Legal Update Article

Marijuana in the Manufacturing Workplace

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The requirement to maintain a safe workplace often clashes with state and local laws that protect the rights of individuals who use marijuana while off-duty, creating unique challenges for manufacturing employers.

Manufacturing employers still may prohibit the use of marijuana at work, as well as marijuana impairment at work. But marijuana drug testing is complicated and controversial because of the legal protections for off-duty marijuana use in some states and cities, the legal protections for medical marijuana users in many jurisdictions, and because there are no drug tests that can detect current marijuana impairment or very recent use of marijuana.

Federal Law

Manufacturers no longer should defend "zero tolerance" marijuana drug testing policies. Previously, employers could argue that marijuana still is illegal under federal law or that the employer is a federal contractor that must comply with the federal Drug-Free Workplace Act. The federal government has not enforced the law that makes marijuana illegal for some time, and it has permitted states to create and enforce their own laws with respect to medical and recreational marijuana.

Some courts have recognized that the federal government is allowing state governments to regulate marijuana and, therefore, courts are enforcing state marijuana laws despite marijuana's illegal status at the federal level. Courts also have rejected arguments that federal contractors "must follow federal law" because the federal Drug-Free Workplace Act does not require drug testing and does not permit employers to regulate off-duty conduct.

State Laws

At present, 39 states and the District of Columbia have medical marijuana laws, while 22 states and the District of Columbia have recreational marijuana laws (Maryland's law will take effect in July and others will be enacted in the coming months). Many of these laws provide employment protections to applicants and employees. The variations in the laws make it difficult for multi-state manufacturers to have consistent marijuana policies in all locations.

What It Means for Employers

Due to the recent trend in some states to protect off-duty use of marijuana, and even prohibiting pre-employment marijuana testing, many manufacturers are discontinuing pre-employment marijuana testing, especially in states where marijuana is legal. Applicants often are surprised to learn that a positive marijuana drug test will lead to withdrawal of the job offer. If the positive marijuana drug test result is due to medical use (and there are no general off-duty protections in the state), manufacturers must be familiar with the applicable law.

Some states prohibit discrimination against medical marijuana users, while other states

may allow an employer to take an adverse employment action if the job is considered "safety-sensitive," *i.e.*, a job with dangerous duties, as defined by applicable state law.

In certain other states where discrimination is prohibited and the manufacturing employer has safety concerns, the employer should engage in the "individualized assessment" and "direct threat analysis" required under state laws that mirror the federal Americans With Disabilities Act. This process includes discussions with the applicant and the applicant's physician to assess the safety risk.

Reasonable suspicion marijuana testing is permissible in most states because impairment at work never is permitted. In states where off-duty marijuana use is protected, manufacturers should rely on the impaired behaviors when taking disciplinary action, rather than rely solely on the positive marijuana drug test result (assuming that testing for marijuana is permitted). This is because marijuana stays in the human body for a long time, so the positive drug test result is not conclusive proof that the employee was impaired at work. Manufacturers also should make sure that supervisors and managers are trained to observe and document reasonable suspicion determinations properly, as these documented observations will be key evidence in a potential lawsuit.

To make matters even more complicated, CBD (cannabidiol), "low THC," and hemp products are being marketed and sold everywhere since Congress legalized hemp (having no more than 0.3 percent THC, the psychoactive component of marijuana) in 2018. Separate from marijuana laws, the use of "low THC" or CBD products is allowed in a number of states, usually for medical purposes, which means that manufacturing employers should tread carefully when an applicant or employee claims to use CBD products for medical reasons. While many CBD and hemp products are marketed as having little or no THC, these statements may not be true, because the U.S. Food and Drug Administration does not yet regulate them. These products may cause positive drug test results for marijuana. There has been an increase in lawsuits where former employees claim that their positive marijuana drug test results allegedly were caused by CBD products.

While it appears that marijuana eventually will be legalized at the federal level, manufacturers must ensure they are complying with all applicable laws. Manufacturing employers should:

- Review drug and alcohol policies for compliance with applicable drug testing and marijuana laws;
- Remove marijuana from the drug testing panel in locations where testing for marijuana is prohibited and locations where off-duty use is protected and consider removing it in other locations where it may be an obstacle in the hiring process;
- Train Human Resources employees and other managers to engage in the interactive process with employees who use medical marijuana (or medical CBD products); and
- Train supervisors to make appropriate and timely "reasonable suspicion" determinations.

Please contact a Jackson Lewis attorney with any questions.

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