

Professional Perspective

Cannabis & the End of Employment Related Drug Testing

Brett M. Gelbord, Dykema

**Bloomberg
Law**

[Read Professional Perspectives](#) | [Become a Contributor](#)

Reproduced with permission. Published November 2022. Copyright © 2022 The Bureau of National Affairs, Inc. 800.372.1033. For further use, please visit: bna.com/copyright-permission-request

Cannabis & the End of Employment Related Drug Testing

Editor's Note: The views expressed in this article are the author's alone and do not necessarily reflect the view of Dykema Gossett PLLC or any of its clients. Content from this article should not be construed to constitute legal advice.

Contributed by [Brett M. Gelbord](#), Dykema

This article will briefly discuss some of the changing legal and cultural factors driving a shift in employment-related drug testing best practices and provide guidance on how employers can stay ahead of the curve in response to a quickly changing environment.

Of course, there are industries and employment roles that are subject to federal drug testing requirements, such as certain jobs subject to the U.S. Department of Transportation's rules and regulations. As long as those requirements remain in effect, nothing in this article is meant to suggest that employers subject to them should do anything other than comply.

Widespread Cannabis Access & Use

As of this writing, cannabis remains fully illegal in only five states, with the vast [majority of states](#) and the District of Columbia providing for access to cannabis in some form or another. On the most permissive end of the spectrum, states like California, Colorado, and Michigan have fully formed markets for legalized and regulated recreational cannabis. On the other end of the spectrum, states like North Carolina have partially decriminalized possession of lesser amounts of marijuana. Forty-five states, the District of Columbia, and several U.S. territories, fall somewhere along that spectrum of access to cannabis.

Employers may be wondering whether that increased access translates to an increase in cannabis use among the active and potential workforce. Because of the historical status of cannabis as a black-market product, it is impossible to tell whether legalization has led to a statistically significant increase in use, or simply a transition from black market to regulated market participation.

However, retail sales are a strong indicator of the public's demand for a given product. Across the 45 states which have some form of sanctioned access to cannabis, the total retail sales for 2021 was estimated to be roughly \$27 billion and is projected to exceed \$50 billion by 2026. As a point of reference, U.S. pizzerias sold roughly \$45 billion worth of pizzas in 2021. In turn, that, translates to an enormous number of potential employees who will either fail a pre-employment drug screen for marijuana, or opt to not even apply for a position that they suspect may require such screening, not to mention current employees who would fail a random drug test, despite not being high at the time of the test.

While many employers rightfully insist on a [drug-free workplace](#)—meaning employees are forbidden from working while intoxicated or under the influence of intoxicating substances and may not use or possess such substances while at work—a major problem in enforcing drug-free workplace rules is the fact that the available drug testing methods do not provide actionable data with respect to cannabis. There is no test for cannabis that can identify intoxication or impairment at the time of the test in the way that a breathalyzer can show with some degree of certainty that a person is drunk.

Cannabis compounds remain present at detectable levels, depending on the test, for thirty days or more, and so a person who has not consumed cannabis in a month may still test positive despite not being under the influence at all. Further complicating the situation, the ability to metabolize cannabis's psychoactive compounds varies from person to person, which means that even if a person had just consumed cannabis and then submitted a test sample, there would be no way to know whether that person was actually impaired based on the test results.

Against this backdrop of increased access to cannabis and drug tests that do not provide useful information, employers are struggling to hire and retain talent.

Challenge of Recruitment & Retention

Employers report that recruiting new employees and retaining strong performers in the wake of the Covid-19 pandemic is more challenging than ever. The media is riddled with stories and statistics regarding the unprecedented recruiting difficulties that employers are facing. Indeed, a new term has been coined to capture the current state of affairs: the Great Resignation.

While there are numerous factors driving individual decisions to find a new job or leave the workforce entirely, it only behooves employers to look at changes to their policies that can have a positive impact on recruitment and retention. Making a change to drug testing policies sends a message to current employees that management trusts their ability to make responsible decisions around cannabis use. It also sends a message to potential employees that they should feel free to apply for a job, because their applications will be considered based on their qualifications and not influenced by state-legal lifestyle choices. These changes alone are not silver bullets, but they should not be undervalued.

Rapidly Changing Laws

Even further compounding the negative effects of maintaining outdated drug testing policies is the fact that as more and more states adopt more robust cannabis regimes, the laws around workplace testing now vary from state-to-state and even among municipalities within the same state. This increases the burden of complying with state and local laws for employers with operations in multiple jurisdictions, as those employers must keep abreast of changing rules across multiple locations.

The potential for confusion in pre-employment and onboarding processes poses real risks to employers with multiple offices or facilities. For example, since May 2020, with some exceptions, covered employers in New York City are not permitted to test job candidates for cannabis as a condition of employment. N.Y.C. Admin. Code [§ 8-107\(31\)](#). New York State has put a similar prohibition in place statewide, however the city rule is part of the New York City Human Rights Law, and violators are subject to enforcement actions by the City's Commission on Human Rights (CHR).

It is common for enforcement actions by the CHR to result in judgments or settlements in the five- and six-figure range. To illustrate the risks in this space, consider a hypothetical employer with multiple locations, including New York City, and Lexington, Ky. Assume that employer posts a job opening that could be filled in either Lexington or New York, and because the employee responsible for posting the job was either unaware of the New York City law or simply too busy to account for it, the job post includes a pre-employment drug testing requirement. Such a misstep could open the employer up to an enforcement action by the CHR.

This is a risk that employers can easily and quickly eliminate.

What Should Employers Do?

