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No Drugs Allowed at the Workplace: How to Develop Employment Policies during the Cannabis Legalization Era

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When it comes to drug testing, employers are caught between a rock and a hard place.

On the one hand, employers are required to provide a safe working environment, and have productive employees. They are even awarded incentives by insurance companies for having a drug free workplace. (Virginia up to 5%)

On the other hand, drug testing is an extra cost, slows down the hiring process and exposes the employer to claims of disability discrimination, invasion of privacy and other potential claims.

So, the question becomes: Is it worth it?

To decide, you must consider the needs of
the business and the laws of the
jurisdictions at issue.

Needs of Business

- Prevent accidents
- Prevent health issues and related costs
- Prevent absenteeism
- Minimize risk for litigation



Types of Business

- Safety-sensitive
 - CDL drivers
 - Child-care workers
 - Workers with patients
 - Positions “with the potential to significantly impact the health or safety of employees or members of the public.”
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Local Laws

- Virginia: No testing or adverse action for medical use of cannabis oils
- Maryland: Can test for “legitimate business purposes
- DC: No THC testing absent conditional offer of employment



Virginia

- Prohibits the discipline, discharge or discrimination against employees who lawfully use cannabis oil
 - A valid written certification by a practitioner substantiating the employee's treatment needs for cannabis oil must be provided to the employer
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Virginia

- Employers are still permitted to take adverse employment action if the employee's performance is impaired by use of cannabis oil. Employers may also prohibit possession of cannabis oil during work hours.



Under the law, Virginia employers staffing individuals lawfully using cannabis oil are not required to engage in any conduct that could:

- Violate federal law;
 - Generate the loss of federal contracts or federal funding; and/or
 - Hire or retain applicants or employees in the defense industrial base sector who test positive for THC (tetrahydrocannabinol) in excess of the pre-determined limits for both urine and hair tests.
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Maryland

- Maryland regulates how tests can be taken and where. Employers can use a POCT “point of care testing” or “preliminary screening test” (unless CBA) but must maintain the specimen donor’s identity and confidentiality; must maintain the integrity of the specimen; must prevent contamination. To conduct POCT testing, (preliminary screening) employer must register with the state.
 - The employer must also maintain a chain of custody log (keep records for 1 year)
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Maryland

- If positive preliminary screening, Maryland employers must use a state licensed drug testing facility to confirm and a Medical Review Officer. Employee can pay for his/her own independent test on the same specimen.

Maryland

If positive at lab, employer must:

- Give person a copy of the results;
- Copy of the employer's written drug policy;
- Written notice of the employer's intent to take disciplinary action, if any
- Delivery: In person or via certified mail, within 30 days of testing

Maryland

- Allows testing of contractors



Maryland

- Senate Bill 504: Prohibits an employer from discriminating in employment against an individual who has received a written certification for the use of medical cannabis under the Health-General Article or who has tested positive for cannabis components or metabolites if the individual holds a written certification for the use of medical cannabis under the Health-General Article, with exceptions as specified.
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Maryland

Senate Bill 504:

An employer may not:

(1) fail or refuse to hire, discharge, or otherwise discriminate against the individual with respect to the individual's compensation, terms, conditions, or privileges or (2) limit, segregate, or classify its employees or applicants for employment in any way that deprives or tends to deprive the individual of employment opportunities or otherwise adversely affect the individual's status as an employee. However, an employer does not violate these prohibitions if an employer's failure to discriminate in employment for the use of medical cannabis would violate federal law or regulations or cause the employer to lose a monetary or licensing related benefit under federal law or regulations.

Died in Committee in 2021, but likely to be revived

District of Columbia

- Bans Pre-Employment Testing for THC
 - Exceptions:
 - Safety-sensitive
 - CDL drivers
 - Child-care workers
 - Workers with patients
 - Positions “with the potential to significantly impact the health or safety of employees or members of the public.”
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District of Columbia

- Does not allow “consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace.”



