

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

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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.



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