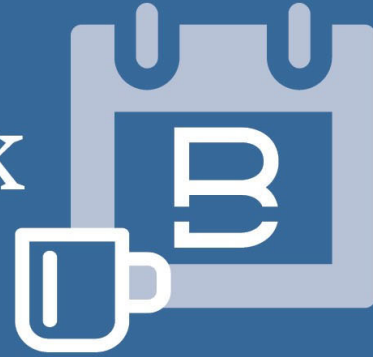


The Work Week

Bassford Remele Employment Practice Group



July 17, 2023

Welcome to another edition of *The Work Week with Bassford Remele*. Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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Preparing Your Workplace for Legalized Marijuana

[Daniel R. Olson](#)

Two weeks from tomorrow, recreational-marijuana use will become legal in Minnesota. Minnesota Public Radio [interviewed](#) Lauryn Schothorst, the Director of the Minnesota Chamber of Commerce, about the impact of legalization in the workforce last week. When asked whether she felt Minnesota businesses are prepared for the change, Schothorst said she does not believe Minnesota employers “are very prepared at all.”

Whether you feel prepared or not, below are some frequently asked questions to consider as we barrel toward the August 1 legalization date:

Can an employee be disciplined for using marijuana at work?

Generally speaking, yes. Just because recreational marijuana will be legalized soon does not restrict an employer’s ability to discipline an employee for using marijuana while at work. This is no different than drinking alcohol on the job. Most employers have a policy against substance use while at work. From a best-practices perspective, these policies should be updated in light of this legislative change. For example, if your policy prohibits the use of “alcohol and any illegal drugs,” marijuana will no longer be covered by this broad prohibition.

Can an employee be disciplined for arriving at work under the influence of marijuana?

Again, generally speaking, yes. Employers can still prohibit employees from arriving at work under the influence of marijuana, even if the employee’s use outside the employer’s premises would otherwise be considered legal. Here again, most employers will need to update their substance-use policy in the next two weeks to clarify this point.

Can an employee be disciplined for possessing marijuana at work?

Absent the rare medical reason to carry marijuana at work under a disability accommodation, yes—an employee can be disciplined for possessing marijuana at work. This is no different than firearms: even if an employee has a valid conceal-and-carry permit, an employer can still restrict the possession of firearms on its premises. The same construct will apply to marijuana.

Can an employer ban the use of recreational marijuana outside of work?

No. As long as the marijuana use is outside of work hours and the employee shows no signs of impairment at work, employers cannot discipline employees for recreational marijuana use outside of work.

Can an employer test applicants for marijuana use?

It depends. Effective August 1, any mandatory testing policy must address cannabis separately. In addition to the restrictions under Minnesota’s Drug & Alcohol Testing in the Workplace Act (“DATWA”), applicants can only be tested if everyone else applying for a similar position is also required to be tested. The test also cannot be for the sole purpose of determining whether an applicant is using marijuana; there must be some legitimate purpose for testing. The legitimate reasons generally fall under five categories: (1) the employee holds a safety-sensitive position; (2) the position requires a commercial driver’s license (“CDL”); (3) the position involves operation of a motor vehicle and state and/or federal law requires testing; (4) the position is funded by a federal grant; and (5) testing is required for the position under state and/or federal law.

Can an employer test employees for marijuana use?

Again, it depends. Drug testing in Minnesota is still governed by DATWA, which was modified by the bill passing the legalization of marijuana. Under DATWA, an employer is allowed to force employees to undergo drug and/or alcohol testing under very specific circumstances. Absent those specific circumstances, random testing for marijuana is now prohibited unless the employee is employed in a “safety sensitive” position. Routine annual physical exams may not include testing for marijuana unless the position falls within the five categories for which an employer can test applicants (discussed above). And an employer can only require testing based on reasonable suspicion of marijuana use under six circumstances: (1) the employee appears under the influence of marijuana and is employed in one of the five categories for which an employer can test applicants; (2) an employer has a written policy against using, possessing, selling, or transferring marijuana while working, on an employer’s premises, or while operating a vehicle, machinery, or equipment; (3) the employee sustains a physical injury; (4) the employee causes a physical injury to a co-worker; (5) the employee is involved in a work-related accident; and (6) the employee was operating or helping in the operation of any vehicle, machinery, or equipment involved in a work-related accident.

What about marijuana convictions that show up on a background check?

Minnesota adopted a “ban the box” law for private employers back in 2013 that prevents employers from seeking criminal-history information before conducting an interview or extending a conditional offer of employment. But, to the extent your company utilizes background checks as part of a condition of employment, be aware that the legalization statute also will expunge all misdemeanor marijuana convictions effective August 1. Felony convictions are also eligible for expungement, though that will entail a longer process. Either way, Minnesota employers will need to be more scrupulous when reviewing

criminal background checks in the coming months because there may be a lag in the expungement of these convictions.

What is cannabis compared to marijuana?

Marijuana is one substance under the cannabis family. For the purposes of the legalization legislation, the following cannabis substances will be legal under Minnesota law effective August 1: marijuana; THC; cannabis flower; cannabis products; lower-potency hemp edibles; and hemp-derived consumer products.

At Bassford Remele, we regularly advise and counsel employers on updating policies and handbooks to remain compliant with changing laws. If we can be of assistance in updating your substance-use-prohibition policies in the coming weeks, just let us know!

The Work Week: Annual Employment Law Seminar (Thursday, July 20)

Please join our Bassford Remele employment team for our inaugural *The Work Week: Annual Employment Law Seminar*!

This year's Minnesota legislative session was the most active in recent memory. We'll begin the Seminar by reviewing the new employment laws that were passed this year, including many that take effect over the course of the next few weeks. Next, we'll examine how the legalization of marijuana will impact the workplace. We'll end the substantive portion of the seminar with a panel discussion on the ethical implications of employment investigations, featuring our special guest panelist, Brittany Skemp, Assistant General Counsel at Essentia Health. Finally, we'll conclude with a social reception to enjoy refreshments and each other's company.

[Register Here](#)

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