



EMPLOYMENT  LAW UPDATE 2023

**Session 4:
Dazed and Confused:
What to Do About Marijuana
in the Workplace**

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EMPLOYMENT  LAW UPDATE 2023

About the Firm

- Ogletree Deakins is one of the largest labor and employment law firms representing management in all types of employment-related legal matters.
- The firm has more than 950 attorneys located in 55 offices across the United States and in Europe, Canada, and Mexico.
- We represent a diverse range of clients, from small businesses to Fortune 500 companies.



950+
Attorneys

55
Offices
worldwide

30+
Practice
areas

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Practice Areas

We handle every type of matter that touches on the employment relationship. Our practice areas include:

Affirmative Action and OFCCP Compliance	Drug Testing	Multistate Advice and Counsel
Appellate	Employee Benefits and Executive Compensation	Pay Equity
Arbitration and Alternative Dispute Resolution	Employment Law Compliance	RIF/WARN
Background Checks	Employment Litigation	Technology
California Class Action and PAGA	ERISA Litigation	Trial
Class Action	Ethics Compliance and Whistleblower Response	Traditional Labor Relations
Cross-border	Governmental Affairs	Unfair Competition and Trade Secrets
Client Training	Immigration	Wage and Hour
Cybersecurity and Privacy	Leaves of Absence/ Reasonable Accommodation	Workplace Investigations and Organizational Assessments
Disability Access	Mergers and Acquisitions	Workplace Safety and Health
Diversity and Inclusion		

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H.F. 4065

- On June 2, 2022, Gov. Walz signed H.F. 4065 into law.
- Amended Minn. Stat. § 151.72 (Sale of Certain Cannabinoid Products Law)
- Law provides “clarity” regarding hemp-derived consumables stemming from the 2018 Farm Bill (i.e., the bill that legalized the sale of hemp-derived products containing .3% THC).

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H.F. 4065

- Allows the sale and consumption of “edible cannabinoid” products containing “no more than five milligrams of any tetrahydrocannabinol [THC] in a single serving, or more than a total of 50 milligrams of any [THC] per package.”
 - Can an individual still feel the effects or get “high” from this amount?
- While marijuana is still illegal in Minnesota, THC derived from hemp is lawful in certain amounts.
 - Can test results show the difference?

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What Does This Mean for Minnesota Employers?

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What Does This Mean for Minnesota Employers?

Primarily two concerns:

1. Minnesota Drug and Alcohol Testing in the Workplace Act
2. Minnesota's off-duty conduct law

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Minnesota Drug and Alcohol Testing in the Workplace Act (“DATWA”)

- Sets forth specific requirements for employers who wish to test employees for drugs and/or alcohol
- However, employers do not have to test employees.
- Requires compliance with employee-friendly mandates governing notice, retests, offering rehabilitation to first-time offenders, random testing, etc.

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Minnesota Off-duty Conduct Law

“An employer may not refuse to hire a job applicant or discipline or discharge an employee because the applicant or employee engages in or has engaged in the use or enjoyment of lawful consumable products, if the use or enjoyment takes place off the premises of the employer during nonworking hours.”

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Minnesota Off-duty Conduct Law

- “Lawful consumable products” is defined as: “... products whose use or enjoyment is lawful and which are consumed during use or enjoyment, and includes food, alcoholic or nonalcoholic beverages, and tobacco.”
- This law likely includes hemp edibles and beverages.
 - Bars are selling THC-infused seltzer.
 - Edible gummies sales have increased.

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Minnesota Off-duty Conduct Law

The off-duty conduct law also has teeth associated with violations:

“The sole remedy for a violation of subdivision 2 is a civil action for **damages**. Damages are limited to **wages and benefits lost by the individual because of the violation**. A court shall award the prevailing party in the action, whether plaintiff or defendant, **court costs and a reasonable attorney fee.**”

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New Bill: Legalize Recreational Marijuana

- Gov. Walz recently said, “It’s time to legalize adult-use cannabis ... I’m ready to sign it into law.”
- May have enough votes
- First reading in the Commerce and Finance and Policy Committee on 1/5/23 in House.
 - Adopted as amended on 1/17/23 and referred to Judiciary Finance and Civil Law Committee

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The Bill - Minn. Stat. 342.09, subd. 1.

A. An individual 21 years of age or older may:

1. **use, possess, or transport cannabis paraphernalia;**
2. possess or transport **two ounces** or less of adult-use **cannabis flower** in a **public place**;
3. possess five pounds or less of adult-use cannabis flower in the individual's private residence;
4. possess or transport eight grams or less of adult-use cannabis concentrate;
5. possess or transport edible cannabinoid products infused with a combined total of 800 milligrams or less of tetrahydrocannabinol;
6. give for no remuneration two ounces or less of adult-use cannabis flower, eight grams or less of adult-use cannabis concentrate, or an edible cannabinoid product infused with 800 milligrams or less of tetrahydrocannabinol to an individual who is at least 21 years of age; and
7. use adult-use cannabis flower and adult-use cannabinoid products in the following locations:
 - i. a private residence, including the individual's curtilage or yard;
 - ii. **on private property, not generally accessible by the public, unless the individual is explicitly prohibited from consuming cannabis flower or cannabinoid products on the property by the owner of the property;** or
 - iii. on the premises of an establishment or event licensed to permit on-site consumption.

