



Marijuana and the Workplace: How the New Minnesota Laws Regarding Marijuana Impact Employers and Employees

Presented By:
Brown & Brown Executive Risk and Casualty Teams

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Panelists



Aaron Stone
Brown & Brown, Moderator



Kelly Lambert
Aafedt Forde Gray Monson & Hager, Panelist



Tracey Holmes Donesky
Stinson, LLP, Panelist



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Overview of New Laws

MN – STATE OF THE LAW

- **Medical** Marijuana use became legal in 2014
- **July 2022:** MN legalized some forms of recreational use of Hemp-derived THC products
 - » Minnesotans - at least 21 years of age
 - » Can lawfully purchase and consume edible and drinkable products containing HEMP-DERIVED THC, the primary intoxicant found in cannabis plants.
- Main components of *new recreational statute* (became effective 8/1/2023)
 - » Adults 21 years and older (trucking industry says should be 25)
 - » Purchase up to two ounces of cannabis
 - » Cultivate up to 8 plants (up to four of which can be mature)
 - » Possess up to 2 ounces in public places
 - » Possess up to 2 pounds in a private dwelling
- Anticipated it will be *12 to 18 months* before someone can go into a store and purchase new, regulated marijuana products.
- Marijuana is still classified as an illegal Schedule I drug at the federal level.

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Impact on the Employment Relationship

Restrictions

WHAT HASN'T CHANGED?

- Employers can still enforce policies prohibiting employees from possessing, using and being under the influence of THC and cannabis during work hours and on work property
- Again, similar to prohibitions for alcohol
- With compliant policies, Random testing (for safety-sensitive positions); and reasonable suspicion testing still possible to address concerns of on-duty intoxication



Restrictions

WHAT HASN'T CHANGED?

- Also requires consideration of Minnesota's Lawful Consumable Products Law
- Protects employees who partake in consumption of lawful products outside of work (e.g. alcohol, and *now, cannabis*)
- But see where Federal law still prohibits, is it Lawful or not? (Colorado said not lawful in 2015); unknown how MN will rule

Contains Exceptions:

- Can restrict use on non-working hours if relates to a Bona Fide Occupational Requirement that reasonably relates to duties/responsibilities or necessary to avoid a conflict of interest of responsibilities owed by employee to the employer
- Treat more like Alcohol (legal, but can restrict—no drinking or, now, consuming cannabis on the job)

To Test or Not to Test?

- Drug Testing – Not a Duty or Requirement
- When to Test/ Pre-Employment (Applicants?); Employee Testing
- But for employers who do test, more employers electing not to test for THC/cannabis
 - » Risks Learning of Medical Conditions
 - » But then, consider Negligent Hiring/Negligent Retention risks
- If decide to drug or alcohol test, Minnesota Employers Must Know about Minnesota’s Drug and Alcohol Testing in the Workplace Act (“DATWA”)181.950 et. seq.
- Very Strict and Restrictive Law – one of the most restrictive state drug and alcohol testing laws in the nation

MN DATWA

- ONLY certain categories of testing allowed:
 - » Job Applicant Testing (*only after conditional offer*); BUT not available for cannabis testing
 - » Routine Physical Exam testing (*but see restrictions*)
 - » Random Testing
 - » Reasonable Suspicion Testing
 - » Treatment Program Testing
 - » No Arbitrary and Capricious testing
- **Must provide written notice** of Drug, Cannabis and Alcohol Testing Policy to employees/applicants
- **Must post** in appropriate and conspicuous location
- **Pre-Testing Acknowledgment Required:** Obtain acknowledgment of receipt of policy before testing (including applicants)

MN DATWA

- Strict Notification requirements for both Negative Test Results and Positive Test Results (3 working days)
- Employee Rights to Challenge Positive Test
- Employee Right to Explain test result (can reveal medical conditions)

Restrictions on Disciplinary Actions – two of note:

- **“Don’t Jump The Gun”**: Can’t discipline or otherwise take adverse action based on the initial screening test- requires verified confirmatory test
- **“One Free Pass”**: Cannot discharge employee if first time positive test result on a confirmatory test - must give employee opportunity to obtain treatment and successfully complete program (note: can discharge if offered and employee either refuses or does not successfully complete)
- Again, carefully review statute for other restrictions and/or exceptions

