NADC
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DEFENDER

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Positive Marijuana Test: No Problem?

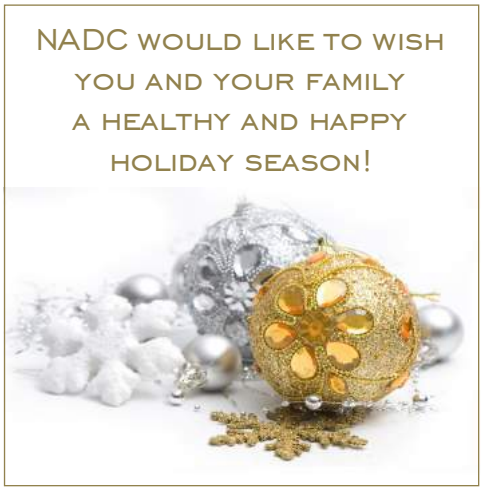
Brent T. Johnson
Fairfield and Woods, P.C.

Auto dealers and other employers who require job applicants to pass a drug screen test are finding that increasing numbers test positive for marijuana, sometimes making it difficult to fill open positions if those applicants are rejected. This causes some employers to question whether they should test for marijuana use or, if they do, whether a positive marijuana test result should automatically disqualify the applicant. Several practical and legal issues should be considered in answering those questions.

After votes on ballot measures in November 2016, there will soon be a total of twenty-nine states and the District of Columbia that allow medical marijuana and eight states and the District of Columbia that allow recreational marijuana.[1] Public acceptance of legal marijuana is growing, and increased access tends to result in increased use.[2] A national study found that in 2014, 32% of persons in the 18-25 age group had used marijuana within the past year.[3]

Increasing drug use has led to employers struggling to find applicants who can pass a drug test, particularly as the unemployment rate drops.[4] Even announcing that a drug test is required can cause otherwise qualified applicants to choose not to apply. Or if a job offer is extended conditioned upon passing a drug test, the applicant might not bother to show up for the test. At some point employers may find that the negative impact of drug testing outweighs any benefits.

One option would be to cease drug-testing altogether. There are reasons, however, to continue drug-testing but make some exceptions for marijuana. First, more addictive drugs, such as heroin or meth, pose a greater risk of workplace injury, employee theft or embezzlement, and absenteeism. Second, marijuana is increasingly becoming legal under the laws of many states, and employers may deem that an important distinction. Employers should check the law of their particular states to determine whether medical marijuana use might be protected from adverse employment action.



Employers should also consider the limitations of marijuana testing. An individual may test positive many days or even weeks after the last use of marijuana, so a positive test is not a reliable indicator that the individual is under the influence at the time of the test.[5] The individual might only use it occasionally or on weekends.

Given these differences between marijuana and other drugs, some employers may consider treating marijuana differently if legally permissible. On that point, there are some safety-sensitive jobs where an employer is precluded from hiring/employing someone who tests positive for marijuana, for example, drivers and others subject to Department of Transportation regulations.[6] The author is not aware of any other federal law that might require employers to conduct drug tests on all applicants, to test for marijuana, or to reject applicants who test positive for marijuana. The Drug-Free Workplace Act does not require marijuana testing nor preclude employing someone who tests positive, even as to the limited category of employers subject to that Act.[7] Each state's laws on this subject may vary, so an employer should consult an attorney in its own state for guidance as to state law.

Employment contexts in which drug testing is not required and employing someone who tests positive for marijuana is not prohibited, an employer willing to hire applicants who use marijuana could choose to either: (a) forego testing for marijuana; or (b) test for all drugs but still consider for employment an applicant who tests positive for marijuana. For several reasons, the second option may be preferable. First, employers conducting drug tests should have a written policy on this subject, and it will probably provide for testing not only of applicants on a pre-hire basis, but also for testing of active employees under certain circumstances. Those typically include testing after any workplace accident or injury, testing upon reasonable suspicion of on-the-job use or impairment, and, less commonly, random testing. There may be other indicia of impairment, such as marijuana odor, odd behavior, glassy or bloodshot eyes, etc. In those situations, the employer may want to test for marijuana. There is some value in maintaining consistency by including marijuana in any drug tests that are conducted.

