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WHAT CONNECTICUT EMPLOYERS NEED TO KNOW ABOUT THE CANNABIS LEGISLATION

On June 23, Governor Lamont signed into effect sweeping legislation legalizing recreational marijuana in Connecticut. The legislation made the possession and use of cannabis legal for adults, and contains certain provisions regarding what actions employers may take with regard to employees' use of recreational cannabis, including drug testing and when an adverse employment action may be taken based upon a drug test that is positive for cannabis use. While employers have time to plan for these changes, which go into effect on July 1, 2022, they will no doubt require adjustments to existing policies and practices that employers should begin to consider.

At the outset, employers may be relieved to know that the statute expressly states that an employer is not required to allow an employee to perform job duties while under the influence of cannabis or possess, use, or consume cannabis while performing job duties or on the employer's premises. Likewise, the statute permits employers to take adverse employment actions against employees who use cannabis products outside the workplace so long as the employer makes their intent to do so clear in a written policy.

WRITTEN POLICY REQUIRED

Once it goes into effect, the new law will largely prohibit adverse action by a non-exempt employer absent a written policy establishing rules regarding employee use of recreational cannabis outside of work. Under the law, an employer may implement a policy prohibiting the possession, use, or consumption of cannabis by an employee. So long as such a written policy is in place and provided to employees prior to enactment (and to prospective employees at the time of an offer or conditional offer of employment), an employer may:

- Discipline or terminate an employee because of the employee's use of cannabis products outside of the workplace;
- Rescind a conditional offer to a prospective employee;
- Subject an employee or applicant to drug testing or a fitness for duty evaluation to the extent otherwise permitted under Connecticut law;
- Refuse to hire a prospective employee solely based on a positive drug test for 11-nor-9-carboxy-delta-9-tetrahydrocannabinol (a metabolite

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formed in the body after cannabis is consumed) if it is established in the policy that a positive may result in an adverse employment action; and

- Discipline or discharge a current employee solely based on a positive drug test for 11-nor-9-carboxy-delta-9-tetrahydrocannabinol obtained pursuant to a random drug testing program if it is established in the policy that a positive may result in an adverse employment action.

EXEMPT EMPLOYERS AND POSITIONS

While there is some ambiguity based on the wording of the statute, it appears that exempt employers and employers of employees in exempt positions, are not required to have a policy in place in order to proceed with adverse actions. Under the statute the following employers are defined as exempt from the statutory provisions requiring a written policy in order to justify adverse action:

- Mining (including, but not limited to, an employer with a North American Industry Classification System code 21)
- Utilities (including, but not limited to, NAICS 22)
- Construction (including, but not limited to, NAICS 23)
- Transportation and delivery (including, but not limited to, NAICS 48 or 49)
- Educational services (including, but not limited to, NAICS (61)

- Health care or social services (including, but not limited to, NAICS 62)
- Justice, public order, and safety activities (including, but not limited to, NAICS 9221)
- National security and international affairs (including, but not limited to, NAICS 928)

The following positions are exempt, in addition to any position at an exempt employer:

1. Firefighter
2. Emergency medical technician
3. Police officer or peace officer, in a position with a law enforcement or investigative function at a state or local agency or in a position with the Department of Correction involving direct contact with inmates
4. Those requiring operation of a motor vehicle, for which federal or state law requires such employee to submit to screening tests, including any position requiring a commercial driver's license or those subject to 49 CFR 40, 14 CFR 120, or 49 CFR 16
5. Those requiring certification of completion of courses in construction health and safety approved by OSHA
6. Those requiring a federal Department of Defense or Department of Energy national security clearance
7. Those funded in whole or part by a federal grant

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8. Those requiring the supervision or care of children, medical patients, or vulnerable persons
9. Those with the potential to adversely impact the health and safety of employees or members of the public, in the determination of the employer
10. Those for which the provisions of the cannabis legislation would be inconsistent with federal law
11. Those for which the provisions of the cannabis legislation would be inconsistent with an employment contract or collective bargaining agreement
12. Those with the potential to adversely impact the health or safety of employees or members of the public, in the determination of the employer

An employee who occupies an exempt position may be subjected to adverse employment action for off-duty cannabis use regardless of whether the employer has a written policy in place.

PROHIBITED ACTIONS

Unless the employer has a written policy in place that was provided to employees, a non-exempt employer may not discharge or take any adverse action against an employee because of the employee's use of cannabis products outside the workplace.

Regardless of whether the employer has implemented a policy, a non-exempt employer may not discharge or take any adverse action against employees or applicants based on cannabis use that pre-dates employment with the employer, unless failing to do so would put the employer in violation of a federal contract or cause it to lose federal funding.

