

TWIN CITIES CEBS FALL SEMINAR: CANNABIS IN THE MINNESOTA WORKPLACE

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AGENDA

- Legalized cannabis – what does it mean for MN employers?
 - Past and new law
 - Company policy considerations
 - FAQs
- Minnesota's non-compete ban
- Lightning round – other MN updates

PRE-EXISTING REGULATORY BACKGROUND

- Lawful Consumable Products protection – off-duty use
 - Food, alcohol, tobacco
- Medical marijuana
 - Arrived in 2014, requires license
 - Protects:
 - Status as a registered patient
 - Positive drug test, unless used, possessed, or under the influence at work
 - Reasonable suspicion – ok
 - Pre-employment and random – prohibited
 - Only certain conditions support medical marijuana and employers can require verification – limited impact

HF100 – IMPACT

- Lawful Consumable Products
 - Now also protects off-duty use of cannabis flower, cannabis products, lower-potency hemp edibles, and hemp-derived consumer products
 - “Lawful” means lawful under state law (regardless of federal or other state law) – resolves debate under similar statutes in other states
- Medical marijuana
 - Program still exists
 - Addition of Tribal medical cannabis program patient

PRE-EXISTING REGULATORY BACKGROUND

- MN Drug and Alcohol Testing in the Workplace Act (DATWA)
- Written, compliant policy along with timely notice
- Reliability and fairness safeguards
- Testing permitted only in five circumstances
 - Pre-employment (after providing a conditional offer)
 - Reasonable suspicion (including post-accident)
 - Routine physical examination (no more than annually)
 - Treatment program
 - Random testing for safety-sensitive positions
- Terminations: no term for first positive unless employee refuses treatment

HF100 - IMPACT

- General statutory scheme remains, but cannabis testing is now a separate form of testing, and cannabis generally is not a “drug”
- Primary change: no pre-employment testing for marijuana
 - Statute prohibits:
 - Testing for cannabis
 - Taking action based on positive for cannabis
 - At a minimum, ensure that you are not taking action
- No routine physical examination testing for cannabis

HF100 - IMPACT

- Policy requirement:
 - Employers may only prohibit 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
 - Ensure policy is updated to refer to “cannabis flower, cannabis products, lower-potency hemp edibles, and hemp-derived consumer products”

HF100 - IMPACT

- Exceptions – permits all forms of testing for cannabis (including pre-employment)
 - Safety-sensitive positions
 - Peace officers
 - Firefighters
 - Positions requiring face-to-face care, training, education, supervision, counseling, consultation, or medical assistance to children, vulnerable adults, or health care patients
 - Positions requiring a CDL or similar position requiring testing under federal or state law
 - Positions funded by a federal grant
 - Any other position that requires testing under federal or state law

HF100 - IMPACT

- What remains unchanged
 - Most importantly, reasonable suspicion testing
 - Random testing for safety-sensitive positions
 - Treatment program testing
 - Policies prohibiting use or possession at work
 - Testing procedures
 - Second chance for positives before termination

CANNABIS POLICY CONSIDERATIONS – WHY TEST?

- Historical bases for comprehensive drug testing
 - Safety
 - Reduce workers' comp costs
 - Productivity
 - Turnover
 - Absenteeism
- Before HF100, employers already asking – is there evidence of this?
And if it was true, is it still true, particularly as to marijuana use?

CANNABIS POLICY CONSIDERATIONS - REALITIES

- Societal acceptance has been causing employers to reconsider cannabis testing
 - Employer acceptance – management isn't concerned
 - Employee acceptance – management wants its workplace culture to be consistent with general sentiment
- Staffing challenges
 - Low unemployment, often limited labor pool in small towns and rural communities
 - Rather not create turnover based on off-duty marijuana alone

CANNABIS POLICY CONSIDERATIONS - OPTIONS

- Eliminating drug testing altogether
 - Still terminating for reasonable suspicion, but without a testing program (testing is not required)
- Maintaining drug testing but eliminating cannabis from the panel
 - Consistent with public sentiment and reduces compliance challenges, particularly for multi-state employers
- Narrowing the positions subject to testing
 - Generally focusing on safety-sensitive positions
- Eliminating all but reasonable suspicion testing
- Maintaining the status quo...
 - Testing consistent with local law, and tracking updates

FAQS

- We're a federal contractor. We don't have to comply, right?
- Federal contractor – Drug-Free Workplace Act
 - Requires policies prohibiting possession, use, etc. at work
 - Does not require testing – does not preempt state law
- But if you test pursuant to federal requirements, you should continue
 - DOT, FAA, etc.

