

UP IN SMOKE: ARIZONA'S MEDICAL MARIJUANA LAW CREATES NEW WORKPLACE PROTECTED CLASS

Insights

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In the final vote tally completed nearly two weeks after the close of the election polls, Arizona's medical marijuana law passed by a margin of just over 4,000 votes. Like prior attempts to legalize medical marijuana in Arizona, Proposition 203 legalizes marijuana use by authorized patients for limited medical purposes under state law. But unlike the prior versions which passed in 1996 and 1998 and which were effectively nullified, Proposition 203 seems more likely to survive technical wording challenges. Arizona joins 14 other states that have adopted similar medical marijuana laws.

What The New Law Requires

As many employers will quickly discover, the new law does more than just legalize medical marijuana use: it also creates a new protected class of workers. This new protected class will be comprised of those individuals who are legally authorized to use medical marijuana under state law. Specifically, the law prohibits employers from discriminating against such individuals, or from making employment decisions based on lawful marijuana use under state law. The language provides that employers:

may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either:

1. The person's status as a [registered medical marijuana] cardholder.
2. A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.

Arizona's medical marijuana law will present unique challenges for employers attempting to maintain a drug-free workplace. Dusting off existing workplace drug and alcohol policies and revising them may be the first order of business. While employers may still discipline most employees who test positive for marijuana metabolites, this generally is not the case for employees who are authorized to use medical marijuana under state law.

Some Gray Areas Remain

This restriction on employment actions contains several exceptions. You may still prohibit all employees from possessing or using marijuana on company premises or during work time, regardless of whether the employee is authorized to use medical marijuana under state law. Employers may also take action against employees who are "impaired by marijuana" while working or while on company property, although the law is notably silent on when an employee may be considered "impaired."

More significantly, though, you may still enforce employment drug and alcohol policies required by federal law. Federal law prohibits marijuana use even for medical purposes, although current United States Attorney General Eric Holder has issued guidelines indicating that the federal government will not make it "a priority to use federal resources to prosecute patients with serious illnesses or their caregivers who are complying with state laws on medical marijuana."

Employers may still take action against medical marijuana users if the failure to do so "would cause an employer to lose a monetary or licensing related benefit under Federal Law or Regulation." The Department of Transportation regulations, Mine Safety and Health Administration regulations, and requirements for contractors under the Drug-Free Workplace Act of 1988 quickly come to mind. Employers still must ensure that their policies and practices comply with these and other federal requirements. Some employers may need to adopt two distinct policies – one for employees who are governed by federal workplace drug and alcohol regulations and a separate policy for employees who are not.

The new law will go into effect on November 29, 2010, and the Arizona Department of Health Services then will have 120 days to finalize implementing rules and procedures. By early April 2011, dispensary and patient applications for medical marijuana use should be under review, with medical marijuana authorizations soon to follow. Employers should prepare themselves now for this coming eventuality.

AN ACTION PLAN FOR ARIZONA EMPLOYERS

1. Carefully audit and, if appropriate, revise your drug and alcohol policies to comply with this new state law.

2. Evaluate overlapping workplace federal drug and alcohol statutory and regulatory requirements and determine whether they apply to your operations. Employers subject to such requirements may need to adopt distinct policies for different employee groups depending on the circumstances.
3. Reinforce your company's commitment to its drug and alcohol policies by notifying employees of continuing requirements.
4. Coordinate testing policies and practices with your company's medical review officer and testing labs to ensure full compliance with Arizona's medical marijuana law.

For more information about this new law and how it will affect your workplace, contact any attorney in the Phoenix office of Fisher Phillips at (602) 281-3400.

This Legal Alert presents an overview of a specific new state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.