

# MINNESOTA SAFETY COUNCIL

 Chapter of the National Safety Council



## How to Message to Recreational Cannabis Consumers Recreational Marijuana in the Workplace

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**Making Minnesota a Safer Place to Live**

# Minnesota Recreational Cannabis

**Minn. Stat. §342.09 Provides:**

Effective date for Workplace Provisions: July 1, 2023 (certain appropriations provisions effective August 1, 2023)

## **POSSESSION**

The use, possession, and transportation of certain amounts of cannabis flower and cannabis paraphernalia by adults 21 years of age or older will be lawful for recreational purposes.

- An adult may possess up to two pounds of cannabis flower at their residence.
- An adult may transport up to two ounces of cannabis flower.
- An adult may use, possess, or transport cannabis paraphernalia.
- 8 grams of concentrates.
- Home growers may have up to eight plants, with four plants flowering at a time.
- 800 mg of hemp edibles.

# Minnesota Recreational Cannabis

## USE of cannabis

- Must be 21 years of age
- In private residence (including yard)
- On private property (unless prohibited by owner)
- In a business licensed for on-site consumption
- No use where it may be inhaled by a minor
- No use in a motor vehicle

# Cannabis Can NOT be used or Possessed in the Following Locations

- Cannabis *cannot* be used when operating a motor vehicle or operating heavy machinery **and where smoking and vaping are prohibited under the Minnesota Clean Indoor Air Act.**
- Public school or charter schools and school buses
- State correctional facilities
- In a location where the smoke, aerosol or vapor of a cannabis product could be inhaled by a minor
- On federal property (such as courthouses, airports and national parks)
- In federally subsidized housing. Due to the federal prohibition of cannabis, the U.S. Department of Housing and Urban Development (HUD) does not have the discretion to admit or retain users of cannabis (i.e., marijuana), including medical cannabis, to the public housing program.
- **While on an employer's premises, or operating an employer's vehicle, machinery or equipment**
- Smoking or vaping adult-use cannabis products is prohibited in a multifamily housing building, including patios and balconies (effective March 1, 2025).

Owners of day cares must disclose to parents if the proprietors permit use of cannabis outside of its normal business hours.

NOTE: Communities may have local ordinances that prohibit smoking or vaping cannabis in public places.

# DATWA

## **Minnesota Drug and Alcohol Testing in the Workplace Act ("DATWA"):**

The Minnesota Drug and Alcohol Testing in the Workplace is codified in Minn. Stat. §§181.950 -181.957.

**DATWA applies to Minnesota employers including public sector employers.**

### **An employer**

- is “a person or entity located or doing business in this state and having one or more employees and includes the state and all political or other governmental subdivisions of the state.” Minn. Stat. §181.950, subd. 7.

**DATWA is the governing law for workplace drug and alcohol testing in Minnesota.**

# Cannabis Testing

Minn. Stat. §181.950, **subd. 5.a** provides:

- The law creates a new type of test (called “**cannabis testing**”) under Minnesota’s Drug and Alcohol Testing in the Workplace Act (DATWA) for when an employer tests for
  - “**the presence or absence of cannabis flower, cannabis products, lower-potency hemp edibles, hemp-derived consumer products, or cannabis metabolites.**”
- Authorized **drug and alcohol testing** within DATWA **DOES NOT** include cannabis testing unless otherwise stated.

# Employer Prohibitions


## Job Applicant (Pre-Employment) Testing for Cannabis:

- An employer must not request or require a job applicant to undergo cannabis 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. Minn. Stat. 181.951, subd.8.
- Unless otherwise required by state or federal law, an employers 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 DATWA and the results of the test indicate the presence of cannabis. Minn. Stat. 181.951, subd. i.
- An employer MAY conduct job applicant testing for the “Seven Lucky Positions”

# Minnesota Recreational Marijuana

An Employer **May** Conduct Cannabis Testing Pursuant to DATWA for Employees Holding the “Seven Lucky Positions” (or the “Lucky Seven”):

(1) safety-sensitive positions

 • “**Safety Sensitive Position**” is defined as “a job, including any supervisory management position, in which an impairment caused by drug, alcohol, or cannabis usage would threaten the health or safety of any person.” Minn. Stat. §181.950, subd. 13.

