

CBD Oil Creating Employer Dilemma Part 2

Earlier this year the FDA approved the drug Epidiolex cannabidiol (CBD) to treat seizures in people with Lennox-Gastaut syndrome and Dravet syndrome. On December 20, 2018 President Trump signed the Farm Bill; his signing of the Bill legalized hemp — a variety of cannabis that is claimed not produce the psychoactive component of marijuana — paving the way to legitimacy for an agricultural sector that has been operating on the fringe of the law.

You ask what in the world do these two events have to do with CBD Oil or workplace drug testing? First, the Drug Enforcement Administration (DEA) has subsequently rescheduled Epidiolex as a Schedule V chemical on the Federal Controlled Substances Act. Keep in mind that CBD oil (which appears to be broadly used) is still a Schedule I illegal drug. The only FDA approved use of Epidiolex is in children with serious seizures. However, like all other drugs it can be prescribed and used off-label. Buried in the 1000-page Farm Bill is a provision allowing the cultivation of industrial hemp, a close cousin of marijuana, from which CBD Oil may be extracted. More later about both highly significant developments.

The Employer Dilemma

The Employer Dilemma is that claimed CBD Oil use is beginning to crop up as an employee excuse for a positive marijuana/THC test. This naturally occurring compound is extracted from the marijuana plant, or its close relative hemp, both of which will test positive for THC above cutoff levels if taken in significantly high dosage. Some report that CBD appears to act as an anti-inflammatory, which means it could relieve pain from arthritis, but it also has an effect on brain chemistry, as do all cannabinoids, including marijuana.

Thousands of CBD products, oils, tinctures, pills, liquids used in vaping devices, are now widely available in retail stores and online. The CBD market is exploding and expected to multiply sevenfold by 2021 to \$2.15 billion, but there are currently no uniform standards or widely accepted testing certifications. States are approving CBD oil to treat disabling conditions based on anecdotal reports and not hard science. Much the same has occurred in states passing medical marijuana laws. To become a medical marijuana card holder, a person must be suffering from one of a multitude of impairments or disabling conditions that allow for a medical professional to recommend the use of medical marijuana. Of course, all such conditions would in all likelihood fall under the state and federal Americans with Disabilities protections. Therefore, presentation of a medical marijuana card, issued to a disabled medical marijuana card holder, becomes the presentation of a disability card. For which the employer may have the duty to at the very least engage in an interactive process. It all becomes very complicated.

Is CBD Oil Still Illegal?

While, as of the date of this article, CBD remains on the DEA Schedule I list, it has been decriminalized in 47 states. It is reported that a [number of lawsuits](#) have been filed against manufactures of CBD oil from customers who relied on the labeling that the product contained only trace amounts of THC, or none at all, but they still tested positive for THC. What has further exasperated the confusion is the passing of the

Farm Bill by both houses of Congress last Tuesday, and President Trump signing it into law on December 20, 2018.

To back up for a minute, the federal government classifies marijuana as an illegal drug, while Hemp has a separate and complicated legal status based on the fact that it can be a crop raised for various farming applications. The DEA currently classifies anything from the marijuana plant, including both THC and CBD, a Schedule 1 substances, meaning that the agency says they have no new known medical use and are addictive.

Back to the Farm Bill, or now law, in its rambling 1000+ pages, is a provision that would make it easier for farmers to legally grow hemp. The final version of the bill places industrial hemp — which is defined as a cannabis plant with under 0.3% of tetrahydrocannabinol, or THC — under the supervision of the Agriculture Department and removes CBD from the purview of the Controlled Substances Act, which covers marijuana. The law also “explicitly” [preserved the Food and Drug Administration’s authority](#) to regulate products containing cannabis, or cannabis-derived compounds.

One goal of the Farm Bill was to loosen restrictions to enable companies to sell products made with hemp – soaps and cosmetics from hemp oil, as well as rope and fabric from its fibers. This will also allow hemp farmers and CBD manufacturers to use banks, get insurance, and raise capital investment without getting spooked. The [summary of the Bill](#) states that it will: “legalize industrial hemp and make hemp producers eligible for the federal crop insurance program.”

Even though the president has now signed the Farm Bill into law, it could be some time before the legal dust settles. The next action will in all likelihood be action by the DEA. ***But clearly, the take away message is: employers need to be preparing now for how to deal with the CBD oil dilemma!***

What about Federally Mandated Drug Testing?

