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Riding the Green Wave – Considerations for Employers in Dealing With Marijuana Legalization

Labor & Employment Workforce Watch

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As a wave of marijuana legalization continues to sweep the country, employers (especially those with multi-state operations) must grapple with its impact on their operations and workforce.

The majority of states and the District of Columbia now permit some form of legal recreational or medicinal marijuana use. Fifteen of those states, as well as the District of Columbia and some cities, prohibit employers in some form or fashion from testing for or taking adverse employment actions based on an employee's legal marijuana use. With similar legislation pending in a number of states, the patchwork of laws affecting employers' rights and obligations with respect to employee marijuana use will continue to grow more complex.

Credit for photo: National Conference of State Legislatures, State Medical Marijuana Laws, <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (April 5, 2021).

Amongst this patchwork of state laws, some common themes and takeaways have emerged:

- **Federal law preempts inconsistent state laws** – Employers with drug testing protocols mandated by federal law (such as Department of Transportation regulations) are likely exempt from inconsistent requirements imposed by state law.
- **Employers can regulate possession and use in the workplace** – Despite growing state law protections for employees engaging in marijuana use, employers still generally retain the right to maintain a drug free work environment, and prohibit use and consumption in the workplace.
- **Employers can regulate workplace safety** – Employers still may prohibit employees from showing up to work or performing their jobs while impaired. In addition, in states that do have certain testing requirements, employers are generally still able to conduct marijuana testing of employees in safety sensitive positions.

Some examples of currently pending legislation affecting employers' rights and obligations with respect to marijuana use include the following:

CALIFORNIA ASSEMBLY BILL 1256

Introduced on February 29, 2021, Bill 1256 is still working its way through the committee process. If passed, as currently written, this proposal would specifically forbid an adverse employment action when employees have “nonpsychoactive cannabis metabolites in their urine, hair, or bodily fluids.” Under Bill 1256, employers who are required to test for THC by federal law, or those who would “lose a monetary or licensing-related benefit” for failing to test for THC, still would be allowed to act based on test results. The bill would exempt employers in the “building and construction trades.” Bill 1256 can be viewed and tracked [here](#).

DISTRICT OF COLUMBIA BILL 309

Mayor Bowser signed Bill 309 on December 17, 2020, and it is projected to become law around May 24, 2021. This legislation protects government employees from discrimination resulting from medical marijuana use. However, to qualify for the protection provided in Bill 309, employees must be enrolled in D.C.'s medical marijuana program and be a public employee. Bill 309 can be viewed and tracked [here](#).

FLORIDA SENATE BILL 1820

Several bills are currently engaged in the legislative process in Florida. Most notably, Senate Bill 1820 seeks to change Florida's current medical marijuana laws in several ways. The bill seeks to prohibit adverse actions against employees who lawfully use medical marijuana, and extends protection to those employees with medical marijuana cards obtained from other states. Employers required by federal law to test for drug use, or who are required to test to receive a “federal contract or federal funding” still are allowed to conduct drug tests and take adverse action against employees who use marijuana, regardless of the medical marijuana status. Senate Bill 1820 can be viewed and tracked [here](#).

HAWAII SENATE BILL 64

Senate Bill 64, referred to committee on February 19, 2021, prohibits employers from discriminating against a

person based on an individual's status as a medical cannabis cardholder. However, employers “may use a fit-for-duty test for medical cannabis qualifying patients in potentially dangerous occupations.” Bill 64 does not apply to a list of specific safety-related positions, including those who operate heavy machinery or transport 16 or more passengers. Employers who are required by federal law to test for THC, or who receive federal funding, also are exempted. Senate Bill 64 can be viewed and tracked [here](#).

MASSACHUSETTS HOUSE DOCKET 3914

Massachusetts already provides employees protection from discrimination based on marijuana use in certain situations. On February 19, 2021, Massachusetts house legislators introduced a bill seeking also to ban the use of urine, blood, and “other body sample” testing as a basis to discriminate against employees. Legislators seek to require employers to look for “demonstrable probable cause to believe that the person is impaired at work by reason of cannabis consumption and has cause, or is at imminent risk to cause, harm to a fellow employee, customer, or the public due to such impairment.” Bill 3914 can be viewed and tracked [here](#).

MARYLAND SENATE BILL 504

Senate Bill 504 is pending before the Senate Judicial Proceedings Committee. This proposal seeks to prevent employers from discriminating against employees who are a part of the state's medical marijuana program. The legislation explicitly exempts employers who are required by federal law to test or to receive funding. Bill 504 can be viewed and tracked [here](#).

NEW JERSEY SENATE BILL 3525

Senate Bill 3525 was introduced on March 9, 2021 and is working its way through the committee process. New Jersey employees already receive some protection from discrimination based on marijuana use, but Bill 3525 would prohibit testing as part of pre-employment screening, and prohibit discrimination against employees based on marijuana use with various exceptions, including, like the Maryland proposed legislation, employers who are required by federal law to test or to receive funding. Interestingly, this proposal allows New Jersey employers to hire a “Workplace Impairment Recognition Expert” to identify employees who show-up to work intoxicated from marijuana use. The legislation also permits employers to “remain free to use scientifically reliable testing services and to exercise [their] own judgment in making a good faith suspicion determination.” Bill 3525 can be viewed and tracked [here](#).

RHODE ISLAND HOUSE BILL 5021

Medical marijuana users in Rhode Island already receive some protection from discrimination. On January 13, 2021, members of the Rhode Island House of Representatives introduced Bill 5021, which seeks to prevent employers from using drug tests for medicinal marijuana use as a basis to “refuse to hire, discharge, or otherwise, discriminate” against medical marijuana cardholders. Employers who are federal contractors, or otherwise required to test by federal law, are allowed to continue using tests as a basis for taking adverse employment actions. The bill also explicitly allows adverse employment actions if an employee is impaired at work—or possesses marijuana on his/her employer's premises. Bill 5021 can be viewed and tracked [here](#).

TENNESSEE HOUSE BILL 1330

Currently before the Banking & Consumer Affairs Subcommittee, Bill 1330 seeks to prevent discrimination based on both medical and recreational use of marijuana when employees are off-the-clock. Bill 1330 excepts “safety sensitive” positions and federal requirements. If passed, the act would take effect on July 1, 2021. Bill 1330 can be viewed and tracked [here](#).

VIRGINIA HOUSE BILL 1862

Governor Northam of Virginia signed Bill 1862 into law on March 25, 2021. This new enactment will protect medical marijuana users from adverse employment action, but provides exceptions for employers’ compliance with federal law and funding requirements. Employers still can restrict possession on their premises, and prevent employees from working while under the influence. The law takes effect on July 1, 2021 and can be viewed [here](#).

As with most state employment law issues, the facts, circumstances, and specific jurisdiction will dictate how employers handle specific scenarios. Employers formulating their approach to marijuana use by employees should consult current resources to ensure compliance with the ever-changing state and federal marijuana law landscape.

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