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# Legality of CBD Oil: What Employers Should Know

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Cannabidiol (CBD) is the second most prevalent chemical in marijuana plants. While it does not produce a “high” commonly associated with marijuana, a growing segment of the population has begun using it, amid questionable legality, to treat chronic pain, seizures, anxiety, and other medical issues. With the rising popularity of products containing CBD, employers who are subject to the Federal Motor Carrier Safety Regulations (FMCSRs) must be aware of the risks posed from use by their drivers.

### **Legal Status: The Past and Recent Changes**

The federal Controlled Substances Act regulates the possession and production of certain substances, referred to as “scheduled substances.” They are organized into categories and often defined by their chemical makeup, ingredients, or source. One such scheduled substance is marijuana, or “marihuana” as it is spelled in the Act. Until 2018, “marihuana” was defined broadly and included most products that included any amount of tetrahydrocannabinol (THC), the primary active chemical in “marihuana.”

The 2018 United States Farm Bill revised the definitions of “marihuana” and “hemp” under the federal Controlled Substances Act. First, the bill removed “hemp” from the definition of “marihuana.” Then, the bill expanded the

definition of “hemp” to include products made from certain parts of the cannabis plant that contain less than 0.9% THC by weight. As a result, any product that qualifies as “hemp” is no longer a scheduled substance and possession thereof is not a crime under the United States Controlled Substances Act.

These changes, however, do not apply to the FMCSR. The FMCSR requires that employers of commercial vehicle drivers subject the drivers to drug tests both randomly and in certain circumstances. These drug tests must be administered under specific regulatory guidelines which include testing for “marijuana.” This is accomplished by searching for the presence of THC in a sample provided by a driver. The presence of THC above a certain threshold will trigger a positive result for “marijuana”. Such a positive result may result in consequences for the driver and employer, regardless of the concentration or source of the THC found in a driver’s system,

Under the North Carolina Controlled Substances Act “hemp” is not excluded from the definition of marijuana. The only oils made from the cannabis plant which are legal under North Carolina law are those made from the seeds of the cannabis plant. Any product that contains THC is illegal under North Carolina law.

Because of this conflict between federal law, state law, and regulations imposed on commercial vehicle drivers, employers who are subject to the FMCSR must educate their drivers on these nuances and the potential consequences of using CBD oil.

#### **Practical Considerations: CBD and THC**

CBD oil products are often advertised as containing no THC, leading consumers to believe that their use will not result in a positive drug test. However, because the Food and Drug Administration does not regulate these products, there is no guarantee that these advertisements are true.

This lack of regulation and the resulting unpredictability means that commercial drivers should be wary of using products marketed as CBD oil. The marketed name and descriptions are irrelevant; if a product contains any THC, it is illegal under North Carolina state law. And if the driver tests positive for THC/marijuana on a test administered under the FMCSR, the source of the THC is irrelevant. A positive test result must be reported to the U.S. Department of Transportation and the North Carolina Department of Transportation and may subject the driver to civil and/or criminal penalties. An employer’s failure to perform or report such testing may subject the employer to similar or more severe penalties.

#### **The Changing Legal Landscape**

During the 2019-2020 legislative session, members of the North Carolina General Assembly have introduced eight bills to revise the definitions and legality of marijuana and hemp in North Carolina. While some sought to allow research into industrial use of hemp, others sought to create a hemp exclusion similar to the one in the 2018 United States Farm Bill or decriminalize marijuana possession in small amounts.

As of the publication date for this post, no such hemp exclusion has been passed and it is illegal to possess any amount of marijuana under North Carolina law.

In the past few years, states like California, Massachusetts, Colorado, Washington, Illinois, and the District of Columbia have changed their laws to decriminalize the possession and use of certain marijuana products. The recent bills introduced to the North Carolina General Assembly indicate that North Carolina may be just a few years behind.

Legalization under North Carolina or federal law could result in revisions to the Federal Motor Carrier Safety Regulations and require adjustments to the hiring procedures, training protocols, and employment policies of commercial trucking and transportation companies.

For the time being, the FMCSRs are unchanged and no amount of THC or marijuana is permitted on a drug test administered under the regulations.

With the changing legal and cultural landscapes related to cannabis-derived products, the Young Moore and Henderson team can help you maintain compliance with federal and state laws and regulations, minimizing risk to your business and your drivers. Please contact us for any assistance you need in revising and updating your employment policies and training your drivers to protect your interests and theirs.

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