

Workplace Drug Policies in the Era of Cannabis Legalization: Anti-discrimination Restrictions

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The conflicting positions of national and state cannabis regulation clearly create legal risk for participants in the cannabis production and distribution industries. However, inconsistent and conflicting regulation imposes an equally daunting and complex scenario for attenuated industries that serve or contract with cannabis businesses and consumers. Although third-party creditors, banks, real estate lessors, suppliers, accountants and attorneys possess the legal autonomy to avoid contracting with this high-risk industry, federal and state anti-discrimination laws may preclude similar risk-avoidance strategies in labor decisions.

Employers should not assume that marijuana's Schedule I drug status broadly supports adverse employment action premised on illegal drug use. Although the Americans with Disabilities Act (ADA) does not require employers to accommodate illegal drug use, several courts have held that the ADA also does not preempt state anti-discrimination laws that impose reasonable accommodation requirements. The unstable and continually evolving regulatory environment has introduced considerable uncertainty among employers and human resource professionals seeking to mitigate legal risk associated with workplace drug policies.

In most jurisdictions, employers may lawfully test employees for cannabis drug use, yet the procedures in both pre-employment and post-employment tests vary by jurisdiction. The purpose of this paper is to summarize the current regulatory environment for workplace cannabis drug testing, identify the unique compliance and legal risks of coordinating workplace drug policies with state medicinal and recreational cannabis laws, and discuss best practices for developing workplace drug policies. The paper's focus on drug policy language and practices will devote special consideration to safety-sensitive drug policies, aligning off-duty and social media policies with evolving state cannabis law, the legal significance of utilizing a Medical Review Officer to interpret drug test results, and the current status of hemp and hemp-related products.