Budding Workplace Marijuana Impairment Laws Put Employers in a Bind

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New legal risks are caused by employers' attempts to detect marijuana impairment within the workplace.

With an increasing number of states passing laws to protect employees who utilize marijuana off-duty, employers throughout the country are presently tasked with redesigning their marijuana-related policies and practices to avoid the risk of suffering discrimination, retaliation, and other claims for wrongfully taking adverse action against an employee for their marijuana legal use. However, while an employee may be permitted under state law to engage in the use of marijuana off-site, these laws do not require employers to tolerate marijuana impairment during work time and preserve an employer's right to take adverse action as a result.

Under these new laws, prior to taking adverse action against an employee for being impaired by marijuana while on-duty, employers are required to comply with state-specific—and for multistate operators, wide-ranging—requirements for testing or otherwise detecting articulable symptoms of marijuana impairment. The wide variety of requirements under these state-specific laws, compounded by the fact that both the technologies and best practices for detecting marijuana impairment are presently nonexistent, or subjective and inconsistent, is likely to create additional legal or reputational risk for the employer.

Lack of Industry Standards

Unlike alcohol use, an industry standard to positively test whether an individual is under the influence of marijuana does not exist.

Further, even if there was an industry standard, there is currently a glaring dearth of effective technologies to effectively detect impairment. While a number of "marijuana breathalyzers" exist on the market, their reliability has been challenged because oral THC fluid contains relatively poor or inconsistent indicators of cannabis-induced impairment. Although researchers are currently developing methods to deploy a reliable marijuana rapid test, such a product, if it becomes viable, will take years to come to market. Other more "traditional" drug tests, such as blood and urine tests, are also ineffective in detecting whether a person is presently under the

influence of marijuana because they can only detect cannabis metabolites that have long since stopped having an effect.

Therefore, until both an intoxication standard and the technology to detect it exist, such a diagnosis must be made subjectively based on the employee's appearance and behavior.

Subjective Detection of Marijuana Impairment

California's Assembly Bill 2188, which becomes effective Jan. 1, 2024, prohibits employers from discriminating against "a person in hiring, termination, or any term or condition of employment" based on their failing an employer-mandated drug screening which detects non-psychoactive cannabis metabolites in blood, hair, urine, or body fluids. This means employers in California that presently rely on drug screenings in the application process, during the term of employment, or in terminating an employee may only utilize a test that differentiates between an employee who is currently under the influence of marijuana and one who previously used marijuana, but is no longer under its influence.

Since that technology does not yet exist, California employers must also develop state-compliant standards for subjectively diagnosing an employee's intoxication based on their appearance and behavior prior to Jan. 1, 2024. In New Jersey, however, laws which protect an employee's off-duty use of marijuana have already been on the books for nearly two years, and many New Jersey employers have already adapted their policies and practices to comply therewith.

When New Jersey passed the Cannabis Regulatory Enforcement Assistance and Modernization Act (CREAMMA), which became effective on Aug. 19, 2021, employers in the state were prohibited from, among other things, taking adverse employment action against an employee solely due to the presence of cannabinoid metabolites in the employee's body fluid. Employers sought guidance from the state with respect to other methods to make a determination that an employee was under the influence of marijuana while on duty sufficient to support employers' decisions to take adverse action against a "high" employee.

The recently issued guidance recommends a trained staff member of the employer or third party complete a "reasonable suspicion" or observation report. To support termination from an observation report, a combination of one or more observable signs of drug or alcohol use must be observed and documented by at least two supervisors within a 24-hour period of observation. Signs or symptoms of drug use under CREAMMA include one telltale sign of cannabis use, which is the odor of marijuana. However, other symptoms include a disheveled appearance, frequent sniffing, being tearful, sad, depressed, withdrawn, or sleepy, and falling down or reaching out for physical support, each or all of which could easily be the result of an underlying medical condition that is protected under the Americans with Disabilities Act (ADA).

