

# Exploring Minnesota's Adult-Use Cannabis Law

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# Cannabis in the Workplace

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## How Cannabis Affects the Workplace

- Hiring and firing
- Drug testing
- Cannabis use on and off premises
- On-site possession
- Training
- Security

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## Federal Law

### Controlled Substances Act (CSA) – 21 U.S.C. § 811

- Does not recognize a difference between medical and adult/recreational use
- Cannabis is classified as a Schedule I drug
  - i.e., highly addictive with no medical value

### Federal regulations applicable to those in certain industries

- e.g., DOT regulations

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## States Law

- Statutory language is key
- Employers must look at the language of the authorizing statute and any relevant state disability laws
  - This is the language that will define obligations and protections

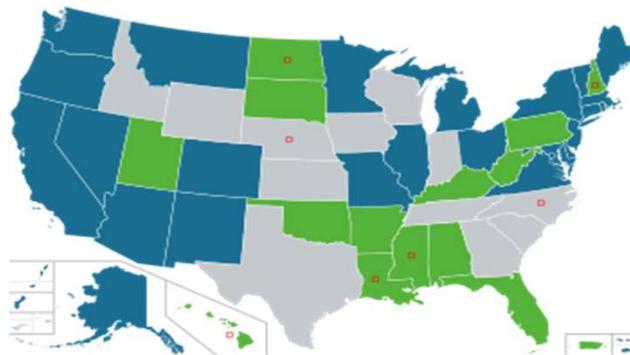
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## Current Status

Blue = legal for recreational use \* Green = legal for medical use \* Grey = illegal \* D = decriminalized  
Source: [https://en.wikipedia.org/wiki/Legality\\_of\\_cannabis\\_by\\_U.S.\\_jurisdiction](https://en.wikipedia.org/wiki/Legality_of_cannabis_by_U.S._jurisdiction)



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## Workplace Protections

- Plaintiffs in numerous states have challenged their termination for positive cannabis tests
- These types of claims have generally been asserted based on one of two theories (or both)—
  - (1) an employer violated the state cannabis statute’s anti-discrimination provision (adult use and medical); or
  - (2) an employer violated a state anti-discrimination statute because medical cannabis was a treatment for a disability, and thus the employee is entitled to a reasonable accommodation (medical)

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## Minnesota’s New Employee Protections for Cannabis Use, Generally

- Minnesota’s new cannabis laws provide for numerous employee protections:
  - E.g., employers are prohibited from discriminating against employees for using cannabis outside of work
  - E.g., employers generally cannot refuse to hire a job applicant because of private cannabis use
  - E.g., there are significant parameters around when testing for cannabis is permitted
- Unlike some states, there are private rights of action for violations of employee rights, so there can be significant repercussions to an employer for failing to comply with these protections

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# Drug Testing

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## The Difficulty with Drug Testing for Cannabis

- Cannabis is detectable in blood and urine for up to a month, and detectable in hair much longer\*
- THC is stored in lipid (fat) compartments throughout the body\*
- Consistent use will result in accumulation of THC in fatty tissues, and the more that accumulates, the slower the elimination rates\*
- So, if an individual consistently uses cannabis legally, they will likely always test positive on a drug test

\*Source: Karen E. Moeller, PharmD, BCPP, et al., Clinical Interpretation of Urine Drug Tests: What Clinicians Need to Know About Urine Drug Screens, Mayo Foundation for Medical Education and Research Mayo Clinic Proc. 2017;92(5):774-796

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## Pre-Employment Testing for Cannabis

- Minn. Stat. 181.951, subdiv. 8 provides:
  - “An employer must not request or require a job applicant to undergo testing solely for the purpose of determining the presence or absence of cannabis as a condition of employment unless otherwise required by state or federal law.”
  - “Unless otherwise required by state or federal law, an employer must not refuse to hire a job applicant solely because the job applicant submits to a cannabis test or a drug and alcohol test authorized by this section and the results of the test indicate the presence of cannabis.”
- Minn. Stat. 181.951, subdiv. 9 provides for certain limited exceptions: “safety-sensitive positions”; peace officers; firefighters; those providing face-to-face care, training, education, supervision, counseling or medical assistance to children, vulnerable adults, health care patients; positions requiring CDLs; positions funded by federal grants; other positions for which state or federal law requires testing