With regards to Federally Mandated Drug Testing, Medical Review Officers (MROs) must follow the current DOT rules and HHS Mandatory guidelines which mandate that medical marijuana and CBD products that cause a donor to test above the DOT urine cut-off for THC, must be reported as a positive drug test. Expect some new regulatory guidance from the DOT on CBD oil.

What about non-regulated workplace drug testing and CBD oil?

In respect to non-regulated workplace drug testing and CBD oil, most employers do not address the issue in their drug testing policy. Over a dozen states have authorized various formulas of CBD for a variety of medical conditions. The latest guidance on this issue came from the American Association of Medical Review Officers (AAMRO), a medical review officer training and certification organization. Their November 26, 2018 guidance to MROs nationwide on CBD was as follows: “In a private employer drug-testing environment, an MRO with a positive THC and a donor’s claim of using CBD oil, the MRO should consult with the employer. CBD oil is still a Schedule I compound, but state law and the employer should be

considered. In the absence of any employer policy or guidance, the "AS IS" approach outlined above is recommended."

The "AS IS" approach mentioned is for the MRO to forward the positive laboratory report for THC and let the employer figure it out.

This is what an MRO interview might sound like as recounted off the Quest Diagnostic Website

Cannabidiol and drug tests: <https://blog.employersolutions.com/cannabidiol-and-drug-tests/>

- ▶ "So... will I pass a drug test? Maybe." CBD itself would not report positive for marijuana or marijuana metabolite. If the CBD product contains THC at a sufficiently high concentration, it is possible, depending on usage patterns, that the use of these products could cause a positive urine drug test result for marijuana metabolites. For example, in some states, CBD may contain up to 5% THC
- ▶ Drug testing- set cutoff level for a positive test at > 50 ng/mL. When a test is positive, it gets screened again with a confirmatory GC/MS or LC/MS test, which have cutoff levels of 15 ng/mL and is specific only to the THC metabolite
- ▶ In order for CBD, or cannabinoid-rich hemp oil products to test positive on a drug test, an individual would have to be using unusually large amounts (above 1000-2000 mg) of the product
- ▶ Due to the fact that it remains an unregulated drug, some CBD oils have as much as 1/10th the THC concentration as marijuana. Therefore, consuming high quantities of CBD oil will leave enough THC in your system to trigger a positive test result and **cause impairment**
- ▶ Employers need to ensure their company's substance abuse policy language clearly reflects their position on marijuana and the use of CBD products

Common Sense Counsel: So how does an employer form its compliant legal strategy to effectively stand firm when dealing with medical marijuana anti-discrimination claims, CBD oil, prescription opiates and impairing substances in the workplace – while at the same time, reducing the risk of administrative claims and/or litigation? Following these six tips will help reduce your legal risks:

1. Update Job Descriptions to include "safety sensitive position" and the ability to work in a constant state of alertness and safe manner as an essential job function;
2. Update drug free workplace policies to bring them into compliance with state laws and to include a pre-duty impairing effects disclose safety policy for safety sensitive employees and notice of how medical marijuana cardholders may make a reasonable accommodation request;
3. Treat all impairing effect prescription medications and substance equally as a safety risk to reduce the risk of medical marijuana anti-discrimination claims;



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December 21, 2018

4. Notify employees in your policy that the claimed use of CBD oil shall not be considered a medical excuse for a positive marijuana test;
5. Train hiring personnel, and supervisors, to engage in the interactive process when dealing with cardholders in the 15 medical marijuana anti-discrimination states;
6. Obtain a written fitness for duty opinion from an Occupational/MRO Physician before you take adverse employment action against a medical marijuana cardholder in one of the 15 medical marijuana anti-discrimination states.

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Tommy Eden's law practice is principally in the areas of Management Labor and Employment Law; he concentrates in Drug Testing Law (DOT Regulated and Non-Regulated) throughout the United States; Preparation of Drug Free Workplace Policies in all 50 states which specifically deal with medical and recreational marijuana issues, recent cardholder protection cases and opioids in the workplace; Tommy is a frequent speaker and trainer on these subjects and heads up [Constangy's Workplace Drug & Alcohol Testing Group](#).

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