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Employment & Human Resources newsletter

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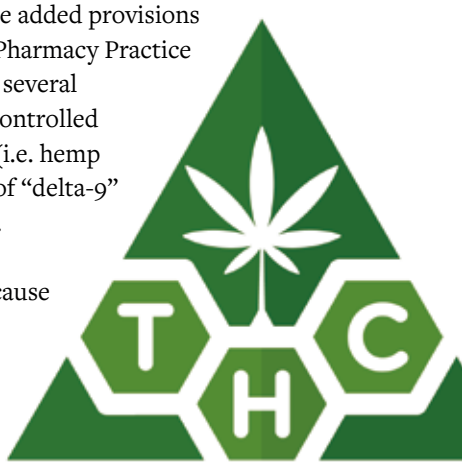
EMPLOYEES USING THC – LEGALLY? NAVIGATING EMPLOYEE DRUG TESTING IN THE POST-LEGALIZATION ERA

The Road to Legalization?

The road to our current legal field began with the federal 2018 Farm Bill, which legalized the cultivation and sale of hemp at the federal level. Specifically, any hemp containing a maximum of 0.3% THC by weight was now considered "legal" at the federal level.

Importantly to Minnesota, the Farm Bill delegated the broad authority to states to regulate and limit the production and sale of hemp within their borders. Accordingly, in 2019, the Minnesota legislature added provisions on the sale of "cannabinoid products" to the Pharmacy Practice and Wholesale Distribution Act and modified several definitions provided by Minnesota drug and controlled substance laws to exclude "industrial" hemp (i.e. hemp and CBD products containing less than 0.3% of "delta-9" THC) from the definition of illegal marijuana.



Shortly thereafter, questions were raised: Because the revisions specifically referenced "delta-9" THC, what about other variants of THC such as "delta-8" or "delta-10"? And while the act

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EMPLOYEES USING THC – LEGALLY? NAVIGATING EMPLOYEE DRUG TESTING IN THE POST-LEGALIZATION ERA

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legalized "industrial hemp," what about the legality of so-called "edibles"?

The legislature revisited these issues in 2021 and passed new legislation, with the current iteration having gone into effect on August 1, 2022. The amendment removed references to "delta-9," opting instead to simply leave in place the general THC limit. And edibles? The new law authorizes the production of "edible cannabinoid products" as long as they (1) adhere to the 0.3% THC limit, and (2) do not contain more than 5 mg of THC per serving or more than 50 mg of THC per package. However, at present, there is no limit to the amount of packages a customer may purchase at a time. The result has accordingly been the de facto legalization of hemp-derived THC for recreational use.

What does this mean for employers and drug testing?

Presently, drug and alcohol testing is only authorized by statute for Minnesota employers in certain circumstances, the following being the most typical:

- **Preemployment Testing:** A job applicant may be required to undergo testing provided a job offer has been made to the applicant and the employer requires all job applicants to undergo such testing.

- **Routine Physical Examination Testing:** An employee my be required to undergo testing as part of a routine physical examination, once annually, and with two-weeks' notice.

- **Safety-Sensitive** (**Random**) **Testing:** An employee working in any job in which an impairment caused by drug or alcohol use would threaten the health and safety of another may be randomly tested.

- **Reasonable Suspicion Testing:** An employee may be required to undergo testing if the employer has a reasonable suspicion that the employee: (1) is under the influence; (2) has violated the employer's written work rules prohibiting the use, possession, sale, or transfer of drugs or alcohol while the employee is working, on the employer's premises, or operating the employer's equipment; (3) has sustained or has caused a personal injury, as defined by statute; or (4) has caused or was operating or helping to operate equipment involved in a work-related accident.

Further complicating things, Minnesota has also enacted a Medical Cannabis Registry statute, which includes a prohibition of discrimination by employers against potential or current employees in hiring, firing, or other term or condition of employment if the employee is enrolled in the cannabis registry or tests positive for cannabis components (unless the employee used, possessed, or was impaired by medical cannabis on the job). Furthermore, under the protections of the medical cannabis statute, an employee may present verification of being enrolled in the registry as part of the employee's explanation under the drug and alcohol testing statutes.

Putting the existing framework together, obvious problems present themselves. For instance, many, if not most, preemployment drug tests required by employers do not provide the level of THC in the candidate's blood stream, but instead simply indicate the presence or absence of THC. Further, the tests do not differentiate between legal hemp-based THC and illegal marijuana-based THC. Therefore, candidates lawfully using hemp-based THC may be unknowingly filtered from candidacy, or worse, employers may open themselves up to potential liability if the candidate has enrolled in the Medical Cannabis Registry but has been denied employment on the basis of a positive test.

The Takeaway

The upshot of this new law is that more job candidates and current employees will inevitably begin testing positive for potentially legal THC in authorized drug and alcohol testing. Employers should consider updating their written and unwritten policies for handling drug and alcohol testing to ensure that they are consistently making hiring, firing, and general business decisions on uniform policies and not arbitrary (and potentially unlawful) bases.

