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Employment Law Note

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Washington Restricts Pre-Employment Cannabis Testing

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As of January 1, 2024, employers in Washington State cannot refuse to hire an applicant based on his or her past use of cannabis. The new law, however, does not impact an employer's ability to drug test applicants for controlled substances.

Intent behind the legislation

Washington's new law is part of a growing trend and joins similar legislation in seven states. Washington legislators enacted the new law because of a concern that, despite the legalization of cannabis in 2012, employers continue to decline to hire individuals who use the legal substance. Legislators argue that past use of cannabis has no correlation to an applicant's future job performance and should be treated like alcohol use, for which employers do not test before an individual's employment has begins.

Employers cannot "discriminate" for cannabis use pre-employment

The law makes it unlawful for an employer to discriminate against a potential candidate in the initial hiring for employment if the discrimination is based upon:

(1) The person's use of cannabis off the job and away from the workplace; or
(2) An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in his or her hair, blood, urine, or other bodily fluids.

What is "nonpsychoactive cannabis"? The law does not define it, but it essentially means any form of cannabis, including tetrahydrocannabinol (THC). THC is the chemical compound in cannabis that can cause impairment and psychoactive effects. These effects typically last for up to twelve hours. Once the body has metabolized THC, it stores it as nonpsychoactive cannabis metabolite for up to 30 days. Drug tests only reveal nonpsychoactive cannabis metabolite, meaning they cannot determine whether a person is impaired when the sample is collected.

The law applies to all employers in the state of Washington, except for most safety-related positions for which impairment while working presents a substantial risk of death (the employer must identify these positions before the applicant applies for employment), first responders, corrections officers, airline or aerospace industries, or employers subject to federally regulated testing programs, among others.

Employers can continue to maintain a drug and alcohol-free workplace

Employers can continue to test applicants for controlled substances and make hiring decisions based on results for drugs other than cannabis.

The law only applies to the pre-application process, specifying that employers can continue to test employees for controlled substances, alcohol, and cannabis post-accident or because of a suspicion of impairment.

Steps for employers to take now

Before the new year, employers should review and revise their drug testing policies, job descriptions, job postings, and websites to align with the new law:

- Any pre-employment cannabis testing requirements should be removed;
- Identify safety positions that may require drug testing of cannabis before a job offer. The law does not define safety positions other than they must be positions where impairment may result in a substantial risk of death. After carefully considering whether a position falls under this category, revise all job descriptions and job postings for safety-sensitive positions to include the required disclosures.
- Discuss options with drug-testing vendors and ensure that, if cannabis is inadvertently included in a test panel for an applicant, the vendor does not give the cannabis test results to the employer.

Sebris Busto James is available to assist in reviewing and revision all employment law policies and procedures to ensure compliance with the law.

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