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EMPLOYMENT & HUMAN RESOURCES

Minnesota's Upcoming Paid Family and Medical Leave

by Brittany R. King-Asamoa

Minnesota continues to expand leave benefits for employees caring for themselves and family members. With the passage of earned sick and safe time and the increased eligibility for pregnancy and parenting leave, Minnesota created a paid family and medical leave ("MNFML") benefits program. This article highlights quick facts about MNFML.

Beginning January 1, 2026, MNFML will provide eligible employees with the right to apply for job-protected paid leave for a serious health condition, family care leave, safety leave, and leave for a qualifying exigency. Leave may be taken intermittently (in certain circumstances), but in all cases MNFML leave shall be taken in minimum increments of 1 day. Employees must provide employers with at least 30 days' advance notice of leave when the reason for leave is foreseeable. When leave is not foreseeable, employees shall provide notice as soon as practicable.

An employee's total available leave will be capped at 20 workweeks per benefit year, but such time is divided amongst leave types in a formulaic fashion.

Type of Leave	Leave Available is the *Lesser of*		
Employee's serious health condition	12 workweeks	OR	12 workweeks – all other MNFML taken + eight workweeks
Bonding, Safety leave, Family care leave or Qualifying exigency	12 workweeks	OR	12 workweeks – leave taken for serious health condition + eight workweeks

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For example, if Jon takes 10 workweeks of leave for his serious health condition, he will have up to 10 workweeks of bonding leave[1] available in the same benefit year. If Jon took only 5 workweeks of leave for his serious health condition, he could take 12 workweeks of bonding leave in the benefit year. [2] Employers may require MNFML leave to be taken concurrently with leave taken for the same purpose under Minnesota's pregnancy and parenting leave law or federal Family and Medical Leave Act.

All employers, regardless of size and location, are required to provide the new leave to eligible employees engaged in covered employment. "Covered employment" means the performance of services for wages or under contract, but does not include self-employed individuals, independent contractors, or seasonable employees.[3] An employee's entire employment during a calendar year is "covered employment" if:

1. 50 percent or more of the employment during the calendar year is performed in Minnesota;

2. 50 percent or more of the employment during the calendar year is not performed in Minnesota or any other state, or Canada, but some of the employment is performed in Minnesota and the employee's residence is in Minnesota during 50 percent or more of the calendar year; or

3. 50 percent or more of the employment during the calendar year is not performed in Minnesota or any other state, or Canada, but the place from where the employee's employment is controlled and directed is based in Minnesota.[4]

The compensation component of MNFML will be administered through the Minnesota Department of Employment and Economic Development in a manner similar to the unemployment system, complete with application and appeals processes. This will be financed through tax premiums of 0.7% of employees' taxable wages. Employers may require employees to share this expense by deducting up to 0.35% of the premium from employees' wages. Eligibility requirements are set forth in Minn. Stat. § 268B.06, subd. 1. In addition to other requirements, the employee must have received wages for covered employment totaling an amount equal to or greater than 5.3% of Minnesota's average annual wage (rounded to the next lower $100) during the base period.

Employers cannot retaliate against employees for taking MNFML leave or enforcing any rights or remedies they are entitled to under the law. Further, like Minnesota's workers' compensation law, it is unlawful for an employer to obstruct, impede, or otherwise interfere with an employee's application for or receipt of MNFML leave benefits. In addition to other remedies, the Minnesota Department of Labor and Industry may impose a $1,000 to $10,000 penalty per violation of MNFML law against employers, with such penalties payable to aggrieved employees.

While the benefits will not become available until 2026, employers have obligations beginning as early as next year. In 2024, employers must submit wage reports providing the total hours worked and wages earned by each employee. Beginning November 1, 2025, employers must post required notices and individually notify each employee of the MNFML in accordance with Minn. Stat. § 268B.26. ■

[1] Maximum bonding leave is the lesser of 12 workweeks or [12 workweeks – 10 workweeks Jon took for his serious health condition + 8 workweeks].

