

Insight

IN-DEPTH DISCUSSION

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Marijuana Legalization Efforts Enjoy Success, Demonstrating Major Shift in Approach to Drug Regulation and Use

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Election Day 2016 proved to be a historic occasion for initiatives favoring expanded access to marijuana. On November 8, California and Nevada joined West Coast early adopters Alaska, Oregon, and Washington in choosing to legalize marijuana for adult recreational use. On the East Coast, Massachusetts became the first state to legalize marijuana for adult recreational use. Whether Maine will join Massachusetts in approving recreational marijuana use in New England is yet undecided, as an initiative to legalize is currently too close to call with 91 percent of the vote counted, according to local press. Arizona voters, however, rejected an initiative to legalize marijuana sales for recreational purposes.

Election night also saw voters approve new laws expanding or permitting the lawful use of marijuana for medical purposes in Arkansas, Florida, Montana, and North Dakota.

Despite these efforts, marijuana remains a Schedule I drug under the federal Controlled Substances Act, which means that it is neither lawful to use or possess as a matter of federal law. And although none of these new legalization efforts aim to change state employment law, employers in the affected states will no doubt be faced with a chorus of questions about how the changes will affect enforcement of their workplace substance abuse policies.

Initiatives To Authorize Recreational Use of Marijuana

California (Proposition 64)

After a 20-year period permitting almost any adult to use marijuana for medical reasons, California voters cast ballots in favor of Proposition 64, legalizing the recreational use of marijuana by adults. Although California's medical marijuana initiative passed in 1996, voters had rejected efforts to legalize the drug for recreational use as recently as 2010. The new law allows adults 21 years and older to possess up to 28.5 grams of marijuana and 8 grams of concentrated marijuana, and to grow up to six marijuana plants at home in a locked area not visible from a public place.

The law also changes the name of the state's Bureau of Medical Cannabis Regulation to the Bureau of Marijuana Control, and the renamed agency will adopt regulations governing the cultivation and retail sale of marijuana throughout the Golden State. Advocates of the new legislation note that the new law will require regulated marijuana businesses to come into compliance with state water use and environmental regulations; marijuana "grow" operations notoriously consume large quantities of water and electric power.

The measure also creates two new taxes, levied on cultivation (\$9.25 per ounce of flowers and \$2.75 per ounce of leaves) and another on retail sale of marijuana products (15%). Revenues collected from the taxes will be placed into the California Marijuana Tax Fund. A majority of the Fund will be directed towards "job placement, mental health treatment, substance use disorder treatment, system navigation services, legal services to address barrier to reentry, and linkages to medical care for communities disproportionately affected by past federal and state drug policies." The remaining tax proceeds will go towards helping state and local law enforcement, medical marijuana research, youth substance abuse prevention, and environmental restoration, cleanup, and enforcement efforts. The new law also permits taxation of marijuana sales by local governments.

In an unusual step, the law allows the state to reconsider criminal penalties already imposed on residents for activities made lawful by Proposition 64. Individuals who are currently incarcerated based on convictions for now-legal marijuana-related misconduct are eligible for resentencing, provided the state determines the person does not pose a risk to public safety. California's courts may also re-designate or dismiss such offenses from the criminal records of persons who have completed their sentences.

The new law does not change existing laws that make it unlawful to operate a vehicle while impaired by marijuana, however, nor does it excuse any act that would be negligence or malpractice if conducted while under the influence of the drug.

Finally, the new law does not change employment law in California. Proposition 64 specifically states that it does not require employers "to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace," or limit employers' ability to "have policies prohibiting the use of marijuana by employees and prospective employees." Employers are also still free to prohibit or restrict any actions or conduct otherwise permitted under the new law on their privately owned property. The Proposition also specifically states that it does not prevent employers from complying with state or federal law.

Massachusetts (Question 4)

Massachusetts voters passed Question 4, legalizing possession up to one ounce of recreational marijuana outside of their residences, possession up to ten ounces of marijuana inside their residences, and cultivation of up to six marijuana plants in their residences. The measure creates a Cannabis Control Commission of three members appointed by the state Treasurer, which will generally administer the law governing marijuana use and distribution, promulgate regulations, and be responsible for the licensing of marijuana commercial establishments. The measure also creates a Cannabis Advisory Board charged with adopting regulations governing licensing qualifications, security, record-keeping, health and safety standards, packaging and labeling, testing, required inspections, and such other matters as the Commission considers appropriate.

The proceeds of retail sales of marijuana and marijuana products will be subject to the state sales tax and an additional excise tax of 3.75%. Localities in Massachusetts may impose a separate tax of up to 2%. Revenue received from the additional state excise tax, license application fees, and civil penalties for violations of this measure will be deposited in a Marijuana Regulation Fund.

The measure does not require employers to permit or accommodate conduct otherwise allowed by the measure in the workplace, and does not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees.

Nevada (Question 2)

Nevada voters passed Question 2, legalizing the possession and use up to an ounce of marijuana by adults aged 21 or older. Pursuant to the new law, Nevada will establish a regulatory framework on the sale of marijuana and impose a 15% excise tax on all marijuana products, with the tax revenue going towards supporting K-12 education. Individuals who do not live within 25 miles of a retail facility selling marijuana store will be permitted to grow up to six marijuana plants on their own property. The Nevada Department of Taxation will oversee the licensing of marijuana retail stores, and marijuana cultivation, manufacturing, and testing. For the next 18 months, only businesses that currently are certified to provide medical marijuana to Nevada residents will be eligible to apply for licenses to sell marijuana on a retail basis, or to operate cultivation and production facilities.

