

# Insights

## **Evolving State Marijuana Laws May Impact Employer Hiring Procedures and Drug Testing Policies**

February 28, 2023

By: Elizabeth M. Roberson and Virginia A. Talley

As employers perform annual reviews of their employment policies, one area to be aware of is whether it is legal to consider marijuana use in the areas of hiring, firing, or drug testing. Many employers have employees in multiple states, either working remotely or at another office site, and employers may wonder if the laws of those states apply to their workforce. The answer is usually yes. There are limited circumstances, mostly involving remote employees, where another state's laws may not apply, but typically they do. This means that, in addition to being up to date on Indiana's laws regarding marijuana, employers must also keep up with other states' laws as well. Laws around the country regarding marijuana use are ever-changing, and employers should consult with legal counsel for questions about state-by-state compliance obligations.

### **1. Overview of Indiana and Federal laws regarding Marijuana**

Indiana's current marijuana and other cannabis-derived products laws are straightforward for employers. The definition of controlled substance in the Indiana Controlled Substance Act includes THC,<sup>1</sup> which is a Schedule I controlled substance, but excludes "low THC hemp extract," commonly found in the form of CBD oil. Marijuana is defined to include any part of the cannabis plant, with limited exceptions such as hemp and low THC hemp extract. Possession, use, or sale of marijuana in Indiana is unlawful.

Federal law on marijuana and other cannabis-derived products also remains relatively straightforward for employers. Marijuana and most cannabis-derived products other than hemp are Schedule I controlled substances. Hemp-derived products containing no more than .3% THC, including certain CBD products, were de-scheduled by the Agriculture Improvement Act of 2018 and are regulated by the U.S. Food and Drug Administration. The FDA has approved only one product containing CBD, Epidiolex, and just a few other cannabis-derived or cannabis-related products. However, possession, use, or sale of marijuana under federal law is illegal.

Thus, employers with employees living and working in Indiana need not accommodate or tolerate marijuana use on or off duty. The inquiry for employers with respect to employee marijuana usage, drug testing policies, and hiring and application procedures, if any, becomes more challenging when employees work or live in other states.

### **2. Laws in Other States**

The patchwork of state marijuana laws undoubtedly presents challenges to employers, whether the employer's workforce is in one location or spans multiple states. State laws, and even some city laws, vary on whether an employee or candidate for employment can be tested for cannabis metabolites, whether cannabis usage can be considered in employment decisions, and whether employees must disclose charges for simple possession of marijuana on an employment application inquiring about criminal history.

In addition to Indiana and federal laws, employers should review their policies and procedures through the lens of state laws applicable to members of their workforce. State laws on marijuana usage, testing, and consideration of cannabis usage vary. For example:

- Some states, such as Nevada, prohibit employers from taking adverse action or refusing to hire an applicant based on a positive pre-employment marijuana test result.
- Some laws permit applicants and employees to exclude information about charges for simple possession of cannabis on job applications or when an employer inquires about criminal history.
- Virginia prohibits employers from requiring job applicants to disclose information related to simple marijuana possession.
- Some state laws, including New Jersey and California, bar employers from taking adverse employment action for off-duty use of recreational marijuana.
- In New York, employers generally cannot test an employee for the use of cannabis.

Despite the above state law provisions, existing marijuana laws generally include exclusions with respect to safety-sensitive positions or for industries or positions where drug testing is otherwise required by law. Further, marijuana laws typically do not limit an employer's right to establish and enforce drug-free workplace policies with respect to employer property and on-duty conduct.

\*\*\*

The changing landscape of marijuana laws on a state and federal level presents challenges to employers, particularly employers with employees in multiple states and remote workers in a variety of locations. For further questions about state-specific marijuana laws, workforce drug testing, or how marijuana laws may impact your employment policies and procedures, please contact **Elizabeth M. Roberson**, **Virginia A. Talley**, or another member of our **Labor and Employment Practice**.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.*

[1] THC is an abbreviation for tetrahydrocannabinols.