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Blog Post

Weed in the Workplace – Marijuana Roundup

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Marijuana was once again one of the hottest legislative topics across the nation in 2021, and while some states' new legislation provided greater protections to employers with drug-free and/or zero-tolerance policies, others took a more employee-friendly approach. Employers will have to continue to review, update, and carefully navigate workplace drug policies to ensure legal compliance based on the employee's locations and whether the employee's use is medical or recreational.

Medical Marijuana

Alabama

On May 17, 2021, Alabama Governor, Ivey, paved the way for medical marijuana use in Alabama by signing the Darren Wesley 'Ato' Hall Compassion Act (Hall Act). The Hall Act is narrow in its prescription for permitting the use of medical marijuana and makes clear in its opening provisions that Alabama has no intention of enabling recreational use of marijuana.

To ease the minds of anxious employers, the Hall Act explicitly acknowledges that "it is important to balance the needs of employers to have a strong functioning workforce with the needs of employees who will genuinely benefit from using cannabis for a medical use in a manner that makes the employee a productive employee." As a result, the Hall Act does

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not require employers "to permit, accommodate, or allow the use of medical cannabis, or to modify any job or working conditions of any employee who engages in the use of medical cannabis." Employers also are not prohibited from "refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action" as a result of an employee's medical marijuana use. The law even provides that a worker whose employment is terminated for using medical marijuana or refusing to take a drug test may, in some circumstances, be "legally conclusively presumed to have been discharged for misconduct." In fact, employers can continue to receive workers' compensation premium discounts for maintaining drug-free workplace policies pursuant to the Alabama workers' compensation statute. Employers may also deny payment of workers' compensation benefits to an employee on the basis of a positive drug test or refusal to submit to or cooperate with a drug test. Finally, the law confirms that it does not establish a private right of action for individuals to pursue legal action against an employer related to any actions the employer takes due to an individual's use of medical marijuana.

The Hall Act went into effect immediately. However, because the Hall Act doesn't allow the Alabama Medical Cannabis Commission to accept applications for licenses to grow or distribute medical marijuana until Sept. 1, 2022, it seems unlikely that cannabis would be ready for distribution before 2023.

Puerto Rico

In contrast to Alabama's more restrictive Hall Act, on July 29, 2021, Governor Pedro R. Pierluisi signed an amendment to Puerto Rico Law 15-2021 which created a protected category for registered and authorized patients of medical cannabis. With the amendment, employers may not discriminate against registered and authorized patients of medical cannabis in the recruitment, hiring, designation, or

termination process or when imposing disciplinary actions.

The law does outline several exceptions to the protected category and will not protect registered and authorized patients of medical cannabis if the employer can establish, by a preponderance of evidence, that:

- The use of medical cannabis represents a real threat of harm or danger to others or property.
- The use of medical cannabis interferes with the employee's performance and functions.
- Permitting the use of medical cannabis would expose the employer to the risk of losing any license, permit, or certification related to any federal law, regulation, program, or fund.
- The registered and authorized patient made use of or possess medical cannabis during working time or in the workplace without the employer's written authorization.

Law 15-2021 went into effect immediately.

Recreational Marijuana

Connecticut

Connecticut joined a slew of other states in legalizing recreational marijuana in 2021 and decriminalizing possession or use of a limited amount of cannabis by adults aged 21 or older.

Importantly, the law that legalized recreational marijuana, also requires that *all* employers prohibit all smoking, including the use of electronic nicotine and cannabis delivery systems (*i.e.*, e-cigarettes or vaping devices) at their business facilities.

The law also contains several employment specific provisions which go into effect on July 1, 2022.

First, the law confirms that employers may still establish written policies prohibiting employee use, possession, or consumption of recreational cannabis. However, in the absence of a clear and legally compliant policy, employers will be prohibited from taking any adverse action against employees or prospective employees on the basis of that person's use, or lack of use, of cannabis products outside of the workplace.

