Minnesota Legalizes the Consumption of THC Edibles—How Can Multistate Employers React to This Growing National Trend?

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On June 2, 2022, Minnesota Governor Tim Walz signed House File (H.F.) 4065 into law, a measure that provides clarity regarding hemp-derived consumables stemming from the Agriculture Improvement Act of 2018, also known as the 2018 Farm Bill. Notably, this law now allows the sale and consumption of “edible cannabinoid” products containing no “more than five milligrams of any tetrahydrocannabinol [THC] in a single serving, or more than a total of 50 milligrams of any [THC] per package.” Notwithstanding the above, marijuana is still illegal in Minnesota; only the THC derived from hemp—in certain amounts—is now legal to consume.

This law is noteworthy as Minnesota, along with numerous other states, begins the slow and gradual process of legalizing marijuana and/or hemp. For example:

- South Dakota briefly legalized the use of marijuana until its law was ruled unconstitutional by the South Dakota Supreme Court (but a new amendment may be on future ballots).
- The effective date of Virginia’s recreational marijuana law was moved up from 2024 to 2021.
- In May 2022, Rhode Island enacted the Rhode Island Cannabis Act, loosening marijuana restrictions.
- Marijuana legalization amendments are frequently showing up on ballots in state elections.
- State legislatures are increasingly debating marijuana legalization legislation. For example, a Minnesota bill (Senate File [S.F.] 757) recently gained support but ultimately failed.

For multistate employers, the web of various laws with differing requirements presents a complex problem in tracking these swift changes and ensuring compliance with the laws with respect to drug testing programs, for several reasons.

### State Laws

First, many of the state laws concerning marijuana and hemp differ fairly considerably. Some states only allow hemp, some states only allow marijuana for certain medical purposes (and each state varies in those purposes as well), while other states have legalized and regulated marijuana in general. These divergent requirements, which are changing rapidly, present a complex compliance challenge for fast-paced multistate employers.

### Drug Testing

Second, while keeping track of all of these differing requirements is a challenge, it is even more difficult when employers have drug testing programs in more than one state. Most commonly, employers conduct preemployment, reasonable suspicion, and safety-sensitive (random) drug tests in their programs, all of which become a compliance nightmare due to the changing landscape of laws. Here are a few considerations with respect to each type of test and how Minnesota’s new law and other states’ laws may impact an employer’s drug testing programs.
• Preemployment testing. Minnesota's new law creates additional questions and considerations surrounding preemployment testing. Employers may find that more and more candidates test “positive” for low levels of THC from the lawful consumption of products containing THC. For example, the individual may have consumed a lawful hemp product (which is legal), which still contains a low level of THC, causing the employee to test positive. This is even more problematic, as many drug tests do not state the level of the THC in someone’s blood and only typically state “positive” or “negative.” Not only may this result limit the pool of qualified applicants for a position, it may present discrimination and accommodation issues as well for individuals lawfully using THC products for a specific medical reason. For example, in Minnesota, employers may not discriminate against an employee based on his or her status on the Minnesota Medical Cannabis Registry. Refusing to hire an individual based on a “positive” test may also subject an employer to liability if the employee holds a medical cannabis card and explains the reasons for the positive test to the employer with the same.

• Reasonable suspicion. The new Minnesota law does not appear to create any new questions or concerns regarding reasonable suspicion tests. While employees are able to consume lawful products in their free time, employees may not be under the influence of legal or illegal drugs while working. Employers may want to consider implementing a specific reasonable suspicion protocol/process, which may include checklists, interviews, and other documentation to ensure the reasons for the test are documented and supported.

• Safety-sensitive/random drug testing. While many states’ laws differ regarding when and how employers may require safety-sensitive employees to submit to a drug test, Minnesota provides a good case study in light of the new law. Under Minnesota law, and after a positive test result, employees “must be given written notice of the right to explain the positive test and the employer may request that the employee or job applicant indicate any over-the-counter or prescription medication that the individual is currently taking or has recently taken and any other information relevant to the reliability of, or explanation for, a positive test result.” The employee may then “submit information to the employer, in addition to any information already submitted ... to explain that result.” Accordingly, if an employee tests “positive” for THC, employers may learn more about the employee’s use and make an employment decision based upon the explanation provided by the employee. The challenge for employers in this scenario will be to ensure they are making consistent employment decisions based on their policies and practices and ensuring such decisions are not being made on a basis that violates the law.

Given this change in the law, more employees may begin testing positive for THC due to the broad legality of hemp products and the increasing legalization of marijuana in general. Accordingly, it may be time for employers to revisit their drug testing programs and how they view the use of THC for the employee population. More simply, the laws of yesterday may create issues for employers today.

Conclusion
Given the complex issues described above, employers may want to consider reevaluating their drug testing programs. As more states begin legalizing marijuana and loosening restrictions around hemp products, employers may want to engage in a broader conversation about testing for THC and whether it makes business sense (or is required under the law) to do so.


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