

Podcast

California and Washington's Controversial 2024 Marijuana Laws: Are You Ready?

By Kathryn J. Russo & Catherine A. Cano

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Meet the Authors



Kathryn J. Russo

(She/Her)

Principal

(631) 247-4606

Kathryn.Russo@jacksonlewis.com



Catherine A. Cano

Principal

(402) 391-1991

Catherine.Cano@jacksonlewis.com

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More and more states continue to enact new marijuana laws to reflect a greater degree of tolerance. Not surprisingly California and Washington are taking the lead in a more progressive and pro-employee approach beginning in 2024. Employers in these states will have to change the way they conduct marijuana drug testing, if they conduct it at all.

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Transcript

Alitia Faccone:

Welcome to Jackson Lewis's podcast We Get Work. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution, and helps answer the question on every employer's mind, how will my business be impacted?

More and more states continue to enact marijuana laws to reflect a greater degree of tolerance. Not surprisingly, California and Washington are taking the lead in a more progressive and pro-employee approach beginning in 2024. Employers in these states will have to change the way they conduct marijuana drug testing if they conduct it at all. For example, California will prohibit employers from discriminating against job applicants based on information regarding prior use of cannabis discovered from an individual's background check. California will also restrict the way that employers will be able to drug test for marijuana. Washington will have a similar marijuana drug testing law, but it will be limited to pre-employment drug testing.

On this episode of We Get Work, we discuss the controversy surrounding these new laws and how employers should handle marijuana drug testing going forward. Our hosts today are Kathryn Russo and Catherine Cano Principals in the Long Island and Omaha offices of Jackson Lewis. Catherine with a K helps clients navigate workplace problems involving drugs and alcohol. She

defends employers in litigation where drug and alcohol test results are at issue and frequently conducts reasonable suspicion training for employers concerning their substance abuse policies. Catherine with a C counsels clients on workplace drug and alcohol issues, including developing substance abuse policies and helping them comply with the Americans with Disabilities Act, family and Medical Leave Act, and state disability and leave laws.

Kathryn and Catherine, the question on everyone's mind today is how are California and Washington changing marijuana drug testing laws and how does that impact my business?

Kathryn Russo:

Hi everyone, this is Kathryn Russo. I'm here today with my partner Catherine Cano, and we are talking about our favorite topic, marijuana. It seems like the questions about marijuana are never ending, but today our real focus is going to be on the two new laws that are effective on January 1st, 2024. There's a law in California and another law in Washington, and these marijuana laws are very different from most of the other state marijuana laws that have come along before them. And because they're so unusual, we thought it was probably a good idea for us to do this podcast today to talk about what the laws say, what they mean, what we think they mean, because they're not 100% clear. So that's our agenda. So I'm going to start off talking about California and then Catherine will talk about Washington. And then after that, we'll go into some more analysis of how do we think employers can comply with these laws, because it really isn't crystal clear.

So let me start with California. There's actually two laws that will take effect on January 1st. The first one has to do with a ban on inquiries about applicant marijuana use. So as of January 1st, it will be unlawful for an employer to discriminate against a job applicant based on information about their prior use of cannabis that you learn from a criminal history. So if you learn in a criminal history that they were convicted or arrested for cannabis use, cannabis possession, you can't discriminate against them for those reasons.

Now, the other law, which is the bigger one that we have more concerns about because of all the drug testing issues, prohibits employment discrimination based on off-duty use of marijuana. California is going to join the group of states in 2024, and there was a bunch of them already, that are going to protect off-duty use of marijuana, and that is frustrating for employers from a drug testing perspective as we're going to get into. But just to start off, just be aware that you can't discriminate against people for their off-duty use. Now, you can, and we'll talk about this in a moment, you can still prohibit on-duty use. So people don't have the right to bring their marijuana to work and use it at work. But the real tricky part is if it's protected off-duty, then employers have to be careful about what do they do with a drug test.

Now, this California law then goes on to say that employers can't discriminate against people if they do a drug test that finds non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids. So in effect, if an employer wants to test for marijuana in California next year, you're only going to be able to do it if you're testing for psychoactive cannabis metabolites. We're

going to get into this more in a second, but psychoactive is the component that makes a person high. So as you may know, non-psychoactive means the metabolites that are in the human body that maybe were from past drug use a couple of weeks ago, but marijuana stays in the fatty tissue of the body for a long time. So the point of this law is if you're going to drug test people, you've got to be testing on the current presence of marijuana in their body, not something that they did days or weeks ago.

We're going to get into this more in a second. I want Catherine to talk about the Washington law, but the other thing I just want to say quickly is that the law does not apply to the building and construction trade. So if you're in that industry, lucky you. It doesn't apply to you. Certainly, this does not apply to any positions that are regulated by federal regulations like DOT or the Department of Defense or other federal agencies, or if there's any other reason, federal, law or state law, if there's any law that mandates testing, then this law does not apply to you. Unfortunately, for everybody else, which is a lot or most employers in California, you're going to have to comply with this law and you're not going to be able to test unless it's for the psychoactive components of cannabis only.

So we'll get into that more in a moment, but now I want to let Catherine talk about the Washington law.

