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Positive Marijuana Test: No Problem?

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Auto dealers and other employers who require job applicants to pass a drug screen test are finding that increasing numbers test positive for marijuana, sometimes making it difficult to fill open positions if those applicants are rejected. This causes some employers to question whether they should test for marijuana use or, if they do, whether a positive marijuana test result should automatically disqualify the applicant. Several practical and legal issues should be considered in answering those questions.

After votes on ballot measures in November 2016, there will soon be a total of twenty-nine states and the District of Columbia that allow medical marijuana and eight states and the District of Columbia that allow recreational marijuana.¹ Public acceptance of legal marijuana is growing, and increased access tends to result in increased use.² A national study found that in 2014, 32% of persons in the 18-25 age group had used marijuana within the past year.³

Increasing drug use has led to employers struggling to find applicants who can pass a drug test, particularly as the unemployment rate drops.⁴ Even announcing that a drug test is required can cause otherwise qualified applicants to choose not to apply. Or if a job offer is extended conditioned upon passing a drug test, the applicant might not bother to show up for the test. At some point employers may find that the negative impact of drug testing outweighs any benefits.

One option would be to cease drug-testing altogether. There are reasons, however, to continue drug-testing but make some exceptions for marijuana. First, more addictive drugs, such as heroin or meth, pose a greater risk of workplace injury, employee theft or embezzlement, and absenteeism. Second, marijuana is increasingly becoming legal under the laws of many states, and employers may deem that an important distinction. Employers should check the law of their particular states to determine whether medical marijuana use might be protected from adverse employment action.

Employers should also consider the limitations of marijuana testing.

An individual may test positive many days or even weeks after the last use of marijuana, so a positive test is not a reliable indicator that the individual is under the influence at the time of the test.⁵ The individual might only use it occasionally or on weekends.

Given these differences between marijuana and other drugs, some employers may consider treating marijuana differently if legally permissible. On that point, there are some safety-sensitive jobs where an employer is precluded from hiring/employing someone who tests positive for marijuana, for example, drivers and others subject to Department of Transportation regulations.⁶ The author is not aware of any other federal law that might require employers to conduct drug tests on all applicants, to test for marijuana, or to reject applicants who test positive for marijuana. The Drug-Free Workplace Act does not require marijuana testing nor preclude employing someone who tests positive, even as to the limited category of employers subject to that Act.⁷ Each state's laws on this subject may vary, so an employer should consult an attorney in its own state for guidance as to state law.

Employment contexts in which drug testing is not required and employing someone who tests positive for marijuana is not prohibited, an employer willing to hire applicants who use marijuana could choose to either: (a) forego testing for marijuana; or (b) test for all drugs but still consider for employment an applicant who tests positive for marijuana. For several reasons, the second option may be preferable. First, employers conducting drug tests should have a written policy on this subject, and it will probably provide for testing not only of applicants on a pre-hire basis, but also for testing of active employees under certain circumstances. Those typically include testing after any workplace accident or injury, testing upon reasonable suspicion of on-the-job use or impairment, and, less commonly, random testing. There may be other indicia of impairment, such as marijuana odor, odd behavior, glassy or bloodshot eyes, etc. In those situations, the employer may want to test for marijuana. There is some value in

maintaining consistency by including marijuana in any drug tests that are conducted.

Second, if an applicant's drug test is positive for marijuana, that might be cause for follow-up discussion about the test results, including inquiring about the frequency and extent of use. If the applicant provides responses that are otherwise satisfactory to the company (for example, "I am an occasional user, but I never use it and drive, and I never use it before work"), and the applicant otherwise looks like a good hire, the company might choose to hire the individual notwithstanding the test results. The company can then firmly make the point that the company does not tolerate possession or use of any illegal drugs on the job or reporting to work under the influence, and if the company ever has reason to believe that the employee is under the influence of marijuana and tests positive at that time, his/her employment will be terminated. The employee's supervisors can be informed of the test results on a confidential basis, so they know to be alert to any signs of on-the-job use or impairment.

The employer can maintain a preference for hiring individuals who do not test positive for marijuana use. If, for example, they have six applicants and five of those test positive for marijuana, that might be the determining factor in offering the position to the sixth applicant who did not test positive. For all of these reasons, it may make sense to continue to include marijuana in any required pre-hire drug testing.

If the employer chooses not to automatically disqualify all applicants who test positive for marijuana, it should exercise some degree of caution if it hires some but not others, making sure to avoid any pattern of rejecting minority candidates who test positive while hiring non-minority candidates who test positive. If there are two applicants who both tested positive, one minority and one non-minority, an employer who hires the non-minority applicant should have a business justification for that choice besides the minority applicant's positive test results.

An employer choosing to exercise discretion and judgment in hiring individuals who test positive for marijuana is somewhat analogous to how employers are expected to deal with an applicant's criminal history. The Equal Employment Opportunity Commission maintains that a past criminal conviction should not automatically disqualify an applicant (since that has a statistically greater adverse impact on African-Americans), but instead the employer should consider the nature of any conviction, how long ago it occurred, and the job duties of the position.⁸ There is no reason under state and federal anti-discrimination laws that an employer should not be able to make similar individualized assessments with respect to positive marijuana test results.

An employer who decides to take a more lenient approach toward positive marijuana test results should communicate that approach clearly to applicants and employees, so qualified candidates who use marijuana are not deterred from applying. The drug and alcohol testing policy in the employee handbook should state that a positive marijuana test will not necessarily disqualify an applicant or employee from working for the company, but also it should make clear that any on-the-job use or impairment that is suspected and confirmed by a test may result in disciplinary action up to and including termination. If the company's web site includes a hiring page that mentions pre-employment drug testing, it should also state that a positive marijuana test will not necessarily disqualify an applicant. If applicants are informed by other means, whether before or after a job offer is extended, that a drug test will be required, the company should include notification that a positive marijuana test is not necessarily disqualifying.

This article does not advocate that employers take a more lenient approach toward marijuana use by applicants and employees. However, employers who are questioning the benefits of marijuana testing and finding it difficult to fill positions because of those test results should know that drug testing need not be all or nothing, and marijuana can often be treated more leniently than other drugs if the employer chooses to do so. ■

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