[2] This amount is less than 15 workweeks (12 workweeks – 5 workweeks Jon took for his serious health condition + 8 workweeks).

[3] Minn. Stat. § 268B.01, subd. 15(a), 35. Individuals that are self-employed, seasonal employees, or independent contracts may elect to participate in the MNFML program by purchasing their own coverage.

[4] Minn. Stat. § 268B.01, subd. 15(b).

Drug Testing Employees in the Age of Legal Recreational Cannabis

by Adam N. Froehlich

On August 1, 2023, Minnesota became the twenty-third state to legalize the recreational use of cannabis for adults over the age of twenty-one.[1] With legalization, many employers may be left asking how they should handle their current drug testing policies related to cannabis. Unlike many of the earlier-adopting states, the Minnesota legislature enacted protections for many categories of workers who may choose to use cannabis outside of work. As a result, significant changes have been made to employers' ability to test for cannabis.

The legislation legalizing recreational cannabis in Minnesota changed the definition of "drug" as the term is used in the Drug and Alcohol Testing in the Workplace Act ("DATWA") to exclude "marijuana, tetrahydrocannabinols, cannabis flower, cannabis products, lower-potency hemp edibles and hemp-derived consumer products."[2] In doing so, the Minnesota legislature took cannabis testing out of the familiar drug testing regime that most employers have worked under for decades.[3] However, cannabis remains within the definition of "drug" for employees in safety-sensitive positions,[4] peace officers, firefighters, positions "requiring face-to-face care, training, education, supervision, counseling, consultation, or medical assistance to children, vulnerable adults, or patients who receive health care services from a provider for the treatment, examination, or emergency care of a medical, psychiatric, or mental condition," positions requiring a commercial driver's license, and positions funded by a federal grant or for which testing is required by another state or federal law.[5] Drug and alcohol testing laws for such employees remain unchanged.[6]

EMPLOYERS CAN NO LONGER TEST MOST JOB APPLICANTS FOR CANNABIS AS A CONDITION OF EMPLOYMENT

Pre-employment drug tests for cannabis are now banned in Minnesota for most types of employees. Previously, employers could test for drugs and alcohol, including cannabis, pursuant to a specific written policy through participating laboratories, and employers may still do so for alcohol and other drugs.[7] However, Minnesota employers are now generally no longer allowed to require or request pre-employment cannabis testing as a condition of employment unless testing is otherwise required by state or federal law.[8]

Even if a job applicant is tested for cannabis, employers are not allowed to refuse to hire the applicant based on a positive test.[9]

Since 1992, Minnesota employers have been prohibited from refusing to hire job applicants because the applicant lawfully uses or enjoys food, alcoholic or nonalcoholic beverages, or tobacco outside of work hours and off of the employer's premises under the Lawful Consumable Products Act (LCPA).[10] As of August 1, 2023, the scope of non-work activities that an employer cannot take adverse action based on has been expanded to include using "cannabis flower, cannabis products, lower-potency hemp edibles, and hemp-derived consumer products."[11] However, there are exceptions. Perhaps most importantly, an employer can refuse to hire an applicant or discipline or discharge an employee based on the person's "past or present job performance."[12] For example, if an applicant's former employer reported that the applicant's cannabis use causes him to frequently sleep in and forget to set alarms, leading to chronic lateness, a decision not to hire the applicant likely would not violate Minnesota law if the lateness, not the related cannabis use, was the actual cause of the adverse hiring decision. Other exceptions include refusal to comply with chemical dependency treatment or aftercare program conditions and the requirements of other state and federal laws.[13]

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DRUG TESTING

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RANDOM TESTING OF SAFETY-SENSITIVE EMPLOYEES, REASONABLE SUSPICION TESTING, AND TREATMENT PROGRAM TESTING FOR CANNABIS REMAINS LEGAL, BUT ROUTINE PHYSICAL EXAMINATION TESTING OF EMPLOYEES IS NOT

