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Cannabis

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Cannabis Concerns? Employer Strategies for Maintaining a Safe Workplace

Approximately 70% of the U.S. population live in states that have legalized some form of marijuana. Only a few states have not legalized marijuana for medical or recreational use, but these sober-state employers still face complex employment issues arising from worker use of cannabis products. For construction employers in particular, the duty to maintain a safe workplace makes handling these complex issues all the more important.

Support and usage on the rise

Public support and the legalization of marijuana in over 50% of the states in the U.S. is reflected in the yearly drug testing index published by Quest Diagnostics. The 2019 Quest Diagnostics Drug Testing Index, based on results from a sample of over 10 million workplace drug tests, established that marijuana was one of the most commonly detected illicit substances across all workforce categories, including safety-sensitive positions, and had the highest positivity rates. The construction sector “experienced a growth rate for the years 2015-2018 in marijuana positivity of 46.7%... compared to the overall growth rate of 7.7% observed in the general U.S. workforce during the same period of time.” Quest also concluded that positive test results for marijuana related to workers in safety-sensitive positions and federally mandated testing occupations rose nearly 24% since 2014.

While the data provides information on usage, there’s no direct corollary to on job impairment rates. Because THC metabolites are stored in the fatty tissue in the body and released over a period that ranges from hours to weeks, an individual can test positive for the presence of marijuana long after it’s ingested but not be impaired. The level and duration of impairment of an

individual depends on a combination of factors including the type of cannabis product used and the individual's ability to metabolize the THC. Impairment of an individual can vary from between 5-8 hours and can manifest in various symptoms such as delayed reaction time, and altered sensory perceptions, as well as affect cognitive functions such as short-term memory and the ability to process and analyze information.

What's the difference between marijuana and CBD?

Cannabis is a broad term that refers to the cannabis sativa L. plant which has psychoactive and non-psychoactive properties. Marijuana and industrial hemp are derived from separate strains of the cannabis sativa L. plant with different chemical and genetic compositions. Both marijuana and industrial hemp contain biologically active chemical compounds called cannabinoids, such as CBD and delta-9-tetrahydrocannabinol (THC). The primary difference between marijuana and industrial hemp is that marijuana contains high levels of the psychoactive chemical compound THC which produces the intoxicating effect or "high" when ingested. In contrast, industrial hemp is a commodity crop which contains low levels of THC and high levels of CBD. Industrial hemp products include textiles, fiber, oil seed, livestock feed and CBD. Until recently, however, both marijuana and industrial hemp were designated as Schedule I controlled substances under the federal Controlled Substances Act.

Their joint designation as a Schedule I drug ended in 2018, when the Farm Bill was signed into law. The Farm Bill delisted industrial hemp as a Schedule I drug and excluded THC in industrial hemp from the definition of THC as listed in Schedule I of the Controlled Substances Act. As a result, marijuana is defined as any cannabis sativa plant with a THC level of greater than .3% THC. To be classified under the statute as industrial hemp, the cannabis plant and any part of the plant must have a THC concentration of not more than .3% on a dry weight basis and be grown pursuant to a valid license.

Despite CBD's delisting as a Schedule I drug, cannabis products, including CBD, lack regulatory oversight. This lack of government oversight and regulation regarding the marketing and sale of CBD has resulted in quality and purity issues, according to the May 2019 FDA hearing on Scientific Data and Information about Cannabis and Cannabis Derived Products. Indeed, news reports have indicated that individuals using CBD have tested positive for THC in employment drug screenings and random testing without realizing that they have ingested THC. Highly sensitive drug screening tests may also detect diluted levels of THC from CBD use.

Bordering states: a look at Wisconsin and Illinois law

Wisconsin state law is consistent with federal law which provides that possession, use, sale and distribution of marijuana is *unlawful* and cannot be used for medical or recreational purposes by any

person. Violation of Wisconsin marijuana laws constitutes a state criminal offense, and the severity of the penalty depends on the amount of marijuana possessed, the number of repeat offenses, and the existence of an intent to sell or distribute the marijuana. Penalties range from misdemeanors to felonies and the imposition of substantial monetary fines. Several cities in Wisconsin, however, have passed ordinances decriminalizing the possession and use of small quantities of marijuana.

In contrast, the Wisconsin Uniform Controlled Substance Act was amended in 2017 to specifically exclude CBD that lacks psychoactive properties from the definition of tetrahydrocannabinols, and to enable doctors to recommend CBD to patients by issuing a written certification under state law permitting the possession and use of CBD products for certain medical conditions. The law was passed to permit patients struggling with debilitating medical conditions to use CBD as an alternative to more addictive or dangerous drugs.

In 2019, legislative and gubernatorial action in Wisconsin has signaled a prospective change in Wisconsin's marijuana laws. Governor Evers submitted a state budget with provisions to legalize the use of marijuana to alleviate the symptoms of certain medical conditions. His plan would have decriminalized offenses relating to small amounts of marijuana and provided for the expungement of certain prior convictions from individuals' records. Although the provisions of the Governor's plan were removed by state legislators, more recently, a bi-partisan group of legislators sponsored legislation that proposes to legalize medical marijuana under limited circumstances for specific medical conditions.

A Republican version of the bill was introduced on December 11, 2019, by Representative Mary Felzkowski and State Senator Kathy Bernier. The bill was quickly quashed by Senate Majority Leader Scott Fitzgerald who is personally opposed to legalization of medical marijuana. Assembly Speaker Robin Vos and Governor Tony Evers have both supported allowing some form of medical marijuana. The bill's provisions relating to employment law indicate that an employer would still be permitted to terminate an employee (or make other adverse employment decisions) based on an employee's marijuana usage – lawful or not – without running afoul of the Wisconsin Fair Employment Act. Similarly, an employee's marijuana usage that violates an employer's written drug policy would still constitute "misconduct," thereby disqualifying that employee from receiving unemployment insurance benefits and certain worker's compensation benefits under Wisconsin law.