Catherine Cano:

All right, well, Washington passed a very similar law to California, but it's targeting pre-employment testing. This law will also go into effect on January 1st, 2024.

The background here is that the Washington legislature had some concerns that applicants are being denied employment opportunities based on a test that might reflect cannabis use even a month before they are applying for this job or taking this drug test despite cannabis being legal in the state. So as of January 1st, Washington employers cannot discriminate in the initial hiring for employment based on the person's use of cannabis off the job and away from the workplace or based on an employer required drug test that is found non-psychoactive cannabis metabolites in the specimen.

There are some caveats here. First of all, the law does not restrict employers for making initial hiring decisions if that's based on a scientifically valid drug test using methods that are not screened for the non-psychoactive cannabis metabolites, so if they're testing for psychoactive cannabis metabolites. And this is also limited to pre-employment testing. So we are not talking post-accident, reasonable suspicion, et cetera.

There are several positions that are specifically accepted from the law, so DOT, those types of positions, anything where it's required by federal law to do drug testing. There are certain law enforcement positions, positions with the fire department, certain first responders. There's a list there. But there's also a general safety sensitive exception, and that covers positions for which impairment while working presents a substantial risk of death. An important note for employers in

Washington is if you intend to rely on that exception, you have to identify those positions prior to the applicant's application for employment.

So with that, Kathryn, do you have any more insight about this whole psychoactive and non-psychoactive metabolites aspect for us?

Kathryn Russo:

Yeah. Part of the problem and why this has become so controversial is that those terms are not defined in the laws. So a lot of us are scratching our heads trying to figure out, okay... And in fact, there is some language in the California law that indicates that employers now have access to multiple types of tests that do not rely on the presence of non-psychoactive cannabis metabolites. And when I read that, I thought, gee, I'd like to know what they are. And I think a lot of us feel that way. A lot of us are not clear what are these tests that can detect only psychoactive cannabis metabolites.

I can tell you it's not urine. So if you plan to continue doing urine testing in January in California and Washington, to the limited extent that Catherine just discussed, urine testing's not going to do it because urine testing tests for everything, psychoactive, non-psychoactive, so that's not going to cut it. Blood testing, my understanding is very similar to urine testing. So it's going to be testing for psychoactive and non-psychoactive. So I don't think blood testing is the answer.

But let me take a moment to talk about oral fluid testing because many of our clients have actually come to me and said, "Hey, our drug testing vendor is telling us oral fluid testing is the way to go, and it complies with the California law." But I've been to some presentations by drug testing vendors who say oral fluid testing is the way to go, and their position is that the oral fluid tests only test for what they call the parent compound of THC and not the metabolites, which is, again, the past usage. Now, if that's true and accurate, I will be a happy, happy camper and I will be happy to endorse that for clients to use. What I haven't seen is any scientific data.

So my advice to employers is if you want to use oral fluid testing and your drug testing vendor is pushing you to use oral fluid testing, and yes, it complies with the law, and yes, you're going to be good, ask them to show you, say to them, "Well, I want to see your data. I want to see your evidence. I want you to prove to me that we're not going to be testing for the non-psychoactive metabolites rather than just taking their word."

The other thing I have to tell you is that I've been reading a lot about the oral fluid technology and there's a huge disparity in the windows of detection. I mean, I've seen some vendors are saying it's as little as three hours, maybe it goes up to 12 hours, maybe it goes up to 24 hours, and even longer periods, up to 48 hours. And the problem that I have with that is you have to remember that in California, as of January 1, you can't discriminate for off-duty use.

Here's a very real situation that could happen. An employee could use marijuana at home at night. They come into work the next morning. They get into an accident. Now the employer wants to test

them on a post-accident test. And even if the employer's using oral fluid testing, the employer's going to say, "Well, I'm complying with the statute, right? My vendor told me we're only testing for psychoactive components." If the employee tests positive, the employee's going to say, "Hey, employer, I used it last night at home and that's protected by law. You can't fire me." And the employer's going to say, "Well, I'm using this oral fluid technology that my drug testing vendor said is the way to go," and now you're going to have a lawsuit. And I have to tell you, I don't know who wins that lawsuit. I think we're going to see a lot of litigation next year, and I think the California courts are going to have to tell us, is oral fluid testing compliant with the law or not compliant?

But I think if you're going to go that way, and I've been hearing from a lot of employers, they want to go that way because their vendors are recommending it, I think you've got to review the evidence for yourself and be prepared for litigation and be prepared that you're going to have somebody from your drug testing vendor testify on your behalf that this is compliant with the law.

So that's oral fluid testing. Now there's another one, there's another device that we're hearing about, and I'm going to let Catherine tell you about that one.