Employers may still conduct random testing for safety-sensitive employees and reasonable suspicion testing of employees for cannabis and may continue to test employees for whom cannabis and related compounds remain a "drug" as defined in the DATWA as they would under written policies for drug and alcohol testing.[14] An employee in substance use disorder treatment or evaluation ordered or subsidized by an employer may be tested for cannabis during the treatment or evaluation period and up to two years after completion.[15] For those employees who are not within the excluded categories, routine physical examination testing must not include cannabis.[16] Employees who are not safety-sensitive, even if they are in one of the other excluded categories, cannot be randomly tested for cannabis.[17] Despite restrictions on testing, it is important to note that employers may still ban the use of cannabis during work hours and on its premises.[18]

The LCPA is relevant to current employees as well, as adverse employment action based on off-duty, off-premises consumption of cannabis is prohibited.[19] The LCPA specifically states that "cannabis flower, cannabis products, lower-potency hemp edibles and hemp-derived consumer products are lawful consumable products" regardless of any state or federal law to the contrary.[20] This sets up a potential trap for employers who test for cannabis even within the confines of the DATWA, as currently available drug tests for cannabis can detect cannabis used within three days for a one-time user and within more than thirty days for chronic heavy users, without a method for determining how recently the use may have occurred.[21] This makes it possible that an employee would test positive for cannabis consumed off-duty and off-premises, after the effects of consumption have worn off,[22] leaving the employer in an awkward position between the DATWA and the LCPA.

WHAT SHOULD EMPLOYERS DO

Employers faced with the new regime of cannabis testing regulations will undoubtedly have questions and concerns. However the most immediate action employers should take is the elimination of cannabis and cannabinoids from their drug and alcohol testing panels, except with respect to safety-sensitive positions, peace officers, firefighters, positions providing "face-to-face care, training, education, supervision, counseling, consultation, or medical assistance to children, vulnerable adults, or patients who receive health care services from a provider for the treatment, examination, or emergency care of a medical, psychiatric, or mental condition," positions requiring a commercial driver's license, and positions funded by a federal grant or for which testing is required by another state or federal law.[23] Employers should also review the wording of their drug and alcohol testing policies to ensure that the new changes to Minnesota law are incorporated properly. Beyond testing, employers should also ensure that all of their drug-use policies are reviewed and updated to reflect the changing cannabis landscape and train employees involved in hiring, firing, and discipline on the new laws surrounding cannabis users. ■

[1] *Steve Karnowski, What to Know as Recreational Marijuana Becomes Legal in Minnesota in August, PBS NewsHour (July 29, 2023, 8:47 PM), https://www.pbs.org/newshour/politics/what-to-know-as-recreational-marijuana-becomes-legal-in-minnesota-in-august.*

[2] *Minn. Stat. § 181.950, subd. 4 (2023). "cannabis flower," "cannabis product," "lower-potency hemp edibles," and "hemp-derived consumer products" are defined in Minn. Stat. § 342.01 (2023).*

[3] *1987 Minn. Laws. Ch. 388.*

[4] *A "safety-sensitive position" is "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." Minn. Stat. § 181.950, subd, 13 (2023).*

[5] *Minn. Stat. § 181.951, subd. 9 (2023).*

[6] *Id.*

[7] *Minn. Stat. § 181.938, subd. 1 (b) (2023).*

[8] *Minn. Stat. § 181.951, subd. 8 (a) (2023).*

[9] *Id. at subd. 8 (b). If an employer is required by state or federal law to refuse to hire an applicant who tests positive for cannabis, then the employer should follow that requirement. Id.*