Second, if an applicant's drug test is positive for marijuana, that might be cause for follow-up discussion about the test results, including inquiring about the frequency and extent of use. If the applicant provides responses that are otherwise satisfactory to the company (for example, "I am an occasional user, but I never use it and drive, and I never use it before work"), and the applicant otherwise looks like a good hire, the company might choose to hire the individual notwithstanding the test results. The company can then firmly make the point that the company does not tolerate possession or use of any illegal drugs on the job or reporting to work under the influence, and if the company ever has reason to believe that the employee is under the influence of marijuana and tests positive at that time, his/her employment will be terminated. The employee's supervisors can be informed of the test results on a confidential basis, so they know to be alert to any signs of on-the-job use or impairment.

The employer can maintain a preference for hiring individuals who do not test positive for marijuana use. If, for example, they have six applicants and five of those test positive for marijuana, that might be the determining factor in offering the position to the sixth applicant who did not test positive. For all of these reasons, it may make sense to continue to include marijuana in any required pre-hire drug testing.

If the employer chooses not to automatically disqualify all applicants who test positive for marijuana, it should exercise some degree of caution if it hires some but not others, making sure to avoid any pattern of rejecting minority candidates who test positive while hiring non-minority candidates who test positive. If there are two applicants who both tested positive, one minority and one non-minority, an employer who hires the non-minority applicant should have a business justification for that choice besides the minority applicant's positive test results.

An employer choosing to exercise discretion and judgment in hiring individuals who test positive for marijuana is somewhat analogous to how employers are expected to deal with an applicant's criminal history. The Equal Employment Opportunity Commission maintains that a past criminal conviction should not automatically disqualify an applicant (since that has a statistically greater adverse impact on African-Americans), but instead the employer should consider the nature of any conviction, how long ago it occurred, and the job duties of the position.[8] There is no reason under state and federal anti-discrimination laws that an employer should not be able to make similar individualized assessments with respect to positive marijuana test results.

An employer who decides to take a more lenient approach toward positive marijuana test results should communicate that approach clearly to applicants and employees, so qualified candidates who use marijuana are not deterred from applying. The drug and alcohol testing policy in the employee handbook should state that a positive marijuana test will not necessarily disqualify an applicant or employee from working for the company, but also it should make clear that any on-the-job use or impairment that is suspected and confirmed by a test may result in disciplinary action up to and including termination. If the company's web site includes a hiring page that mentions pre-employment drug testing, it should also state that a positive marijuana test will not necessarily disqualify an applicant. If applicants are informed by other means, whether before or after a job offer is extended, that a drug test will be required, the company should include notification that a positive marijuana test is not necessarily disqualifying.

This article does not advocate that employers take a more lenient approach toward marijuana use by applicants and employees. However, employers who are questioning the benefits of marijuana testing and finding it difficult to fill positions because of those test results should know that drug testing need not

be all or nothing, and marijuana can often be treated more leniently than other drugs if the employer chooses to do so. ■

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President's Message

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NADC President

NADC Welcomes New Staff Member

Please join us in welcoming Jennifer Polo-Sherk to the NADC staff. Jennifer will be replacing Christina McGrath as Program Manager for NADC. Jennifer can be reached at jpolo-sherk@dealercounsel.com or 202-293-1454.

As I write this President's report, we are approaching the holiday season and the end of 2016. Although it seems to me that the year has sped past quickly, when I reflect on the projects that have come to fruition at NADC this year I realize that we have made significant progress in meeting the association's goals –goals which were outlined several years ago when we did our strategic planning process. But, before listing those projects, I have to pause to first acknowledge the tremendous support the Board has received from our membership and our staff. For myself and on behalf of the Board--thank you NADC members for your active participation in our events and thank you for your interest in pursuing our new membership benefit projects. In addition to our conferences and webinars (and among other customary matters) this year we implemented our weekly Dealer Counsel Alert, obtained federal registration of the NADC trademark and tradename, established a branding trademark policy using the NADC logo, continued the Database/Website Integration Project, debuted our new 10' by 20' booth at NADA and established needed policies regarding document retention, conflict of interest, and whistleblowers. We also continued to make significant gains in membership and membership participation. We currently have 580 members – an all-time high. Attendance at our recent Fall Conference at the Radisson Blu in Chicago was 208, also an all-time high.

