



GUNDERSON | PALMER | NELSON | ASHMORE LLP
ATTORNEYS AT LAW

How Marijuana and COVID Affect the Public Workplace

Sara Frankenstein

IMPORTANT NOTE AND DISCLAIMER:

The information found here is provided as a general resource. This information is provided as an educational and informational resource only, meant to provide an overview of the law in this area to promote the public's understanding of their need for competent legal services when addressing these issues. The information provided here is my own and I do not represent any federal governmental committee in giving my presentation. My presentation is not as a member of the State Advisory Commission and I am not a federal spokesperson. All of the information contained herein is merely a summarization which contains exceptions, limitations and subtleties which have been omitted in the interests of clarity and brevity. This information should not be interpreted as legal advice. No one rule can be applied to all individuals or situations. Although information provided here is intended to be current and accurate, the law can and often does change on a daily basis as new laws are passed and court decisions handed down. No representations are made to the accuracy, completeness or timeliness of the discussions of law provided herein. No representations are made concerning the accuracy of the information. Always consult a competent and experienced employment law attorney for legal advice and for answers to specific questions. Never base a decision solely on the information provided here and one should not attempt to make employment policies, decisions, or respond to claims without the assistance of a lawyer.

Public vs. Private Employers

- Is there a difference?
 - Yes!
- The U.S. Constitution applies to government, restricts government
 - Therefore, the U.S. Constitution applies to governmental employers and employees
 - Not so in the private employment context

Public vs. Private Employers

- Examples:
 - The 1st Amendment to the U.S. Constitution in the Bill of Rights states:
 - “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”
 - Note this Amendment restricting *Congress*.
 - The 14th Amendment incorporates these protections from all government. (“No state shall make or enforce any law which shall ... deprive any person of life, liberty, or property, without due process of law;...”

Public vs. Private Employers

- Private employers can generally do what they want, unless a *statute* prohibits it.
- Governmental employers at all levels must, however, abide by the U.S. Constitution, as well as any statutes.

Public vs. Private Employers

- Fourth Amendment:
- “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

What's a "search or seizure"?

- Searching or taking of property
- Includes taking blood, urine, and saliva
- Again, private employers are not prohibited by the Constitution from seizing such property, need no warrant or probable cause

What's a "search or seizure"?

- While private employers are generally unrestricted constitutionally, can governmental employers engage in random drug testing?
- Case law has interpreted the 4th Amendment prohibition on unreasonable searches or seizures in the public workplace:

Prohibited search/seizure

- Random drug testing can be done without suspicion, probable cause, or a warrant *only* if there is a “special need”. *Chandler v. Miller*, 520 U.S. 305, 313 (1997).
- When a governmental entity alleges a “special need”, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties. *Chandler*, 520 U.S. at 314.
- “The special need for drug testing must be substantial-important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion.” *Id.* at 318.

Prohibited search/seizure

- In special-needs cases, courts employ a balancing test that considers the nature of the privacy interest, the character of the intrusion, and the nature and immediacy of the government's interest. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 829-33 (2002).

Prohibited search/seizure

- One such recognized exception is for “safety-sensitive” positions.
- Courts have upheld random drug testing of occupations that provide services to the public and are deemed “safety sensitive”. *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 628 (1989).

Prohibited search/seizure

- The 6th Circuit has found the following three groups as “safety sensitive” occupations:
 - 1) those who provide health care to patients at state-run hospitals of the mentally ill and developmentally disabled;
 - 2) those who provide medical care to prisoners; and
 - 3) those who have direct unsupervised contact with the patients and/or inmates. *Int’l Union v. Winters*, 385 F.3d 1003 (6th Cir.2004), cert. denied, *Int’l Union v. Fink*, 544 U.S. 1017 (2005).

Prohibited search/seizure

- Factors that appear to be important are:
 - whether drug testing is based on substantial (not hypothetical) public safety concerns,
 - whether the occupation is highly regulated (such as health care), and
 - whether a momentary lapse of attention can have disastrous consequences.
 - The public employer has the burden of proving the occupation is “safety sensitive”.

Prohibited search/seizure

- In short, governmental employers should NOT randomly drug test without consulting their attorney and the court cases on point.

Prohibited search/seizure

- What about drug testing when interviewing potential new hires?
- Public employers may only require pre-employment drug screens:
 - If the job is a safety-sensitive one, and
 - only *after* a conditional offer of employment.