Until the legislature provides further guidance, the ins and outs of the law surrounding legal and illegal THC possession and use remains murky. The best way for an employer to get ahead of this unclear situation is to consult an experienced counsel with any questions and concerns, including the revision of company policies that may be outdated or incompatible with the current legal landscape.

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INTERVIEW DO'S AND DON'TS FOR EMPLOYERS

There are many areas of a job applicant's life that a person may be curious about, but an employer should steer clear of. This article identifies some of the questions employers should avoid (Interview Don'ts) and things employers you should remember and do when interviewing applicants.

Interview Don'ts:

- Don't ask questions about membership in protected classes

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to make employment decisions based on an applicant's color, sex, race, national origin, or religion. The Minnesota Human Rights Act expands the protected classes upon which employment decisions cannot be based to include, in addition to those created by Title VII: disability, sexual orientation, gender identity, recipients of public assistance, familial status, marital status, membership in a local commission, and age. Examples of generally innocent questions and statements that would prompt a candidate to disclose this information include the following:

  - o That's a unique accent, where are you from?
  - o Questions regarding work life balance or children's activities
  - o You look too young to have a PhD degree
  - o Are you in any social or organizational clubs?
  - o We are shooting for 200 days without a workplace injury. Have you ever been injured on the job?

- Don't use a location that could present obstacles for individuals with disabilities

Of course, an employer cannot think of all the potential obstacles a candidate with disabilities may face. Nonetheless, the employer should at least ensure there are no steps to the interview room, the table is high enough for an individual with a wheelchair to sit comfortably and have an individual prepared to guide the candidate to the interviewing room.

- Don't ask questions about anticipated leaves

  - o Do you anticipate deployment in the near future?
  - o What time obligation does your reserve military service require?
  - o Do plan to start or expand your family?

- Don't cast positions before interviewing candidates

To some extent employers rule out candidates before conducting interviews, but these should be based on justifiable business decisions (e.g. misspellings on resume, candidate was rude to staff). However, employers should not select the physical characteristics (e.g. woman, specific ethnicity) a candidate must have for a position, unless such are bona fide requirements to perform the work.

What Employers Should Do in Interviews:

- Be consistent

Candidates for the same positions should be asked generally the same questions. Asking some candidates

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INTERVIEW DO'S AND DON'TS FOR EMPLOYERS

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questions that others were not asked absent a legitimate, nondiscriminatory reason for doing, so could stand as circumstantial evidence of discrimination.

- Redirect the conversation when needed

Whenever a candidate begins disclosing information you cannot make an employment decision on, redirect the conversation. Do not acknowledge the information disclosed and ask additional questions based solely on the candidate's ability to perform the job.

- Ask whether the candidate can perform the job with or without accommodation

To ensure the interviewer does not run afoul of the Americans with Disabilities Act he/she should not require the candidate to go into further detail. This is ideally a question that should be answered on the application.

- Take notes

Write notes as if they will be used in court. Identify the basis for every decision. What comments made during the interview indicate a candidate is or is not able to perform the job? What entries on the candidate's resume indicate that he/she does not have the experience or knowledge to complete the job? What interactions during the interview process demonstrate that the candidate is not right for the organization? The answers to these questions should be detailed in the employer's notes.

Interview Checklist

- Write interview questions ahead of time
- Avoid questions that require answers identifying membership in a protected class
- Use a quiet room that does not present obstacles for individuals with disabilities
- Take notes

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THE NLRB GOES AFTER HANDBOOKS . . . AGAIN.

With the return of Democrat control of the National Labor Relations Board, the pendulum is swinging back so fast, it might hit some employers on the chin. In particular, the NLRB is undoing many of the changes made by the Trump NLRB as to employee handbooks.

Before we get to the changes, let's cover how things can change so fast. Most administrative bodies—such as OSHA, the EEOC, and the Department of Labor—can only change policy via rulemaking procedures under the Administrative Procedure Act. The NLRB is different in that it not only makes rules, it also adjudicates them, meaning that it has an administrative court-like system to try cases internally. This means that, without actually re-writing the rules, the NLRB can effectively change how rules are implemented by making different decisions in individual NLRB cases.

Further, the NLRB can effectively change policy—if not change the letter of the law—via its General Counsel Office ("GCO"). The General Counsel is the head lawyer for the NLRB and decides which cases are prosecuted through the NLRB. By simply deciding to focus investigations and prosecutions on an area, the GCO can effectively punish things that previously were ignored.

I'd also like to put the handbook controversy in context. (Here, I'll be using very general and plain-English terms; please remember that there is a lot of legal complexity I'm leaving out for the sake of clarity.) The ultimate legal issue here is employee rights under Section 7 of the National Labor Relations Act. In very simple terms, Section 7 says that employees have the right to work together to discuss with each other, complain to management about, and improve the terms and conditions of their employment. Under the Obama administration, the NLRB for the first time examined when and how an employer's rules it its handbook might illegally limit an employee's Section 7 rights.