The simple answer is stop requiring cannabis tests for job applicants and current employees for positions that are not required to test by some superseding law or regulation. Of course, that is not the whole answer.

Workplace intoxication remains a problem and none of the laws passed to date require an employer to allow intoxication on the job, and some employers either choose to or are obligated to abide by the [Drug Free Workplace Act](#)-which, conveniently, does not require testing. Thankfully, with a little investment in managerial training, it is easy enough to identify when a person may be intoxicated at work to maintain a safe and productive workplace.

Guidance for this kind of training can be found in the newer laws enacted around the country. For example, in Illinois, without resorting to a drug test, an employer may support a good faith belief that an employee is under the influence of cannabis through the identification of specific, articulable symptoms.

The Illinois law provides examples of physical traits to monitor for changes that may indicate impairment, such as: "speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment or property; disruption of a production or manufacturing process; or carelessness that results in any injury to the employee or others." [410 Ill. Comp. Stat. 705/10-50\(d\)](#).

Managers should be trained to recognize impairment, and the foregoing list is a great starting point. It is also important for managers to become acquainted with each employee's typical demeanor and physical presentation, which can then serve as a baseline for articulating symptoms of impairment.

A synergistic benefit of observational intoxication monitoring programs is that they necessarily increase engagement between management and staff. Executed properly, such a program may lead to increased retention not only because employees will not be fired for irrelevant off-hours cannabis use, but also because better staff-management engagement creates a more personal and lasting bond with the workplace for employees on both sides of that relationship.

It cannot be overstated how quickly the legal landscape on this issue is evolving, which is another reason to reduce or eliminate cannabis-based testing as the determinative factor for employment decisions. Removing cannabis testing is a simple and effective way to decrease the risk of running afoul of a new law or regulation that might roll out in a jurisdiction where a large employer has a portion of its workforce.

Indeed, New Jersey announced new guidance for employers seeking to monitor workplace cannabis intoxication in that state. On Sept. 9, 2022, the [New Jersey Cannabis Regulatory Commission](#) issued a two-page guidance document regarding “Workplace Impairment” which states that “[a] scientifically reliable objective testing method that indicates the presence of cannabinoid metabolites in the employee’s bodily fluid alone is insufficient to support an adverse employment action.

However, such a test combined with evidence-based documentation of physical signs or other evidence of impairment during an employee’s prescribed work hours may be sufficient to support an adverse employment action.” This announcement makes clear that New Jersey is now a state where a laboratory drug test alone is not permitted to be the basis for employee discipline or termination.

The guidance goes on to describe a “Reasonable Suspicion Observation Report” that relies on physical indicators, much like the Illinois law described above. In short, employers with a presence in New Jersey have a new rule to worry about when faced with an employee who is potentially under the influence of cannabis. If they do not have an observational system in place, those employers open themselves up to legal exposure by taking employment action based on a laboratory test alone.

It remains to be seen whether the need for continued reliance on laboratory testing, as contemplated by the New Jersey guidance, will persist as employers implement observational methods for determining workplace impairment. As the various states promulgate their own rules on this topic, employment counsel should encourage their clients to establish observational programs.

Some employers may, as the New Jersey guidance suggests, rely on observational reports at the time of an accident, without a broader observational framework, whereas other employers may find it useful to introduce an ongoing monitoring program, as described above, aimed at increasing engagement between staff and supervisors. While a trained observer may be able to conclude that an individual is under the influence of marijuana in a one-off observation, a similarly trained supervisor who enjoys daily interactions with his or her staff will have a better frame of reference in terms of baseline behavior from which to create such an observational report.

Conclusion

Many employers can accomplish multiple goals by eliminating employment related testing for cannabis.

First, eliminating such testing dramatically increases the applicant pool of otherwise qualified individuals and sends a message to current employees that management is not looking over their shoulders when they are not at work, both of which will help with the current struggle to find and retain talent.

Second, by eliminating cannabis testing employers with operations in multiple states can streamline one aspect of compliance by essentially opting out of the testing paradigm, which would automatically put those employers in compliance in all 50 states (again, this is not an option for employers subject to federal testing requirements). Employers also benefit from not spending time and money on tests that do not provide useful information as to whether an employee was under the influence of cannabis at the time of the test. Laboratory cannabis testing policies should be replaced by observational intoxication assessment programs, which have their own inherent benefits.

Taking drug tests for cannabis off the table should also insulate employers from frivolous employment discrimination and wrongful termination claims based on drug tests that do not provide actionable information about cannabis use. If an employee is disciplined or terminated due to workplace intoxication, it should be based on documented evidence created through the observational process, rather than based on tests that do not indicate present intoxication. That evidence can then serve as a powerful shield should the employee turn around and sue for wrongful termination.

While the focus of this article has been on testing for cannabis, looking a little further into the future, with attitudes about the war on drugs changing and the scientific community’s evolving understanding of how addiction works, the entire concept of workplace drug testing could soon be a thing of the past.

As researchers offer new insights on how to best address the societal harms caused by addiction, it is becoming apparent that shutting people out of employment on the basis of drug use exacerbates the problem. Current addiction theory focuses on harm reduction strategies that allow addicted people to address the underlying reasons for their addictions while, if necessary, continuing to allow use of a given substance.

Under that theory, if a person's job performance is not impacted by their substance use, then the substance use should not be an issue for employers, and observational frameworks like those discussed above can be a tool for employers to ensure that an employee's addiction does not, in fact, impact safety or productivity. Moreover, employers that have an interest in improving recruitment and retention can build stronger relationships with their employees struggling with addiction by utilizing modern harm reduction policies that will strengthen employee loyalty and performance.