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Minn. Stat. 342.09, subd. 1. – Continued

B. Except as provided in paragraph (c), an individual may not:

1. use, possess, or transport cannabis flower or cannabinoid products if the individual is under 21 years of age;
 2. **use** cannabis flower or cannabinoid products in a **motor vehicle** as defined in section 169A.03, subdivision 15;
 3. use cannabis flower or cannabinoid products at any location where smoking is prohibited under section 144.414;
- * * *
6. **operate a motor vehicle while under the influence of cannabis flower or cannabinoid products;**

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Lawful Products Law, Minn. Stat. 181.938, subd. 2

- a. An employer may not refuse to **hire** a job applicant or discipline or **discharge** an employee because the applicant or employee engages in or has engaged in the use or enjoyment of lawful consumable products, if the use or enjoyment takes place off the premises of the employer during nonworking hours. For purposes of this section, "lawful consumable products" means products whose use or enjoyment is lawful and which are consumed during use or enjoyment, and includes food, alcoholic or nonalcoholic beverages, and tobacco, **cannabis flower**, as defined in section 342.01, subdivision 16, and **cannabinoid products**, as defined in section 342.01, subdivision 12.
- b. **Cannabis flower and cannabinoid products are lawful consumable products for the purpose of Minnesota law, regardless of whether federal or other state law considers cannabis use, possession, impairment, sale, or transfer to be unlawful. Nothing in this section shall be construed to limit an employer's ability to discipline or discharge an employee for cannabis flower or cannabinoid product use, possession, impairment, sale, or transfer during working hours, on work premises, or while operating an employer's vehicle, machinery, or equipment.**

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DATWA, Minn. Stat. 181.950 - Definitions

- "Drug" means a controlled substance as defined in section 152.01, subdivision 4, but does not include marijuana, tetrahydrocannabinols, cannabis flower as defined in section 342.01, subdivision 16, or cannabinoid products as defined in section 342.01, subdivision 12.
- "Safety-sensitive position" means a job, including any supervisory or management position, in which an **impairment** caused by drug, alcohol, **or cannabis** usage would threaten the health or safety of any person.

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DATWA, Minn. Stat. 181.950 – Limitations

Limitations on cannabis testing.

- a. An employer must not request or require a job applicant to undergo cannabis testing or drug and alcohol testing solely for the purpose of determining the presence or absence of cannabis as a condition of employment unless otherwise required by state or federal law.
- b. Unless otherwise required by state or federal law, an employer must **not** refuse to hire a job applicant solely because the job applicant submits to a cannabis test or a drug and alcohol test authorized by this section and the results of the test indicate the presence of cannabis.
- c. An employer must not request or require an employee or job applicant to undergo cannabis testing on an arbitrary or capricious basis or on a **random selection basis**.
- d. An employer may request or require an employee to undergo cannabis testing conducted by a testing laboratory that participates in one of the programs listed in section 181.953, subdivision 1, **if the employer has a reasonable suspicion that while the employee is working or while the employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment, the employee:**
 1. as the result of consuming cannabis flower or a cannabinoid product, **does not possess that clearness of intellect and control of self that the employee otherwise would have;**
 2. has violated the employer's written work rules prohibiting cannabis use, possession, impairment, sale, or transfer, provided that the work rules for cannabis and cannabis testing are in writing and in a written policy that contains the minimum information required in section 181.952; or
 3. has sustained a personal injury or has caused a work-related accident as provided in subdivision 5, clauses (3) and (4).

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DATWA, Minn. Stat. 181.950 – Exceptions

Cannabis testing exceptions. For the following positions, cannabis and its metabolites are considered a drug and subject to the drug and alcohol testing provisions in sections 181.950 to 181.957:

1. a safety-sensitive position, as defined in section 181.950, subdivision 13;
* * *
5. a position requiring a commercial driver's license or requiring an employee to operate a motor vehicle for which state or federal law requires drug or alcohol testing of a job applicant or an employee;
* * *
7. any other position for which state or federal law requires testing of a job applicant or an employee for cannabis.

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Hypo #1 – Off-duty Conduct/DATWA

- On Thursday, Randy consumes an entire pack of lawful hemp-based gummies (50 mg of THC).
- After an eventful evening, Randy goes to his work at Acme Co. the next day. Just Randy's luck, Acme randomly selects Randy for a drug test and he tests positive for THC.
- What should Acme do?

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Hypo #2 - DATWA

- While at his work, Acme Co., Randy "just can't."
- On his break, Randy smokes some marijuana.
- After smoking some marijuana, Randy's manager, Hilario, sees Randy with an odd smile and he keeps dancing around on a conveyor belt.
- What should Acme Co. do?
- Let's change some facts: Instead of dancing on a conveyor belt, Randy is operating a forklift and has a small accident.
What should Acme Co. do?

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Hypo #3 – New Law

- Minnesota passes H.F. 4065 (the new marijuana bill), making, among other things, the consumption of marijuana legal.
- Randy quickly runs to sign up for a marijuana registry card and becomes a lawful card holder.
- Randy subsequently lawfully purchases a mound of marijuana.
- The next day, Randy is scheduled to work his job as a forklift operator 11:00 a.m. to 6:00 p.m. He lawfully consumes marijuana at 9:00 a.m. to take the edge off of his day.
- At work, Randy's supervisor, Hank, notices that he appears to be acting normal, but his eyes are bloodshot and he keeps eating everyone's Doritos.
- What should Hank do?
- What if Hank sees Randy consuming his mound of marijuana while working? During his break?

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Key Takeaways

- Discipline or discharge an employee for cannabis use, possession, impairment, sale, or transfer during working hours, on work premises, or while operating an employer's vehicle, machinery, or equipment
- Pre-employment tests?
- Safety sensitive?
- Policy changes?

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Thank You! Any Questions?