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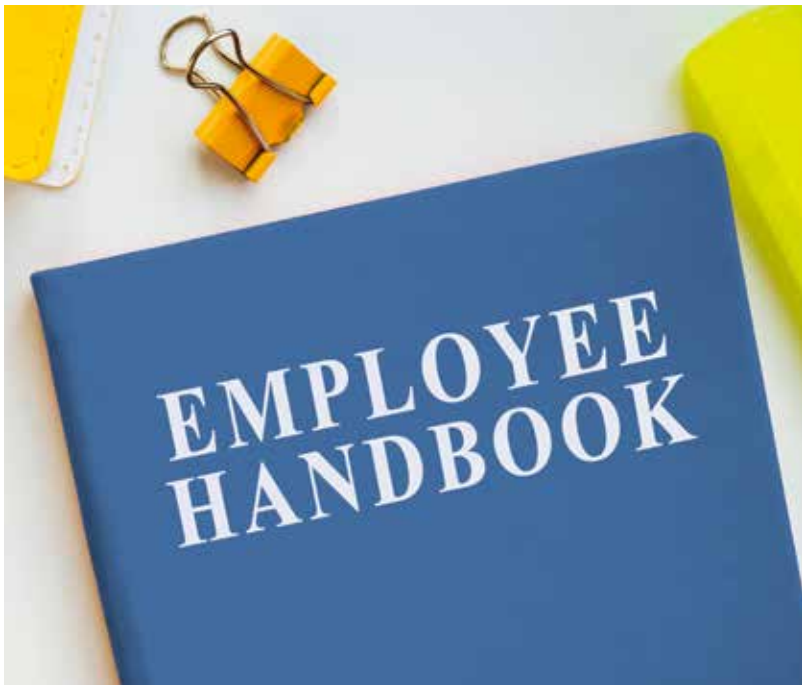

THE NLRB GOES AFTER HANDBOOKS . . . AGAIN.

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Prior to the Obama era, the NLRB only found a violation of Section 7 when actual employment action was taken. For instance, if an employee complained about a safety issue and was fired for this, then her Section 7 rights were clearly violated. The Obama NLRB examined if rules about civility, loyalty, and other workplace behavior could "chill" or prevent an employee from making such a complaint.

For example, pre-Obama, an employer could have a "No whining!" rule so long as it only actually punished unproductive and rude grousing but still allowed legitimate complaints about working conditions. The Obama NLRB reasoned that such a rule might discourage an employee with a legitimate complaint and thus is "chilled" the exercise of Section 7 rights. In very rough terms, pre-Obama the NLRB prohibited employers from actually punishing employees for exercising their Section 7 rights. Post-Obama, the NLRB prohibited employers from having any rule which could be interpreted as discouraging an employee from exercising her Section 7 rights.

Then under Trump, the pendulum swung back to the pre-Obama standard. In an NLRB ruling titled *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017), the NLRB did away with the "could be interpreted as discouraging" standard and returned to an "actually discouraged or punished" standard. The NLRB then further clarified the new (return to the old) *Boeing* standard in General Counsel Memorandum 18-04

GC 18-04 resulted in a very employer-friendly, and user-friendly framework for determining if handbook rules were legal and illegal. First, it produced three logical categories—Rules that are generally lawful; rules that unlawful, and rules warranting individual scrutiny. Even without legal analysis, it's telling that the lawful rules (rules employers are allowed to have) covered 14 pages while prohibited rules (rules employers can't have) covered less than three full pages.

On February 1, 2021 Acting General Counsel Peter Ohr issued GC Memorandum 21-02 which rescinded 10 separate guidance Memoranda issued under the Trump NLRB (out of a possible 15). First on the list of rescinded Memoranda was GC 18-04, which gave guidance on handbook rules.

GC 18-04 allowed handbook rules covering: workplace civility; photography and recording; insubordination; disruptive behavior; confidentiality; defamation and misrepresentation; use of logos and intellectual property; speaking on behalf of the company; and disloyalty, nepotism, and self-enrichment.

GC Memorandum 21-02 removes all of that. But GC 21-02 does not replace the Trump NLRB three-part, employer-friendly, framework with any framework—not even an employee-friendly framework. Frustratingly, GC 21-02 does not even *explicitly* say that the NLRB will be going back to the Obama NLRB's standards for handbooks. Instead, it says that GC 18-04 is "no longer necessary, given the number of Board cases interpreting *Boeing* that have since issued." Those cases, of course are now being interpreted by the Biden NLRB and are steadily moving closer to the Obama-era "could be interpreted as discouraging" standard.

In practical terms, what this means is that employers need to review their handbooks once again. If you and your attorney re-read and edited your handbook during the Obama NLRB and with those standards in mind; and if you haven't changed them to take advantage of the employer-friendly Trump NLRB standard, then you might be safe. (Although if you haven't reviewed your handbook or cleaned out the break-room refrigerator since the Obama Presidency, you probably should do both of those things.) If you first generated or last updated your handbook under the Trump NLRB, you need to set aside some time (and probably legal fees) for a thorough review under the new (old) standard.

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