

Cannabis Legalization Creates New Challenges for Minnesota Employers



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Minnesota employers face additional workforce challenges with the legalization of recreational cannabis for adults on August 1, 2023. Like employers in the 23 other states that have now legalized recreational cannabis, Minnesota employers will need to reevaluate their employment practices, policies, and procedures based on Minnesota's law change.

Use of Cannabis Products

For more than 30 years, it has been unlawful for Minnesota employers to refuse to hire a job applicant or to discipline or discharge an employee because of the individual's off-duty use of "lawful products." The 2023 cannabis legislation expressly amended Minnesota's Lawful Consumable Products statute to add cannabis and related products to the definition of "lawful consumable products." Accordingly, cannabis users are now afforded these same protections.

Cannabis use, however, is only protected if it occurs:

- 1) during non-work hours; and
- 2) off the employer's premises.

Employers continue to retain the discretion to discipline or discharge employees who:

- 1) use, possess, transfer, or sell cannabis or related products while on the job, on work premises, or while operating a company vehicle or equipment; or
- 2) report to work while impaired by cannabis.

Now, the actual policing of cannabis impairment on the job may be more difficult. Notably, edible forms are more difficult to detect than alcohol or marijuana smoking and can have much longer release times.

Employee Drug Testing

Implementing and using employer drug testing programs has continued to be challenging for Minnesota employers since the

passage of Minnesota's Drug and Alcohol Testing in the Workplace Act ("DATWA") in 1987. DATWA has detailed requirements for testing and is considered employee friendly.

Under DATWA, an employee has always had protection after an initial positive drug test; the positive test could not be used as a basis for discharge unless the employee also subsequently tested positive a second time, refused the employer's offer to participate (at the individual's expense) in a drug or alcohol counseling or rehabilitation program, or failed to successfully complete a counseling or rehabilitation program once started. These employee protections continue to remain in place and have always extended to cannabis.

The 2023 cannabis legislation amended DATWA's definition of "drug" to remove cannabis and made related changes, including to describe "cannabis testing" and when it is allowed, and to specify the circumstances under which an employer may take disciplinary action based on cannabis test results.

Employers with Minnesota employees that decide to pursue testing under the new law are now subject to what is effectively a two-tier system for drug and cannabis testing. Employers are now prohibited from using tests to screen most job applicants for cannabis (similar to the prohibition to test for pre-employment alcohol use) and from randomly testing most employees for cannabis, other than for employees in safety-sensitive and certain other listed positions, including but not limited to teachers of children, health care employees involved in patient care, truck drivers, and other employees subject to federal drug testing standards.

All employees are, however, subject to testing for cannabis if the employer has reasonable suspicion that an employee:

- 1) is impaired on the job;
- 2) has sustained an injury or been involved in an accident; or
- 3) has violated the employer's work rules relating to drugs or cannabis, provided such rules are in writing and have been provided to the employee.

Conclusion

In light of Minnesota's move to permit adult use of cannabis, employers are well-advised to review and update their work rules or policies relating to employee drug and cannabis use as well as their employee drug and cannabis testing policies. Any employee

drug and cannabis testing policies created before the recent law change may not be legally compliant. The employment law lawyers at Moss & Barnett are ready to assist employers in this area.