As applied to prospective employees, this prohibition appears to conflict with the provision of the Act that expressly allows an employer to rescind a conditional offer of employment or take other employment action against a prospective employee who fails a pre-employment drug test. While it remains to be seen how this conflict will be resolved, the Act's explicit acknowledgement that an employer may rescind a conditional offer of employment based on a positive drug test indicates that such action is permissible so long as the test is issued and the adverse action taken pursuant to the employer's written policy.

ON-THE-JOB IMPAIRMENT

Employers may still take adverse action against an employee, including termination, where there is:

- Reasonable suspicion of an employee's use of cannabis while performing job duties at the workplace or on call

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- A determination that an employee manifests specific, articulable symptoms of drug impairment while working (either at the workplace or on call) that decrease the employee's performance of job duties, such as
 - Symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence or carelessness in operating equipment or machinery
 - Disregard for the safety of the employee or others
 - Involvement in any accident that results in serious damage to equipment or property
 - Disruption of a production or manufacturing process
 - Carelessness that results in any injury to the employee or others.
- A determination that an employee manifests specific, articulable symptoms of drug impairment while working (either at the workplace or on call) that decrease the employee's performance of job duties, solely for 11-nor-9-carboxy-delta-9-tetrahydrocannabinol shall not form the basis for refusal to hire or continuing to employ the individual unless:
 - Failing to do so would put the employer in violation of a federal contract or cause it to lose federal funding;
 - The employer reasonably suspects an employee's usage of cannabis while performing job duties
 - The employee manifests specific, articulable symptoms of drug impairment while working (either at the workplace or on call) that decrease the employee's performance of job duties
 - If a current employee, the drug test was pursuant to a random drug testing policy and the policy provides that such a positive will result in an adverse employment action
 - If an applicant, the drug test was of a prospective employee with a conditional job offer, and the policy provides that such a positive will result in an adverse employment action

An employer need not have a written policy in place in order to conduct reasonable suspicion testing, though it still must comply with Connecticut's drug-testing law regarding urinalysis drug tests.

TESTING

Employers may continue to subject employees and applicants to drug testing or fitness for duty evaluations pursuant to their written policies so long as those policies comply with Connecticut's existing drug testing laws. However, a drug test of a prospective or current employee that yields a positive result

These testing restrictions do not apply to prospective or existing employees in exempt positions or to employees of exempt employers. Thus, exempt employers or those with employees in exempt positions may continue to take adverse action against employees, or refuse to hire prospective employees, solely because of a positive drug test result for cannabis.

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This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

ENFORCEMENT AND DEFENSES

The statute creates a private right of action for individual aggrieved by a violation. Such claims must be brought within 90 days of the alleged violation. The available remedies are reinstatement of the job or job offer, back wages, and reasonable attorney's fees and costs.

The statute creates a series of important defenses for employers. There is no cause of action by any person against an employer for:

- Actions taken based on the employer's good faith belief that an employee used or possessed cannabis in the workplace, except possession of palliative cannabis by a qualifying patient, while performing job duties during work hours, or while on call
- Actions taken based on the employer's good faith belief that an employee was unfit for duty or impaired due to cannabis use, or under the influence of cannabis, in the workplace, while performing job duties, during work hours, or while on call
- For subjecting an employee to drug testing or fitness for duty evaluation pursuant to a policy establishing under (b)(1)
- For subjecting a prospective employee to drug testing or taking adverse action against a prospective employee (such as rescission of a conditional job offer) based on a drug test, so long as

action is not taken based on a test that is solely positive for 11-nor-9-carboxy-delta-9-tetrahydrocannabinol unless the employer has an established policy

- The employer is exempt or the position involved is an exempt position

TAKEAWAYS

Overall, employers will retain some latitude to restrict their employees' use of cannabis so long as they are in compliance with the requirements of Connecticut's Cannabis Legislation.

These provisions go into effect on July 1, 2022, but employers may wish to review their policies sooner rather than later, as the legality of recreational marijuana may generate questions from employees or supervisors about the application of current policies and the consequences of off-duty use of recreational marijuana.

With these changes, employers must remain aware of their obligations under the Palliative Use of Marijuana Act with regard to employees who are qualifying patients. Employers must likewise remain cognizant of the restrictions regarding urinalysis drug-testing under Connecticut law, which remain in place. Those restrictions allow for pre-hire testing and reasonable suspicion testing, and allow for random testing in the case of positions determined to be high-risk and safety-sensitive by the Connecticut Department of Labor.