

# Clearing the Haze: Marijuana Drug Testing Legal Updates

By Kathryn J. Russo & Catherine A. Cano

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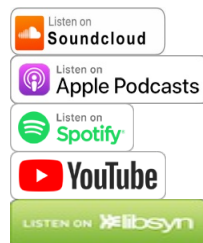
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## Details

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Marijuana drug testing is complicated and controversial, and with rapidly increasing federal, state, and local laws affecting workplace policies, it may be challenging for employers to keep up. Indeed, since January, the U.S. Department of Transportation has published new drug testing regulations and several states have enacted new marijuana laws.

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## Transcript

Alitia Faccone:

Welcome to Jackson Lewis's podcast, We Get Work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business oriented solutions to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact the workplace, and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted? Marijuana drug testing is complicated and controversial. And with rapidly increasing federal, state, and local laws affecting workplace policies, it may be challenging for employers to keep up. Indeed, since January, the US Department of Transportation has published new drug testing regulations and several states have enacted new marijuana laws.

On this episode of We Get Work™, we discuss how recent drug testing laws affect the workplace and employers who are bound to comply with them. Our hosts today are Kathryn Russo and Catherine Cano, principals in the Long Island and Omaha offices of Jackson Lewis. Kathryn with a K helps clients navigate workplace problems involving drugs and alcohol. She defends employers in litigation where drug and alcohol test results are at issue and frequently conducts reasonable suspicion training for employers concerning their substance abuse policies. Catherine with a C counsel's clients on workplace drug and alcohol issues, including developing substance abuse

policies and helps them comply with the Americans with Disabilities Act, Family and Medical Leave Act, and state disability and leave laws. Kathryn Russo and Catherine, the question on everyone's mind today is what are the latest marijuana drug testing laws and regulations and how does that impact my business?

Kathryn Russo:

Hello, everyone. This is Kathryn Russo. I'm here today with my partner, Catherine Cano, who she's in the Omaha office. I'm in the Long Island, New York office. And we are going to update you today on some recent developments in drug testing and marijuana laws. And Catherine and I actually decided recently we should be doing this on a regular basis, because it seems like these laws just keep coming out nonstop. Every time we turn around, there's a new law and we've got to summarize it and get the information out to our clients. So, we thought what we would do today is talk about some of the laws that have been enacted within the last three, four months. And so, I'm going to start with what I think is a pretty significant one. And this is the US Department of Transportation's new regulations allowing oral fluid drug testing. This is a pretty significant thing because we've been waiting for it for a long time.

So, DOT had been talking about oral fluid testing for years. They're very slow to actually enact regulations. Their proposed rules came out at least a couple of years ago. And we've been waiting, waiting, waiting for them to finalize them. And finally on May 2nd, they published the final regulations. And everybody's quite happy about that, because I think oral fluid testing, I think is viewed by employers as just being a lot easier. With urine drug testing for drugs, you have to worry about potential tampering, adulteration, substitution, and people have to go into a bathroom and have privacy. With oral swab testing, it's going to be a much easier, much faster process. So, I think employers are very happy about this. Their new rules technically become effective on June 1st, but they really won't become effective on June 1st, because no DOT mandated drug testing can happen unless there's a certified laboratory.

So, we have to wait for the US Department of Health and Human Services to certify at least two laboratories, because we're going to need one laboratory to be the primary laboratory and another one to do the split specimen testing. So, as you may know, DOT testing requires split specimen. So, for example, if somebody tests positive and the test is done by one laboratory, the employer applicant has the right to ask that the split or the second specimen gets sent out to another laboratory, kind of like for a second opinion. So, that has to happen. We've got to wait for two laboratories. I don't know when that's going to happen. I've been asked several times by clients, when is that going to happen? I don't know. And I don't know how long it will take. But in the meantime, I think it's good that we have a little bit of time, because I think there's a lot that DOT regulated employers need to start thinking about and planning.

