



## 2. Training

Recognizing the signs of impairment is an important factor in dealing with THC or any other substance that can impair a person at work. Managers and staff should be trained to spot signs of impairment, as well as indications that an employee is trying to hide his or her impairment. They should also be trained in how to handle a suspected impaired employee, and how to document observations and other evidence of potential impairment. Further, managers must know how to appropriately administer the drug testing policy.

## 3. Drug Testing

Wisconsin employers can conduct drug and alcohol testing 1) on a pre-employment basis for candidates to whom a conditional offer has been made, 2) when reasonable suspicion indicates that a current employee is potentially impaired, and 3) on a random basis for employees who are required to have a CDL. Testing must be done within

the parameters of a written policy, and a state-accredited lab must be used to do the testing. The policy must be disseminated to affected employees and applicants, and the consequences of a positive test must be clearly outlined.

There is some indication that CBD use can cause a positive drug test result, even at low levels and particularly with repeated use.<sup>8</sup> Drug testing is currently unable to identify whether marijuana or CBD caused the positive THC result.

Wisconsin employers are not required to exempt positive tests due to CBD. At this point in the legal landscape, policies could adopt the same approach taken by the federal Department of Transportation (DOT), which makes a positive drug test for THC a policy violation for any safety-sensitive position, regardless of whether its source is marijuana or CBD.<sup>9</sup> For organizations who choose not to take this approach, at a minimum, any employee claiming that CBD caused a positive test result should be required to produce a

doctor's authorization for medical use, as well as the medical provider's certification that the substance will not cause the employee to be impaired and unable to safely perform assigned job duties.

## Conclusion

Employers have an obligation to protect their employees. Using sound policies, training, and testing, organizations can deal with staff who may be under the influence or impaired by any substance. Nevertheless, there are many different factors that may come into play in a particular situation, and the interplay of other laws, such as Wisconsin's use of lawful products statute<sup>10</sup> or reasonable accommodation under the Wisconsin Fair Employment Act<sup>11</sup> could potentially factor into the analysis of an individual situation. Before taking an adverse employment action against an employee, the circumstances should be discussed with legal counsel.

## Employees 358

1. 2015 National Survey on Drug Use and Health.

2. Wis. Stat. § 961.14; 21 U.S.C. § 841; City of Madison permits small amounts of marijuana in private places. Madison Code of Ordinances § 23.20.

3. Agricultural Improvement Act of 2018.

4. <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-signing-agriculture-improvement-act-and-agencies>.

5. <https://www.fda.gov/news-events/press-announcements/fda-approves-first-drug-comprised-active-ingredient-derived-marijuana-treat-rare-severe-forms>.

6. Wis. Stat. § 961.32(2m)(b).

7. Wisconsin Dep't of Justice, AG Schimel and Stakeholders Resolve Questions Surrounding DATCP Industrial Hemp Research Pilot Program (May 10, 2018).

8. <https://www.sciencedaily.com/releases/2019/11/191104141650.htm>.

9. 49 C.F.R. § 40.151(f).

10. Wis. Stat. § 111.35.

11. Wis. Stat. § 111.34(1)(b).



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