

OFFICE OF THE SECRETARY OF STATE
DENNIS RICHARDSON
SECRETARY OF STATE

LESLIE CUMMINGS
DEPUTY SECRETARY OF STATE



ARCHIVES DIVISION
MARY BETH HERKERT
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

PERMANENT ADMINISTRATIVE ORDER

ED 1-2018
CHAPTER 471
EMPLOYMENT DEPARTMENT

FILED

01/05/2018 11:18 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Updates To Unemployment Insurance Eligibility Requirements Due To Cannabis Use

EFFECTIVE DATE: 01/07/2018

AGENCY APPROVED DATE: 01/03/2018

CONTACT: Cristina Koreski
503-947-1471
cristina.koreski@oregon.gov

875 Union St NE
Salem, OR 97311

Filed By:
Cristina Koreski
Rules Coordinator

RULES:

471-030-0125, 471-030-0126

AMEND: 471-030-0125

RULE TITLE: Benefits and Claims: Drug, Cannabis, and Alcohol Adjudication Policy

NOTICE FILED DATE: 11/17/2017

RULE SUMMARY: The Employment Department is amending language in two Oregon Administrative Rules, 471-030-0125 and 471-030-0126, relating to Unemployment Insurance (UI) resulting from the passage of Senate Bill (SB) 302 in the 2017 Legislative Session. SB 302 modified Oregon Revised Statute (ORS) 657.176 to do the following:

1. Replaced all references to the term "Marijuana" with the term "Cannabis";
2. Included "Cannabis" with the two other substances, "Drugs" and "Alcohol", for which an individual can be found to be in possession or under the influence of, be tested for, seek rehabilitation for, and be disqualified from receiving UI; and
3. Established the requirement that individuals who are discharged from employment due to absence or tardiness as a result of cannabis use twice within a 12 month period of time are disqualified from receiving UI.

The department is also making other technical updates relating to drugs, cannabis, and alcohol to reflect current workplace practices and testing requirements defined under other areas of state law.

RULE TEXT:

(1) Purpose. For purposes of any applicable provision of ORS 657.176, this rule establishes policy for adjudicating cases involving the use, sale, possession or effects of drugs, cannabis, or alcohol in the workplace.

(2) Definitions. For the purposes of this rule:

(a) For purposes of ORS 657.176(9), "workplace" means the employer's premises or any place at or in which an individual performs services for the employer or otherwise acts within the course and scope of employment.

(b) For purposes of ORS 657.176(9), an individual "fails or refuses to take" a drug, cannabis, or alcohol test when the individual does not take the test as directed by the employer in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement.

(c) For purposes of ORS 657.176(9) and 657.176(13), an individual is "under the influence" of intoxicants if, at the time

of a test administered in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement, the individual has any detectable level of drugs, cannabis, or alcohol present in the individual's system, unless the employer otherwise specifies particular levels of drugs, cannabis, or alcohol in its policy or collective bargaining agreement.

(d) "Performing services for the employer" as used in ORS 657.176(9) and "during work" as used in ORS 657.176(9) mean that an employee is on duty and is, or is expected to be, actively engaged in tasks as directed or expected by the employer for which the employee will or expects to be compensated with remuneration.

(e) For purposes of ORS 657.176(9), an individual "tests positive" for alcohol, cannabis, or an unlawful drug when the test is administered in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement, and at the time of the test:

(A) The amount of drugs, cannabis, or alcohol determined to be present in the individual's system equals or exceeds the amount prescribed by such policy or agreement; or

(B) The individual has any detectable level of drugs, cannabis, or alcohol present in the individual's system if the policy or agreement does not specify a cut off level.

(f) An individual fails a test for alcohol, cannabis, or unlawful drugs when the individual tests positive as described in subsection (e) of this section.

(g) For purposes of ORS 657.176(9) and 657.176(13), "unlawful drug" means a drug which is unlawful for the individual to use, possess, or distribute under Oregon law. This term does not include a drug prescribed and taken by the individual under the supervision of a licensed health care professional and used in accordance with the prescribed directions for consumption, or other uses authorized by law.

(h) "Connection with employment" as used in ORS 657.176(9) means where such positive test affects or has a reasonable likelihood of affecting the employee's work, the employer's interest, or workplace.

(i) For purposes of ORS 657.176(9):

(A) "Recognized drug, cannabis, or alcohol rehabilitation program" means a program authorized and licensed by the State of Oregon, or another state.

(B) "Documentation of participation in the program" means a signed statement by an authorized representative of the recognized program that the individual is or was participating in a treatment program.

(C) "Participation" means to be engaged in a course of treatment through a recognized drug, cannabis, or alcohol rehabilitation program.

(3) For purposes of ORS 657.176(9), (10), and 657.176(13), a written employer policy is reasonable if:

(a) The policy prohibits the use, sale, possession, or effects of drugs, cannabis, or alcohol in the workplace; and

(b) The policy does not require the employee to pay for any portion of the test; and

(c) The policy has been published and communicated to the individual or provided to the individual in writing; and

(d) When the policy provides for drug, cannabis, or alcohol testing, the employer has:

(A) Probable cause for requiring the individual to submit to the test; or

(B) The policy provides for random, blanket or periodic testing.

