

Washington State to Bar Employers From Relying on Off-Duty Use of Marijuana in Hiring Decisions

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The state of Washington will prohibit employers from making hiring decisions based on off-duty use of cannabis or positive pre-employment drug test results that find an applicant to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids. The new law ([SB 5123](#)) takes effect on January 1, 2024.

Noting that recreational cannabis was legalized in Washington in 2012 and that it should now be treated like alcohol (also a legal substance), the new law is intended to prevent restricting job opportunities based on an applicant's past use of cannabis.

Cannabis metabolites can stay in the body for long periods of time and most drug tests will detect nonpsychoactive cannabis metabolites for up to 30 days after use. Past use of marijuana has no correlation to an applicant's future job performance given that marijuana is a legal substance.

The law does not prohibit employers from basing initial hiring decisions on scientifically valid drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites. Like a similar [California law](#) that also will take effect in 2024, the Washington law contains no explanation of what is meant by "nonpsychoactive cannabis metabolites" and, presently, there are no drug tests that can distinguish between psychoactive metabolites (those that create a "high") and nonpsychoactive metabolites. If no such drug tests are developed by January 1, 2024, Washington employers will not be able to test for marijuana on pre-employment drug tests.

The law further states that it does not prohibit employers from maintaining a drug and alcohol-free workplace and does not affect any other rights or obligations of an employer required by federal law or regulation.

Employers still may drug test for marijuana on tests other than pre-employment, such as post-accident and reasonable suspicion. Additionally, employers still may test for other drugs, as well as alcohol.

The law does not apply to applicants seeking:

- Positions requiring a federal government background investigation or security clearance;
- Certain law enforcement positions;
- Certain fire department positions;
- First responders (including 911 dispatchers) positions;
- Corrections officers positions;
- Positions in the airline or aerospace industries;
- Safety-sensitive positions for which impairment while working presents a substantial risk of death. Such safety-sensitive positions must be identified by the employer prior to the applicant's application for employment.

The law does not preempt state or federal laws requiring an applicant to be tested for drugs. This includes testing that is related to the receipt of federal funding or federal licensing-related benefits or as required by a federal contract.

It is permissible to test applicants for cannabis, as long as the test result is not provided to the employer.

Washington employers should review their drug and alcohol testing policies to ensure that they will comply with the law as of January 1, 2024.

Please contact a Jackson Lewis attorney with any questions about this and other workplace developments.

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