Meanwhile, Wisconsin's neighbor to the south, Illinois, recently passed one of the most comprehensive laws in the U.S. legalizing the use of recreational marijuana. Beginning on January 1, 2020, Illinois residents and non-residents who are 21 years of age and older may legally purchase marijuana products up to a limited amount for recreational use. The Illinois law, however, also supports employers' right to maintain drug policies and a drug-free workplace, and to take adverse action against employees who are under the influence of marijuana on the job or violate employers'

drug policies. Illinois law broadly defines the employer's workplace to include areas such as parking lots, vehicles and other areas used by employees during the performance of their job, and permits employers to ban the use and storage of cannabis in the workplace, to make good faith determinations regarding impairment, and to discipline employees, including termination, for violating the employer's drug policies.

Lawful product?

As noted above, while marijuana remains an unlawful product in Wisconsin and at the federal level, recreational usage will soon be legal in Illinois. This presents a challenging issue for employers concerned with the Wisconsin Fair Employment Act which protects employees from discrimination arising out of their use or non-use of lawful products off the employer's premises during non-working hours. Fortunately, the WFEA provides some exceptions which may help employers navigate this "smoky" issue.

First, the WFEA provides an exception regarding the use of products that conflict with a federal or state statute. So, while Wisconsin case law indicates that marijuana would be considered a *product* for the purpose of WFEA, it would not be a *lawful* product as Wisconsin and federal law classify marijuana as a Schedule I controlled substance. Consequently, consumption of marijuana outside of the employer's premises would not be entitled to WFEA protection, even if consumed legally in Illinois. Note, however, if the employer-employee relationship is also subject to Illinois employment laws, employers will need to tread carefully before making employment decisions.

The WFEA also provides exceptions to support employers' right to enforce drug policies against employees who are impaired as a result of marijuana usage or whose bona-fide occupational qualifications conflict with marijuana usage, *i.e.* safety-sensitive positions. These exceptions support Wisconsin employers' right to control the health and safety of their workplace. Wisconsin employers should clearly identify their safety-sensitive positions to ensure protection under these exceptions.

What about CBD?

CBD is considered a lawful product under Wisconsin law, and hemp-derived CBD is lawful under federal law so long as it is properly sourced. Lawful CBD usage under Wisconsin law is limited to those individuals who have a certification from their doctor recommending its usage. An employee's use of CBD outside of the employer's premises and in conformity with the law's requirements appears to be protected under WFEA so long as the employee is not otherwise impaired, or the use of CBD does not conflict with a bona-fide occupational qualification. Employers must also recognize that the underlying medical condition for which the employee is using CBD may constitute a disability under

WEFA and require the employer to engage in an interactive process with the employee to accommodate the underlying disability.

Best practices for sober-state employers

Employers should evaluate and revise their drug policies to comply with the law and protect the health and safety of their workplace. CBD legalization some medical conditions, public support for legalization of marijuana, and regional trends provide employers with an even greater incentive to plan strategies and establish workplace policies that are clear and specific. Employers remain in control of their workplace drug policies. We recommend the following best practices to maintain and control safety in their workplace:

1. Identify all jobs that are safety-sensitive positions and that require drug testing under federal law and modify such job descriptions to inform applicants that hiring and maintaining their job is contingent on testing negative for illegal substances, including marijuana.
2. Establish a clear policy for employees regarding drug use in the workplace and communicate the policy to employees; define the terms marijuana, THC, and CBD; educate employees on safety and productivity risks; identify the consequences for being under the influence of marijuana or other drugs; disclose the administration of drug screening tests and consistently apply such screening tests. Employers should consider whether a zero-tolerance drug policy is desired for their workplace. An employer can choose to eliminate marijuana from pre-employment drug screening tests for jobs that do not require drug screening tests or are not considered safety-sensitive positions.
3. Employers may discharge employees who use or possess marijuana in the workplace. Discharge of an employee for such conduct is permitted under the law and may even be permitted in states that have legalized marijuana for recreational or medical purposes. Employers should treat use and possession of marijuana in the workplace like alcohol for employment purposes.
4. For employees who test positive for marijuana as a result of a drug test based on reasonable suspicions of intoxication or for being under the influence at work, an employer is permitted to discharge the employee. Similar to use and possession of alcohol at work, an employer is not required to tolerate employees who are intoxicated at work. Employers should maintain a written record of the observable, specific symptoms that gave rise to the reasonable suspicion of intoxication and the use of a drug test.
5. For employees who are subject to random or pre-employment testing that test positive for marijuana, an employer can refuse to hire or discharge the employee based on the positive test.

For safety-sensitive positions, federal contractors, or federal positions that require drug testing, an employer has no choice but to refuse to hire or discharge the employee who tests positive for marijuana.

6. For employees who use CBD to treat a medical condition and request an accommodation, employers must exercise caution. In most cases, if the CBD user tests positive for marijuana on a drug screening test, an employer may terminate the employee. If the employee requests an accommodation for off duty CBD usage to treat a medical condition and complies with state law, an employer should engage in an interactive process with the employee to accommodate the employee's underlying disability.

The evolving law and changes in public acceptance of marijuana usage present challenging employment issues. Preparation and consistent application of best practice strategies will diminish safety risks, maintain worker productivity, and protect employee rights while ensuring continued control over your workplace.

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