

Employee Benefit ■ Plan Review

Puff, Puff, Passed: A 6-Step Plan for Ohio Employers as Recreational Marijuana Is Legalized

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Ohio voters have passed a statutory initiative to legalize adult use (and purchase) of recreational marijuana in the state, becoming the 24th state to do so. Specifically, Issue 2 – which passed on November 7 and became effective on December 7, 2023, – permits Ohioans to purchase and/or possess up to 2.5 ounces of cannabis and to grow marijuana plants at home. What do Ohio employers need to know about this new law and what are the six things they should do to prepare?

OHIO HAS SOME CANNABIS HISTORY

Many employers are already familiar with some of the issues created by this new law as Ohio authorized the use of medical marijuana in 2016. That law permitted the purchase and use of marijuana by using a medical “marijuana card” certified or prescribed by a licensed physician.

The medical marijuana card is limited to individuals suffering from specified medical conditions.

Importantly for employers, the medical marijuana provisions set forth protections for employers, and provided that an employer would have the right to take employment actions to the extent the marijuana or cannabis use impacted the workplace. In response to the

2016 law, many employers have already developed policies to deal with the use of medical marijuana by their employees.

CHANGED LANDSCAPE

However, Issue 2 changes the landscape for Ohio. It will open up the box to and expand the numbers of employees (adults 21 and over) who may legally use marijuana. The impact on employee safety has in fact been a subject of significant studies in other states that have legalized recreational marijuana.

With the new law, Ohio employers should prepare for an influx of workplace accidents and injuries that will come with more employees using cannabis. Quest Diagnostics found the number of marijuana-positive drug tests performed after workplace accidents soared 204% from 2012 to 2022 – coinciding with the trend of more states legalizing recreational use of marijuana. Studies further show a 55% increase in workplace accidents in states that have legalized recreational marijuana, and an 85% higher injury rate for workers who tested positive for marijuana.

PROTECTIONS FOR EMPLOYERS

As with the medical marijuana bill, Issue 2 provided specific language to protect an employer’s right to discipline and discharge employees for cannabis use that impacts the

workplace. Much like with medical marijuana, employers with employees in Ohio retain all of the following rights:

- An employer does not have to permit or accommodate an employee's use, possession, or distribution of adult use cannabis at the workplace, or tolerate an employee's impairment from the drug, even if caused by lawful off-duty use of cannabis;
- An employer is permitted to refuse to hire, discharge, discipline, or otherwise take an adverse employment action against an individual because of that individual's use, possession, or distribution of cannabis in the workplace;
- An employer is permitted to establish and enforce a drug testing policy, drug-free workplace policy, and/or zero-tolerance drug policy; and
- If an employer discharges an employee from employment due to cannabis use in violation of company policy, the employee will be considered to have been discharged for just cause.

A 6-STEP PLAN

While the initiative preserves an employer's rights to deal with its workers, the legalization of recreational marijuana will have a significant impact on employee retention and hiring, and, as noted above, employee safety. Below is a six-step plan of action for employers to take in light of this development:

1. Review and Update Drug Testing Protocols

Employers now need to reevaluate their pre-employment, post-accident and reasonable suspicion testing programs and protocols. Keep in mind that employers may have mandatory testing requirements under certain

state and/or federal regulations, such as those set by the Department of Transportation. Also, recognize that testing for marijuana use is not a perfect science as the tests do not detect current use of marijuana. Also, employers should use established labs for the use of up-to-date testing.

Employers not covered by a mandate have a range of options to consider when it comes to testing, including pre-employment, post-accident, random, and reasonable suspicion testing. Options for testing may include:

- Pre-employment, random, post-accident, and/or reasonable suspicion testing of all employees (regardless of occupation or position) for all panel drugs, including marijuana;
- Stop or discontinue all drug testing;
- Stop or discontinue all pre-employment testing;
- Remove marijuana from all testing panels;
- Remove marijuana from only pre-employment testing panels, but continue to test for marijuana in other tests;
- Test for all drugs but only specific occupations or positions (e.g., safety-sensitive positions).

2. Update Policies

Update employee handbooks, workers' compensation, and other policies so employees have notice that, even though legalized, marijuana is still prohibited in the workplace. The policies should provide clear notice to the employees that possession or use of cannabis at the worksite is prohibited, and that employees are not permitted to use cannabis while on lunch or other breaks. The company policies should make clear the consequences of prohibited workplace use.

3. Last Chance Policies and Substance Abuse Programs

Determine if you want to adopt last chance programs for employees who test positive or provide access to a substance abuse program.

4. Offer Training

Train human resources professionals, managers, and supervisors for conversations with employees regarding both medical and personal use of marijuana. Make sure your managers have a clear understanding of the policies relating to cannabis use at the workplace, an understanding of testing protocols, and disciplinary policies.

5. Stay Alert

Train managers on the signs of impairment at work and your organization's policy for addressing working under the influence of cannabis.

6. Communicate

Hold a meeting to update employees on the company's position and expectations relative to cannabis use.

WHAT'S NEXT?

While it is unlikely that a full-out repeal of the law will occur given the comfortable margin by which the ballot initiative passed, there still may be changes to come through legislative review and amendment. In addition, the state is still in the process of finalizing the licensure requirements for approval of dispensaries. Thus, licensed dispensaries will not have marijuana products available for sale until the Fall of 2024. 🌿

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