And realize, I'm talking about DOT regulated employers. And so, the DOT agencies are the Federal Motor Carrier Safety Administration for truck drivers, the FAA for aviation employees, the FRA for railroad employees, the FTA for transit employees, the Pipeline and Hazardous Materials

Administration for pipeline employees and the Coast Guard for Marine employees. So, if you are regulated by any of those federal agencies, you've got to follow DOT's procedural rules, and now you have the option. You can decide whether you want your drug testing to be urine testing or oral fluid testing, or some combination thereof. But this requires the employers to decide. You've got to make that decision, okay, well, when are we going to use oral fluid testing? Then you're going to have to revise your policy. So, these are issues you really should be thinking about discussing in your organization.

You've got to decide, do you want to use it for pre-employment, for reasonable suspicion, post-accident, random? You've got to think about that. You could also have it as an alternative, for example, if somebody is claiming they have a shy bladder, then maybe you're going to use it for that or in certain direct observation situations. So, you really need to decide when do you want to use the oral fluid testing. And of course, employees don't get the option. So, realize that this is up to the employer. The employee doesn't get to decide, "Oh, I'd like to do an oral fluid test today. I don't want to do urine testing." That's not how it works. It's the employer's decision.

Catherine Cano:

Kathryn, can an employer just require both at the outset, they have a belt and suspenders approach? Can they have the employee do both from the beginning of the testing process?

Kathryn Russo:

Yeah, I think it's better. My concern is that may confuse the laboratory or the collection site, because another thing that employers are supposed to do is have a standing order in place with their collection sites and laboratories. Meaning that when the employee gets to the collection site, the collection site should already know what the employer wants. Is this a urine test? Is it an oral fluid test? What are we supposed to be doing? So, I do think that the employer should decide that ahead of time and that you need to communicate with your collection facilities and labs. And don't assume that they're going to know what to do, because honestly, they will only do what the employer instructs them to do. Realize point of collection testing or instant tests are not allowed. So, again, this is the usual DOT process, which is a collection facility followed by a laboratory, followed by review, by a medical review officer. So, those are the issues that employers really need to be deciding regarding oral fluid testing.

Catherine Cano:

Kathryn, is there a process in the rule that addresses if somebody's unable to provide a oral fluid sample?

Kathryn Russo:

Yeah, I believe that there is. And I think that there are processes for being unable to provide any specimen, whether it's breath, urine, or oral fluid, that there are procedures in place for that. The other thing I wanted to add that I found interesting when this rule came out, and I was anxious to

see if they would address it, was that in their notice of proposed rulemaking, they had talked about the fact that for oral fluid testing of marijuana, they believe that the window of detection is shorter in oral fluid than it is in urine/ and they opined that it's up to 24 hours. They were looking for input from commenters on that issue. And I don't know what comments they got, but that issue is not addressed in the final rules.

So, the only reason I mentioned that, I don't think it's really significant for purposes of DOT mandated testing. But many employers will adopt DOT procedures for their non-DOT policies. And employers are desperate to find a drug testing device that will detect current impairment by marijuana. And right now with urine testing, you don't know. You have no idea when the person used marijuana. You just have a positive test. It shows THC. You have no idea if they used it today or yesterday or last week. We were hoping that oral fluid possibly would address that issue. And I think many people think that it does, but I just haven't seen any scientific data, evidence, surveys. So, I can't really say for certain that oral fluid has only a 24-hour window of detection.

And I also think that even if it does, that doesn't necessarily help employers in states where all off-duty use of marijuana is protected. Because the employee could say, "Okay, I tested positive today, but I used it last night and it's legal, and you can't penalize me for doing something that's legal." So, I still think we're in a little bit of a bind about detecting current impairment by marijuana. So, that leads me to segue into the next topic I wanted to talk about, which is Washington State's new law that will take effect on January 1st of next year, and that is going to bar employers from relying on off-duty use of marijuana. So, in effect, as of January 1st, Washington State employers should not test for marijuana.

