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Got Pot? Can You Test to Find Out?

Authors: Elizabeth Ann Liner, Derbigny Daroca

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Because of the state-by-state piecemeal legalization of marijuana, employers today face a dichotomy between maintaining a safe workplace versus adhering to the ever-changing legal landscape of drug testing for marijuana. Fifteen states have passed laws allowing recreational marijuana consumption of cannabis, and 48 states permit some form of marijuana use for medical reasons. Several states that have legalized marijuana recreationally are now implementing protections such as anti-discrimination laws for employees in non-safety-sensitive positions who use cannabis outside of working hours. Also, approximately 15 states provide a private right of action for employees who claim that their employer failed to accommodate their marijuana use due to a disability or other medical condition. The purported purpose for such protections is to ensure that employees are not subject to adverse employment consequences for conduct outside of work that is legal in particular states.

So, employers are faced with the dilemma of whether to test for marijuana at all when faced with the possibility of costly litigation as a result. Notably, employers have concerns regarding marijuana use and impairment at work even for employees in non-safety-sensitive positions such as those that require a sober mind and focused attention to detail (accountants, attorneys, doctors) or that entail driving (ride share, delivery).

There might be an answer to these concerns on the horizon. There are companies, such as [Cannabix Technologies](#) and [Hound Labs](#), developing marijuana breathalyzer technologies for law enforcement and the workplace. These drug-screening devices are projected to detect THC, the psychoactive component of marijuana that causes impairment, using breath samples. Most drug tests, such as hair or urine analysis, detect THC in the system for days or sometimes weeks after consumption and long after the individual is no longer impaired. The breathalyzers are reported to show if a person has used marijuana within 2-3 hours before the test is administered, which is believed to be the peak period of impairment after the ingestion of THC. These inventive companies developed this technology in order to aid law enforcement in preventing impaired driving. But these companies also recognize and advertise the potential benefits for employers including potential cost savings in avoiding employee turnover, workplace safety benefits, and treating all employees fairly. These companies highlight the efficiency of the marijuana breathalyzers: minimal training is required; they are non-invasive and hygienic; they offer a high level of measurement sensitivity; they provide quick results onsite; they feature secure and encrypted data; and they are portable and durable. These devices may be the answer to employer concerns as the employers can say that a positive result demonstrates impairment at work rather than general past use.

As employers are considering whether to drug test for marijuana at all in the wake of these anti-discrimination laws, marijuana breathalyzers could be the ultimate long-term solution to balance employer concerns regarding a safe workplace and employees' rights to engage in legitimate conduct outside of work. However, because such devices are in the early stages of development, testing, and use, it is unclear whether they fall within the scope of the new anti-discrimination laws and whether they can be used for non-safety-sensitive positions. Because many of the anti-discrimination laws relate only to use outside of work, it appears that reliance on testing demonstrating impairment while at work would not violate such laws, but this area of the law is continuing to develop. Further, until such devices are readily available, employers who choose to drug test for

marijuana must evaluate the legal risks associated with doing so on a state-by-state basis and should consult with legal counsel before doing so.

If you have any questions about workplace drug testing, please contact the authors or your Baker Donelson attorney.