District of Columbia

Also, not intended to:

- Affect an employee's compliance with employer drug policies
 - Interfere with federal contracts
 - Prevent the employer from denying employment for a positive drug test
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District of Columbia

- Testing is allowed once a conditional offer of employment is made: HOWEVER:
 - Washington, D.C.'s City Council passed the Cannabis Employment Protections Amendment Act of 2022 which, if Mayor Muriel Bowser approves it, will prohibit employers from firing employees who fail marijuana drug tests. The Cannabis Employment Protections Amendment Act of 2022 would also ban employers from firing or refusing to hire an employee because of their recreational or medical marijuana use.
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District of Columbia

- While the protections under the Cannabis Employment Protections Amendment Act of 2022 are broad, they are not without exceptions. Employers will not violate the legislation if they act under federal guidelines, or if an employee consumed marijuana at work or while performing work-related duties. Employees are also not allowed to possess, store, deliver, transfer, display, transport, sell, purchase or grow cannabis at work.
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District of Columbia

- For those employees who use marijuana for medicinal purposes, employees are required to evaluate "medical marijuana to treat a disability in the same manner as it would treat the legal use of a controlled substance prescribed by or taken under the supervision of a licensed health care professional." Employees in "safety-sensitive" occupations, such as police, security guards, construction workers, those who operate heavy machinery, health care workers, caretakers, or gas and power company employees are not afforded the Act's protections. Also excluded from the legislation are federal government employees, as well as employees of D.C. courts.
 - If the bill passes, employers have 60 days to notify their employees of their new rights and if they are designated as safety-sensitive employees. Thereafter, employers must provide that same notice annually and for each new hire.
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Federal law: No regulation of private employers, except if: Federal contractor or safety/security sensitive industries. Must follow SAMHSA (Substance Abuse and Mental Health Service Administration).

- E.g. Employers subject to the Drug-Free Workplace Act of 1988
 - Must be balanced with ADA, FMLA, Title VII and others
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- If upon consideration of the legitimate business needs and laws of the local jurisdictions, next consideration is when to test and how.



Options for When

- Preemployment
 - Reasonable Suspicions
 - Accidents
 - Random
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Most Common Tests Check For

- THC
 - Opiates
 - Cocaine
 - Amphetamines
 - PCP
 - Maryland: Can test for substances in Schedules I-V of Criminal Laws §§5-101 and 5-202
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Substances that can cause a false positive

- Sudafed, Poppy Seed, Herbal teas, Unisom
 - Robitussin, Delsym or other OTC cough suppressants
 - Benadryl, Advil, Motrin, Aleve, Nyquil, Vicks Formula 44
 - Diltiazem/Cardizem (HBP meds)
 - Metformin (Glucophage)(Diabetes)
 - Certain Antidepressants
 - Ritalin
 - Certain Antibiotics
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Preemployment

- Be aware of possible discrimination
- Be cautious of new THC screening laws (DC, VA)
 - Eg. Does test expose a medical condition
 - Does test expose a pregnancy



Take Away

- If you are going to test pre-employment, decide what you are looking for and why.
 - E.g. Are you looking for opiates? If so, what will that tell you? Why is it important? Does it affect one population more than others? What will you do if there is a positive test.
 - Make sure whatever your consequences they are consistently applied
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Reasonable Suspicions

- What does this mean? Based on logic and facts
 - E.g. direct observation of abnormal conduct
 - Reports from a reliable source
 - Evidence of tampered with drug test results
 - Erratic behavior
 - Decline in work performance – be careful with this one
 - *make sure it is relatable to drug use
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Take Away

- If going to test based on reasonable suspicion, make sure consistent and documented. Make sure not testing on “your own whim,” as this is illegal.

Workplace Accidents

- Need “legitimate business reason,” e.g. reasonable belief drug use contributed to the injury.



Post- Accident Testing Falls Under OSHA

- Cannot drug test *or threaten to drug test* to “penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health.”
 - Employers cannot administer blanket post-accident drug tests in situations when drugs are not likely a cause
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Take Away

Should test post-accident but only if there is a reasonable belief drug use contributed to the injury and make sure policy does not penalize or deter reporting of work-related injury or illness.

Random Testing

- Must be truly random and for “legitimate business purposes”
 - Cannot single out individuals without reasonable suspicion, accident or erratic behavior.
 - DC: Case law says restricted to safety-sensitive occupations
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What About Remote Employees?

- A new study by an Arizona-based mental health treatment center shows one in five American workers indicate they've used alcohol, cannabis, or recreational drugs while working from home. These employees admit to using the substances and then participating in work video calls. The survey also reported 52% of cannabis users admit to increasing their overall consumption during the pandemic. <https://www.sierratucson.com/selfmedicationnation/>
 - So what do you do if you think a remote employee is working under the influence?
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What About Remote Employees?