Similarly, Illinois passed the Cannabis Regulation and Tax Act, effective Jan. 1, 2020, which prohibits an employer from terminating an employee as a result of off-site marijuana use, but permits adverse employment action if the employer has a good faith belief that the employee is under the influence of marijuana while on-site. "Good faith belief" includes observations of the employee's speech, physical dexterity, agility, coordination, and demeanor, all factors which could cause an employee to have reason to perceive that the employee may have a disability under the ADA.

Challenges and Additional Risks in Subjective Detection

It is important to emphasize that some of the articulable signs of cannabis impairment as set forth in these state laws could be attributed to immutable predispositions or characteristics, which could expose an employer to claims of discrimination under other federal and state laws, such as the Civil Rights Act of 1967 and the Age Discrimination in Employment Act.

Notably, the definition of a disability under the ADA includes those individuals who are perceived as disabled; documentation of the disability is not necessary. There has been one published opinion that involves this statute, *In the Matter of Christopher Carralero, Town of West New York*, 2022 N.J. Agen LEXIS 809, which involved an appeal by a police officer who was terminated after testing positive for a cannabinoid metabolite following a random drug screening.

In this case, the administrative law judge concluded that termination was improper based on a urine screen without any proffered evidence that the officer was in any manner impaired on the job. The police officer ultimately won his appeal, and the municipality was forced to reverse the termination and pay the officer's court costs and fees.

In essence, an employer must rely on the observations of a manager to document characteristics that could actually protect an employee under a web of anti-discrimination laws. New Jersey's CREAMMA recommends training an individual to spot the signs of drug use and some organizations; however, training a staff member does not insulate an employer from a discrimination or wrongful termination lawsuit if adverse employment action is improperly meted out.

Growing the Roots of Resolution

This is not to say that it will always be a difficult decision as to whether an employee is impaired by marijuana at a worksite. In *Terry v. UPS*, 508 P.3d 1137, 1138 (Ariz. App. 2022), the Arizona appellate court ruled that an employee's termination did not violate a state law prohibiting taking adverse employment action against an employee who holds a valid medical marijuana card. That employee tested positive for cannabinoids, and his speech was slurred, he was incoherent, he was asking the same questions over and over, losing his train of thought, had heavy eyelids and red eyes, was talking excessively, and made repeated statements about a scorpion running across a table and climbing up a wall. However, under Arizona law (and other similar laws), more than a simple positive cannabinoid test is required to support adverse employment action.

While it is laudable that states are attempting to curb the impairment of individuals at the workplace, absent an employee complaining about phantom scorpions, the use of physical and behavioral observation measures may be just as unreliable in detecting marijuana impairment as the breathalyzers that are currently on the market, and have the added danger of exposing the employer to a discrimination lawsuit if not performed correctly. However, on the other side of the coin, if an employer has reason to suspect that an employee is impaired at the workplace and declines to take action, the employer could be vicariously liable for any torts caused by the employee in the scope of his employment.

Where, then, does this leave employers? The answer, unfortunately, is unclear. Many employers, especially small and midsize businesses, do not have the capacity or resources to designate and train an individual as a "drug czar" to determine whether an employee is under the impairment of marijuana, nor do they want to risk a costly wrongful termination or discrimination lawsuit if the "good faith belief" supporting a termination is not ultimately deemed justifiable by a court of law. At the same time, with the increasing acceptance and use of marijuana, employers run the risk of being embroiled in costly tort litigation if they do not have a plan in place to address workplace marijuana impairment and an employee causes damages.

Ultimately, what to do in this situation comes down to the employer's individual risk assessment and tolerance. These risks can be mitigated by having a clear drug use policy memorialized and provided to all employees and with continued dialogue to ensure that employees understand the risks and dangers imposed by workplace impairment and are aware that its use can, and will, result in adverse employment action.

However, such notices and communications may also present their own risks to employers, as the content and frequency of these disclosures required under each relevant state's law also differ. For example, in Washington DC, as of October 22, 2023, employers are required to notify existing workers of the new rights afforded by the Marijuana Employment Protections Amendment Act of 2022 (MEPAA) within 60 days, new workers upon employment, and all employees annually thereafter. Notices must, among other things, include the identification of safety-sensitive roles and inform affected employees of the drug testing protocols associated with those positions.

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Chase Stoecker

Heidi Urness