(2) peace officers;


(3) firefighters;

(4) positions requiring face-to-face care, training, education, supervision, counseling, consultation, or medical assistance to children, vulnerable adults, or medical, psychiatric, or mental health patients;



# Lucky Seven

## An Employer May Conduct Cannabis Testing Pursuant to DATWA for Employees Holding the “Seven Lucky Positions”:

 (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;

(6) a position of employment funded by a federal grant; or

(7) any other position for which state or federal law requires testing of a job applicant or an employee for cannabis.

For these positions, the Recreational Marijuana Statute still considers “cannabis and its metabolites” a “**drug,**” and therefore employees holding these positions are subject to drug and alcohol testing as authorized by DATWA.

# Post-Injury & Post-Accident

Reasonable Suspicion (Post-Injury & Post Accident) Testing Under Minn. Stat. 181.951, subd. 5:

An employer may request or require an employee to undergo cannabis testing and drug and alcohol testing if the employer has a reasonable suspicion that the employee:

- Has sustained a personal injury as defined in the Worker's Compensation Act, or has caused another employee to sustain a personal injury; or
- Has caused a work-related accident or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.

Post-Injury & Post-Accident cannabis testing is not limited to the "Seven Lucky Positions"

# Safety Sensitive Position

## SAFETY-SENSITIVE POSITION

### DEFINITION OF “SAFETY-SENSITIVE POSITION” UNDER DATWA:

“**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. Minn. Stat. §181.950, subd. 13 as amended by Chapter 63, Article 6, Section 32.

# Procedural Requirements

## **Safety-sensitive position recommendations/DATWA procedural requirements:**

**Acknowledgement Form:** Before requesting an employee or job applicant to undergo **cannabis testing or** drug or alcohol testing, an employer shall provide the employee or job applicant with a form, developed by the employer, on which to acknowledge that the employee or job applicant has seen the employer's drug and alcohol testing **or cannabis testing** policy. Minn. Stat. §181.953, subd. 6(a).

**Certified Laboratories:** Testing must be conducted by an accredited or certified testing laboratory. Minn. Stat. §181.953, subd. 1.

**Chain of Custody:** Chain of custody procedures must be followed by employers and laboratories. Minn. Stat. §§181.953, subds. 3 and 5.

# Safety Sensitive Position Recommendations

- Appoint a designated HR person or committee to classify “safety-sensitive positions” throughout the company.
- Research the safety-sensitive nature of various positions and save all backup documentation including OSHA guidance, articles, studies, surveys, industry publications, etc.
- Draft a formal “business justification memo” identifying all “safety-sensitive positions” and the rationale for each classification.
- Identify all “safety-sensitive positions” (by title, job functions, and DATWA’s definition) in your drug/cannabis/alcohol testing policy and reserve the right to designate additional positions.
- These steps may minimize the risk of a punitive damages award under DATWA.
- These steps may minimize an award of attorney’s fees and costs to the employee under DATWA.

# Policy Implementation

## Employers May Enact and Enforce Cannabis Policies:

An employer may only enact and enforce written work rules prohibiting cannabis flower, cannabis product, lower-potency hemp edible, and hemp derived consumer product **use, possession, impairment, sale, or transfer:**

While an employee, is **working** or while an employee is **on the employer's premises** or **operating the employer's vehicle, machinery, or equipment** in a written policy that contains the minimum information required by this section. Minn. Stat. 181.952, subd.3(b)

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# Minnesota Recreational Marijuana

Employers **May Impose Discipline** For Violating Certain Policies:

An employer **may discipline, discharge, or take other adverse personnel action** against an employee for cannabis flower or cannabis product **use, possession, impairment, sale, or transfer** while an employee is working, on the employer's premises, or operating the employer's vehicle, machinery, or equipment:

- 1) if, as the result of consuming cannabis flower or a cannabis product, the employee does not possess that clearness of intellect and control of self that the employee otherwise would have;
- 2) if authorized cannabis testing verifies the presence of cannabis following a confirmatory test **subject to DATWA's limitations against terminating employees following a first positive test);**
- 3) as provided in the employer's written work rules for cannabis and cannabis testing; or
- 4) as otherwise authorized or required under state or federal law.

