

Blog Post

Five New States Approve Marijuana Use, Leaving Employers Dazed and Confused

December 16, 2020

By [Brittany Buccellato](#) and [Christopher S. Duke](#)

Voters around the country recently approved a number of ballot initiatives legalizing the use of marijuana for recreational and/or medical purposes, further complicating the patchwork of existing marijuana laws found throughout the country. The confusion is compounded by the fact that marijuana remains classified as a Schedule I drug under the federal Controlled Substances Act, thereby making it illegal (at the federal level) for an employee to use or possess marijuana for any reason. This dichotomy has always produced headaches for employers, but as new states continue to enact statutes with differing requirements relating to marijuana use and its impact in the workplace, employers must now be even more vigilant and learn the requirements of each state's specific marijuana statutes in order to anticipate and prevent unnecessary legal claims.

In the most recent election, Arizona, Montana, South Dakota, and New Jersey just legalized the possession and use of recreational marijuana for persons who are at least 21 years of age. Arizona, Montana, and South Dakota's approved ballot initiatives provide that employers have a right to maintain a drug and alcohol free workplace. In addition, employers in Arizona and South Dakota are expressly permitted to have workplace policies restricting the use of marijuana by employees (and by prospective employees in Arizona). Likewise, Montana's new law

Related People

[Brittany Buccellato](#)
[Christopher S. Duke](#)

Related Work

[Employment](#)
[Administrative Claims](#)
[Defense](#)

Related Offices

[New York](#)
[West Palm Beach](#)

HR Defense

[Akerman Perspectives on the Latest Developments in Labor and Employment Law](#)

[Visit this Akerman blog](#)

does not prohibit employers from disciplining an employee or making an employment decision based on a violation of its workplace drug policy or working while under the influence of marijuana. New Jersey's constitutional amendment legalizing recreational marijuana, however, does not address implications for employers. Employers will have to wait until New Jersey's Cannabis Regulatory Commission enacts regulations.

Voters in South Dakota also passed Measure 26 which legalizes medical marijuana. Employers should take note that Measure 26 requires that they treat employees who use medical marijuana the same as employees who are prescribed pharmaceutical medications, except to the extent this would create a conflict with employers' obligations under federal law or regulations. Finally, in Mississippi, Initiative 65 allows qualified patients with debilitating medical conditions to use medical marijuana, but does not require accommodation for the use of medical marijuana in the workplace.

Arizona, Montana, New Jersey, South Dakota, and Mississippi join a growing list of states that have legalized the recreational and/or medicinal use of marijuana. Given the differences in how each state treats marijuana, multi-state employers need to be especially mindful of their workplace drug policies to ensure that they comply with the laws of each state in which they operate. For example, many states have laws expressly prohibiting employers from discriminating against medical marijuana users, some states have promulgated regulations stating that employers cannot make adverse decisions about most employees' employment based on their use of marijuana outside of the workplace, and others have limits on pre-employment marijuana tests (with exceptions for safety-sensitive positions).

Despite this patchwork of state laws, there are some universal best practices that employers can adopt to ensure compliance with growing state marijuana

legalization, including discontinuing zero-tolerance drug testing policies and updating policies to address on and off-duty marijuana use. The focus of employers should be on marijuana intoxication in the workplace (rather than on a positive marijuana test result) because no state law requires an employer to permit marijuana use on the job.

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

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.