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## Other Types of Testing (Minn. Stat. § 181.951, subdvs. 2-5)

- Routine Physical Examination Testing – Generally cannot test for cannabis
- Random Testing – Can test for cannabis, but only if:
  - The employee is employed in a safety-sensitive position; or
  - The employee is a professional athlete if subject to a collective bargaining agreement that allows for testing
- Reasonable Suspicion Testing – Generally can test for cannabis if there is reasonable suspicion to believe that the employee:
  - Is under the influence;
  - Has violated written work rules prohibiting the use, possession, sale or transfer of drugs or alcohol while working or on employee’s premises;
  - Has sustained a personal injury or caused personal injury to another; **or**
  - Has caused a work-related accident or was operating or helping operate machinery, equipment or vehicles involved in a work-related accident

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## Best Practices for Reasonable Suspicion Testing

- Proceed cautiously
- Best practices:
  - Requiring two supervisors to observe behavior raising suspicion of drug or alcohol use
  - Document!
  - Maintain confidentiality to the extent possible
  - Give the employee an opportunity to provide information that management should consider before making its decision if the test results are positive

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## Other Types of Testing (Minn. Stat. § 181.951, subdiv. 6)

- Treatment Program Testing – Generally can test for cannabis when:
  - The employee has been referred by the employer for substance use disorder treatment or evaluation, or is participating in a substance use disorder treatment or program under an employee benefit plan
  - Employee can be tested without notice for a period of up to two years following completion of the prescribed substance use disorder treatment program

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## Notes on Cannabis Testing – Policies

- Any testing must be pursuant to a written policy that complies with the elements of Minn. Stat. § 181.952 in that it sets forth:
  - The employees subject to testing under the policy;
  - The circumstances under which testing may be requested/required;
  - The right of an employee to refuse testing and consequences of refusal;
  - Any disciplinary or adverse personnel action that may be taken based on a confirmatory test verifying an initial positive test result;
  - The right of an employee or job applicant to explain a positive test result on a confirmatory test or request and pay for a confirmatory retest; and
  - Any appeal procedures available
- This policy must be provided to every employee subject to it before any testing, and notice of the policy must be posted in a conspicuous location in the workplace

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## Notes on Cannabis Testing – Procedures

- All cannabis testing must comply with the reliability and fairness safeguards applicable to drug and alcohol testing found in Minn. Stat. § 181.953, which contains requirements for, for example:
  - Use of licensed or certified laboratories for testing
  - Testing, reporting and sample retention requirements
  - Employer chain-of-custody procedures
  - Employee rights in the testing process and notification to employees of same
  - Limitations on employee discharge, discipline or discrimination

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## Notes on Cannabis Testing – Procedures (Cont.)

- Minn. Stat. 181.953, subdiv. 10a provides when an employer may discipline or discharge an employee for use, possession, impairment, sale or transfer while working, on the employer’s premises or operating the employer’s machinery:
  - If, as a result of consuming cannabis, the employee does not possess the clearness of intellect and control of self that the employee would otherwise have;
  - If cannabis testing verifies the presence of cannabis following a confirmatory test;
  - As provided in the employer’s written work rules for cannabis and cannabis testing, provided that the policy complies with statutory requirements; or
  - As otherwise authorized or required by state or federal law or regulations, or if failure to do so would cause an employer to lose a monetary or licensing-related benefit under federal law or regulations

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## Notes on Cannabis Testing (Cont.)

- Cannabis testing is subject to the privacy and confidentiality safeguards applicable to drug testing, more generally:
  - E.g., a laboratory may only disclose to the employer data regarding the presence of drugs, alcohol or their metabolites in the sample tested;
  - E.g., test results are generally private and confidential information; and
  - E.g., positive test results from an employer test cannot be used as evidence in a criminal action against the employee. Minn. Stat. § 181.954.
- Another important protection: Employers cannot require employees or applicants to “undergo cannabis testing on an arbitrary or capricious basis.” Minn. Stat. § 181.951, subdiv. 8

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## Medical Cannabis Patients

- Employees generally cannot be discriminated against in hiring, firing or terms or conditions of employment because they are:
  - Enrolled in the Minnesota Medical Cannabis registry program; or
  - Test positive for cannabis or cannabis metabolites, unless the employee possessed, sold, transported or was impaired by cannabis while on work premises, while working, or while operating the employer's vehicles, machinery or equipment
    - Employees who undergo cannabis testing may present proof of their enrollment in the Minnesota Medical Cannabis registry program to explain a positive test result
- Exceptions: state or federal law or regulations require otherwise, or the employer would lose federal funding or a licensing related benefit under federal law or regulations