Catherine Cano:

Yeah, similar representations, I think, by companies that are selling this, but there are entities that are selling marijuana breathalyzers, so similar to alcohol breathalyzers, and most of us are familiar with those, but using a breath test for marijuana. Some of these companies are representing that the detection window is approximately three hours or up to three hours versus 24 hours or several days. But these are all pretty new products. Oral fluid, it's been around many years. Whereas marijuana breathalyzers, it's a much more recent concept. But the idea would be that you would do the marijuana breathalyzer and either send it to the lab for them to analyze the results, or that it appears some of them have some on-demand testing. But I think just like the precautions Catherine suggested taking, if you're looking at oral fluid testing, you would want to look at those same types of measures around using the marijuana breathalyzer. You'd also want to look at if there's any state drug testing laws that restrict the kind of samples that you can use because this isn't necessarily going to be a solution that you can use in all 50 states, certainly.

Kathryn, I know clients that I talk to are usually frustrated with all this. They feel like they don't really have a way to police marijuana at work, but what kind of advice do you provide to those employers that maybe feel like drug testing isn't giving them enough relief anymore?

Kathryn Russo:

Well, the first thing that I suggest to employers, especially in the states where off-duty use is protected, is please make sure you've got a really good, clear policy on marijuana. So you want your policy not just to address alcohol and illegal drugs, but you got to spell out marijuana because people don't think of marijuana as an illegal drug anymore. So it's got to be spelled out. You want a policy that prohibits use at work, prohibit bringing it to work. And that's true for medical users by the way. So even if the person says, "Oh, but my doctor says I have to use it four times a day,"

they can't bring it to work. So you can absolutely have a policy that says, don't bring it to work, don't use it at work, and you can't be impaired at work.

And then, I think, as an employer, you're going to have to start thinking about, what do you really want to do? We've already seen a nationwide trend to remove marijuana from the pre-employment drug testing panel. And that's been true in California for a while now. I think that most employers have said, "Hey, it's been legal in our state for a long time. We're not going to test for it anymore." And then think about, what do you really need to test it for? I do work with a bunch of clients who have decided that marijuana, we're starting to view it more like alcohol. And so they're generally only testing for it if it's legal to do so in the state when there's reasonable suspicion. So think about, do I really need it for pre-employment? Do I really need it for post-accident or random? Because you're going to capture a lot of off-duty use if you test for marijuana on those tests. But if it's legal in the state to do reasonable suspicion testing, you may want to consider it.

And Catherine, I'll toss this back to you, but we've always endorsed reasonable suspicion testing to clients. And I don't think that changes a whole lot, except in a few states where you can't test for marijuana anymore.

Catherine Cano:

Yeah. And reasonable suspicion training for your supervisors is something that is really important. A lot of times we get calls from a client who says a supervisor had an issue over the weekend. They let the person work the shift, or maybe sometimes they send them home, but they're not doing a drug test right away. They're not really sure how to handle the situation. And we end up with a result where maybe it's not quite ideal. Your supervisors, if they're going to be weighing in on who's going to be taking drug tests or if they're going to be making determinations about potential impairment, things like that, they definitely need to have training on reasonable suspicion, and in particular, marijuana. What are the signs of impairment? What steps are they supposed to take if somebody is displaying signs of impairment? Who do they need to talk to? Do they need to remove the person from the workplace? How do we get that person to their home safely? Because we certainly don't want to have people driving if we think they're impaired at work.

And another piece there, just from a state law standpoint, there are more than a dozen states that have mandatory employer drug testing statutes. So you always want to keep those in mind. Some of them define reasonable suspicion, and some of them define reasonable suspicion very strictly. For example, we were talking about California. Well, in San Francisco, you can only do testing for your current employees if you have reasonable suspicion, and that's one of the strictest definitions of reasonable suspicion in the country.

So make sure that you're also checking, is there a state law definition of reasonable suspicion? And there may also be requirements around supervisor training. I know Iowa has one, for example. Montana has one, is another example. There's a lot of states that have that type of structure in place. So make sure that you're checking state law. And in the absence of state, this is a best

practice, have some policies and procedures for supervisors and train them on what they're supposed to do if they think someone is impaired at work, including under the of marijuana.

Kathryn, anything else to add for what employers should be doing for 2024?

Kathryn Russo:

Yeah, I mean, just to add onto what you just said there, I think even if you're in a state where you can't test, like New York, and if you decide you're not going to test in California next year, you still want to train your supervisors, right? Because they're going to ask, what do we do if somebody appears to be high for marijuana but we can't test them? So what are we going to do? So I do think as an employer, to get ready for 2024 in California, there's quite a few things that you should be doing.

I think you need to decide first, are you going to test for marijuana? And if so, by what method? Because you can't use urine testing anymore. So you've got to decide, are we going to try oral fluid? Are we going to try the breathalyzer, or are we just going to stop? Which many employers are deciding to do. And then, you've got to revise your policies, train your supervisors so that they know what the policy is and what do we do if we think somebody's high at work. And then, for the purposes of the Washington law, you've got to decide which positions are safety sensitive if that applies to you. We are certainly available to help you make any of those decisions or talk through those decisions.

And the other thing I wanted to let you know is Catherine and I are going to do a webinar at the beginning of December to talk about all of the marijuana laws, not just California and Washington, but we're going to do a little summary of all marijuana laws. We're going to go through it, and again, just remind employers of the things that you need to keep in mind to be compliant with drug testing laws and marijuana laws in all 50 states. And I hope you'll join us. Thank you.

Alitia Faccone:

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