As most of you know, we contractually outsource our administrative and operational functions to Association Management Strategies, Inc. (AMS). Annually, the Board of Directors does a performance evaluation of AMS and its employees who are assigned to serve us (Erin Murphy and Christina McGrath). Board members actively participate in these reviews and again showed continuing satisfaction with our working relationship with AMS and the services that we receive from AMS. In addition to conducting the annual evaluations of AMS, every two years our agreement with AMS comes up for renewal. I am pleased to report that we have agreed upon a new two year contract with AMS that will assure that we continue to have the outstanding administrative support we have experienced in the past. As an aside and unhappily, during the contract discussions, we learned that Christina McGrath, our fine Program Manager, has been promoted within AMS and has accepted a new position that will take her away from NADC. Christina has been a wonderful asset to us and will be missed. However, since she is still at AMS she will be able to assist us with our website project and the transition to her successor Jennifer Polo-Sherk. Jennifer has been with AMS for 5 years and has vast experience in project management, events coordination, and communications. I am confident that Jennifer will be a competent replacement as we go forward. I look forward to your meeting her at our next Annual Conference in April.

Speaking of which, I hope that you are planning to attend that conference (our 13th!). It will be held at the Ritz-Carlton, Laguna Niguel in Dana Point, California from April 23 to April 25. Please make your reservations early as this conference is almost an assured sell out. The room rate is $325 (for a garden pool view); ocean view rooms are available at a higher price point. The Planning Committee has already begun work on programs for this event. Members of that Committee are me, Johnnie Brown, Andy Weill, Bob Weller, Scott Silverman, Ron Smith, Diane Cafritz, Melinda Levy-Storms, Eric Baker, and Kevin Hochman. In addition, we will elect new board members in April at the conference. Eric Baker has agreed to chair our Standing Board Membership Committee. Members of that committee include Ron Smith, Mike Dommermuth, Diane Cafritz, and Jonathan Harvey. Thanks to everyone who has agreed to serve on a committee. You make it all happen!

So, as you can see, we have been busy and will remain busy well into 2017. Personally, and on behalf of your Board of Directors, please have a joyous and safe holiday season and a Happy New Year. See you in California! ■

Updated Member Contact Information

Please make sure to notify NADC Staff (info@dealercounsel.com) if your contact information has changed so that your records can be updated accordingly. We will begin to list updated contact information in *The Defender* so all members can be aware of the change.


Watts


Olmsted

Ninth Circuit Approves Neutral Time Clock Rounding Practice

By Keith A. Watts and Christopher W. Olmsted
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

Time clock rounding is a longstanding employer practice whereby employers round employee starting and stopping times to the nearest five minutes or to the nearest one-tenth or quarter of an hour. Is the practice legal? For over fifty years, a federal regulation has authorized the practice, but until recently, no federal appellate court had endorsed the practice. In May 2016 the Ninth Circuit Court of Appeals determined that an employer's time clock rounding procedures complied with federal law in *Corbin v. Time Warner Entertainment-Advance/Newhouse P'ship*, 821 F.3d 1069 (9th Cir. 2016).

Missing Pocket Change Fuels a Class Action

The practice at issue in *Corbin* was Time Warner Entertainment-Advance/Newhouse Partnership rounded employee time punches to the nearest quarter hour. For example, if an employee clocked in at 8:07 a.m., Time Warner would round his or her time stamp to 8:00 a.m. Thus, the employee would benefit from rounding and be compensated for seven minutes that he or she was not actually working. Conversely, if an employee clocked out at 5:05 p.m., that time stamp would be rounded to 5:00 p.m., and the employee would not be compensated for five minutes that he or she actually worked.

The plaintiff, Andre Corbin, argued that the rounding practice short-changed him. Although the data showed that he gained or broke even under the rounding system for fifty-eight percent of his shifts over a span of several months, he earned $15.02 less then he would have had the company not rounded his time. Corbin also alleged that on one occasion, he had logged on to an auxiliary computer system before logging into the time system, resulting in a loss of one minute of compensable time that was not captured by the time clock.