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## Repercussions of Violating the DATWA

- Employers may be liable to the employee in a civil action for:
  - Damages incurred by the employee;
  - Reasonable attorneys' fees if the employer knowingly or recklessly violated the statute
- A court may award equitable relief against an employer that:
  - Enjoins the employer from further violating DATWA;
  - Orders an injured employee or job applicant reinstated with back pay

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# Use and Possession in the Workplace

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## On-Site Use and Impairment

- Employers can prohibit employees from using cannabis in the workplace, while working, or while operating the employer's vehicles, machinery or equipment
- Employers can prohibit employees from being impaired by cannabis in the workplace during work hours
  - The challenge: identifying employees who are "impaired"
- Employers can prohibit the possession of cannabis at work
- Employers can prohibit the sale or transfer of cannabis at work

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## The Importance of a Compliant Policy

- If an employer wants to curtail the use, possession, impairment sale and transfer of cannabis at work, it is crucial that an employer has a statutorily-compliant policy to that effect
- “An employer may only enact and enforce written work rules prohibiting cannabis flower, cannabis product, lower-potency hemp edible, and hemp-derived consumer product use, possession, impairment, sale, or transfer while an employee, is working or while an employee is on the employer’s premises or operating the employer’s vehicle, machinery, or equipment in a written policy that contains the minimum information required by this section.” Minn. Stat. § 181.952, subdiv. 3(b)

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## Regulatory Requirements

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## MN Adult-Use Cannabis - History



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## Office of Cannabis Management (OCM)

- Regulates cannabis and hemp consumer industry
- Issues and renews licenses
- Establishes rules
- Investigates and enforces regulations

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## Licenses: Adult-Use Cannabis Licenses

License Type	Description	Application Fee	Initial License Fee	Renewal Fee (Annual)
Cannabis Microbusiness	<ul style="list-style-type: none"> <li>• ≤ 5,000 sq. ft. indoor canopy space OR ≤ 1/2 acre outdoors</li> <li>• ≤ 1 retail location</li> <li>• vertical integration permitted</li> </ul>	\$500	\$0	\$2,000
Cannabis Mezzobusiness	<ul style="list-style-type: none"> <li>• ≤ 15,000 sq. ft. indoor canopy space OR ≤ 1 acre outdoors</li> <li>• ≤ 3 retail locations</li> <li>• vertical integration permitted</li> </ul>	\$5,000	\$5,000	\$10,000
Cannabis Cultivator	<ul style="list-style-type: none"> <li>• ≤ 30,000 sq. ft. indoor canopy space OR ≤ 2 acres outdoors</li> <li>• vertical integration prohibited</li> </ul>	\$10,000	\$20,000	\$30,000

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## Licenses: Adult-Use Cannabis Licenses

License Type	Description	Application Fee	Initial License Fee	Renewal Fee (Annual)
Cannabis Manufacturer	<ul style="list-style-type: none"> <li>• Can buy cannabis, hemp to mfr. cannabis prods., lower-potency hemp edibles, etc.</li> <li>• Can resell to other Cannabis Businesses</li> </ul>	\$10,000	\$10,000	20,000
Cannabis Retailer	<ul style="list-style-type: none"> <li>• Direct to consumer sales</li> <li>• ≤ 5 retail locations/license</li> <li>• ≤ 1 per city</li> <li>• ≤ 3per county</li> </ul>	\$2,500	\$2,500	\$5,000
Cannabis Wholesaler	<ul style="list-style-type: none"> <li>• Purchase from micro, mezzo, cultivators, mfrs.</li> <li>• Sell to micro, mezzo, mfrs., retailers</li> </ul>	\$5,000	\$5,000	\$10,000
Cannabis Transporter	<ul style="list-style-type: none"> <li>• Transport to/from cannabis businesses, industrial hemp growers, etc.</li> </ul>	\$250	\$500	\$1,000
Cannabis Testing Facility	<ul style="list-style-type: none"> <li>• Test from cannabis businesses, industrial hemp growers, etc.</li> </ul>	\$5,000	\$5,000	\$10,000
Cannabis Delivery Service	<ul style="list-style-type: none"> <li>• Purchase from retailer (micro or mezzo with retail endorsement or cannabis retailer) and deliver to consumers</li> </ul>	\$250	\$500	\$1,000
Cannabis Event Organizer	<ul style="list-style-type: none"> <li>• Temporary event no more than 4 days</li> </ul>	\$750	\$750	N/A