[10] *1992 Minn. Laws Ch. 538.*

[11] *Minn. Stat. § 181.938, subd. 2 (b) (2023).*

[12] *Id. at subd. 3 (d).*

[13] *Id. at subd. 2 (b), subd. 3 (a)–(c).*

[14] *Minn. Stat. § 181.951, subd. 4–5 (2023).*

[15] *Id. at subd. 6.*

[16] *Id. at subd. 3.*

[17] *Id. at subd. 4, 9.*

[18] *Minn. Stat. § 181.938, subd. 2 (b) (2023).*

[19] *Minn. Stat. § 181.983, subd. 2 (2023).*

[20] *Id.*

[21] *Karen E. Moeler, et al., Clinical Interpretation of Urine Drug Tests: What Clinicians Need to Know About Urine Drug Screens, MAYO CLINIC PROCEEDINGS, March 18, 2017, at 774, 778–781.*

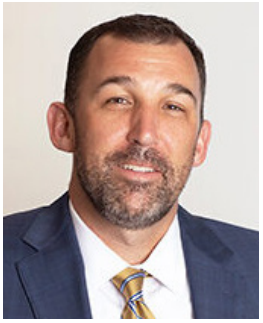
[22] *"[T]he noticeable effects of smoked marijuana generally last from 1 to 3 hours, and those of marijuana consumer in food or drink may last for many hours." What are Marijuana's Effects?, NATIONAL INSTITUTE ON DRUG ABUSE, Apr. 19, 2023, https://nida.nih.gov/publications/research-reports/marijuana/what-are-marijuana-effects.*

[23] *Minn. Stat. § 181.951, subd. 9 (2023).*

Enhanced Wage Disclosure Protections

SAFEGUARDING YOURSELF FROM WHAT YOU MAY NOT KNOW

by Cory A. Genelin



With big ticket items like Earned Sick and Safe Time and Paid Family Medical Leave passed in the 2022-2023 Minnesota Legislative Session getting most of the attention, you may have missed some of the smaller items that can get employers in trouble. Wage Disclosure Protections are one of them.

Wage Disclosure Protections under Minnesota Statutes section 181.172 first made news in 2014 when made into law in the Minnesota Women's Economic Security Act. Since 2014 181.172 has prohibited employers from requiring employees to keep their wages confidential. The theory at the time was that allowing employees to share wage information would identify and eliminate wage discrepancies based on illegal discrimination, sex discrimination in particular.

While the prohibition is nine years old, I actually saw a violation of the Protections just this week while reviewing a potential employee-side case. Of course, this was in an employee handbook that looked like it hadn't been updated in twenty years.

As of July 2023, the prohibition has been expanded. Minnesota employers are now prohibited from requiring applicants to share their pay history, asking about it, or even considering it. The proponents of this restriction reasoned that an applicant's wage history might incorporate a history of illegal discrimination, and so by basing future compensation on past compensation, the new employer may be perpetuating this discrimination, even if not engaging in it directly.

But an employer making a job offer is in the position of any purchaser. A buyer of a car for instance wants the best possible price. What others are paying for the same car is a very helpful piece of information. An employer is simply purchasing labor—the time and services of the new employee. What other employers are willing to pay for these same services is a fairly logical basis for making an offer. So what are employers to do?

Dealing with the first two restrictions is fairly simple—just remove any such questions or requirements from your application process. But what about the third restriction—not considering wage history? Certainly like most things an employer can't base employment decisions upon—race, religion, gender, age, ethnicity, etc.—the first layer of protection is to simply not collect the information in the first place. There may be situations, such as a small industry, where competitors know each other's wage scales and if an applicant is coming from a competitor, probably have a good idea of what the applicant is making. Or, an applicant might blurt out his current or previous rate of pay. In that case, the best you can do is ensure that no record of this information is contained in the interview notes or any document related to the hiring decision.

Going forward, the most effective way for employers to discover what they need to offer an applicant to entice them to take the job will be to change the question from the past or present tense to the future tense. Instead of "what did you make at your last job?" or "how much are you making now?" employers should ask "how much do you expect to make at this job?" or "what would it take to get you to come work for us?" ■

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EMPLOYMENT LAW SEMINAR
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Mayo Clinic Healthy System Event Center

Watch for more information soon.

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