



Failed Drug Test: Diet Coke and a Poppy Seed Muffin

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SmithAmundsen Medical Cannabis Alert

We've all heard *Seinfeld's* Elaine Benes's defense to a failed drug screen for opium: she eats a poppy seed muffin every day. With Coca-Cola recently announcing that it was exploring a cannabidiol-infused beverage line, companies should again buckle-up for the next wave of employment-based substance screening.

Is the *Benes Defense* valid? Could a poppy seed muffin a day actually result in a false-positive?

Maybe. The U.S. Department of Health and Human Services occasionally changes the cutoff levels for initial and confirmatory testing thresholds for metabolites. This testing does NOT show impairment, rather it shows how much a particular substance (like opioids, cocaine, amphetamines, etc.) are in the blood, urine, or other body tissue sampled. If a drug screen set the threshold too low, it is possible that it could detect trace amounts of opioids from that poppy seed muffin. This is why confirmatory testing using recognized standards is so important when employment decisions are to be made. So, there may be some validity to the defense, but very unlikely!

So, now what is an employer to do with the possibility of *CannabidOLA* hitting the shelves?

Initially, it is important to understand the two main substances involved derived from cannabis plants:

- Cannabidiol or "CBD" is a non-psychoactive component of cannabis;
- Tetrahydrocannabinol or "THC" is the psychoactive compound that provides the euphoric stoned or high sensation.

Both CBD and THC are believed to have medical benefits. While marijuana remains unlawful under federal law, over 30 states and Washington D.C. have made some form of medical use permissible, with 10 of these approving recreational (adult) use. The lawful medical and recreational use numbers are growing.

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Companies that consider entering into the CBD-infused market should understand and ensure that their products comply with the highly regulated patchwork of state and local laws. For example, ensuring that their products will not cause the average (or even heavy) consumer to rely upon the *Benes Defense*.

For employers, the legality of medical and recreational use is becoming more prevalent. Prepare for these changes now – including understanding that off-duty use of (but never at-work use of or impairment from) lawful substance may be protected under disability and/or privacy laws. To the extent substance screening is used, employers may need to closely evaluate the metabolite threshold to ensure that they meet both the company's actual policies and their enforcement (e.g., zero tolerance vs. zero impairment).

As always contact competent counsel in navigating these highly evolving laws.

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