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## Licenses: Lower-Potency Hemp Edible Licenses

License Type	Application Fee	Initial License Fee*	Renewal fee (Annual)
Lower-Potency Hemp Edible Manufacturer	\$250	\$1,000	\$1,000
Lower-Potency Hemp Edible Retailer (per location)	\$250	\$250	\$250

\*Can sell without a license until March 1, 2025

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## Licenses Restrictions: Prohibition on Vertical Integration § 342.18, subd. 2

- Exception for microbusiness and mezzobusiness licenses
  - Grow/manufacture/purchase
  - Package/label for sale
  - Sell
  - On-site consumption of edible products
- Multiple licenses
  - Lower potency hemp edibles, § 342.43
    - Can hold both retailer and manufacturer licenses
    - Can hold licenses for other products (e.g. sell food, tobacco, alcohol)
    - Can hold license to cultivate industrial hemp (Farm Bill)
    - Can NOT hold any other cannabis business license
  - Cannabis Businesses

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## Licenses Restrictions: Multiple Licenses

CANNABIS BUSINESSES	Micro	Mezzo	Cultivator	Mfr.	Retailer	Wholesaler	Transporter	Testing	Delivery	Event
Micro										X
Mezzo										X
Cultivator				X						X
Mfr.			X							X
Retailer									X	X
Wholesaler							X		X	X
Transporter						X			X	X
Testing										
Delivery					X	X	X			X
Event			X	X	X	X	X		X	

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## License Applications

- Contents § 342.14
  - General info
  - Disclosure of ownership and control
  - Security plan
  - Business plan (size, growth, experience, environmental, financial, operational, etc.)
- Criteria (Score) § 342.18
  - Social Equity
  - Veteran/retired national guard status
  - Security/record keeping
  - Employee training plan
  - Business plan/finances
  - Labor and employment practices
  - Knowledge/experience
  - Environmental plan
  - Additional points of licensee would expand service to underrepresented market

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## License Applications: Social Equity

- Qualifications – ALL Owners § 342.17
  - Convicted of possession or sale offense
  - Family member convicted of possession or sale offense
  - Service member who lost honorable status due to possession or sale offense
  - Resident of certain areas that have experienced disproportionate enforcement and/or poverty
- Must account for 20% of score
- Social equity licenses can only be transferred to social equity applicants

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## Licenses: Local Governments § 342.12

**CANNOT**

- Prohibit cannabis businesses

**CAN**

- Restrict, regulate temporarily until 1/1/25
- Enact reasonable time, place, manner restrictions
- Prohibit locations within 1,000 ft. of school, 500 ft. of daycare, residential treatment facility, attraction (e.g. playground)
- Limit to 1 license per 12,500 people (381 dispensaries)
- Provide additional information "relevant" to license within 30 days of receiving application from OCM (e.g. concerns about location or applicant)

**MUST**

- Require licensee operating retail location to register with city, town, or county (can be delegated to county)
- Certify compliance with local zoning ordinances, fire and building codes within 30 days of receiving application

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## What's Next? 2024 Legislative Session

- Recommendations from OCM Annual Report to Legislature (1/16/2024)
  - Temporary license system
  - Eliminate certain requirements:
    - Secure location before applying
    - Local government input (30 days)
  - Consolidate medical and recreational licenses for growers and processors
  - Social equity component
    - Change mandate to 51% ownership by social equity applicants (from 100%) to get social equity benefit
- Could result in licenses issuing as soon as this summer

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## Taxation § 295.81

- Taxation under Adult-Use Cannabis Law
  - 10 percent sales tax on gross retail sales of taxable cannabis products
    - Includes cannabis products
    - Includes lower-potency hemp edibles (not previously subject to additional tax)
  - Split 80%/20% between state and local government
  - Exemptions
    - Products purchased on reservation from tribe-licensed seller
    - Medical cannabis
    - Retailers purchasing product for resale
- Additional taxes
  - All applicable state and local sales taxes
  - Federal taxes – irrelevant that cannabis is illegal

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