Prohibited search/seizure

- Public employer may also drug test after an accident

Medical Marijuana in SD

- Medical marijuana became law by virtue of SD citizens voting for Initiated Measure 26 on November 3, 2020.
- That IM became effective July 1, 2021.
- That IM is now codified at SDCL 34-20G-1 through 43-20G-95.
- The SD state legislature can make changes to such statutes.

Medical Marijuana in SD

- IM 26 requires the SD Dept. of Health to promulgate rules by October 29, 2021.
- On September 13, 2021, the SD Dept. of Health presented its proposed rules to the Legislative Interim Rules Review Committee
- The Committee adopted 143 of the 149 rules submitted.
- Those Rules will be found in ARSD 44:90.

Internal Policy Options

- Employers need a policy on medical (and/or recreational) marijuana
- Your choices:

Zero Tolerance v. No Impairment

Zero Tolerance Option

- First, write a policy that recognizes that the misuse of controlled substances, prescription or illegal drugs, or alcohol pose a risk to employees and the public.
- Such use can also damage Employer's reputation.

34-20G-22. Employment and drug testing.

Except as provided in this chapter, a registered qualifying patient who uses cannabis for a medical purpose shall be afforded all the same rights under state and local law, as the person would be afforded if the person were solely prescribed a pharmaceutical medication, as it pertains to:

- (1) Any interaction with a person's employer;
- (2) Drug testing by a person's employer; or
- (3) Drug testing required by any state or local law, agency, or government official.

Zero Tolerance Option

- Employees are expected to report to work in a condition that is conducive to performing their duties in a safe, effective, and efficient manner.
- Prohibit possession, transfer, use, or being under the influence of any alcohol while on property, on company time, driving, or other safety-sensitive operations (some law enforcement exceptions).
 - You can indicate the number of hours prior to work that alcohol consumption is prohibited.
 - Prohibit use at lunch or on breaks
 - Hangovers of BAC must be under a certain amount.

Zero Tolerance Option

- Same for drugs – prohibit their possession, distribution, dispensing, sale, attempted sale, use, manufacture, or being under the influence of any drugs or controlled substance while on property, on company time, while driving, or in safety-sensitive situations.

Zero Tolerance Option

- **State that employees may not have any detectable amount of drug or controlled substance in their system while on property or on company time.**
 - This provision distinguishes Zero Tolerance from No Impairment.
- No consumption prior to reporting to work or at lunch or on breaks.
- “If such use or withdrawal symptoms adversely affect your physical or mental abilities while at work to any degree, or you test positive by screening and confirmation tests, you will be deemed under the influence.”

Zero Tolerance Option

- Define “controlled substances” as those listed in Schedules I through V of the Federal Controlled Substance Act, which includes marijuana that may be otherwise lawful in South Dakota.
- Cannot bring controlled substances or paraphernalia to work, no edibles

Zero Tolerance Option

- State that Employer, with the exception of medical marijuana, does not prohibit the use of a drug taken under supervision by a licensed health care professional where it does not present a safety hazard or impact employee's performance.

Zero Tolerance Option

SDCL 34-20G-18. Unauthorized conduct.

This chapter does not authorize any person to engage in, and does not prevent the imposition of any civil, criminal, or other penalty for engaging in, the following conduct:

- (1) Undertaking any task under the influence of cannabis, when doing so would constitute negligence or professional malpractice;
- (2) Possessing cannabis or otherwise engaging in the medical use of cannabis in any correctional facility;
- (3) Smoking cannabis:
 - (a) On any form of public transportation; or
 - (b) In any public place or any place that is open to the public;
- (4) Operating, navigating, or being in actual physical control of any motor vehicle, aircraft, train, or motorboat while under the influence of cannabis, except that a registered qualifying patient or nonresident cardholder is not considered to be under the influence of cannabis solely because of the presence of metabolites or components of cannabis that appear in insufficient concentration to cause impairment.

Zero Tolerance Option

- State explicitly that the use of marijuana, a Schedule I controlled substance under federal law, is expressly prohibited under Employer's policy, even if its use (or medical use) is authorized under state law.
- State that if an employee is using medical marijuana in connection with a disability, discuss other means of accommodating their disability in the workplace, as medical marijuana will not be allowed as a disability accommodation.

