

Medical (and Recreational Cannabis): HR Updates and Liability

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FEDERAL OVERVIEW

- Under the Federal Controlled Substances Act (CSA), Cannabis Continues To Be Listed As A Schedule I Controlled Substance.
- A Schedule I Controlled Substance Is One In Which The Drug Or Substance:
 - Has a high potential for abuse;
 - Has no currently accepted medical use in treatment in the United States; and
 - There is a lack of accepted safety for use of the drug or other substance under medical supervision.

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FEDERAL CANNABIS ENFORCEMENT EFFORTS

- In 1970, Congress Studied cannabis.
- Study Concluded That cannabis was NOT a Schedule I substance.
- Nevertheless, cannabis remained a Controlled Substance.
- 2009 AG Memo Relaxes Enforcement. Do Not Interfere With State Legislation.
- 2018 Memo of AG Sessions Places More Focus on Illegal Use.
- However, No Crackdown Since And Federal Prosecutions Down By 20%.

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STATE LEGALIZATION

- As States Continue To Legalize Medical and Recreational Cannabis, Employers are Faces With Difficult, New Employment Scenarios.
- State Law On The Subject Conflicts With Federal Law.
- It Is Crucial To Understand Both, And Follow State Law Where Indicated.

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WHERE DOES THIS LEAVE US?

- Still Not Permissible To Show Up At Work Under The Influence.
- Gaps In Employment Law And How To Treat Off-Duty Cannabis Use.
- Effect and Meaning of Cannabis Testing.
- Previously, Without A Specific Law Or Precedent, Employers Could Take Adverse Action For Positive Tests. Now, However, More Careful Consideration Is Required.

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COMMON QUESTIONS TO CONSIDER

- May Employees Use Cannabis Recreationally Or Medically Outside Of Work?
- Are You Allowed To Test For Cannabis On A Pre-employment Drug Test?
- Can You Refuse To Hire An Applicant Who Tests Positive For Cannabis?
- May A Rejected Applicant Who Tested Positive For Cannabis Sue You?
- Is Cannabis Legal When Used For Medical Purposes Under Federal Law?
- Do You Have To Allow An Employee Who Uses Cannabis For Medical Purposes To Be Under The Influence At Work?
- Do You Have To Allow Medical Cannabis Use As A Reasonable Accommodation Under The Ada Or Your State Disability Law?

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NEW YORK LAW

- The MRTA Allows Adults Aged 21 And Older To Possess, Purchase, Display, Obtain, And Transport Cannabis In Limited Quantities. The MRTA Takes Effect Immediately, Although The Sale Of Recreational-use Cannabis Is Not Expected To Become Legal For At Least Another Year.
- MRTA Amends Section 201-d Of The NYLL To Include Cannabis. This Now Protects Employees Off-duty Use Of Cannabis.
- Employees Still Cannot Be Under The Influence At Work.
- Employees Who Claim That Their Rights Are Violated Under Section 201-d Of The NYLL May File A Private Lawsuit For Equitable Relief And Damages.

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NEW YORK LAW (CONT.)

- There are some limited exceptions to New York's law protecting off-duty cannabis use:
 - The employer's actions were required by state or federal statute, regulation or ordinance, or other state or federal government mandate;
 - The employee is "impaired" by the use of cannabis; or
 - The employer's actions would require such employer to commit any act that would cause the employer to be in violation of federal law, or would result in the loss of a federal contract or federal funding.
- "Impaired" means that the "employee manifests specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy work place, free from recognized hazards, as required by state and federal occupational safety and health law."

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WHAT ABOUT TESTING?

- New York City Already Prohibits Drug Testing For Job Applicants, Unless Necessary Under Federal or State Law. New Laws, However, May Further Restrict Even That Limitation.
- No New York State Law Specifically Precluding Testing, But Limitations On Adverse Actions.
- No New Jersey Limitations On Testing, But Same Potential Limitations.
- Connecticut Limitations, Including Related To New Legalization Laws.
- Generally, Testing Is Permitted In Case Of Potential On-Site Use or Accidents.

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ENFORCEMENT OF CANNABIS USE

- Recognized Talent Shortages.
- Nursing Shortages.
- Competition In The Market.
- Maintaining Consistency. Equal Treatment.
- Drug Testing Safety v. Non-Safety Positions.
- Zero-Tolerance Policy Limited Only Where Impairment Interferes With Job Or Statute.

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CASE EXAMPLES

Physician Tests Positive:

- Physician Offered A Job At Your Business. You Test Her/Him For Drugs, Positive For Cannabis.
- Physician Says He Legally Used CBD To Treat Medical Issue.
- What Do You Do?
- What If Test Comes Back For THC And Physician Says I Legally Used cannabis Off-Duty In Colorado, Where It Is Legal?
- What About Reporting To Medical Board?
- What If It Was A Front Desk Receptionist?

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CASE EXAMPLES (CONT.)

Accident On-Duty:

- An Employee Operating Safety Equipment Has An Accident.
- Policy Requires Drug Testing.
- Employee Tests Positive For THC. But You Cannot Tell When It Was Used From Test. What Do You Do?
- What Questions Should You Ask?
- What If You Trust This Employee, But Another Employee Had a Similar Situation And You Want That Person Terminated?

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BEST PRACTICES

- Keep Cannabis Out Of Office, Same With Alcohol.
- Research And Careful Selection Of Type Of Test You Use And Stay On Top Of Developments In The Technology Of Testing.
- Consult A Local Lawyer About Relevant State Laws Before Setting Policies And Testing Rules.
- Educate Employees About The Company cannabis-use Policy And The Repercussions For Failed Tests, Including Random, Post-accident Or Reasonable Suspicion Tests. Handbook Topic.
- Questionable On Whether To Train Managers To Spot Signs Of Impairment. Caution!

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QUESTIONS?

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