Updates

*Beginning in 2024, both Washington and California will prohibit employers from basing hiring decisions on an applicant's legal marijuana use.*

**What Is Prohibited?**

Effective January 1, 2024, employers are prohibited from discriminating against job applicants on the basis of lawful, off-the-job marijuana use. Specifically, employers may not rely on preemployment drug tests that screen for nonpsychoactive cannabis metabolites when making hiring decisions. A similar law is slated to take effect in California the same day.

Nonpsychoactive cannabis metabolites remain in the body even after it has metabolized any tetrahydrocannabinol (THC) (the active chemical in marijuana). As a result, tests that detect nonpsychoactive cannabis metabolites show whether someone has consumed marijuana within the last few weeks.

In passing this new law, the state legislature noted "[m]any tests for cannabis show only the presence of nonpsychoactive cannabis metabolites from past cannabis use … that have no correlation to an applicant's future job performance." SB 5123 (to be codified at RCW Ch. 49.44). The legislature's express intent in passing the new law was to "prevent restricting job opportunities based on an applicant's use of cannabis." *Id.*

The law does not prohibit employers from basing hiring decisions on drug tests that do not screen for nonpsychoactive cannabis metabolites, nor does it affect employers' ability to maintain a drug- and alcohol-free workplace. Employers are still permitted to test employees after accidents or when they suspect an employee is under the influence of drugs or alcohol at work.

Employers may continue to use testing methods that screen for marijuana in addition to other substances only if the cannabis-related test results are not provided to the employer. In short, except as otherwise specified below, employers may not receive information about—or base hiring decisions on—applicants' off-the-job marijuana use.

**Who Is Affected?**

All employers in Washington state are subject to the new law, but the ban on preemployment testing does not extend to all positions. The law does not apply to applicants pursuing roles:

- That require a federal background check or security clearance.
- With "general authority Washington law enforcement agencies" as defined in RCW 10.93.020.
- With a fire department, fire protection district, or regional fire protection service authority.
- As a first responder.
- As a corrections officer.
- In the airline and aerospace industries.
- That are safety-sensitive positions for which impairment while working presents a substantial risk of death. The employer must identify such safety-sensitive roles *in advance* (i.e., before the applicant applies).

Washington's law does not preempt state or federal laws that require applicants be tested as a condition of employment, as a requirement under a federal contract, or in order to receive federal funding or licensing-related benefits.

**Employer Takeaways**

To ensure compliance with this new law, employers should review their drug testing policies and procedures. If an employer plans to continue testing applicants for various substances, the employer must ensure that either the test they are using does not screen for cannabis or, at a minimum, that the employer will not be provided any cannabis-related results. They should also identify which jobs they consider "safety-sensitive" and be sure to include that information in any job postings.

Employers should work with experienced legal counsel to determine the best approach to ensuring compliance with this new law.

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