

Pre-Employment Cannabis Testing: Is It Still Worth It?

Prepared by:
Patrick J. McMahon
Foley & Lardner LLP

Application For Employment

We are an equal opportunity employer. Application must be fully completed.

Personal Information

Name

Address

Number

LORMAN[®]

Published on www.lorman.com - May 2022

Pre-Employment Cannabis Testing: Is It Still Worth It?, ©2022 Lorman Education Services. All Rights Reserved.



Lorman Education Services is a leading provider of online professional learning, serving individuals and teams seeking training and CE credits. Whether you're looking for professional continuing education or an enterprise-wide learning and development solution, you will find what you need in Lorman's growing library of resources.

Lorman helps professionals meet their needs with more than 100 live training sessions each month and a growing collection of over 13,000 ondemand courses and resources developed by noted industry experts and professionals.

Learn more about Lorman's individual programs, economical All-Access Pass, and Enterprise Packages:

www.lorman.com

Pre-Employment Cannabis Testing:

Is It Still Worth It?

Written by Patrick J. McMahon

For years, most employers and employees alike assumed a clean drug test was a pre-requisite for getting hired. These pre-employment drug testing panels included a list of illegal drugs, and almost always included Tetrahydrocannabinol (THC), the key psychoactive compound found in cannabis. But the times have changed as it relates to cannabis—from both social and legal perspectives. These changes beg the question: is it even worth testing for cannabis still? Perhaps even more concerning, is such testing even legal?

In addition to medical cannabis being legal in 37 states, recreational cannabis is now legal in 18 states and the District of Columbia. Considering that just 10 years ago there were only two states with legal recreational cannabis, it is not hard to see where the trend is heading. Perhaps recognizing this trend and more commonplace usage, certain jurisdictions have adopted protections for employee candidates surrounding drug testing, including outright bans on testing for cannabis. For example, New York City prohibits all employers from requiring employment candidates to submit to testing for THC. Most recently, Philadelphia enacted a similar law effective January 1,

2022, prohibiting employers from requiring job applicants to submit to cannabis testing. At the state level, Nevada has prohibited pre-employment cannabis testing since January 2020.

Setting aside these explicit prohibitions surrounding testing, though, there are some practical considerations as well. As we previously discussed, there are risks in states like Illinois for discriminating against recreational cannabis users because cannabis is now a “lawful product” under Illinois law. Other states like New York and New Jersey protect off-duty cannabis use even more broadly. There can be real consequences for violating these protections, too. Amazon recently settled a proposed class action alleging it discriminated against New Jersey recreational cannabis users. Amazon also dropped cannabis from its drug screening shortly after this suit was filed. And while these statutory protections are notable, employers that require testing would still feel the impacts of legalized cannabis in other respects. One Illinois employment agency noted that an astounding 40% of recent applicants had failed drug tests for cannabis use. In an era of a generally contracted employee pool, that can lead to a prohibitively small group of candidates.

So with all these factors in mind, is testing for cannabis even worth it? Of course, the answer is not a “one-size-fits-all” issue. The decision will depend on a number of factors including some exceptions to statutory prohibitions on testing listed above, laws *requiring* drug testing for certain jobs, and position-specific questions surrounding job duties (e.g., desk job versus operating

heavy machinery). Still, what many employers may have considered as a best practice for years is one that should be reconsidered in light of these rapid developments. Foley's Labor & Employment Group, with the support of Foley's Cannabis Law Team, is ready to help employers navigate this ever-evolving landscape.



LORMAN[®]

📍 2510 Alpine Road Eau Claire, WI 54703

💻 www.lorman.com ☎ 866-352-9539 ✉ customerservice@lorman.com



The material appearing in this website is for informational purposes only and is not legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. The information provided herein is intended only as general information which may or may not reflect the most current developments. Although these materials may be prepared by professionals, they should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The opinions or viewpoints expressed herein do not necessarily reflect those of Lorman Education Services. All materials and content were prepared by persons and/or entities other than Lorman Education Services, and said other persons and/or entities are solely responsible for their content.

Any links to other websites are not intended to be referrals or endorsements of these sites. The links provided are maintained by the respective organizations, and they are solely responsible for the content of their own sites.