

5 THINGS KENTUCKY EMPLOYERS NEED TO KNOW ABOUT THE STATE'S NEW MEDICAL CANNABIS LAW

Insights
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Kentucky just became the 38th state to legalize medicinal cannabis when Governor Andy Beshear signed SB 47 into law on March 31. This comes after many years of failed legislation and just a few months after the governor signed an executive order allowing Kentuckians diagnosed with certain medical conditions and receiving palliative care to purchase, possess, and use cannabis. While the new law legalizes medicinal use, you should note that its reach is limited. For example, the qualifying medical conditions are not expansive, and the law provides for strict regulation of the industry by the Cabinet for Health and Family Services. Moreover, the law not set to take effect until January 1, 2025 – but you should prepare now to field questions from your employees and assess the new law's potential impact on your workplace policies and practices. Here are the answers to five top questions employers are asking.

1. Who Does the Law Protect?

The law is set to provide access to medicinal cannabis only for those individuals with a qualifying medical condition. These include:

- any type or form of cancer, regardless of stage;
- chronic, severe, intractable, or debilitating pain;
- epilepsy or any other intractable seizure disorder;
- multiple sclerosis, muscle spasms, or spasticity;

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- chronic nausea or cyclical vomiting syndrome resistant to other conventional medical treatments; and
- post-traumatic stress disorder.

While the number of qualifying conditions is relatively low, the law also allows the Kentucky Center for Cannabis to identify other medical conditions or diseases for which scientific data and evidence demonstrates that cannabis is likely to have medical, therapeutic, or palliative benefits.

Those who qualify will have to register with the Cabinet for Health and Family Services as a qualified registered cardholder and will be issued a registry identification card.

The law will also protect and regulate medicinal cannabis businesses in the Commonwealth, including cultivators, dispensaries, producers, and safety compliance facilities. These businesses must obtain a license from the Cabinet for Health and Family Services and will be subject to inspection and investigation by the Cabinet for compliance with the law.

2. Are Employees Governed by Professional Licensing Boards Subject to Disciplinary Action for Use of Medicinal Cannabis?

Generally, an employee who holds a professional license from a state licensing board will not be subject to disciplinary action if they are a registered qualified patient and they do not possess more medicinal cannabis than permitted by the law.

However, certain employees licensed under the Kentucky Board of Nursing, the Kentucky Board of Podiatry, or the Kentucky Board of Medical Licensure, may be subject to disciplinary action if there is probable cause to believe that they have become impaired by or abused medicinal cannabis. They may also be subject to discipline by their licensing board if their use interferes with their professional, social, or economic functions in the community or causes a loss of self-control.

However, the potential for disciplinary action by a licensing board does not stop with just medical professionals. The law will not protect any employee who undertakes a task when under the influence if doing so would constitute negligence or professional malpractice.

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3. Are Employers Required to Permit Employees to Use Medicinal Cannabis?

Employees may believe that the new law will protect them from adverse employment actions if they are qualified and registered to use medicinal cannabis within the state.

However, Kentucky the law allows employers to limit or prohibit use even by qualified, registered employees in the workplace. Here are a few points to note about the new law:

- **Employment Policies.** Employers are not required to permit or accommodate the use, consumption, possession, transfer, display, transportation, distribution, sale, or growing of medicinal cannabis in the workplace. Employers may include provisions in their employment contracts prohibiting use by employees. Additionally, they may create or rely upon existing personnel policies prohibiting the use of cannabis – including medicinal use – by employees.
- **Operating Equipment.** Employers may prohibit employees from using equipment, machinery, or power tools if you believe the employee's medicinal cannabis use poses an unreasonable safety risk. In fact, the operation of some equipment, such as vehicles, aircraft, or other vessels, while under the influence would not only be a potential violation of employment policies, but the law as well. While the new law legalizes the use of medicinal cannabis, it does not de-criminalize the operation of a vehicle while under the influence or consumption while operating those vehicles.
- **Restrictions on Certain Properties.** Employees that work at any preschool, primary, or secondary school; any correctional facility; or on federal government property will also be legally restricted from the use or possession of medicinal cannabis while working in these environments.
- **No New Protected Class.** The law does not create a new protected class of individuals or give employees the right to bring a claim against an employer for wrongful discharge or discrimination for using medicinal cannabis.

4. Are Employers Required to Make Reasonable Accommodations?

While the medical conditions outlined in the new law may qualify as a disability under the Americans with Disabilities

Act (ADA) and may require employers to reasonably accommodate that disability, they do not require employers to accommodate those disabilities by permitting the use of medicinal cannabis in the workplace.

It is important to note that cannabis use is still illegal under federal law. In fact, the ADA (which applies to businesses with 15 or more employees) provides that a "qualified individual with a disability" shall **not** include any employee or applicant who is currently engaged in the illegal use of drugs, when the covered employer acts on the basis of such use. Another subsection provides that a covered employer may (1) prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees; and (2) required that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace.

5. Can Employers Still Test for Drug Use?

Yes. Consistent with the ADA and the new Kentucky law, employers in the state may continue to test employees for medicinal cannabis and act based on a positive result.

Under the ADA, a test to determine the illegal use of drugs is not considered a medical examination. The ADA also states, "nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results."

The new Kentucky law permits employers to establish and enforce drug testing policies, drug-free workplace policies, and zero-tolerance drug policies. In addition, the law explicitly allows employers to drug test cardholding employees that the employer believes, in good faith, to be impaired. These good faith determinations of impairment should include a behavioral assessment of impairment and testing for the presence of cannabis by established methods. If the behavioral assessment and testing demonstrate impairment on the part of the cardholding employee, that employee may attempt to refute the employer's findings.

Any employee that is discharged for consuming medicinal cannabis in the workplace, working while under the influence, or testing positive for a controlled substance will not be eligible for unemployment insurance benefits if those

actions violate their employment contract or established personnel policies.

Next Steps

Things will not change overnight in Kentucky, especially given the new law's January 1, 2025, effective date. However, Kentucky employers should prepare by taking the following actions:

- **Review current drug use and testing policies** with your human resources department to discern whether any changes need to be made to policies prior to the act's effective date.
- **Watch for administrative regulations**, which will likely be issued prior to the effective date and may further clarify your responsibilities as they relate to employees who are qualified and registered to use medicinal cannabis.

We will continue to monitor the situation and provide updates as developments occur, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. If you have questions about how to ensure your drug testing policies comply with workplace and other applicable laws, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in [our Louisville office](#).