The Case for Limiting Employee Drug Tests for Cannabis

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By now most employers are aware of the legal changes surrounding adult-use (also referred to as "recreational") and medicinal cannabis but may be reluctant to change their policies absent a formal governmental requirement. Cannabis is only approved in Maryland for medicinal purposes; however, earlier this year State House Speaker Adrienne Jones (D) pledged that the House will soon pass legislation allowing for Marylanders to vote on the legality of adult-use cannabis on the November 2022 ballot. Expecting that voters will support legalization, Annapolis lawmakers have already discussed establishing a regulated adult-use cannabis marketplace by as early as 2023.[1]

To make matters more complicated for many Maryland employers, Virginia recently authorized the cultivation, use and possession of cannabis in that state. While Virginians are without a legal mechanism to buy adult-use cannabis until its regulated marketplace is formalized, individuals are allowed under the present law to consume cannabis that they grow themselves, or that was freely shared with them.

The current state of cannabis legislation in Maryland (and throughout the country) presents several legal and practical concerns for employers that utilize drug tests at any stage of the employee life cycle. Virtually all of these concerns stem from the physiological aspect that cannabis breaks down slowly in the human body, and a person will test positive for cannabis well after they last consumed it. This process becomes even more elongated following consistent repeated use.

What are the risks of conducting cannabis drug tests under a medical-only legislative scheme?

Unlike some states, Maryland's medical cannabis law does not contain an explicit provision that employers cannot take action against employees because they use medical cannabis. Rather, the law only provides that qualifying patients (i.e., people lawfully prescribed medical cannabis) may not be "denied any right or privilege." MD Code, Health – General § 13-3313(a)(1). While most practitioners conservatively believe this establishes an anti-discrimination protection for medical cannabis users, the provision has not been tested in any reported caselaw. Even absent a direct anti-discrimination requirement, however, employers who drug test for cannabis must do so in a way that does not violate state and local laws prohibiting disability discrimination, such as the Maryland Fair Employment Practices Act (MFEPA).[2]

Employers undoubtedly have the right to prevent employees from using or possessing cannabis during working hours and on their premises, regardless of whether they are certified to use medical cannabis. However, under the MFEPA employers have an obligation to reasonably accommodate employees' disabilities so long as the accommodation does not present an undue hardship. Such an accommodation could include the ability to use medical cannabis while off duty and outside of the worksite, inevitably causing an employee to test positive anytime he or she is tested for cannabis. Additionally, many employees who are prescribed medical cannabis may not even disclose this fact to their employer, so following a positive drug test may become the first time the conversation even happens.

Drug tests are typically performed in two separate contexts: (i) pre-employment, or (ii) following a workplace accident. Caselaw from other jurisdictions provides that in both of these contexts employers must recognize if the applicant/employee utilizes medical cannabis, and if so, not take any adverse action against them exclusively because of a failed drug test.

An example of courts scrutinizing post-accident drug testing can be found in the New Jersey Supreme Court decision *Wild v. Carriage Funeral Holdings, Inc.*, 241 N.J. 285 (2020). *Wild* concerned a motion to dismiss, and the plaintiff, a driver for the defendant funeral home, alleged that he utilized medical cannabis as part of his cancer treatment. While working a funeral the plaintiff's vehicle was struck by another vehicle that ran a stop sign. The plaintiff was taken by ambulance to the hospital, and the plaintiff informed the treating physician that he had a license to possess medical cannabis. The plaintiff alleged that the treating physician informed him that it was clear that he was not under the influence of cannabis, and therefore the physician did not believe a drug test was necessary. However, the funeral home advised the plaintiff that a blood test was required before the plaintiff could return to work. The plaintiff in-turn advised the funeral home that he used medical cannabis for his disability, and that he would undoubtedly test positive despite not being impaired at the time of the accident.

Several days later, the plaintiff was informed that the funeral home was unable to "handle" his cannabis use and that his employment was being terminated because they found drugs in his system. The plaintiff received a letter stating that he had been terminated because he failed to disclose his use of medication which might adversely affect his ability to perform his job duties. See also *Wild v. Carriage Funeral Holdings, Inc.*, 458 N.J. Super. 416 (App. Div. 2019) (intermediate appellate decision with additional factual background).