Corbin filed a class action lawsuit alleging that the rounding practice violated state and federal wage and hour law, because it denied him full compensation for time spent actually working.

Round and Round We Go

The court began its opinion by observing, "[T]his case turns on $15.02 and one minute," the amount by which the plaintiff argued he was underpaid as a result of the rounding policy. The plaintiff argued that unless every employee gains or breaks even over every pay period, an employer's rounding policy violates the federal rounding regulation. The court rejected that contention.

The court analyzed a federal regulation allowing for time clock rounding. The regulation, 29 C.F.R. § 785.48(b), provides:

> It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

The court acknowledged that federal rounding rules had long been applied to federal claims pursuant to the Fair Labor Standards Act. The court also noted that California's Division of Labor Standards Enforcement—"the agency empowered to enforce California's labor laws"—has "adopted the federal regulation in its manual." In *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889 (2012), a California Court of Appeals, however, noted that the Supreme Court of California had not addressed whether rounding is permissible. Nevertheless, the *See's Candy Shops* court held that the federal rounding regulation described above applies to California state claims so long as the employer's "rounding-over-time policy is neutral, both facially and as applied."

The Ninth Circuit determined that the federal regulation could not be read to mean that an employee must always come out even or ahead. The court reasoned that a rounding policy will mean that some pay periods an employee may come out ahead and sometimes he or she may come out behind. However, in the end, rounding is meant to average out over the course of time. Corbin's rationale was faulty and impractical, according to the court, because it would essentially require the employer to "un-round" every employee's time stamps for each pay period to ensure that every employee benefitted from the rounding policy. The court rejected Corbin's argument given that obligating an employer to engage in this "mini actuarial process at the time of payroll" would defeat the purpose of rounding altogether.

Examining the company's rounding policy, the court determined that it passed muster. It was facially neutral because it rounded all employee time punches to the nearest quarter-hour without considering whether the employer was benefitting from the policy (*i.e.,* the employer rounds down and up) and it did not depend on managerial oversight (*i.e.,* the

system is entirely electronic and cannot be manipulated by supervisors or others). In the end, Corbin failed to show that over a period of time, he was not properly compensated for his work.

Wait a Minute

Separately, the court addressed Corbin's claim that one day he lost one minute of compensable time by logging into an auxiliary system before logging into the time clock. Can an employee sue for as little as one minute of unpaid time?

The court dispensed with this claim by applying a longstanding judicial reality check in the realm of wage and hour law: the de minimis doctrine. This Latin phrase means "about minimal things." In the legal context, it means that a court may refuse to consider trifling matters. "'[I]n light of the realities of the industrial world,' a 'few seconds or minutes of work beyond the scheduled working hours . . . may be disregarded.'" The rule is concerned with "the practical administrative difficulty of recording small amounts of time for payroll purposes."

In this case, it would have been impractical for the company to cross-reference computer log in times with time clock punches for each employee on each day in the off chance that an employee accidentally started a computer program before punching in. Moreover, the amount of lost time here, one minute, was so small that it resulted in only pennies in lost wages. Furthermore, the lost minute was not a recurring problem, but instead one rare instance of off-the-clock time. Accordingly, the court concluded that the uncompensated time was de minimis and therefore not a valid legal claim.

Practical Application

This case reaffirms the legality of time clock rounding. However, it also highlights the importance of implementing a neutral practice that, on average, does not undercompensate employees.

Although rounding is legal, it can be challenging to properly implement. As this case makes obvious, even a proper system can be challenged in litigation. To verify that a system is properly balanced, it may be prudent for employers to conduct periodic audits to ensure that rounding does not lead to an average underpayment of wages.