FAQS

- What is a safety-sensitive position?
- Pre-existing definition applicable to random testing unchanged: a job in which an impairment caused by drug or alcohol usage would threaten the health or safety of any person
- Note that the test is for each position, not the workplace
 - Finance team at a manufacturer?
 - Look for law to develop in the coming years

FAQS

- What is reasonable suspicion?
- “A basis for forming a belief based on specific facts and rational inferences drawn from those facts”
- Document the observed behaviors that led to the conclusion
- Consider having a select group of management who are authorized to conclude there is reasonable suspicion, and train them (often EAP providers have training)
 - In multi-shift environment, consider having at least one trained manager/shift
- Speak to employee, ask if they are ok, point out the observed behaviors – often you will obtain admissions
- Don’t rely on other employees – make your own observations

FAQS

- What circumstances trigger reasonable suspicion testing?
- A reasonable suspicion that the employee:
 - Is under the influence of drugs or alcohol
 - Has violated company policy regarding use, possession, etc. on premises
 - Has sustained a personal injury or caused another employee to sustain a personal injury
 - Has caused a work-related accident or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident

FAQS

- Our customers require us to drug test, including marijuana. Can we continue to comply with our commercial contracts?
- Minnesota law only permits drug testing consistent with the statute
- Contractual duty is not a basis for testing
 - Testing before visiting a customer site is not permitted, regardless of safety-sensitive position (not pre-employment, reasonable suspicion, etc.)
- Review contracts – don't overpromise, or limit commitments (e.g., "...consistent with applicable law")

FAQS

- What about other drugs legalized in various states, such as psilocybin or THC gummies?
- Minnesota only protects positives for cannabis, primarily in pre-employment testing; employers can take action based on positives for other drugs, which are still “drugs” under DATWA
- The source of the positive doesn’t matter (except medical marijuana)

MN NON-COMPETE BAN

A "Covenant not to compete" means an agreement between an employee and employer that restricts the employee, after termination of the employment, from performing:

- (1) work for another employer for a specified period of time;
- (2) work in a specified geographical area; or
- (3) work for another employer in a capacity that is similar to the employee's work for the employer that is party to the agreement.

- The new law does not ban:
 - Non-disclosure agreements (NDAs)
 - Confidentiality agreements – provisions protecting a business's confidential information and/or trade secrets
 - Customer non-solicitation agreements
 - Employee non-solicitation agreements

MN NON-COMPETE BAN

Minnesota's new non-compete law generally does the following:

- Bans non-competes for employees and independent contractors.
- Applies these bans to any contract—including agreements governing employment, contractor status, intellectual property rights, equity, separation, severance, and anything else.
- Bans non-Minnesota choice-of-law and choice-of-venue provisions for non-competes in employment agreements.
- Gives employees and contractors the right to void those provisions and to seek attorneys' fees associated with litigation to enforce that right.

MN NON-COMPETE BAN

- You can still protect your business
 - Previously, non-competes were most successful and needed with individuals who have the “keys to the business.”
 - Our practice has always been to advise our clients non-competes are less useful and less enforceable for lower-wage workers – being selective can help
 - Employee non-solicit, or customer non-solicit, if customer facing, more practical anyways.
- Review employment agreements to determine whether any restrictive covenants in the agreements will be enforceable moving forward.
 - Technically speaking, any existing non-competes will not be deemed automatically unenforceable, unlike non-competes signed after July 1. But existing non-competes still need to be considered “reasonable” in time, geographic location, and the subject matter of the restriction.
 - In other words, enforcing current pre-July 1 non-competes might be more difficult.

MN LIGHTNING ROUND – OTHER UPDATES

- Unpaid parental leave – available from day 1
- Lactation and pregnancy rights
 - Must permit lactation breaks – no defense of disrupting operations
 - More frequent/longer restroom, food and water breaks – no defense of undue burden (and no medical certification needed)
 - Codifies accommodations of temporary leave, modified work schedule, and modified work duties (also consider new federal PWFA)
 - New notice requirements – at hire AND upon first inquiry regarding parental leave
- No inquiry into applicant’s pay history
- Prohibition on mandatory meetings addressing religious or “political” matters,” which includes “labor organization” – but challenges to come

QUESTIONS?