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Cannabis Testing Employees - The Haze Continues: Part II

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The first part of this two part blog discussed the circumstances under which employers may test and take adverse action against employees for cannabis use. These circumstances are spelled out in The New Jersey Cannabis Regulatory Enforcement Assistance and Marketplace Modernization Act (Cannabis Law). However, employers who are subject to Department of Transportation regulations or a federal contract must consider additional laws and regulations in determining whether to test employees for cannabis and whether to take adverse action based on test results.

If the provisions of the Cannabis Law jeopardize an employer's obligations under Department of Transportation (DOT) regulations then the employer may test and take adverse actions against employees who have cannabis present in their systems, consistent with the terms of the employer's obligations under the DOT regulations. Employers who contract with the federal government should note that, although they are required to comply with the Drug Free Workplace Act (DFWA), they are not required to terminate an employee who tests positive for marijuana. This is, of course, unless there is a provision in a specific federal contract requiring termination of an employee who tests positive for cannabis, DFWA generally provides that, in order to be awarded a government contract, a company must agree to provide a "drug-free workplace" by:

1. publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the workplace and specifying the actions that will be taken against employees for violations of the prohibition;
2. establishing a drug-free awareness program to inform employees about the dangers of drug abuse in the workplace, the company's policy of maintaining a drug-free workplace, the available drug counseling, rehabilitation, and employee assistance programs, and the penalties that may be imposed on employees for drug abuse violations;
3. giving employees a copy of the company's drug free policy; and
4. abiding by certain notice and reporting requirements surrounding an employee's conviction of any criminal drug statute.

Despite these requirements, there is nothing in the Drug Free Workplace Act requiring the implementation of a drug testing policy with respect to Schedule 1 drugs. Accordingly, deciding not to test for cannabis in pre-employment applicant screens would not appear to run afoul of the DFWA.

In *Noffsinger v. SSC Niantic Operating Company, LLC,* 338 F.Supp.3d 78 (D. Conn. 2018), a prospective employee who was diagnosed with Post Traumatic Stress Disorder ("PTSD"), and used medical marijuana pursuant to Connecticut's Palliative Use of Marijuana Act ("PUMA") was denied employment following a positive pre-employment drug screen. The prospective employee argued that denying her employment based on a positive cannabis test violated PUMA. The employer argued that the language in PUMA, that made it illegal to discriminate against an employee for using medical marijuana, contained an exception that allowed employers to take action against employees on the basis of medical marijuana usage if it is "required by federal law or required to obtain federal funding." Id. at 83-84. The employer argued that the DFWA barred it from hiring employees who use marijuana.

The Court did "not agree that the DFWA required the defendant to rescind plaintiff's job offer." Id. at 84. The Court explained:

> The DFWA does not require drug testing. Nor does the DFWA prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical marijuana outside the workplace in accordance with a program approved by state law. That defendant has chosen to utilize a zero-tolerance drug testing policy in order to maintain a drug free work environment does not mean that this policy was actually "required by federal law or required to obtain federal funding."

Accordingly, the court rejected the defendant's argument that it would violate the DFWA for it to hire someone like the plaintiff who uses medical marijuana during off-hours.

Takeaway: Employers subject to DOT regulations regarding an employee that tests positive for cannabis must comply with them. An employer who contracts with the federal government should proceed carefully in their application of drug-testing policies and are advised to reach out to legal counsel for guidance before terminating an employee for merely having a positive marijuana test result, even if an employer believes it is in violation of their federal contract.

If you are an employer and need help navigating employee cannabis testing, contact Tracy Armstrong, Stephanie Gironda or any member of the Wilentz Employment Law Team.

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*Cannabis Law Disclaimer: Per federal law, under the Controlled Substances Act, marijuana is categorized as a Schedule I controlled substance. Possession, use, distribution, and/or sale of cannabis is a Federal crime and is subject to related Federal policy, regardless of any state law that may authorize certain marijuana activity. Compliance with state marijuana law does not equal compliance with federal law. Legal advice provided by Wilentz, Goldman & Spitzer, P.A. is designed to counsel clients regarding the validity, scope, meaning, and application of existing and/or proposed cannabis law. Wilentz, Goldman & Spitzer, P.A. will not provide guidance or assistance in circumventing or violating Federal or state cannabis law or policy, and any advice provided by Wilentz, Goldman & Spitzer, P.A. should not be construed as such.