The de minimis rule continues to be a topic of ongoing litigation. Although federal courts and some lower state courts have addressed the issue, the Supreme Court of California has yet to address application of the de minimis rule to state law. In June 2016 the Supreme Court of California agreed to review federal Ninth Circuit Court of Appeals case, *Troester v. Starbucks Corp.* (S2334969). The court will determine whether the de minimis rule applies in the context of a store employee who, after clocking out, spent time setting an alarm and locking up the store. An opinion is expected to be released sometime during the next year. ■

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Kaltwasser


Neporadny

President-Elect Donald Trump: Possible Dealership Tax Impacts and Considerations

By Jorg Kaltwasser & Adam Neporadny, *DHG Dealerships*

On November 8, 2016, Donald Trump was elected the United States' 45th president. Although nothing is definitive at this time, President-elect Trump focused on tax reform as a large piece of the economic component of his campaign and has previously indicated that he plans to make changes to several key areas of U.S. tax law. Therefore, it is critical for dealers to begin considering how such changes might impact them and their dealership(s) once Trump officially takes office. The areas of potential change that are most likely to impact dealers and their businesses include:

- Lowering income tax rates;
- Repealing the Affordable Care Act (ACA), thereby eliminating the net investment income (NII) tax; and
- Repealing/significantly reducing federal estate and gift taxes.

Income Tax Considerations

From an individual standpoint, Trump's tax plan as communicated during his campaign entailed compressing the current seven tax brackets into three as well as removing the individual AMT. If put into place, this plan would reduce rates on ordinary income to 12%, 25%, and 33%, respectively.

From a corporate standpoint, Trump proposed lowering the business income tax rate from 35% to 15%, while also removing the corporate AMT. Trump has indicated that pass-through entity types whose owners wish to retain the profits within the business may be taxed at this flat 15% tax rate as well. However, the full impact of making such an election under the Trump plan is not defined; therefore it is possible that the tax rate would potentially be applied prior to any distributions with a second level of tax on subsequent distributions. It is worth noting that the Blueprint being developed by House Ways and Means Committee retains single level taxation and would place a 25% rate cap on business taxable income with a reasonable compensation deduction required in calculating business taxable income.

Pending the verification of this proposed plan, dealers might want to consider accelerating deductions this year and deferring income to next year.

Capital Gains Considerations

Trump's plan did not seem to entail changing the current tax rate for capital gains. However, his proposal does entail repealing the NII tax in relation to passive income, including capital gains. As such, it may be likely that Trump modifies the capital gains tax rate structure to align with his proposed three-pronged tax brackets. Under the Blueprint, rates on capital gains would be reduced via a deduction equal to 50% of net investment income, which would include not only capital gains and dividends, but also any interest income. In essence, taxpayers in the highest bracket (33%) would pay 16.5% on capital gains.

Potential ACA Repeal

Trump has included in his posted one hundred day plan that he plans to eliminate Obamacare and repeal the ACA in its entirety; however, he did indicate that some provisions of the ACA may be carried over into a new plan. While repealing the ACA has many implications, the one most pertinent to taxation of dealers is removing the 3.8% NII tax, imposed by IRC Section 1411, as mentioned above.

Estate and Gift Tax Matters

While he proposed to repeal federal estate and gift taxes, Trump stipulated that his plan would not provide a "step-up" in basis for appreciated assets held at death with gains exceeding $10 million. Consequently, only a small business owner's holdings would be fully exempt from taxation. Otherwise, income tax would be due on gains over $10 million upon the eventual sale of a decedent's businesses. In making this calculation of appreciated assets, contributions to a private charity established by the decedent or decedent's relatives will be disallowed.

This proposed area of Trump's tax plan is, at a minimum, worth addressing in tandem with the recently proposed Treasury regulations surrounding the potential reduction of valuation discounts on interest transfers for family-owned businesses (which largely impacts dealers). This language has caused dealers to act quickly and make tax-advantageous gifts under current law; however, dealers might now consider stepping back and thinking through what these changes might mean for estate and gift taxes before making any finalizations. With President-elect Trump's oncoming occupancy of the White House, there is likely much taxation change to ensue should the plans proposed in his campaign or the ones already underway in the House Ways and Means Committee's Blueprint be employed. While we cover some of the more prudent areas in relation to dealership impact, we recommend dealers and individuals begin familiarizing

themselves with some of the more detailed nuances of these potential changes to better grasp how they might affect your business and personal tax posture. ■

For questions or to learn more, please contact your trusted tax advisor, or:

Jorg Kaltwasser at jorg.kaltwasser@dhgllp.com or 901-684-5642, or Adam Neporadny at adam.neporadny@dhgllp.com or 205-212-5317.

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