(4) Probable Cause for Testing. For purposes of ORS 657.176(9), an employer has probable cause to require an employee to submit to a test for drugs, cannabis, alcohol, or a combination thereof if:

(a) The employer has, prior to the time of the test, observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by drugs, cannabis, or alcohol in the workplace. Such evidence may include, but is not limited to, abnormal behavior in the workplace, a change in productivity, repeated tardiness or absences, or behavior which causes an on-the-job injury or causes substantial damage to property; or

(b) The employer has received reliable information that a worker uses or may be affected by drugs, cannabis, or alcohol in the workplace; or

(c) Such test is required by applicable state or federal law, or an applicable collective bargaining agreement that has not been declared invalid in final arbitration; or

(d) Such test is required or allowed pursuant to a reasonable agreement.

(5) Random, blanket and periodic testing. For purposes of ORS 657.176(9) and (10):

(a) A "random test for drugs, cannabis, or alcohol, or a combination thereof" means a test for drugs, cannabis, or alcohol, or a combination thereof given to a sample drawn from a population in which each member of the population has an equal chance to be selected for testing.

(b) A "periodic test for drugs, cannabis, or alcohol, or a combination thereof" means a drug, cannabis, or alcohol test or a combination thereof administered at prescribed intervals.

(c) A "blanket test for drugs, cannabis, or alcohol, or a combination thereof" means a test for drugs, cannabis, or alcohol, or a combination thereof applied uniformly to a specified group or class of employees.

(6) For purposes of ORS 657.176(9), (10), and (13), no employer policy is reasonable if the employer does not follow their own policy.

(7) For purposes of ORS 657.176(13), a reasonable agreement is a document signed by the employee as a condition of continued employment and:

(a) The agreement may require the employee to submit to drug, cannabis, or alcohol testing;

(b) The agreement may not require the employee to pay for the test; and

(c) The agreement may not require them to attend a rehabilitation program that causes a hardship to the individual.

(8) Failure to Apply or Failure to Accept:

(a) A requirement that job candidates submit to a pre-employment drug, cannabis, or alcohol test does not make the work unsuitable for purposes of ORS 657.176(2) and 657.190.

(b) If, after being referred by the Employment Department, an individual does not apply for otherwise suitable work because the employer requires a pre-employment drug, cannabis, or alcohol test, the individual has committed a disqualifying act, unless the individual is required to pay for costs associated with the drug, cannabis, or alcohol test.

(c) If an individual does not accept an offer of otherwise suitable work because the employer requires pre-employment drug, cannabis, or alcohol testing, the individual has committed a disqualifying act, unless the individual is required to pay for the costs associated with the drug, cannabis, or alcohol test.

(9) The employee is discharged or suspended for committing a disqualifying act if:

(a) The employee violates or admits a violation of a reasonable written employer policy governing the use, sale, possession or effects of drugs, cannabis, or alcohol in the workplace; unless in the case of drugs the employee can show that the violation did not result from unlawful drug use.

(b) In the absence of a test, there is clear observable evidence that the employee is under the influence of alcohol in the workplace.

(10) For the purposes of ORS 657.176(9) and (10):

(a) Testing for drugs, cannabis, or alcohol must be conducted in accordance with ORS 438.435.

(b) Breathalyzer tests for alcohol must be conducted in accordance with ORS 659A.300 and ORS 659.840.

(11) If the employer discharges or suspends an employee because of use, sale, or possession of drugs, cannabis, or alcohol in the workplace and the employer has no written policy regarding the use, sale, or possession of drugs, cannabis, or alcohol in the workplace, the provisions of OAR 471-030-0038 apply.

STATUTORY/OTHER AUTHORITY: ORS 657.610

STATUTES/OTHER IMPLEMENTED: ORS 657.176 & Ch. 792, OL 2003 (SB 916)

AMEND: 471-030-0126

RULE TITLE: Benefits and Claims: Absence Due to Alcohol, Cannabis, or Drug Use

NOTICE FILED DATE: 11/17/2017

RULE SUMMARY: The Employment Department is amending language in two Oregon Administrative Rules, 471-030-0125 and 471-030-0126, relating to Unemployment Insurance (UI) resulting from the passage of Senate Bill (SB) 302 in the 2017 Legislative Session. SB 302 modified Oregon Revised Statute (ORS) 657.176 to do the following:

1. Replaced all references to the term "Marijuana" with the term "Cannabis";
2. Included "Cannabis" with the two other substances, "Drugs" and "Alcohol", for which an individual can be found to be in possession or under the influence of, be tested for, seek rehabilitation for, and be disqualified from receiving UI; and
3. Established the requirement that individuals who are discharged from employment due to absence or tardiness as a result of cannabis use twice within a 12 month period of time are disqualified from receiving UI.

The department is also making other technical updates relating to drugs, cannabis, and alcohol to reflect current workplace practices and testing requirements defined under other areas of state law.

RULE TEXT:

(1) "Drug" has the meaning given in ORS 475.005(6);

(2) "Documentation of program participation" means a signed statement by an authorized representative of the recognized program that the individual is or was participating in a treatment program;

(3) "Participation" means to be engaged in a course of treatment through a recognized drug, cannabis, or alcohol rehabilitation program;

(4) "Recognized drug, cannabis, or alcohol rehabilitation program" means a program authorized and licensed by the State of Oregon, or authorized and licensed by another state.

STATUTORY/OTHER AUTHORITY: ORS 657.610

STATUTES/OTHER IMPLEMENTED: ORS 657.176