

Employer Drug Policies in the Era of CBD

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Cannabidiol (CBD): Is it a miracle cure for nearly any ailment, or is it just the newest form of snake oil? Regardless, no one can deny that CBD's popularity has grown with nearly every demographic. There may not be hard science yet to support them, but recently, CBD has been touted as a natural remedy for seemingly every ailment, from alleviating various kinds of pain and insomnia to lowering anxiety and acting as an antidepressant and antidiabetic. These claims are clearly connecting with consumers: The Brightfield Group, a market research firm specializing in cannabis, expects the CBD market from hemp alone to grow to \$22 billion by 2022, up from \$327 million in 2017.

An estimated 64 million Americans have tried CBD at least once in the last two years, with one out of seven of those individuals using it every day, according to a recent survey conducted in January 2019 by Consumer Reports. With more than one in four Americans trying CBD products, employers should expect that regular users of CBD products are amongst their employees. Employers in the construction industry should take special note, as their employees are more prone to joint and back pain (which is one of the most popular ailments that advertisers of CBD target). Employers should be aware of the unique set of issues and complications that CBD users bring to the workplace.

Not to be confused with tetrahydrocannabinol (THC), which is the psychoactive compound found in marijuana associated with the "high" felt by marijuana users, CBD is a non-intoxicating compound found in marijuana and hemp. CBD is generally not mind-altering and has very little effect on the body's receptors that interact with THC to produce the marijuana "high." CBD can be derived from hemp or marijuana. After the December 2018 passage of the 2018 Farm Bill, hemp and its



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derivatives are legal nationwide as long as they contain a THC concentration of less than .3 percent. CBD derived from marijuana is still illegal federally, but may be legal under state schemes, like in Oregon.

Although sold in nearly every form from extracts and pills to lotions and beverages, CBD is still most commonly formulated

as an oil. However, it must be noted that the vast majority of these CBD products are entirely unregulated by the Food and Drug Administration (FDA) as a "dietary supplement." Indeed, the FDA just recently issued warning letters to 15 companies on November 25, 2019 for illegally selling products containing CBD, largely due to how the products were marketed and the claims made about them.

Of particular note, a consumer has no way of knowing exactly how much THC is present in the popular hemp-derived CBD products they are consuming. This is because the majority of CBD products that could be used by your employees are sold as dietary supplements and the employee has no way of knowing exactly what else is in the product. Due to state regulations, CBD products derived from marijuana and sold in a dispensary are subjected to stricter testing requirements and may have more reliable and descriptive labeling. However, most of the products fueling the boom of CBD use are hemp-derived and do not fall under these regulations.

Given the increased use of CBD products, you must be asking what the use of CBD products means for employer drug testing programs? The drugs commonly tested for during employment-related drug testing include THC — not CBD. However, the use of CBD products may have an impact on a drug test. As stated above, users of CBD products cannot be sure how much THC is present in hemp-derived CBD products. So, employees could inadvertently

use a product containing increased levels of THC. Additionally, chronic users of these products may see an increased level of THC in their bodies because THC metabolites (which trigger a positive drug test in sufficient concentrations) are stored in protein cells and fat tissue, and, over time, THC metabolites build up in one's body. Therefore, it is possible to have an employee test positive for THC and fail a drug test, even when he or she believes that he or she has stayed on the right side of your drug policies and the law.

There are several steps that a prudent employer should take given the unregulated nature of the CBD market and the increased popularity of CBD products. First, employers that maintain drug-testing programs should inform employees of the risks of using CBD products. Second, employers should review and consult with counsel about their substance abuse policy and determine what employee conduct is subject to discipline. For example, employers may impose discipline for a positive drug test, even in the absence of on-the-job impairment, or employers may impose discipline if there is on-the-job impairment. Employers are free to maintain a policy that does not provide an "innocent ingestion" defense for a positive drug test. Each workplace presents different circumstances, and employers are free to tailor their substance abuse policy to their individual workplace. Finally, employers should proactively explain to employees how the use of CBD products may impact the substance abuse policy. In a union workplace, where disciplinary action must be supported by "just cause," this is especially true.

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