- Remote employees are not exempt from drug testing policies
 - The problem, however, becomes how to test if you suspect an employee is impaired?
 - Employers who have reasonable suspicion that employees may be under the influence during video calls, must not require those employees to immediately drive to a nearby testing center.
 - You can, however, provide a ride through Uber or Lyft
 - Treat remote employees as you would as if they were in the office.
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Takeaways re Remote Employees

- Remind remote employees they are subject to all policies and procedures
 - Remind them this includes drug and alcohol testing policies and what those policies are
 - Put in your policies that remote workers are subject to the same expectations and can be required to submit to drug testing, and may be required to take transportation to a drug testing site, but under no circumstances should ever drive themselves
 - Put in policies consequences for refusal to submit to testing upon reasonable suspicion
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If you decide to drug test, you must have a comprehensive written drug-free workplace policy. Policy must include:

- Statement of purpose
 - Implementation
 - Definition of all terms
 - Definition of illicit substances
 - Employer and Employee responsibilities
 - Consequences of positive drug test
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- Each applicant or employee must be given a copy of the policy. They should be given this policy before testing. They should read, sign and date. If they refuse, you can withdraw your job offer but cannot force them to test.

- Remember that privacy laws apply: Do not watch an employee urinate, for example, but you can test the temperature, listen and dye the toilet water.



What If Positive?

- If Federal Employee: Executive Order 12,564 requires referral and compliance with EAP
 - State and private employers no EAP requirement
 - Positive result: Employer can refuse to hire or discipline up to and including termination
 - However, be careful to be consistent and do not single out race, ethnicity or potential disability related to that drug
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Potential Exposure for Drug Testing in the Workplace:

Main exposures:

- Discrimination (ADA, Title VII, FMLA, state/local FEPs)
 - Invasion of Privacy
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ADA does not protect individuals who are currently using illegal drugs. So, the positive drug test can be grounds for termination, discipline or refusal to hire.



Where is the risk?

- When the positive drug test is explained or the drug test otherwise reveals a disability or serious health condition.
 - Where the testing singles out individuals based on a protected status.
 - Testing is not done in a minimally invasive or legally proscribed way.
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What happens if an employee tests positive and tells you the drug is prescribed and that is being used for a disability?

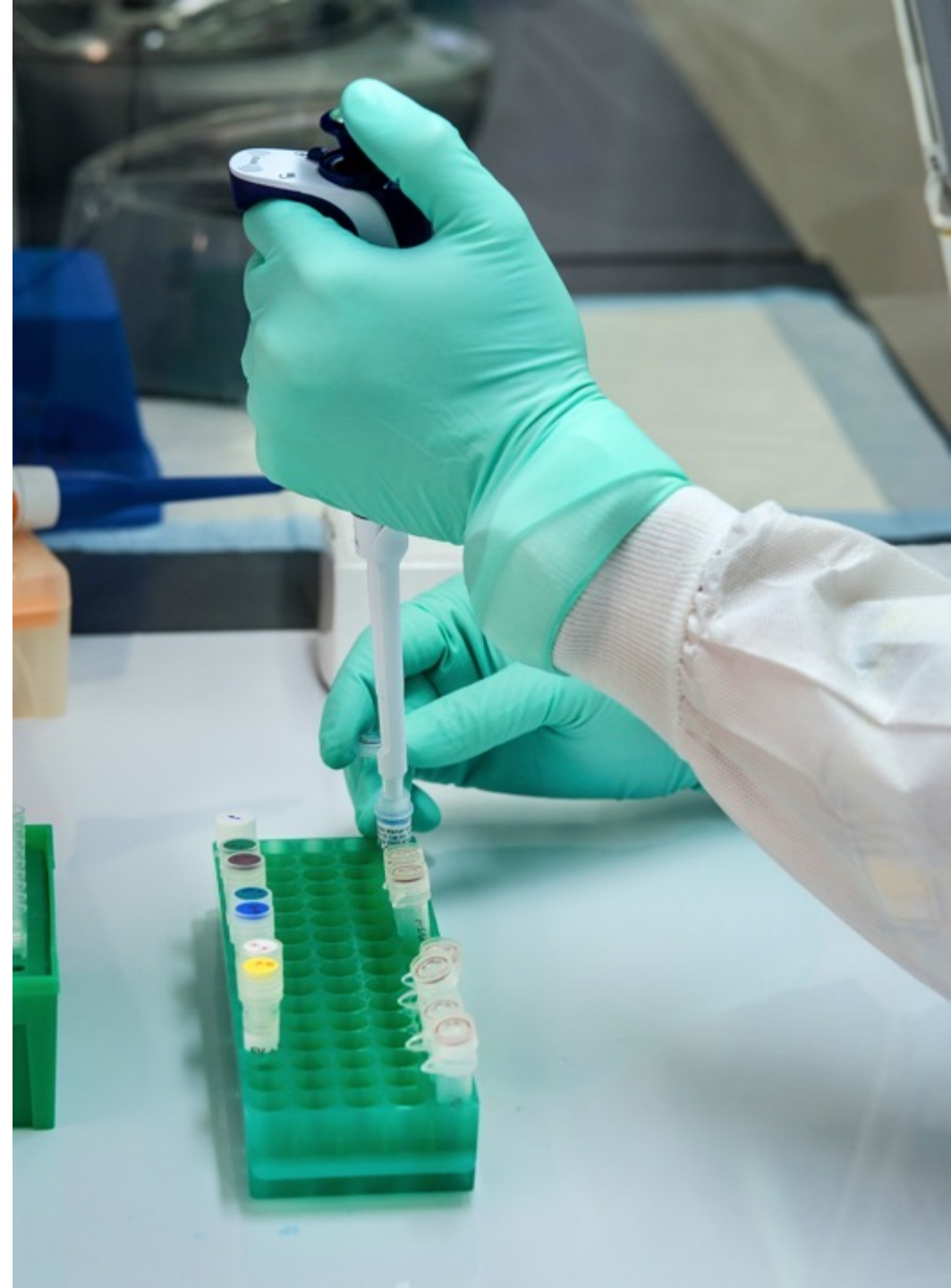
E.g.:

- Opiates can be detected in saliva for 1-4 days after use; urine for 24-48 hours; blood for 24 hours.
 - THC is detectable for up to 90 days in hair, anywhere between 3 days to a month or longer in urine (depending on how often the person uses), up to 48 hours in saliva, and up to 36 hours in blood
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1. Ask for proof from a physician that the substance has been prescribed.
2. If proof is provided, then consider off-duty use as a reasonable accommodation.
3. If no proof is provided, then you can take adverse job action.

Nothing requires acceptance of on-duty use or working under the influence.

- Ultimately, the question for employers is whether to conduct pre-employment or random tests. Many answer yes to deter drug users from applying and to decrease work-related injuries or accidents.

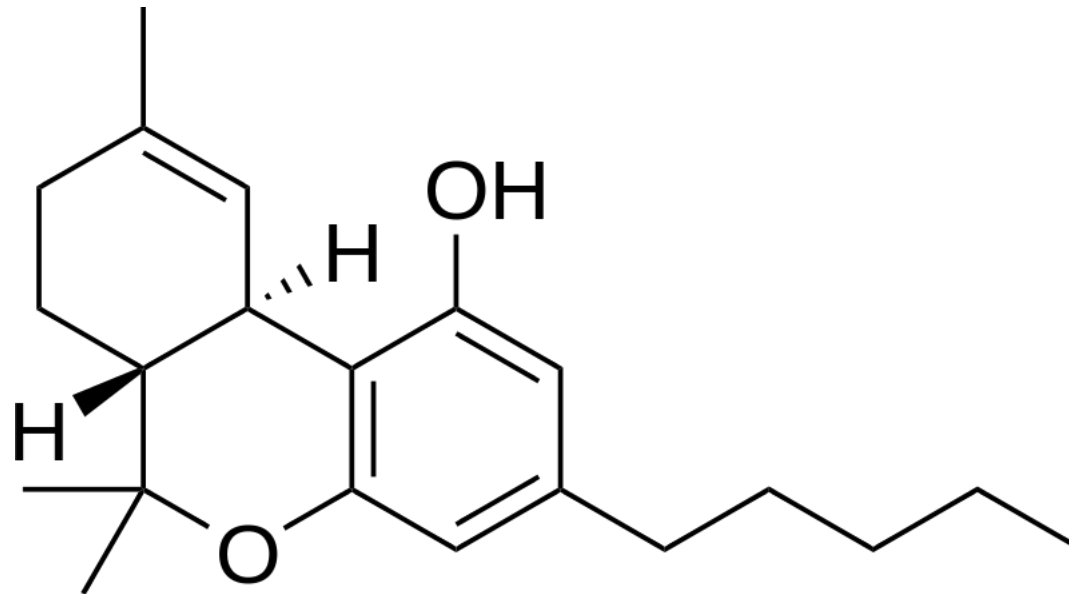


If the answer is yes, should you test for THC and Opiates given they are used for medicinal purposes?