Now, if you read the law, the law is very similar to the California law that will also take effect on January 1st, 2024. They both have this language about employers cannot rely on drug tests that detect non-psychoactive cannabis metabolites. And what they mean by that is psychoactive means the component of marijuana that makes a person feel high or impaired. So, what these laws are saying is that employers can't rely on tests that rely on the non-psychoactive components of cannabis, because that doesn't cause people to be impaired, and it's legal and it's protected. So, you can't use that in your hiring decisions. The problem with that is I'm not aware of any drug tests that make that distinction.

So, it seems a little puzzling to me that these laws that California and Washington are now saying that employers need to distinguish or use drug tests that distinguish between psychoactive components and non-psychoactive components of marijuana. I'm just not aware of any tests that can do that. So, for the moment, unless someone invents a brand new drug test that can detect only psychoactive components of marijuana, we are advising employers in Washington and California not to test for marijuana in California at all as of January 1st. And then for Washington State, not for pre-employment tests as of January 1st.

Catherine Cano:

Kathryn, are there any safety sensitive exceptions in the Washington law?

Kathryn Russo:

Yes, there are. Thank you for reminding me. So, there are some exceptions in that law. You should take a look at it. But for very dangerous jobs, including positions requiring federal background checks or security clearances, law enforcement, fire department positions, first responders such as 911 dispatchers, corrections officers, positions in the airline or aerospace industries. And then there's a nice catchall that says, any safety sensitive position for which impairment while working presents a substantial risk of death, and the employer must identify what those positions are. So, I think for employers in very dangerous industries in Washington State, you can probably continue to test for marijuana in January, as long as you identify specifically what those safety sensitive jobs are. I would recommend putting it on your job descriptions. So, Catherine, I'm going to turn it over to you to talk about Delaware and Kentucky. And the hits just keep on coming.

Catherine Cano:

Yeah. I have just two relatively brief updates. But in April, Delaware became the most recent state to legalize recreational marijuana. This law, it shouldn't have a huge impact on employers for purposes of drug testing, because the law says that it's not intended to impact or impose any requirement or restriction on employers with respect to terms and conditions of employment, and it specifically addresses policies or disciplines. So, employers in Delaware don't have to allow employees to use marijuana at work or during work time. You can still test for marijuana and take disciplinary action based on positive test results. Two caveats there. First, keep in mind that Delaware does have a medical marijuana law. So, you have an employer or applicant who tests positive for marijuana in Delaware, we still need to walk through whether that person has a medical basis for using marijuana and there is protection for those individuals.

And then second, there's just the practical side of it, that if marijuana is legal in the state and people are using it off duty, does it make sense for employers to continue to test or to do broad testing of marijuana in Delaware? And on March 31st, Kentucky also enacted a medical marijuana law. As a lot of states are moving into recreational marijuana, there are still some states in the country that don't have medical marijuana. So, Kentucky's law is limited to medical marijuana. It won't go into effect until January 2025. So, employers have quite a bit of time to get their arms around the law. It has a lot of employer friendly provisions in there. It specifically says employers can implement policies restricting the use of medical marijuana or medical cannabis by employees, restricting or prohibiting the use of equipment, machinery, or power tools by qualified patients, if the employer believes that it would pose an unreasonable safety risk.

Employers can continue to test for marijuana and enforce drug testing policies, including zero tolerance drug testing policies. There is one interesting provision about testing. A registered cardholder cannot be considered under the influence of cannabis solely because the presence of

THC metabolites. So, that basically means that if an employee tests positive for marijuana, we can't just assume they're under the influence just because they've tested positive. But if the employer determines that this individual's impaired by the use of cannabis based on reasonable suspicion assessment, and then they test for cannabis, the employee then has the burden of proving non-impairment. If an employee is discharged from employment for consuming medical cannabis or working while under the influence of medical cannabis, or testing positive for controlled substance, they'll be ineligible for unemployment, as long as the employer has it in their policies that using marijuana is a violation of their policy. So, again, employers have about 18 months for that one to come into play. And it's not going to have a significant impact on employers' rights with respect to drug testing. But just an update that we wanted to share.

