as operating heavy machinery. This can be an effective way for employers to protect employees and customers as well as reduce potential legal risks.

Strategies for Preemployment Marijuana Testing Policies

While more accurate testing measures can provide employers with results they can confidently rely on, many employers may hesitate before taking adverse employment action against an applicant in response to a positive test result due to ever-changing marijuana regulations. Because of the legal complexities and potential future compliance obligations surrounding the drug, there is no one-size-fits-all approach to preemployment marijuana testing. Instead, employers should consider which option best serves their organization and specific business needs.

The best practices for employers that conduct drug testing for marijuana will depend heavily on the applicable state laws; nonetheless, the following is general guidance for employers when reviewing and implementing preemployment marijuana testing policies:

- Apply state and local policies and practices to preemployment testing.
- Adopt policies and practices that comply with the most restrictive laws for any states and localities where an employer operates.
- Employ an “as-needed” approach to required preemployment marijuana testing based on business necessity.
- Eliminate preemployment marijuana testing in states and localities where there is no legal testing requirement.

Employers operating in multiple states should review their policies to ensure they comply with all applicable state and local requirements. Some organizations that operate in multiple states may decide to implement a universal policy that applies to all employees regardless of location or adopt state-specific policies depending on where employees work. If employers decide to forgo preemployment testing altogether, they should determine whether doing so may expose their organizations to legal risks, such as claims of negligent hiring.

Additionally, accommodating employee marijuana usage does not mean employers must tolerate unsafe work environments or individuals working under its influence. Most state laws, even those permitting medical and/or recreational marijuana usage, do not permit individuals to use marijuana while at work or during work hours.

Summary

The expanding network of marijuana laws in the United States is forcing many employers to reevaluate their workplace policies, including preemployment drug testing. Rescinding a job offer due to a positive marijuana result could expose an organization to legal risks and liabilities, including civil fines, lost wages, compensatory damages and attorneys' fees. This is a rapidly changing area of law, so it's critical that employers regularly review their workplace policies to ensure they comply with the most current marijuana and drug testing laws. Employers should monitor state and local laws for further developments.

For more workplace resources related to medical or recreational marijuana use, contact Employco USA, Inc. today.