

What Every Employer Needs to Know About CBD

By Nathan Pangrace and Madison Lisotto Whalen

The market for CBD products is booming. People are using CBD to treat various health conditions, such as chronic pain, inflammation, and anxiety disorders. The growing list of CBD-infused products includes lotions, oils, sprays, beverages, vapors, cosmetics, and gummies. One company has even begun selling CBD-infused workout clothing that supposedly helps “fight soreness and promote healing before activity even begins.” The recent explosion of CBD products has caused confusion among employers about what CBD products their employees may use without violating the law.

Below are some frequently asked questions about CBD and guidance on how employers should address CBD in the workplace.

Marijuana, hemp, CBD? What’s the difference?

One reason for the confusion regarding CBD products is the terminology. Marijuana and hemp are two different strains of the same species of plant: *Cannabis sativa* L. Both hemp and marijuana contain two key compounds: THC and CBD. The differentiating factor between hemp and marijuana is the level of THC, which has a psychoactive effect and produces a “high.” Hemp must have a THC level of 0.3% or lower and is an agricultural product often used to make fiber, paper, and clothing. In contrast, marijuana is a strain of *Cannabis sativa* L that contains more than 0.3% THC.

Is CBD Legal?

The legality of CBD products is a grey area and depends upon how the CBD is extracted and the law of the state where a person lives. The 2018 Farm Bill legalized industrial hemp and hemp-derived products at the federal level. For that reason, a CBD product is federally legal if it comes from hemp plants that are grown and processed in accordance with the United State Department of Agriculture’s hemp regulations. Marijuana, on the other hand, is a Schedule 1 Controlled Substance and illegal under federal law. A CBD product is thus federally illegal if it is derived from marijuana plants.

To complicate matters further, some states have legal restrictions on the sale and production of CBD, and those restrictions also differ depending upon whether the CBD was extracted from hemp or marijuana. The FDA has also prohibited the sale of CBD in unapproved health products, dietary supplements, and food. The only FDA-approved CBD product is the prescription drug Epidiolex, which is approved to treat children with epilepsy. However, the FDA’s enforcement of its regulatory authority over CBD products has been limited.

My employee says he failed his drug test because he used CBD. What now?

Employers should not generally be concerned about employees becoming impaired from using CBD because CBD is not intoxicating. Most drug tests are designed to detect the presence of THC levels in the employee’s system. CBD does not contain THC and will not result in a positive test.

However, the problem lies in the fact that virtually none of the CBD products available for sale have been approved by the FDA. These products have various other substances mixed in and may be contaminated with psychoactive THC. An employee could therefore fail a drug test or become impaired at work because he or she unknowingly used a CBD product that contained THC. Current drug testing methods cannot distinguish whether a positive result was triggered by a legal hemp-derived CBD product or an illegal marijuana-derived CBD product. An employer thus has no way of knowing whether an employee's claim that he or she failed a drug test because of CBD is truthful.

Employers can address this scenario by educating their employees about CBD products and informing them that using CBD can cause a failed test. Employers should explain that most CBD products are unregulated and there is no guarantee of what it contains. Such products might contain THC and violate the employer's drug-free workplace policy. Employees use CBD products at their own risk. Lastly, employers should consider updating their drug-free workplace policies to address the use of CBD products and explain how the employer will handle a failed test due to CBD use.

Are employers required to accommodate CBD?

There is no law that specifically requires employers to accommodate employees' use of CBD products. In fact, federal contractors or DOT-regulated employers may want to consider banning CBD products due to the risk that such products may be contaminated with THC.

However, how an employer treats job applicants or employees using CBD will vary by state. Thirty-three states and the District of Columbia have legalized medical marijuana, while twelve state have legalized recreational marijuana. Courts in several of these states have held an employer may be obligated to accommodate employees who use medical marijuana while off duty by making an exception to the employer's drug-free workplace policy. Employers may also have a duty to accommodate the underlying medical condition prompting the employee's CBD or marijuana use. Employers should carefully examine the cannabis laws in their jurisdiction and consult with counsel before deciding whether to permit employees' use of CBD products or marijuana.

Roetzel's employment services practice group frequently counsels clients regarding CBD products and drug-free workplaces. Please contact any of the listed attorneys for assistance.

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