

# Tearing Up the Litmus Test: Potential Problems with Testing Employees for Marijuana Use

Written By **Emily G. Massey** (egmassey@wardandsmith.com) and **Allen N. Trask, III** (ant@wardandsmith.com), **Devon D. Williams** (ddwilliams@wardandsmith.com)

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## Picture this: You are a law-abiding citizen.

You observe the speed limit (or, at least, stay within five MPH of it), you don't cheat on your taxes, and you most certainly do not take illegal drugs. Those values permeate your business and you expect the same of your employees. You've done your homework and you know that maintaining a drug and alcohol-free workplace is the way to go, which is why you have a zero-tolerance drug and

alcohol testing policy. Your drug and alcohol testing policy requires that your employees regularly submit to drug tests and all applicants must pass a post-offer, pre-employment drug test before beginning work at your company. What can go wrong, right?

Let's imagine you learn that Henry Hempster, your most trusted machine operator, tested positive for tetrahydrocannabinol ("THC"), the psychoactive component found in marijuana, during a recent random drug testing. Not only are you shocked (and perhaps disappointed), but you believe you have no choice but to terminate Mr. Hempster in accordance with your zero-tolerance policy. You calmly call Mr. Hempster into your office to break the news.

At first, Mr. Hempster is similarly shocked by the positive THC test result and denies any illicit drug use. Although you are fond of Mr. Hempster, you are unconvinced and you become further annoyed that he would lie to your face (or so you assume). Confident you are holding the "smoking gun" (a.k.a. the drug testing results), you ask Mr. Hempster, "well, then, how do you explain these results", pointing to the paper of course. Mr. Hempster calmly informs you that he has been regularly taking a hemp-derived cannabidiol ("CBD") product to ease his chronic knee pain caused by osteoarthritis. He also is quick to inform you that it is legal.

You are left puzzled and befuddled. What do you do next? In a game of jeopardy, you might choose "Call My Attorney for \$400, please Alex." In the game of navigating employment law minefields, you likely should pick the same answer.

Joking aside, this situation is poised to become all too common and is indicative of a gap between various laws (and a grey area where there are established laws). As we've written before, hemp and hemp-derived CBD products are now legal. Hemp and its derivatives are being used in a wide variety of products that range from basic tinctures and creams, to mainstream medicines. But because hemp, by legal definition, can contain

trace amounts of THC (0.3% delta-9 THC or less to be considered lawful), it is possible that people who lawfully use these hemp products may fail drug tests. Let's examine a few employment-related scenarios that can arise with CBD.

## **A State-Specific Problem**

Well, you say, if hemp and marijuana are the same plant, then I don't care about what the law says. I have a moral objection to it and I don't want my employees using it, period. Not so fast. Here in North Carolina, we have a law known as the Lawful Use of Lawful Products (N.C. Gen. Stat. § 95-28.2). In short, this law prohibits employers (i.e., those with three or more employees) from discriminating against an employee or applicant because he or she engages in or has engaged in the lawful use of lawful products during nonworking hours off the employer's premises. Since hemp is now a legal substance under both federal and state law, employees who use hemp products during nonworking hours off the employer's premises arguably fall under the statute's protection. While there are certain limited exceptions to the law, any employer should think twice before discharging or otherwise punishing an employee for their lawful use of hemp-derived CBD products.

In the case of Mr. Hempster, if you disciplined or fired him based on his use of a lawful CBD product, he could file a lawsuit against you for violation of this North Carolina law. States outside of North Carolina may have similar laws. In places where medical marijuana is legalized, some states (such as Arizona and Oklahoma) have similar laws that prohibit employment discrimination based on the lawful use of medical marijuana. Some courts have even gone so far as to prohibit employers from taking adverse employment action against an applicant or employee solely because the applicant or employee tested positive for THC.

## **A Federal Offense**

In another turn of events, what if Mr. Hempster tells you that he needs to take lawful CBD products to curb his chronic knee pain? This could be a request for an accommodation under the Americans with Disabilities Act ("ADA"). Mr. Hempster tells you he has osteoarthritis in his knee, which causes chronic pain that can prevent him from being able to walk. This could be considered a disability under the ADA since the condition substantially limits a major life activity. Therefore, his use of lawful CBD products could be viewed as an accommodation of the employee's disability even if it goes against your company policy.

Employers with 15 or more employees must provide reasonable accommodations to employees with disabilities unless an accommodation presents an undue hardship. Of course, you would have the right to ask Mr. Hempster to provide a medical certification from his health care provider to make the determination that a disability accommodation is required. Nevertheless, a zero-tolerance policy against use of lawful hemp-derived CBD products may raise an issue under this federal law.

## **Whatever the Case, Be Consistent**

Even worse, how do you as an employer distinguish between those employees who are using marijuana and those who are using hemp products? Let's adjust the scenario with Mr. Hempster slightly. He has no disability, but promises that he has used nothing but lawful CBD products. You decide to make an exception to your policy since you trust that Mr. Hempster was using a lawful CBD product and not illegal marijuana. Soon enough your problem is not only with Mr. Hempster.

Sally Stone, an administrative employee in your front office, also is subject to random drug test and tests positive for THC. You have had doubts about Ms. Stone. She has only worked for the company for a few months and you don't trust her like you trust Mr. Hempster. When confronted about the failed drug test, Ms. Stone says that she is also taking legal CBD products and even provides a receipt for a CBD product she purchased two weeks earlier. Still, you have no way of verifying that she is using lawful CBD products instead of illegal marijuana (or that her positive drug test was because of her use of one, but not the other).

Because she is a new employee and you don't have the same level of trust, you decide to terminate Ms. Stone, citing her violation of your zero-tolerance Drug and Alcohol Testing Policy. This presents a new problem (and a potential legal claim for Ms. Stone). You made an exception based on legal CBD use for one employee but not another. Sally Stone could now allege that she was treated differently based upon membership in a protected class, such as sex or gender. Ms. Stone likely did not have a sex discrimination claim prior to failing the drug test, but by applying the policy inconsistently, the employer created the claim for her. Applying a policy consistently is critically important because otherwise, employers open themselves up to unnecessary claims of unlawful discrimination.

## **Where Do We Go From Here?**

Due in large part to the complications presented by drug testing for THC (e.g., the inability to decipher whether the positive result is due to marijuana or a lawful hemp-derived product; state laws with medicinal marijuana protections that prohibit employers from making decisions based solely on a positive drug test), we are seeing more and more employers, particularly those with operations in multiple states, moving away from testing for THC altogether.

However, even in states where medicinal marijuana use is protected, employers may still enforce their drug and alcohol policy and may require drug testing of its employees where there is a reasonable suspicion that a person is impaired while at work or if there has been an accident for which the person's impairment could have been a contributing factor. Essentially, employers with operations in states with medicinal marijuana legislation are adapting to the increasingly complicated legal changes by treating THC more like alcohol (i.e., they do not care what employees do during their free time, but they cannot report to work impaired or under the influence of THC).

Needless to say, employers with existing prohibitions on their employees' use of hemp-derived CBD products and/or marijuana should consider those policies in light of the changing laws across the nation. Plus, just because a state has not passed legislation regarding recreational or medicinal marijuana use, does not mean the employer can blindly ignore these issues. With dedicated Labor and Employment and Hemp Law practice groups, Ward and Smith, P.A. is uniquely suited to guide employers through these tricky issues, to better understand the applicable law and the anticipated changes to it, and to craft and enforce policies that jibe with the current legal environment.

*This article was first published on Remedy Review.*

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