

WASHINGTON STATE RESTRICTS PRE-EMPLOYMENT CANNABIS TESTING: 4 KEY TAKEAWAYS FOR EMPLOYERS

Insights
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Washington state is joining the growing trend to provide some level of protection for off-duty recreational cannabis use and will impose new restrictions on employers that conduct pre-employment drug screening. Specifically, since recreational cannabis use is legal in the state, the Washington State Legislature is concerned that there may be a disconnect between an employee's legal off-duty activities and an employer's hiring criteria. What are the four main takeaways for employers as you prepare for the new law to take effect in January 2024?

1. Limitations on Drug Screening

Washington state lawmakers are aiming to protect job seekers from potentially losing employment opportunities due to the use of non-psychoactive cannabis products or lawful, off-duty use of psychoactive cannabis that does not correlate to job performance or indicate on-the-job intoxication.

As a quick refresher, CBD products and other cannabinoids, for example, are generally considered "non-psychoactive," meaning that they don't get you high. Products that contain THC – the "psychoactive" component in cannabis – may cause intoxication but are legal in Washington state. Moreover, THC, after it is metabolized, is stored in the body as a non-psychoactive cannabis metabolite.

While employers can monitor employees for on-the-job THC intoxication, the state legislature has made it unlawful, starting January 1, 2024, for an employer to discriminate

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against a job applicant based on cannabis use that is off the job and away from the workplace. SB 5132 also makes it unlawful for an employer to deny a job to an applicant because of a drug test that finds the person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

2. Exceptions May Apply

You should note that the law contains several exceptions. Specifically, it does not do the following:

- Prohibit an employer from making hiring decisions based on a scientifically valid drug screen, so long as it does not screen for non-psychoactive cannabis metabolites;
- Affect the right of an employer to maintain a drug and alcohol free workplace or obligation to do so under federal law;
- Apply to any cannabis testing other than pre-employment testing; or
- Apply to an applicant seeking a position that requires a federal government background investigation or security clearance, a first responder or law enforcement type position, a position in the airline or aerospace industry, or a safety sensitive position for which impairment while working presents a substantial risk of death.

3. Risks for Employers to Consider

The practical effect of SB 5132 is that it will make pre-employment testing for cannabis riskier for employers. Traditional drug testing methods — especially urine, hair, and blood tests — can detect cannabis metabolites weeks after use. Since the law prohibits discrimination based on cannabis use away from the workplace, an employer will not be able to rely on a test that may only show such off-duty use. Some have proposed saliva testing as an alternative. However, while saliva testing does have a shorter positive result window after use, it still may show a positive result 24 to 72 hours after use, which would still run afoul of the law because it does not solely show current impairment.

4. Steps You May Want to Take Now

Prior to the new year, employers will want to review their handbooks, drug policies, and collective bargaining

agreements to ensure they comply with SB 5132. Employers will need to review positions to identify any that qualify as “safety sensitive” under the law or are otherwise exempt.

The law requires any safety sensitive position to be identified before an applicant applies for employment. For all other positions, employers must take steps to revise policies and procedures to ensure they receive cannabis drug test results that are limited to psychoactive cannabis metabolites and, likely, any such testing must be limited to testing for current intoxication.

Employers should check with the laboratory that conducts their testing to learn more about what metabolites their tests screen for and how long after use a screen can come back positive to determine the feasibility of continued testing and compliance with the law.

Conclusion

Employers have a lot to consider as the trend to [legalize and protect off-duty recreational use](#) of cannabis continues. Your Fisher Phillips attorney is ready to help you adapt and create compliant policies.

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