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[1]House Cannabis Referendum and Legalization Workgroup streaming session for Wednesday, September 8, 2021, available at https://www.youtube.com/watch?v=26cX-phcqpU&feature=emb_imp_woyt

[2]Under the Americans with Disabilities Act, current illegal drug users, which include drugs that are unlawful under the Controlled Substances Act, are not "individuals with disabilities." Because marijuana remains illegal under the federal Controlled Substances Act, anyone using marijuana, medical or otherwise, is a "current" illegal drug user that is not entitled to a reasonable accommodation under the ADA. 42 U.S.C. §12114(a)

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The funeral home moved to dismiss the plaintiff's discrimination claim arguing that the state anti-discrimination statute (the N.J. Law Against Discrimination) does not require an employer to accommodate an employee's medical cannabis use because the separate medical cannabis law did not contain an anti-discrimination provision at the time. The New Jersey Supreme Court soundly rejected this and recognized that a plaintiff's authorized use of medical cannabis outside the workplace is "harmonized with the law governing [state] disability discrimination claims." Wild, 241 N.J. at 288. Accordingly, the court found that the plaintiff's discrimination claim could proceed despite the fact the medical cannabis law itself did not contain an anti-discrimination provision.[3]

In the pre-employment context, the District of Connecticut's decision in *Noffsinger v. SSC Niantic Operating Co.*, 338 F. Supp. 3d 78 (D. Conn. 2018) is instructive. There, the plaintiff alleged that a nursing and rehabilitation center, which operates as a federal contractor, reneged on its decision to hire her because she acknowledged using medical cannabis and tested positive for cannabis in a pre-employment drug test. The plaintiff filed a complaint against the center alleging, among other things, a violation of Connecticut's Palliative Use of Cannabis Act ("PUMA"). The center countered by arguing that it was exempt from PUMA's anti-discrimination provision because the statute allows for an exception if discrimination "is required by federal law or required to obtain federal funding." To this point, the center contended that the federal Drug Free Workplace Act (DFWA) barred it from hiring the plaintiff. The court rejected the center's argument, stating that the DFWA does not require drug testing, "[n]or does the DFWA prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical cannabis outside the workplace in accordance with a program approved by state law." Finally, the court also declined the center's argument that PUMA only prohibits discrimination on the basis of one's status as an approved medical cannabis patient, but not on account of one's *use* of medical cannabis, finding that the purpose of the statute is to protect employees from discrimination based on their use of medical cannabis pursuant to their qualifying status under PUMA.

What's up next if adult-use cannabis is legalized?

Employers trying to predict what the employment landscape may look like once cannabis becomes legalized can look at recent activity in New York, which (similar to Virginia) authorized the possession and use of cannabis, but has not yet set up a regulated marketplace. Coupled with this authorization, New York amended its Labor Law to make it clear that employers may not discriminate or retaliate against employees or job applicants because they consume cannabis recreationally (or for medical purposes).

Recent guidance published by the New York State Department of Labor (NYSDOL) addresses how this amendment relates to drug testing, and states that employers are not allowed to test employees or applicants for cannabis unless (1) it is required to do so by federal or state law; (2) failure to do so would result in a violation of federal law or result in the loss of a federal contractor of federal funding; or (3) the employee manifests specific articulable symptoms of impairment. Accordingly, drug testing for cannabis has effectively become illegal in that state outside of those narrow circumstances.

The trend in New York is notably continuing in other jurisdictions, including that in Philadelphia the city passed an ordinance effective January 1, 2022, prohibiting employers from conducting pre-hire cannabis testing. While it is unclear how exactly Maryland will implement any adult-use cannabis authorization, the trends from other jurisdictions suggests that employers will be forced to accommodate employees' rights to consume cannabis outside of working hours away from company property.

What actions can employers take now?

Employers can protect themselves from anti-discrimination claims under the current model by first recognizing what cannabis drug testing can tell you, and what it cannot. Employers who utilize pre-employment drug testing should understand that applicants who test positive for cannabis may be certified medical cannabis patients, who may be able to raise a claim under either the Maryland medical cannabis law or the MFEPA if they are denied employment solely because of a failed drug test. Further, employers should be cautious about exclusively relying on cannabis drug testing in the post-accident context. Managers should be trained to identify any potential signs of impairment and contemporaneously document them. This documentation, *together with a failed drug test*, may support a disciplinary action. Relying on a drug test alone could be deemed insufficient and may expose the company to liability.

For government contractors, the legal predicaments are further heightened by competing obligations under the DFWA and relevant contracts, which was highlighted by the *Noffsinger* decision. These employers and their counsel should closely scrutinize their drug testing obligations and revisit past practices to avoid legal problems in the future.

Authors:

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[1]After the New Jersey Supreme Court granted certification to review the decision in *Wild*, the legislature amended its medical statute and enacted adult use legislation, both of which impact an employer's ability to conduct drug testing for cannabis.