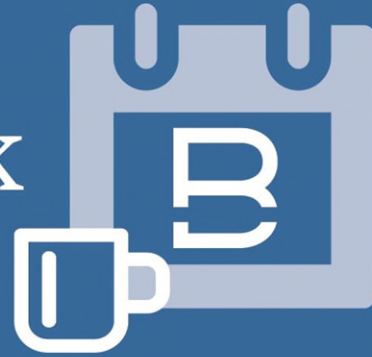


The Work Week

Bassford Remele Employment Practice Group



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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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The New Regulations for Cannabis in the Workplace

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The legalization of recreational-cannabis use has dominated headlines in both *The Star Tribune* and *The Pioneer Press* since its August 1 effective date. We have followed the legalization legislation and its impact on employers in [prior editions](#) of *The Work Week*. The most complicated and nuanced of these new employer regulations involve the ability to test applicants and employees for cannabis use under Minnesota's Drug & Alcohol Testing in the Workplace Act ("DATWA"). This week, we provide a more in-depth review of these testing implications.

An Overview of DATWA

DATWA is the Minnesota law that allows employers to test job applicants and employees for drug and alcohol use under certain circumstances. DATWA applies to all Minnesota employers and limits employers' ability to require applicants and employees to undergo chemical testing to very specific circumstances. The most-significant restrictions under DATWA require employers to: (1) have a written policy in place; (2) use an independent lab for testing; (3) show an applicant or employee a copy of the written policy before testing; and (4) confirm a positive test through a confirmatory test. Compliance with DATWA is vital for employers; the statute creates a private cause of action for applicants and employees to recover damages resulting from an employer's violations, including recovery of attorney's fees and costs.

Limitations on Cannabis Testing under DATWA

As highlighted in [last week's edition](#) of *The Work Week*, the definition of "cannabis" includes marijuana, THC, cannabis flower, cannabis products, lower-potency hemp edibles, and hemp-derived consumer products—essentially, anything other than synthetic marijuana and designer drugs. DATWA covers four

separate types of testing for cannabis: (1) pre-employment testing; (2) testing during routine physical exams; (3) random testing; and (4) testing due to reasonable suspicion. Below is an overview of each:

(1) Pre-Employment Testing

Employers can no longer test for cannabis during the pre-employment process unless the applicant's position falls under one of several specific groups:

- (A) a safety-sensitive position;
- (B) a position requiring a commercial driver's license ("CDL");
- (C) the position involves operating a motor vehicle and state and/or federal law requires testing;
- (D) the position is funded by a federal grant; or
- (E) state or federal law requires testing for the position.

A "safety sensitive position" is defined as a job, including any supervisory or management position, in which an impairment caused by drug, alcohol, or cannabis usage would threaten the health or safety of any person. Similar to the safety-sensitive position carve-out, healthcare and educational positions are also carved out from the general ban.

If an employer requires one applicant for these exempted positions to undergo testing, all applicants in the pool must be required to undergo testing. Additionally, testing cannot be done on an arbitrary or capricious basis and cannot be conducted solely for the purpose of determining whether an applicant uses cannabis.

(2) Routine Physical Exams

Similar to the restrictions governing pre-employment testing, employers can now only require cannabis testing as part of a routine physical exam if the position falls under one of the exempted groups detailed above. Employers are limited to requiring only one routine physical exam per year, and employees must receive two weeks' notice before undergoing cannabis testing as part of an annual physical exam.

(3) Random Testing

Random testing is now restricted to only safety-sensitive positions, as defined above. As with all testing under DATWA, any positive random test must also be confirmed through a second confirmatory test.

(4) Reasonable-Suspicion Testing

Under DATWA, reasonable suspicion means a basis for forming a belief based on specific facts and rational inferences drawn from those facts that an employee is under the influence of cannabis at work. An employer with reasonable suspicion that an employee is under the influence of cannabis may only require an employee to undergo testing under six specific circumstances:

- (A) the employee’s position falls under one of the exempted groups discussed above;
- (B) the employee possesses, sells, or transfers cannabis while working, on work premises, or while operating a work vehicle, machinery, or equipment;
- (C) the employee sustains a personal injury;
- (D) the employee causes a personal injury to another employee;
- (E) the employee causes a work-related accident; or
- (F) the employee was operating, or helping to operate, a vehicle, machinery, or equipment that was involved in a work-related accident.

In addition to updating handbooks and policies to prohibit employees from being under the influence of or possessing cannabis at work, employers also must update their testing policies to comply with these new regulations. At Bassford Remele, we regularly advise and counsel employers about the restrictions under DATWA, and we’ve been closely following these updated regulations in light of the legalization of recreational cannabis use. Please feel free to reach out if you need any assistance!

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