Second, a drug test of a prospective or existing employee that yields a positive result for THC cannot form the sole basis for refusal to employ or to continue to employ an individual, unless:

1. failing to do so would put the employer in violation of a federal contract or cause it to lose federal funding;
2. the employer reasonably suspects an employee's usage of cannabis while engaged in the performance of the employee's work responsibilities;
3. the employee manifests specific, articulable symptoms of drug impairment while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position; or
4. such drug test was pursuant to a random drug testing policy, or was for a prospective employee with a conditional job offer, and the employer had established in such policy that a positive drug test THC may result in an adverse employment action.

Employers with legally compliant policies in place that prohibit employee use or possession of marijuana must ensure the policies are made available to current employees prior to enactment, and to prospective employees at the time of a job offer.

Notably, although employers do not have to allow employees to use or be under the influence of cannabis while at work, they must permit employees

to possess medical marijuana at work. Finally, the law gives employees a 90-day statute of limitations to pursue grievances of an employer's alleged violations.

The law does make exemptions for certain employers and categories of employment, including but not limited to emergency responders, safety sensitive positions, positions requiring operation of a motor vehicle or heavy machinery, and jobs entailing the supervision or care of children, medical patients, or vulnerable persons. As a result, Connecticut employers should be sure to consult with an attorney on any compliance issues surrounding legalization of recreational and/or medical marijuana.

New Mexico

Governor Grisham signed New Mexico's recreational marijuana bill – the Cannabis Regulation Act ("CRA") – into law on April 12, 2021. The law includes several protections for employers. Significantly, the law does not "prevent or infringe upon the rights of an employer to" have and maintain written zero-tolerance policies relating to the use of cannabis products. Employers may maintain policies that impose adverse actions, up to and including termination, against employees for a positive drug test, and for possession or use of marijuana at work or during work hours.

Philadelphia, PA

Similar to New York, Philadelphia employers, labor organizations, and employment agencies are now prohibited from requiring job applicants to submit to a marijuana drug test as a condition of employment. Such a drug test is now considered an "unlawful employment practice."

The law does come with several exceptions. The prohibition does not apply to employees in safety sensitive positions like police officers, positions

requiring operation of a motor vehicle or heavy machinery, positions involved in the supervision or care of children, medical patients, or vulnerable persons, and any position where the employee may significantly impact the health and/or safety of other workers and/or members of the public, as determined by the enforcement agency, and pursuant to the law.

The prohibition also does not apply to any federal or state statute, regulation, or order that requires drug testing of prospective employees for purposes of safety or security; government contracts with employers where the employer must require drug testing of prospective employees as a condition of receiving the contract or grant; or any applicants whose prospective employer is a party to a valid collective bargaining agreement that specifically addresses the pre-employment drug testing of applicants.

Given that the law went into effect January 1, 2022, Philadelphia employers should immediately evaluate their pre-employment drug testing policies and prepare to cease pre-employment drug screening for marijuana for non-exempted positions.

Takeaways for Employers

Employers should review their current policies in every state they operate and prepare to make updates with respect to medical and recreational marijuana use by employees and prospective employees. Employers should also make sure that any updates to policies are being disseminated to employees and, where appropriate, to candidates who are offered positions to ensure compliance.

Akerman lawyers are here to advise employers regarding the complicated employment issues surrounding the legalization of recreational and/or medical marijuana.

Disclaimer

Possessing, using, distributing, and/or selling marijuana or marijuana-based products is illegal under federal law, regardless of any state law that may decriminalize such activity under certain circumstances. Although federal enforcement policy may at times defer to states' laws and not enforce conflicting federal laws, interested businesses and individuals should be aware that compliance with state law in no way assures compliance with federal law, and there is a risk that conflicting federal laws may be enforced in the future. No legal advice we give is intended to provide any guidance or assistance in violating federal law.

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