Positive Opiate and THC tests are likely to lead to disclosure of medical conditions to rationalize use of the substance.

Given the recent Opiate Epidemic, the benefits of testing for Opiates is likely to outweigh the risk of exposure of a disability or serious health condition. You can determine if it is prescribed and consider reasonable accommodations. If not medically prescribed, use of Opiates is illegal and grounds for adverse action.

Recreational use of THC, on the other hand, is legal in DC and Virginia. There is also no known Epidemic of THC addiction or abuse. Therefore, the employer should ask whether the risks of testing for THC and exposing other medical conditions is worth it.



What does the presence of THC tell you?

- It does not indicate recent use;
- It does not indicate immediate impaired ability;
- Unless required by law, e.g. for CDL holders, will pre-employment testing for THC really indicate likelihood for absenteeism, productivity or safety concerns?

Example 1

Rocchio was an engineer who was subject to random drug testing under his employer's drug testing policy. The policy required testing for marijuana and also provided for termination in the event of a positive drug test result.

In July 2019 Rocchio was required to take a random drug test and tested positive for marijuana. He claimed that the positive test result was due to his use of legal CBD oil. His employment was terminated in accordance with the Company's policy.

Rocchio alleged that the employer violated the Americans with Disabilities Act by terminating him and failing to rehire him.

What should the employer do in a case like this?

First, what jurisdiction are we in? If Virginia, and there is a medical certification, we cannot take adverse job action. If DC or Maryland, a positive THC indication is grounds for termination.

NOTE: If the employee had said, I am taking CBD for XYZ disability (e.g. glaucoma or Parkinson's Disease), then he would also likely claim discrimination based on that disability. So, then what?

Perhaps we should consider off-duty hour use of CBD or marijuana a reasonable accommodation?

Case above is: *Rocchio v. E&B Paving, LLC, and Int'l Union of Operating Engineers Local 103*, Case No. 1:20-cv-00417 (S.D. Indiana March 31, 2022). In that case the court held that there was no evidence of discrimination because the employer did not know Rocchio used the CBD oil; Rocchio admitted he told the third-party administrator only, and there was no evidence he or the TPA told the employer.

What if he had told his employer? How would that change things?

