



5-Step Plan for Employers as Missouri Legalizes Marijuana

Insights

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When Missouri voters approved Amendment 3 this Election Day to legalize personal use of marijuana by adults 21 and older, employers were sure to have questions. Besides legalizing the recreational use of marijuana (also referred to as cannabis), the new law also allows individuals to petition for release from prison, expunge certain arrests and conviction records of non-violent marijuana offenses, and enacts a 6% tax on the retail sale of the product. Because Amendment 3 also has notable legal changes for Missouri employers, we've answered your top seven questions about how the legalization of recreational marijuana may impact your business – and provided you with a five-step plan to prepare for the impending changes.

How does Amendment 3 differ from the 2018 Amendment 2?

In November 2018, Missouri voters approved Amendment 2 which primarily legalized the medical use of marijuana for qualifying patients. Four years later, Missouri voters approved Amendment 3 which amended Section 1 of Article XIV of the Missouri Constitution to expand what Missouri voters passed in 2018. It now legalized the personal use of marijuana along with its medical use, among other amendments.

When does the law go into effect?

December 8, 2022. The earliest recreational cannabis products are expected to be available for purchase is after February 6, 2023.

Am I required to allow my employees to work while high?

No. The law did not change in this regard. Missouri employers do not have to permit their employees to work or attempt to work while under the influence of marijuana. In fact, Missouri employers may still discipline or terminate an employee for working under the influence of marijuana. The law provides some employer-friendly protections if you discipline or terminate employees working or attempting to work under the influence.

Is a marijuana user now a protected class in Missouri?

Not exactly. Only medical marijuana users with a valid card have employment protections, with certain exceptions. This is a change from the 2018 Amendment and is arguably the most significant

impact Amendment 3 will have on employers.

The new law specifies that employers cannot make employment related decisions and/or discriminate against a person based upon their status as a qualifying patient or primary caregiver who has a valid identification card, the qualified patient's off-site legal use of marijuana during non-working hours, or for a positive drug test if a person has a valid qualifying patient card. The drug testing protection does not apply if the person used, possessed, or was under the influence of medical marijuana on the premises of the place of employment or during the hours of employment.

However, the law does have exceptions for certain employers if abiding by the rules above would cause them to lose a monetary or licensing-related benefit under federal law. In such cases, the employer could be exempt from the listed employee protections (think DOT regulations). Also, the employee protections do not apply for positions in which the legal use of marijuana affects the person's ability to perform job-related employment responsibilities or the safety of others, or conflicts with a bona fide occupational qualification that is reasonably related to the person's employment.

Can I still drug test?

Yes – but with caution. The new law prohibits employers from making employment decisions based upon a positive drug test for qualifying patients if their positive test was due to lawful consumption off the employer's premises and not during work. Therefore, drug testing for qualified patients may not be a basis to deny employment or take employment actions, unless the business or position meets one of the exemptions listed above. If you intend to use one of the exemptions to continue your current drug testing practices, it is best to consult with your legal counsel before doing so.

Is there a way to test employees for marijuana “impairment” or “influence”?

Maybe. Missouri employers have struggled with this question for the past four years because there is not a reliable test on the market to measure marijuana “impairment” or “influence.” Meaning an employee may test positive for THC, the active ingredient in marijuana detected in drug tests, for weeks after a person consumes cannabis products. But although that employee may test positive for marijuana (THC), they may not be currently “impaired” if they consumed marijuana days or weeks before.

Continue to train your managers and supervisors to spot the signs of marijuana impairment at work. Similarly, just as how your managers have been trained to objectively identify the signs of alcohol impairment at work, they should follow the same practice for suspicion of marijuana impairment. Make sure you are following your company policies on reasonable suspicion testing procedures if you suspect impairment or use while the employee is at work.

Should I change my practices regarding background checks for marijuana related offenses?

Maybe. The new law has detailed provisions regarding a person's ability to petition for or have an automatic expungement of certain marijuana related convictions. This process will take time and some marijuana-related convictions are likely to show up on certain background checks during this process.

Also note the law specifies that individuals who have expunged records are not required to acknowledge the existence of such a criminal history record or answer questions about the record in any application for employment regardless of whether the person has received notice from the court that an expungement order has been issued.

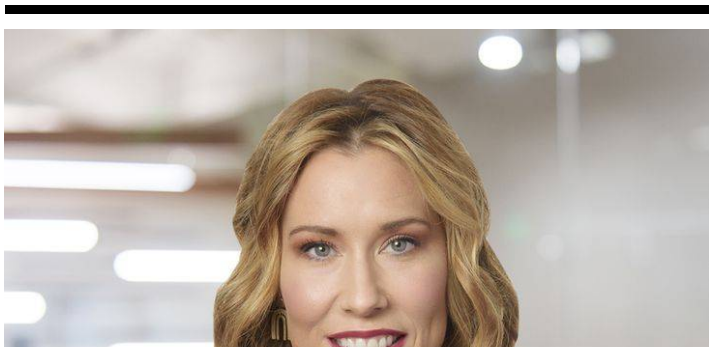
Therefore, make sure that any employment decision you make regarding marijuana related convictions is compliant with the Fair Credit Reporting Act (FCRA). If you are considering denying employment for a marijuana related conviction, consult with a trusted legal counsel before doing so.

Next steps for Missouri Employers:

1. Evaluate your current drug testing policies and practices;
2. Revise employee handbooks and drug-testing policies;
3. Determine if your business or positions could qualify for one of the exemptions to the qualified patient protections;
4. Train human resources professionals, managers, and supervisors for conversations with employees regarding medical marijuana and personal use of marijuana;
5. Train managers on the signs of impairment at work and your company's policy for addressing working under the influence of cannabis.

It is best for Missouri employers to stay tuned as the legalization of marijuana develops and is interpreted by Missouri courts. We'll track any developments and provide updates as warranted, so make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information directly to your inbox. If you have questions about this new law or how it may affect your business, please contact your Fisher Phillips attorney, the author of the Insight, or any of the attorneys in [our Kansas City office](#).

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