

Marijuana Criminalization No MORE?

Labor & Employment Workforce Watch

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In recent years, forty-seven states have revised their regulatory schemes regarding marijuana, whether to permit its use for limited medical reasons or to decriminalize it altogether. Nevertheless, despite this dramatic shift on a state level, as of the date of this article, marijuana remains illegal on the federal level. But that landscape may be set to shift, with the House of Representatives' passage of the [Marijuana Opportunity Reinvestment and Expungement Act](#) (the "MORE" Act) on April 1, 2022.

Most significantly, the MORE Act decriminalizes cannabis by removing it from the list of scheduled substances under the Controlled Substances Act and eliminates criminal penalties for the manufacture, distribution, and possession of cannabis, with retroactive applicability. This MORE Act additionally proposes to establish a process to expunge federal convictions of cannabis-related offenses, make Small Business Administration loans and services available to legitimate cannabis-related businesses or service providers, and prohibit the denial of federal public benefits to individuals based on certain cannabis-related conduct or convictions.

Currently, employers with multi-state operations are subject to a patchwork of states' laws addressing marijuana, its legality, and how employers must approach employee marijuana use in locales where it is legal in some form or fashion. Though employers generally have wide discretion in crafting their drug and alcohol policies, in some instances state and federal law can impact how those policies are implemented. For example, for employers with employees in safety-sensitive positions, some state and federal laws contain mandatory testing obligations.

Federal directives and guidance regarding drug testing for safety-sensitive employees primarily derive from the Department of Transportation's ("DOT") regulations. The DOT currently requires transportation employers to test safety-sensitive employees for multiple drugs, including cannabis. 49 C.F.R. § 40.3. Under the regulations, "safety-sensitive" functions include all time spent at the driving controls of a commercial motor vehicle in operation and other responsibilities for performing work, until the employee is relieved from work. 49 C.F.R. § 382.107(9). Upon notification of an employee's positive drug test, covered employers must immediately remove the employee from performing safety-sensitive duties. 49 CFR § 40.309(a).

As currently drafted, the MORE Act will not impact these federal regulations regarding safety-sensitive employees. The Act expressly does not "abridge the authority of the Secretary of Transportation . . . to regulate and screen for the use of a controlled substance." However, other parts of the Act suggest that changes may still be coming. The Act directs the Secretary of Transportation to conduct a study on methods that law enforcement may use to determine whether a driver is impaired by marijuana. The MORE Act additionally directs the National Institute for Occupational Health and Safety to conduct a study on the workplace impact of states' legalization of recreational cannabis and to develop best practices for employers.

Many states that extend employment protections to employees who use cannabis, whether medically or recreationally, nevertheless carve out exceptions for workers in safety-sensitive roles. States differ widely on how they define “safety-sensitive” positions, with some deferring to the federal definition or to state statutes, while other states defer to the employer’s discretion or even just common sense. For example, employers in New Mexico may not take adverse employment actions against an applicant or employee due to their usage of medical marijuana, but this protection excludes employees in safety-sensitive roles, defined broadly as “position[s] in which performance by a person under the influence of drugs or alcohol would constitute an immediate or direct threat of injury or death to that person or another.” N.M. Stat. Ann. § 26-2B-3. New Jersey represents the opposite end of the spectrum—employers may not take adverse employment actions based solely upon a positive marijuana test (whether due to medicinal or recreational use), with *no exceptions* for safety-sensitive roles. N.J. Stat. Ann. § 24:61-52. Regardless of these differing laws, however, no state requires an employer to tolerate employees using marijuana in the workplace. The MORE Act will not impact these state regimes, nor does it propose to alter them.

As always, when it comes to cannabis, this is an ever-evolving area of law, and employers must still adhere to various federal and state regulations. Checking laws and regulations at the federal and states levels, when applicable, before enacting drug-testing programs is key to ensure such programs comply with the applicable regulatory schemes.

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