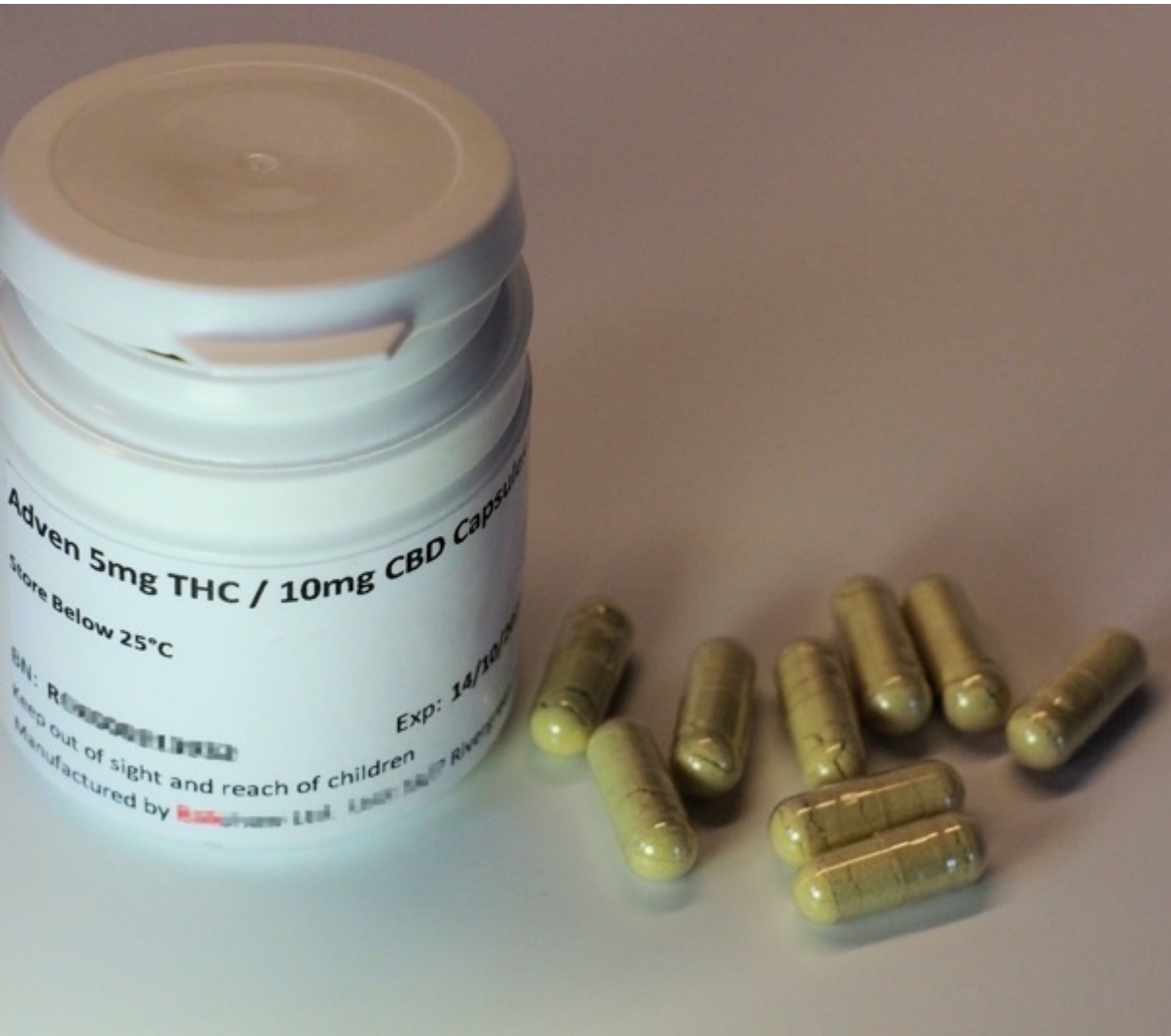


- Rocchio also argued that the employer's policy of terminating all employees who test positive "categorically regards" them as users of illegal drugs and also regards them as disabled because safety was the rationale for the drug testing policy.

While the court in Indiana stated that “it did not follow” that an employer who conducts drug testing believes that everyone who tests positive is disabled under the ADA and that there was no evidence that the employer believed that Rocchio was disabled, or that he was terminated because of any perceived disability, we cannot guarantee that other courts in other jurisdictions would agree.

Example 2

A certified medical marijuana user was terminated after testing positive for marijuana in a return to work drug test. The employee suffers from cancer and uses medical marijuana pursuant to state law. Following his termination, the employee filed a lawsuit claiming unlawful discrimination.



- Various courts throughout the US have found that employers discriminate against certified medical marijuana users when adverse employment actions are taken against them solely because of failed drug tests. Instead, they find that failed drug tests should result in a “deliberative process” to discuss reasons and possible accommodations if for a disability.

Take Aways

- Employers should carefully consider whether to drug test, when and, what drugs to test for;
 - Once employers determine they want to drug test, make sure there is a written drug-free workplace policy in place that is given to the employee before any testing;
 - Only test after making a conditional offer of employment;
 - If you get a positive drug test, you can take adverse job action;
 - However, if a medical reason is given for use of the detected drug consider engaging in more investigation:
 - Ask the employee/candidate for a note from a medical provider confirming the drug is prescribed;
 - If proof is given, consider off-duty use as a reasonable accommodation.
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Take Aways

- With THC, consider whether testing for its presence is valuable information, particularly considering recent legalization of recreational use.
 - When testing because of erratic behavior or reasonable suspicion, make sure observations are documented. Include in the documentation suspicion it is drug-use related.
 - Where possible have more than one person observe the behavior
 - In the case of erratic behavior, reasonable suspicion or post-accident, make sure testing is done right away. Use a qualified testing laboratory.
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Employers Should Consider Assessing Current Policies and Procedures by:

- Documenting expected conduct for positions;
 - Training supervisors to observe conduct that may indicate an employee is under the influence;
 - Preparing to engage in the interactive process with an employee if the employee is certified under state law to use medical marijuana and requests to use it off-site and during non-working hours; and
 - Reevaluating zero tolerance drug testing policies.
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Take Aways

Employers should comply with their drug testing policies and take care that, when testing for cause, they have objective evidence to support the decision to test. Employers should train their supervisors regarding their drug testing policies. Employers should document the reasons supporting the need for testing and maintain the test results in accordance with applicable law.