Zero Tolerance Option

- ADA – Americans with Disability Act

Zero Tolerance Option

- Reasonable Cause Testing
 - If there is reasonable cause to suspect an employee is under the influence during work hours, or has otherwise used in violation of this policy, testing may be required.
 - Define Reasonable Cause
 - Erratic behavior, information from a credible source, observation, physical symptoms, unexplained significant deterioration in job performance, admissions, etc.

Zero Tolerance Option

- How do you test after having reasonable cause?
 - This is what makes “zero tolerance” a difficult option to enforce.
 - Job impairment field tests, lab tests, breathalyzers, saliva test, blood and urine tests.

How to test for marijuana?

- Urine – tests for marijuana metabolites, only shows recent marijuana use (up to past 30 days) and not current intoxication or impairment.
- Hair – detects use up to year.
- Saliva – recent use in last 8-12 hours.
- Blood – can show active marijuana in the system.

Zero Tolerance Option

- Policies should indicate Employer will also test post-accident
- Indicate that employer should have no expectation of privacy in their work lockers, desk, toolbox, etc.
- Indicate that with reasonable suspicion, Employer may search employee's possessions location at worksite.

What's the difference?

- Zero Tolerance – can't show up to work with *any* marijuana metabolites in them, regardless of whether they are impaired when tested.
- No Impairment – can't show up to work impaired, under the influence.
 - Can't discipline for metabolites.
 - There is no recognized test for marijuana impairment.

No Impairment Option

- See the previous provisions recommended under the “Zero Tolerance” option.
- Nearly all provisions of your policy remain the same, except omit statements that indicate employees may not have any detectable amount of drug or other controlled substance in their system while on property or on the employer’s time.

Either Policy

- Federal law requirements:
 - If you receive federal funds through a grant, the grant's terms may indicate drug testing expectations.
 - CDL (commercial driver's license) holders: federal Department of Transportation drug testing requirements prohibit CDL holders from using marijuana, even if allowed by state law.

Either Policy

DOT does not allow any employees in safety-sensitive positions to use marijuana.

www.transportation.gov/odapc

- Safety-sensitive positions include pilots, school bus drivers, train engineers, subway operators, aircraft maintenance personnel, pipeline emergency response personnel, etc.
- Despite the DOJ's guidelines to federal prosecutors not to prosecute medical marijuana users, the DOT will not be relaxing its own anti-marijuana-use policies.

FAA has similar regulations.

Either Policy

SDCL 34-20G-23. Conflict with employer's obligations or benefits under federal law.

The rights provided by §§ 34-20G-19 to 34-20G-25, inclusive, do not apply to the extent that they conflict with an employer's obligations under federal law or regulation or to the extent that they would disqualify an employer from a monetary or licensing-related benefit under federal law or regulation.

Either Policy

SDCL 34-20G-24. Ingestion of cannabis at workplace-
-Working under the influence of cannabis.

No employer is required to allow the ingestion of cannabis in any workplace or to allow any employee to work while under the influence of cannabis. A registered qualifying patient may not be considered to be under the influence of cannabis solely because of the presence of metabolites or components of cannabis that appear in insufficient concentration to cause impairment.

Either Policy

SDCL 34-20G-28. Discipline for ingestion of cannabis at workplace and working under the influence of cannabis permitted.

Nothing in this chapter prohibits an employer from disciplining an employee for ingesting cannabis in the workplace or for working while under the influence of cannabis.

Practical Considerations

- Have you drug tested before? Why start now?
- Do you have drug testing facilities in your area?
- Have unions? How expensive will it be to negotiate?
- Pick on version and apply it consistently.
- Keep drug test results confidential – including from your elected officials potentially.

Legislative Options

Consider opposing any change to:

SDCL 34-20G-6. Attorneys not subject to discipline for certain conduct.

No attorney is subject to disciplinary action by the State Bar of South Dakota or other professional licensing association for providing legal assistance to a prospective or registered medical cannabis establishment or other related to activity that is not subject to criminal penalties under law of this state.

COVID and the public workplace

- Can you mandate masks?
 - Is it unconstitutional?
- Can you mandate vaccines?
 - ADA disability/medical exception
 - Bona fide religious exemption
 - Is it unconstitutional?

THANK YOU!