CBD & The Workplace, A Word to The Wise

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Federally legal CBD products may, under some circumstances, cause consumers to fail drug tests. An employer's right to terminate employee-consumers on that basis is not prohibited by federal law, including the Americans with Disabilities Act.

Many of us are familiar with CBD products. In some states, they can be found in grocery stores, convenience shops, independent storefronts, and farmers markets, as well as easily purchased online. CBD products take the form of lotions, oils, gummies, chocolates, beverages, and just about anything else that is consumable.

CBD's use is widespread. According to a recent survey by Healthline.com, 25% of respondents were either currently using CBD products as part of their lifestyle routine or were interested in trying them. CBD is commonly used by consumers to help relieve a variety of physical and psychological ailments, including depression, anxiety, pain, and inflammation.

Despite its relatively wide availability and current federally legal status, however, a person's use of CBD can still have negative consequences, such as causing them to be terminated from their job.

A Brief Introduction to Cannabinoids

First, what is CBD? CBD is short for "cannabidiol," the name for a specific cannabinoid found in the *Cannabis sativa* plant. The term "cannabinoid" refers to any of the various chemical constituents found in cannabis; over 100 cannabinoids are found in the cannabis plant. Cannabinoids interact with a human's endocannabinoid system, where neurotransmitters bind to cannabinoid receptors throughout the body.

Under present federal law, when CBD is extracted from hemp, it is federally legal. While CBD does not produce a "high" effect, as the term is commonly understood, studies show that it does affect the mind and body. Indeed, CBD is the active ingredient in Epidolex, an FDA-approved prescription drug used to treat people one year of age or older.

The most well-known cannabinoid, and cannabinoid that most people associate with marijuana, is delta-9 tetrahydrocannabinol (D9 THC). D9 THC is best known for its psychoactive qualities and is the cannabinoid that distinguishes federally legal hemp from its still-very-much-federally illegal sister marijuana under present law. Any *Cannabis sativa* plant or product containing more than 0.3% D9 THC is federally prohibited as a schedule I substance under the Controlled Substances Act (CSA).

A third cannabinoid that has made the news lately is delta-8 tetrahydrocannabinol (D8 THC). It is yet another psychoactive cannabinoid that naturally occurs in the *Cannabis sativa* plant but only in very small amounts – meaningless amounts from a consumer's perspective. However, D8 THC can be created from other federally legal cannabinoids, such as CBD.

How CBD Became Legal

Marijuana and hemp are both the *Cannabis sativa* plant. The distinction is a legal fiction: *Cannabis sativa* is considered "marijuana" when the plant, whether growing or not, contains a D9 THC concentration of more than 0.3% by dry weight. (Dry weight is the measurement of the plant when all water is removed.) By contrast, *Cannabis sativa* is considered "hemp" when the plant contains a delta-9 THC concentration of not more than 0.3% by dry weight.

The 2018 U.S. Farm Bill, signed into federal law on December 20, 2018, removed "hemp" from the CSA, which had the effect of permitting the cultivation, processing, sale, and transport of the hemp plant or any derivative thereof (and in compliance with state law). "Hemp," as defined by present federal law, however, includes far more than live or dried hemp leaves or "flower":

The plant species Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a total delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. 7 CFR 990.1 "Hemp"

As discussed in the previous section, some cannabinoids, such as D8 THC, occur in very low amounts naturally in the cannabis plant. D8 THC, however, can be chemically produced from hemp extracts which naturally occur in the plant in much greater amounts. Under this process, certain federal courts have held that D8 THC is thus considered a legal hemp derivative under the U.S. Farm Bill and, therefore, can legally be sold under federal law – notwithstanding the fact that it has psychoactive properties when consumed. Many states are currently, or in the near future, plan to regulate or ban the sale of delta-8.

CBD occurs naturally in hemp and can be extracted from hemp in relatively ample amounts. Because the 2018 U.S. Farm Bill removed hemp from the CSA, CBD's derivation is legal so long as the dry weight of the *Cannabis sativa* plant and the final extract does not contain more than 0.3% THC. However, even though the cannabinoid CBD, isolated, does not contain THC, some products that contain CBD legally derived from hemp may still also contain low-levels of THC based on the CBD extraction process used. This is most common in "broad-spectrum" or "full-spectrum" CBD products. As a result, taking large doses of CBD could result in the ingestion of a sufficient amount of THC to result in a failed drug test.

Because THC can accumulate "in adipose tissue where it is stored for long periods of time" and can be released "from fat stores back into blood," depending on how much a user consumes it, how often, and for how long, it is possible for these low levels of THC present in certain broad- and full-spectrum CBD products to accumulate in the body and trigger a positive drug test.

Federal Workplace Discrimination Laws

Federal workplace discrimination laws – such as Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act (ADA) – prohibit discrimination, harassment, and retaliation in the workplace. Recently, federal courts are increasingly enforcing these laws against, and federal agencies have even begun prosecuting, marijuana businesses for violations thereof. For example, federal courts have permitted individuals employed in the cannabis industry to maintain lawsuits against their employers for violation of Title VII, notwithstanding the fact that cannabis is prohibited under the CSA. Federal courts have likewise ruled that cannabis employers are subject to the Fair Labor Standards Act and must pay their employees' wages, including overtime pay, in accordance with that law, again ignoring the illegality of cannabis under the CSA.

