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# MEDICAL MARIJUANA IN MISSOURI: NEW LAW BRINGS NEW QUESTIONS FOR EMPLOYERS

Insights  
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Missouri voters approved Amendment 2 on Election Day 2018, one of the three medical marijuana measures appearing on the state's ballot. Amendment 2 adds an article to the [Missouri Constitution](#) legalizing medical use of marijuana for qualifying patients and allowing people who qualify to grow their own plants. With a new law comes new questions about how this development will affect workplaces across the state. Here are a series of the most common questions Missouri employers may have while adjusting to this new reality.

## WHAT IS AMENDMENT 2?

Amendment 2 makes Missouri one of the 33 states in the country that have legalized marijuana to some degree. Amendment 2 does not change federal law, which continues to classify marijuana illegal under the Controlled Substances Act, even if it is used for medical reasons.

Under the new Missouri law, qualified patients who have approval from their physician will receive identification cards from the Missouri Department of Health and Senior Services that will allow them and their registered caregivers to grow up to six marijuana plants and purchase at least four ounces of cannabis from dispensaries on a monthly basis.

The list of medical conditions that will permit medical marijuana use is broad and somewhat open-ended. Qualifying medical conditions include specific conditions or symptoms related to, or side-effects from, the treatment of

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cancer, epilepsy, glaucoma, HIV, intractable migraines unresponsive to other treatment, and any terminal illness, as well as a litany of chronic medical conditions and psychiatric disorders such as Crohn's disease, autism, Alzheimer's disease, and post-traumatic stress disorder, to name just a few.

Should any of your employees or applicants have one of the qualifying conditions or, in the professional judgment of their physician, have a debilitating or other medical condition, they may be a qualifying patient eligible to apply for a medical marijuana identification card.

## **DO I HAVE TO LET MY EMPLOYEES WORK WHILE HIGH?**

No. Missouri employers may continue to enforce their drug-free workplace policies prohibiting employees from working under the influence of marijuana even after the new law takes effect. In fact, employers will be pleased with the express language in Amendment 2 which provides a safety net for employers.

The new law specifically prohibits employees from filing claims against Missouri businesses for wrongful discharge, discrimination, or similar causes of action based on the employer prohibiting the employee from being under the influence of marijuana while at work or disciplining the employee for working or attempting to work while under the influence of marijuana. Therefore, it is important to review your policies to ensure the language expressly prohibits working under the influence of medical marijuana.

## **CAN EMPLOYEES CONSUME MARIJUANA AT WORK?**

No. The express language of the amendment also prohibits public use of marijuana. In addition to enforcing your drug-free workplace policy, you can also similarly adjust other policy language prohibiting smoking, ingesting, or otherwise consuming marijuana at the workplace in any form (vapor, edible, oil, etc.).

## **CAN I STILL DRUG TEST APPLICANTS AND EMPLOYEES?**

Yes. It is important to understand that the new law does not prevent you from drug testing potential or current employees. If you have a drug testing policy and practice,

you should continue to follow that policy and enforce your disciplinary policies as you would no matter what kind of illegal drug shows up in the individual's system.

If you employ individuals in safety-sensitive positions or other jobs that require drug testing under federal or state guidelines, you will almost certainly want to continue your current drug testing practices. In some cases, you may be required to do so under federal law, such as the Department of Transportation (DOT) regulations. In other cases, you will want to do so in order to avoid the risk of having one of your employees cause an accident involving members of the public, co-workers, or simply themselves, which could lead to devastating consequences and employer liability.

In fact, the Missouri law specifically states, "nothing in [the law] permits a person to operate, navigate, or be in actual physical control of any dangerous device or motor vehicle, aircraft or motorboat while under the influence of marijuana."

## **IS THERE A WAY TO TEST EMPLOYEES FOR MARIJUANA "IMPAIRMENT" OR "INFLUENCE"?**

Maybe. The rub here is that testing for marijuana "impairment" or "influence" hasn't caught up with the laws. An employee may test positive for marijuana but not be "impaired" if they consumed marijuana days or weeks before. This stems from the fact that marijuana's active ingredient—THC—stays in the bloodstream well after consumption, sometimes for weeks at a time. This is much different from testing for alcohol "impairment," which passes through a person's bloodstream at a much quicker rate.

While it may be unfortunate that you cannot adequately test for marijuana "impairment," that does not mean that you cannot test for and subsequently discipline workers who simply have THC in their system while at work.

An alternative approach is to train your managers to spot the signs of marijuana impairment at work. While you are not asking them to become drug detectives, they should be able to recognize the telltale signs of marijuana impairment: red eyes, lethargic demeanor, lack of coordination, confusion and lack of focus, etc. Just as managers have been trained to objectively identify the signs of alcohol impairment at work, managers should do the same for marijuana usage.

Make sure they are aware of their responsibility when it comes to reasonable suspicion testing procedures, whether it includes documenting their findings and directly sending the employee for testing or otherwise informing Human Resources of the situation.

## **IS MEDICAL MARIJUANA USE A REASONABLE ACCOMMODATION IN MISSOURI?**

It's too soon to tell. Amendment 2 does not address this issue and we cannot predict how a Missouri court would rule in cases involving reasonable accommodations for qualified patients using medical marijuana. Although the answer is left open to debate, employers will need to explore "what-if" scenarios.

For example, will you extend reasonable accommodations to medical-marijuana-using applicants or employees who happen to have the drug in their system while on duty at work or while submitting to a pre-hire drug test, despite the fact that they do not appear "high" at work or during the pre-hire drug test process? Given that this conundrum could run into direct conflict with your zero-tolerance drug policy, you will need to decide how to respond to these inevitable situations.

The employer-friendly language allowing employers to discipline or terminate an employee for working under the influence of marijuana may provide some guidance as the inevitable litigation will unfold resolving this question. For now, Missouri will have to take lessons from other states until our courts rule on whether permitting use of medical marijuana is a reasonable accommodation under state law prohibiting disability discrimination. Unfortunately, other states are divided on this particular issue, and it is difficult to predict how our courts will rule on the issue.

## **WHEN WILL THE NEW LAW TAKE EFFECT?**

The election results still need to be certified by the Secretary of State's office before the law will become official, which is expected to take place on or around December 6. The Missouri Department of Health will then be tasked with developing regulations to implement the law, which needs to complete the process by June 2019. At that point, however, additional administrative requirements might

mean that another six months might pass before the first prescriptions can be issued. In other words, you might not see your first applicant or employee with a valid medical marijuana card until late 2019 or even early 2020.

Although that seems like a long time from now, it will be here before you know it, so you should begin the process of preparing as soon as possible. Here are some recommended steps to take:

#### Next Steps for Missouri Employers

1. Revise employee handbooks and drug-testing policies;
2. Determine applicable DOT regulations;
3. Review any federal government contracts;
4. Train managers to identify marijuana impairment;
5. Train managers for conversations with employees regarding medical marijuana; and
6. Carefully consider medical marijuana-related accommodation requests.

It is best for employers to stay tuned as the law develops and interpreted by Missouri courts. If you have any questions about this new law, or how it may affect your business, please contact your Fisher Phillips attorney or one of the attorneys in [our Kansas City office](#) at 816-842-8770.

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