MN DATWA

- **Key change** in new amendments to DATWA statute (also became effective 8.1.2023)
 - » “An employer *must not request or require a job applicant to undergo cannabis* testing solely for the purpose of determining the presence or absence of cannabis as a condition of employment *unless otherwise required by state or federal law.*” Minn. Stat. Section 181.951, Subd. 8.
 - » *“Unless otherwise required by state or federal law,* an employer must not refuse to hire a job applicant solely because the job applicant submits to a cannabis test or a drug and alcohol test authorized by this section and *the results of the test indicate the presence of cannabis.*” *Id.*
 - » There are **exceptions**: “unless otherwise required by state or federal law”

Best Practices and Considerations

- ✓ Stay abreast of ever-changing laws
- ✓ Consider audit of existing policies to review/ possibly modify scope and parameters of testing
- ✓ Review policies /implement as needed for permitted restrictions on use, possession in workplace
- ✓ Manager training on signs and symptoms if actual impairment becomes greater focus
- ✓ Be mindful of interplay/potential application of other laws (e.g. MN Lawful Consumable Products Acts; potential implications of disability laws if medical conditions revealed)
- ✓ If considering drug/alcohol testing, carefully develop plan with MN DATWA compliance

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Workers' Compensation Issues

Intoxication and Workers' Compensation Claims

- If an individual is believed to be intoxicated at the time of a work-related injury, there may be available defenses to pursue in denying the claim. Under Minn. Stat. §176.021, Subd. 1, an employer may raise the intoxication defense as a bar to a claim for workers' compensation benefits if it can be shown:
 - 1 The employee was intoxicated at the time of injury; and
 - 2 The intoxication was the proximate cause of the employee's injury.
- The employer has the burden of proving the elements and must establish an understanding of the laws regarding substance abuse, testing, and defenses. If an employer suspects an employee is impaired at the time of a work-related injury, a toxicology screen should be conducted along with a thorough investigation.

Determining Marijuana Intoxication Levels

- The difference between other intoxicating substances and marijuana is that it is difficult to measure intoxication and/or impairment with marijuana compared to other substances.
- Potentially, an individual may continue to test positive for THC in their system 30 days or longer after last ingestion of marijuana. This can make it difficult to determine when an individual last utilized marijuana and whether the individual was intoxicated at the time of injury.



Background on Medical Cannabis and Workers' Compensation Claims

- As of May 2014, use of medical cannabis was restricted to those with “qualifying conditions” which did not typically involve workers’ compensation injuries.
- In 2016, “intractable pain” became a qualifying diagnosis for an individual to receive medical cannabis.
- An employee must complete the certification process and register pursuant to the requirements set forth by the Department of Human Services. An employee had to establish a diagnosis for a qualifying condition. The diagnosis must be issued by a certified physician. Generally, this included a diagnosis of intractable pain or post-traumatic stress disorder.

Background on Medical Cannabis and Workers' Compensation Claims Cont.

- The courts determined whether use of medical cannabis was reasonable and necessary with early medical cannabis claims. The employee had the burden of proof to establish medical cannabis was reasonable and necessary to relieve the effects of the work-related injury.
- The employee would provide documentation including copies of medical records, narrative opinions that medical cannabis was appropriate. Typically, an individual would establish medical cannabis was effective, and at a cost savings, when compared to chronic opioid use.
- Minnesota workers' compensation officials began approving medical cannabis to treat intractable pain primarily.

Current MN Case Law

- The Minnesota Supreme Court issued two companion decisions in 2021 – Musta v. Mendota Heights Dental Center, and Bierbach v. Digger’s Polaris –holding that due to issues of federal preemption, Minnesota employers and workers' compensation insurers cannot be compelled to violate the Federal Controlled Substances Act by providing for an employee’s use of medical cannabis, even if medical cannabis is legal under the Minnesota Medical Cannabis Therapeutic Research Act.
- Following these decisions, defense parties have a basis to deny claims for marijuana or request to reimburse expenses for medical cannabis, as they cannot be required to violate federal law. This applies even if the treatment with medical cannabis is found reasonable and necessary from a medical provider.

Additional Consideration



- The WCRA currently takes the position that they are not reimbursing for medical cannabis, even with long-term opioid use.
- Consider a closeout of marijuana in workers' compensation settlements in the event that the law changes in the future.
- Even in long-term chronic pain or intractable pain claims, employers and insurers are not currently required to approve marijuana under any circumstance.

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Questions and Answers





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