However, courts have not extended the same analysis to other federal workplace discrimination laws and have declined to enforce them in the marijuana-context, such as the ADA. The ADA is divided up into multiple titles. Titles I and II of the ADA, which govern workplace discrimination based on a disability, provide *no* protection against discrimination on the basis of medical marijuana use, even where that use is state-authorized and physician-supervised.(1) Indeed, the ADA specifically states that "[f]or purposes of this Act, the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on behalf of the basis of such use." 42 U.S.C. § 12210(a).

As a result, even in states which permit marijuana for medical use, employers may, without fear of violating federal discrimination laws, terminate – or take other adverse employment actions against – employees who use medical marijuana as prescribed by their doctor. In response to this lack of federal protection from discrimination, several states passed laws protecting medical cannabis patients from the consequences of failing employment drug screenings. Naturally, both employers and lawmakers in states with legal recreational marijuana markets then began considering expanding these workplace protections to employees who legally utilize marijuana outside of the medical patient context. To date, several states have passed, and many states are considering passing, relevant laws that expand protections available to employees who would otherwise face adverse employment actions based on their off-duty medical and recreational use of marijuana.

Use of CBD in the Workplace

However, the protections regarding the use of marijuana, hemp, and hemp's legally derived extract CBD in the workplace have gone unaddressed by federal lawmakers, and employers and employees both face significant risk when CBD and federally-regulated workplace issues collide.

Recently, the Third Circuit Court of Appeals reviewed a decision issued by the United States District Court for the Eastern District of Pennsylvania tackling the issue of CBD use and the ADA in *Lehenky v. Toshiba America Energy Systems Corporation*, No. 22-1475 (3rd DCA May 19, 2023) (unpublished). In *Lehenky*, the employer had implemented a drug-free workplace policy that prohibited the presence of a detectable amount of any illegal drugs while on duty or otherwise performing work on behalf of the employer, either on or off employer premises. The policy at issue in *Lehenky* was not just restricted to illegal drugs; prescribed drugs and over-the-counter drugs that were improperly used or possessed were also prohibited.

Employees using prescribed or over-the-counter drugs in the workplace were required, under the employer's policy, to provide appropriate documentation which identifies the drug and dosage. Failure to report the use of such drugs could result in disciplinary action. Further, the policy alerted employees that the employer would conduct random drug tests and that a positive test in itself shall constitute a violation of the policy, which would result in an immediate termination.

The employee at the center of the lawsuit worked for *Toshiba* for 18 years and since 2014 had been working remotely from home. She was diagnosed with an inflammatory autoimmune disease in 2018, and, due to pain associated with this disease, after consulting with her doctor, she began using CBD oil derived from hemp. She stated to the court that the CBD oil vastly improved her ability to engage in activities and reduced her pain. However, she did not report her use of CBD oil to her employer and never provided her employer with documentation from her doctor identifying the CBD use and its dosage.

In early 2019 the employee was selected for a random drug screening. She tested positive for THC and was immediately terminated.

The employee thereafter sued her employer for violation of the ADA under disparate treatment and disparate impact theories, both of which were rejected by the Third Circuit. The court ruled with respect to the disparate treatment claim, in part, that "[a]ccording to the complaint, she tested positive for THC, and Toshiba believed that the only explanation was illegal drug use. Lehenky alleges Toshiba was wrong. But being wrong does not mean that Toshiba discriminated on the basis of disability."

In other words, "Toshiba [did not] terminate[] Lehenky's employment because of a disability of which it was unaware and did not consider when it terminated her employment." The court continued, "[i]nstead, […] Toshiba fired Lehenky because it thought she was using illegal drugs," concluding "[i]f [Toshiba] did indeed apply a neutral, generally applicable […] policy […], [Toshiba]'s decision […] can, in no way, be said to have been motivated by [Lehenky]'s disability."

With respect to the latter theory, the court rejected Lehenky's claim that the policy has a disparate impact on people with disabilities on the basis of insufficient pleading. The court explained, "[b]y the terms of the policy, an employee without a disability wishing to use CBD oil must produce the same documentation as one with a disability. Lehenky has not alleged any facts suggesting that employees without disabilities are more capable of producing the necessary documentation, so the policy's effect does not fall more harshly on a protected class. *Raytheon*, 540 U.S. at 52."

The Takeaway

Most employers have implemented a workplace drug policy. While some states have recently passed laws prohibiting an employer from taking adverse employment action(s) against employees who use cannabis off-site, *Lehenky* shows us that, at the federal level, employers can still rely on robust, overbroad drug policies when taking adverse action against employees for drug use in the cannabis context, even if the use is recommended by a doctor. So long as an employer believes that an employee was using a product containing any THC at the time of termination, and acts in compliance with company policy, the employer's right to discipline, fire, and

refuse to rehire that employee will be protected under the ADA, even if the product is fully legal under federal law.

This article was first published in the Cannabis Law Journal.

*(1) Zarazua v, Ricketts, No. 8:17-cv-318, 2017 U.S. Dist. LEXIS 161990, at *5 (D. Neb. 2017) (no cognizable claim under the ADA for denial of access to medical marijuana); Steele v. Stallion Rockies, Ltd., 106 F. Supp. 3d 1205, 1*

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