Minn. Stat. §181.953, subd. 10a.

# Are Employer Required

## Employers are **Not** Required to Accommodate Cannabis

- Unless **otherwise provided by state or federal law**, an employer is not required to permit or accommodate cannabis flower, cannabis product, lower-potency hemp edible, or hemp derived consumer product **use, possession, impairment, sale, or transfer** while the employee is working or while an employee is on the employer's premises or operating the employer vehicle, machinery, or equipment.

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# Reasonable Suspicion

DATWA Permissible Test:

Reasonable Suspicion Definition Under Minn. Stat. 181.950, subd. 12:

- “Reasonable Suspicion” means a basis for forming a belief based on specific facts and rational inferences drawn from those facts.

# Reasonable Suspicion Goal

Recognize individuals who are **impaired** by alcohol and/or drugs and cannabis to make the workplace safer.

# DATWA Reasonable Suspicion

## DATWA Permissible Tests:

### Reasonable Suspicion Testing Under Minn. Stat. §181.951, subd. 5:

An employer may request or require an employee to undergo **cannabis testing** and drug and alcohol testing if the employer has a reasonable suspicion that the employee:

**7** is under the influence of drugs or alcohol (**but \*probably\* not cannabis unless the employee holds one of the “Seven Lucky Positions”**); or

(2) has violated the employer’s written work rules prohibiting the **use, possession, sale, or transfer** of drugs or alcohol, **cannabis flower, cannabis products, lower-potency hemp edibles, or hemp-derived consumer products**, while the employee is working or while the employee is on the employer’s premises or operating the employer’s vehicle, machinery, or equipment, provided the work rules are in writing and contained in the employer's written drug and alcohol testing policy.

# Conducting Reasonable Suspicion

- Can an Employer Conduct “Reasonable Suspicion” Cannabis Testing **(for Non-Lucky Seven Positions)** if the Employer Merely Has Suspicion That the Employee is “Under the Influence of” or “Impaired by” Cannabis While Working, on the Employer’s Premises, or Operating its Equipment?

## ARGUMENTS AGAINST SUCH TESTING:

- An earlier version of the bill would have permitted employers to conduct such reasonable suspicion cannabis testing, but that language **was not** adopted in the final version of the legislation:

# DATWA

Sec. 34.

Minnesota Statutes 2022, section 181.951, subdivision 5, is amended to read:

Subd. 5.

## Reasonable suspicion testing.

An employer may request or require an employee **to undergo cannabis testing and drug and alcohol testing** if the employer has a reasonable suspicion that the employee:

(1) is under the influence of **drugs or alcohol**;

(2) has violated the employer's written work **rules prohibiting the use, possession, sale, or transfer** of drugs or alcohol, **cannabis flower, cannabis products, lower-potency hemp edibles, or hemp-derived consumer products** while the employee is working or while the employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment, provided the work rules are in writing and contained in the employer's written **cannabis testing or** drug and alcohol testing policy;

(3) has sustained a personal injury, as that term is defined in section [176.011, subdivision 16](#), or has caused another employee to sustain a personal injury; or

(4) has caused a work-related accident or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.

# Why We Train

- Is the subject under the influence or impaired?
- Is this a medical situation?
- Confirm or Rule-out influence
- Presence does not equal impairment

# REMEMBER

- You can have a policy
- Recognition of impairment is the first step
- Know your next step

## WHY?

- In the interest of safety and health of your organization



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