Kathryn Russo:

Catherine, even though I think that Kentucky law is pretty employer friendly, but do Kentucky employers have to have concerns about potential disability discrimination claims? Meaning that even though the medical marijuana law is employer friendly, could somebody just assert a generic disability discrimination claim because they're using medical marijuana, "My doctor says, I have to use it, and you employer don't want to let me use it?"

Catherine Cano:

Well, and the law does say that it does not permit a cause of action against an employer for discrimination or wrongful discharge. So, I think that would be difficult for the employee to try to bring a claim. That said, we see a lot of creative lawyering out there. So, I think we can't rule anything out in terms of what an employee may try.

Kathryn Russo:

And the Delaware law I thought was interesting, because Delaware, their medical marijuana law is very protective. And so, I was a little surprised that the recreational marijuana law wasn't more expansive than it is, because there was some case law in Delaware that was not favorable for an employer in the medical marijuana context. So, it's interesting. But I think that all of these laws are showing the trend in the law is that more and more states are enacting either recreational or medical marijuana laws. And there are very few states now that don't have some kind of marijuana law. They're getting fewer, and fewer and fewer, and I think it's hard. I think it's hard for employers to manage that.

Catherine Cano:

I think in particular, the employers, that if you're a multi-state employer, to try to keep up with all of these laws. Because even where we feel like we start to get a handle on one piece, then there's a change. So, maybe we feel like we know how to handle medical marijuana, then we are starting to get recreational marijuana. We got a handle on that, and now there's amendments to the recreational marijuana laws where it's creating protection. And employees are arguing that it's

lawful off-duty conduct. And it just seems like a bit of a never ending learning curve for employers trying to manage this space.

Kathryn Russo:

All right, one more state law that we should talk about is Minnesota's new law that took effect on August 1st. This law legalized recreational marijuana so that individuals over 21 years old may use it.

It amended the Lawful Consumable Products law so that now cannabis products are lawful consumable products and employers are not permitted to discipline or discharge employees for refusing who who actually use lawful consumable products outside of work. So this this law kind of joins a number of other states that are now protecting off duty use of marijuana and cannabis products.

Now the good thing is that at the same time this law took effect, the the legislature also amended the drug testing law in Minnesota. And you may be aware that there's a pretty technical drug testing law in Minnesota that imposes many requirements or restrictions on employers who do drug testing.

The good news is that if you still want to test for marijuana or cannabis products, because they have a pretty broad definition now of cannabis products, you can still do so for reasonable suspicion and post accident tests. However, for pre employment cannabis testing you need to limit it to safety sensitive jobs only and the same is true for random testing.

Now safety sensitive jobs in Minnesota are defined as a job in which impairment caused by drug, alcohol or cannabis usage would threaten the health or safety of any person. So you just need to be careful if you're going to do pre employment and random testing that you're limiting it to safety sensitive individuals.

The other thing I will say is in Minnesota, employers really need to revise their drug testing policies because the statute does go on to say that if you want to take adverse employment actions against people who use cannabis at work or sell it or test positive for it, you need to have a very clear written policy and work rules that spell all of this out and that comply with the new law.

Kathryn Russo:

And just for those of you listening, if you don't already know, our firm has a drug and alcohol testing law advisor blog. So, whenever any new law comes out dealing with marijuana, we post it on there. You can also find us on LinkedIn, and Twitter, and everywhere else you get content. We like to keep you up to date on all these laws. It's very difficult to be a multi-state employer now and conduct drug testing. So, we urge you that if you're still testing for marijuana, you really need to be up-to-date on all of the marijuana laws in the various states where you operate. So, thank you very much for listening today, and we'll be back very soon, I'm sure, with more laws.

Alitia Faccone:

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