

Nevada & NYC Roll Out Pre-Employment Cannabis Drug Screening Restrictions

Labor & Employment Law Update

on July 2, 2019

Pre-employment drug screening for marijuana is starting to create exposure for employers. In several states, including Connecticut, Maine and Massachusetts, courts have ruled that employees have a valid claim against an employer for terminating or pulling a job offer because the employee tested positive for marijuana during the pre-employment stage, in order to enforce a drug-free workplace policy. In fact, Illinois' new recreational cannabis law, effective January 1, 2020, infers that employers could face a claim under Illinois' Workplace Privacy law for doing the same.

More recently though, Nevada and New York City passed first-of-their-kind laws expressly restricting pre-employment drug screening for marijuana, respectively effective January 1, 2020 and May 10, 2020. While Nevada's Assembly Bill 132 prohibits employers from failing or refusing to hire an applicant because a pre-employment drug screen shows the presence of marijuana, NYC's Int. No. 1445-A prohibits testing for THC and marijuana in the first place. Employers must understand the significant impacts of these laws, and plan accordingly.

Exceptions

Neither law applies to the extent it is inconsistent with a CBA, federal law (including Department of Transportation regulations), or a position funded by Federal funds (reminder: cannabis is still Federally unlawful, even though Congress has curtailed the DOJ's enforcement of marijuana where lawful for medical (not adult use) purposes and approved extraction of CBD from hemp). Nevada's law further does not apply if inconsistent with an employment contract; while NYC exempts positions requiring compliance with other NYC and NY State law.

In Nevada, positive tests can be used to weed out (pun intended) applicants for positions as firefighter and EMT, operators of motor vehicles for which federal or state law require substance testing, and **positions that in the determination of the employer could adversely affect the safety of others**; an employee tested in the first 30 days of employment can, at his/her own expense, submit to additional screening to rebut an employer's initial screening.

NYC permits pre-employment testing for police and other officers; positions requiring a CDL or supervision of children, medical patients, or vulnerable persons; or any position with the potential to significantly impact the health or safety of employees or members of the public – but only as determined by “the commissioner of citywide administrative services for the classified service of the city of New York, and identified on the website of the department of citywide administrative services” or the chairperson. NYC is expected to promulgate further rules.

Penalties

NYC’s law amends its civil rights law, which provides for injunctive relief (e.g., an order to hire the applicant), back pay/front pay, attorneys’ fees, experts’ fees, costs, and civil penalties of \$125,000 to \$250,000. Though it does not specifically address penalties, Nevada’s law will likely amend its workplace privacy protections for use of a lawful product outside employment, with similar damages to NYC, plus liquidated damages (equal to lost wages and benefits), and as applicable, reinstatement without loss of position, seniority, or benefits.

Not a Total Ban on Pre-Employment Drug Testing

Neither law is a complete ban on pre-employment substance testing — employers may still test for other controlled substances like barbiturates and amphetamines. Note also the jurisdiction-by-jurisdiction at play. To the extent they permit cannabis – whether medical or adult-use – most other jurisdictions are either silent as to pre-employment testing, or implicate prohibitions vis-à-vis privacy laws. There, courts will likely resolve whether pre-employment screening is permitted or prohibited. Notably, courts have historically been pro-employer on this topic, though that could certainly change given the shift in cannabis regulation (and no company wants to be the test case!).

What Employers Must Do

With marijuana regulation in flux, employers must take steps to shore up their employment policies and practices in light of states and local jurisdictions’ growing acceptance of cannabis and employee protections. This includes updating job descriptions to identify safety sensitive positions, drug testing policies and procedures, and training for supervisors and employees.

Employers must also ensure that their vendors comply with applicable laws and understand the basis/type of test being performed – it is not a guarantee that a vendor will know to appropriately exclude cannabis for pre-employment versus including it for post-accident/reasonable suspicion purposes. Appropriate contracts with risk shifting and backed up by insurance should be considered.

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NYC employers may wish to work with regulators to categorically define positions that impact the health and safety of employees and the public.

Now is the time to have intimate discussions with legal counsel to understand and address these issues.

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