Nevada Becomes First State to Prohibit Rejection of Applicants Testing Positive for Marijuana

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On June 5, 2019, Governor Steve Sisolak of Nevada signed AB 132 (the “Law”), which prohibits employers from declining to hire a prospective employee based on pre-employment marijuana drug tests. On the heels of a new New York City law which prohibits employers from requiring pre-employment drug testing for marijuana and tetrahydrocannabinols (the active ingredient in marijuana), Nevada is now the first state to prohibit employers from using pre-employment drug tests to screen out applicants who use marijuana.

Under the Law, beginning January 1, 2020, employers in Nevada will be prohibited from denying employment to a prospective employee when that individual is required to take a drug test and the results of that drug test indicate the presence of
marijuana. The Law also provides individuals who test positive for marijuana with the right to, at their own expense, rebut the original test results by submitting an additional drug screening test. This rebuttal procedure must take place within the first 30 days of employment. When the employee has chosen to rebut the original test results with a subsequent test, the employer must accept and “give appropriate consideration” to the results of the latter test.

The Law provides for a number of carve-outs and exceptions to the prohibition as follows:

**Firefighters & Emergency Medical Technicians:** Firefighters (defined as those who hold a license and either volunteer or are employed by firefighting agencies), and Emergency Medical Technicians (“EMTs”) (defined as those as having satisfactorily completed a program of training for certification as an EMT), are excluded from protection under the Law.

**Motor Vehicle Operation:** The Law does not apply to an employee who must operate a motor vehicle and submit to a screening test under federal or state law in order to operate the motor vehicle.

**Employees who Affect the Safety of Others:** If an employee, by the “determination of his or her employer,” could “adversely affect the safety of others,” then the Law’s protections will not apply to that employee. There is no further guidance as to what factors employers should consider in making this determination. Given the broad language of this provision, health care employees who provide patient care should be exempt from the Law.

**Employment Contract or Collective Bargaining Agreement:** The protections of the Law will not apply to the extent that they are inconsistent or otherwise in conflict with the provisions in an employment contract or in a collective bargaining agreement. The Law, however, is silent as to whether an employer may bargain to include such drug testing in a collective bargaining agreement or employment contract.

**Positions Funded by a Federal Grant:** The Law’s protections do not apply to an employee who is in a position of employment “funded” by the federal government. Many federal contractors and all federal grantees must comply with the Drug Free Workplace Act (“DFWA”) and agree that they will provide a drug-free workplace as a precondition of receiving the contract or grant. Although the covered contractors and grantees must maintain a drug-free workplace, the specific components necessary to meet the requirements vary. The basic requirements do not include drug testing. Therefore, while many employers may perform drug testing in order to ensure compliance with the DFWA that does not mean that they are required to perform that drug testing. Thus, Nevada’s exception to employees “funded” by the federal government may exceed the requirements of the DFWA.

**What Nevada Employers Should Do Now**

To comply with this new law, Nevada employers should consider the following:

- Review and consider whether to revise drug-testing requirements to ensure that
they do not violate the new prohibition.

- Revise pre-employment hiring procedures to account for employees’ right to rebut a pre-employment drug test that is positive for marijuana.

- Review job classifications, and identify those that fit into one of the law’s exceptions for which such testing can still be required.

- Train human resources personnel, as well as supervisors and managers, on any changes made to current policies and practices pursuant to the law, including permissive testing requirements during the pre-employment process, and on what may or may not be included in job postings.

**Implications for Other States**

Given the growing trend of laws that protect the use of medical and recreational marijuana and its derivatives, companies are increasingly reconsidering whether to require drug testing for applicants and employees. The Law in Nevada may be the first of its kind, but it is likely not the last, in light of rapidly changing attitudes about marijuana. Indeed, Nevada Assemblywoman Nina Neal supported the Law despite opposing the earlier ballot initiative legalizing recreational marijuana because she did not want her constituents who lawfully used marijuana to be precluded from future employment. It would not be surprising to see other states following Nevada’s lead, as they try to balance employers’ efforts to maintain safe and health work environments with a growing cannabis industry and increasing numbers of employees who lawfully use marijuana.

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