

Minnesota Legalizes Recreational Marijuana, Protects Off-Duty Use

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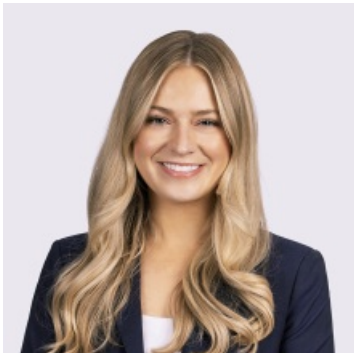
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Under a [new Minnesota law](#) legalizing recreational marijuana, beginning August 1, 2023, individuals 21 years of age or older may possess or transport up to two ounces of cannabis flower in public and to possess up to two pounds of cannabis flower in the individual's private residence, among other things.

Minnesota has had a medical cannabis law since 2014 that prohibits discrimination against medical cannabis patients.

In addition, the state will protect all employee off-duty use of cannabis as of August 1, 2023.

Protections for Off-Duty Use

The new law amends Minnesota's Consumable Products Act (CPA), which prohibits employers from disciplining or discharging employees (or refusing to hire applicants) who use "lawful consumable products" outside of work.

Effective August 1, 2023, the term "lawful consumable products" will specifically include cannabis flower, cannabis products, lower-potency hemp edibles, and hemp-derived consumer products, as such terms are defined by Minnesota law. The law goes even further to explicitly provide that the aforementioned products are considered lawful consumable products under Minnesota law "regardless of whether federal or other state law considers cannabis use, possession, impairment, sale, or transfer to be unlawful."

However, nothing in the newly amended CPA prohibits employers from taking action against employees who use, possess, sell, transfer, or are otherwise impaired by such lawful products while working, while on work premises, or while operating an employer's vehicles, machines, or equipment. Similarly, employers may continue prohibiting the use of such products if failing to do so would violate another federal or state law or regulation or cause the employer to lose money or any licensing-related benefit under federal law or regulations.

The existing exceptions to the general prohibition on employer restrictions of lawful consumable products during nonworking hours outlined in the CPA will remain in place.

Updates to Drug and Alcohol Testing in the Workplace Act

Effective August 1, 2023, the law makes substantial changes to the Minnesota Drug and Alcohol Testing in the Workplace Act (DATWA), which already imposes significant restrictions on employer drug testing. The changes apply to cannabis flower, cannabis products, lower-potency hemp edibles, and hemp-derived consumer products.

Generally, employers may no longer require or request pre-employment cannabis testing or refuse to hire an applicant solely because the applicant tested positive for cannabis on a pre-employment test. Similarly, employers may no longer require routine physical

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examination cannabis testing for most positions, nor can they require cannabis testing on an arbitrary or capricious basis.

However, employers may continue pre-employment and routine physical examination cannabis testing for the following positions:

- A safety-sensitive position (i.e., a job in which an impairment caused by drug, alcohol, or cannabis usage would threaten the health or safety of any person);
- A peace officer position;
- A firefighter position;
- A position requiring face-to-face care, training, education, supervision, counseling, consultation or medical assistance to: children, vulnerable adults, or patients who receive health care services from a provider for the treatment, examination, or emergency care of a medical, psychiatric, or mental condition;
- A position requiring a commercial driver's license or requiring an employee to operate a motor vehicle for which state or federal law requires drug or alcohol testing of a job applicant or an employee;
- A position of employment funded by a federal grant; or
- Any other position for which federal law requires testing of a job applicant for cannabis.

For the above positions, employers can continue treating cannabis like other drugs for purposes of DATWA.

Employers may continue random cannabis testing for safety-sensitive positions and professional athletes subject to a collective bargaining agreement that permits random testing.

Employers may also continue reasonable suspicion cannabis testing (which includes post-accident testing) and treatment program cannabis testing (as defined by the law).

Unless otherwise provided by state or federal law, employers are not required to permit or accommodate cannabis use, possession, impairment, transfer, or sale while an employee is working or while an employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment. However, employers may only enact and enforce rules regarding cannabis use, transfer, sale, possession, or impairment while an employee is working or while an employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment, and the policy must contain the minimum information required by DATWA.

1. If an employee uses, possesses, sells, transfers or is impaired by cannabis while working, on the employer's premises, or operating the employer's vehicle, machinery, or equipment, the employer can discipline, discharge or take other adverse action:
2. If, as a result of consuming cannabis, the employee does not possess that clearness of intellect and control of self that the employee otherwise would have; If cannabis testing verifies the presence of cannabis following a confirmatory test;
3. If the employer's written work rules for cannabis apply to such conduct and the policy complies with DATWA; or
4. If the employer is otherwise authorized or required to do so under state or federal law or regulations, or if a failure to do so would cause an employer to lose a monetary

of licensing-related benefit under federal law or regulations.

However, employers should keep in mind that DATWA requires employers to offer rehabilitation in lieu of termination to employees who test positive for drugs or alcohol for the first time, including cannabis.

Given the intricacies of DATWA, employers should consult with counsel about updating their drug testing policies to comply with the changes.

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