Nevada's measure does not prohibit either public or private employers from maintaining, enacting, and enforcing workplace policies prohibiting or restricting actions or conduct otherwise permitted under the measure.

Maine (Question 1)

The morning following the election, the outcome was too close to call on Maine's "Question 1", an initiative to legalize, regulate, and tax marijuana in Maine as an agricultural product. (According to Ballotpedia, proponents of the new law outspent opponents by a factor of nearly 14 to 1.) The measure would allow individuals over the age of 21 to possess, use, or transport up to 2.5 ounces of marijuana and to grow up to six mature or twelve immature marijuana plants. The measure also provides for the licensure of retail facilities and marijuana social clubs. If the initiative is enacted, the Maine Department of Agriculture, Conservation and Forestry will regulate the cultivation and sale of marijuana in Maine, which will be taxed at the relatively low rate of 10 percent. Ninety-eight percent of the sales taxes collected would be deposited in the general fund, while 2 percent would be distributed to cities and towns through the Local Government Fund.

The measure does not require an employer to permit or accommodate the possession or use of marijuana in the workplace and does not affect the ability of employers to enact and enforce workplace policies restricting the use of marijuana by employees or to discipline employees who are under the influence of marijuana in the workplace. Many Maine employers are already limited in their ability to enforce drug-free workplace policies, however, as the state has one of the nation's most restrictive drug-testing laws and a medical marijuana statute that prohibits employers from refusing to employ or otherwise penalize a person solely for that person's status as a qualifying medical marijuana patient unless failing to do so would put the employer in violation of federal law or cause it to lose a federal contract or funding. Employers may prohibit the use of marijuana on the employer's premises (even if used for medical purposes) if the employer prohibits all smoking on the premises and posts notices to that effect. Employers are not required to accommodate the ingestion of marijuana in any workplace or any employee working while under the influence of marijuana.

Arizona (Proposition 205)

Arizona voters rejected Proposition 20, which would have allowed adults over 21 to buy and possess up to an ounce of marijuana, and to grow up to six plants at home. Advocates intended the state to create a new government agency to regulate recreational marijuana cultivation, manufacturing, testing, transportation, and sale, and to impose a 15% tax on the proceeds from marijuana (and marijuana product) sales.

The failure of Proposition 205 does not affect Arizona's existing medical marijuana law, adopted some years ago, which does contain certain protections for workers who use marijuana for medical reasons. Driving while impaired by marijuana remains illegal, as is performing any task while impaired that would constitute negligence (or malpractice) and providing marijuana to individuals under the age of 21.

Medical Marijuana

Arkansas (Issue 6)

Arkansas voters were set to consider both a state constitutional amendment to legalize physician-certified medical marijuana (Issue 6), and a proposed act to implement that directive (Issue 7). On October 27, however, a divided Arkansas Supreme Court disqualified Issue 7 from appearing on the ballot on the ground that its supporters failed to gather enough signatures. Issue 6 remained on the ballot, and voters voted to pass the amendment, setting the stage for the creation of a medical marijuana program.

The constitutional amendment approved the establishment of a system for the cultivation, acquisition, and distribution of marijuana for qualifying patients through licensed medical marijuana dispensaries and cultivation facilities, and granted those dispensaries and facilities limited immunity. Qualifying patients, as well as dispensary and cultivation facility agents, will not be subject to criminal or civil penalties or other forms of discrimination under state law for engaging in or assisting with the patients' medical use of marijuana.

The amendment specifically states that “[a]n employer shall not discriminate against an individual in hiring, termination, or any term or condition of employment, or otherwise penalize an individual, based upon the individual's past or present status as a qualifying patient or designated caregiver.” However, it also makes

clear that an employer is not required to accommodate the ingestion of marijuana in a workplace or to tolerate an employee working while under the influence of marijuana.

Florida (Amendment 2)

Florida enacted Amendment 2, a provision permitting marijuana to be used as a treatment for patients with a diagnosis of cancer, epilepsy, glaucoma, HIV, AIDS, post-traumatic stress disorder, amyotrophic lateral sclerosis, Crohn's disease, Parkinson's disease, and multiple sclerosis. In addition, licensed physicians will be permitted to certify patients to use medical marijuana if they are diagnosed with some "other debilitating medical conditions of the same kind or class as or comparable to those enumerated." The law expands Florida's current medical marijuana law, passed in 2014, which permits the use of non-smoked, low-THC (the psychoactive ingredient that causes a "high") marijuana for qualified residents. Amendment 2 does not immunize individuals from prosecution for violations of federal law or protect the non-medical use, possession, or production of marijuana by any person. The provision specifically states that employers need not accommodate any on-site medical use of marijuana; it is silent as to whether employers can otherwise enforce neutral drug-free workplace policies against medical marijuana users.

Montana (I-182)

Montana voters have expanded their current medical marijuana law by enacting an initiative allowing a single treating physician to certify medical marijuana for a patient diagnosed with debilitating medical conditions, including chronic pain and post-traumatic stress disorder. The new law eliminates the current limit of three patients for each licensed provider, allows providers to hire employees to cultivate, dispense, and transport medical marijuana, and repeals the requirement that physicians who provide certifications for 25 or more patients annually be referred to the board of medical examiners.

Montana's law does not require employers to accommodate the use of marijuana by a registered cardholder. Employers are also not prohibited from including in any employment contract a provision prohibiting the use of marijuana; no cause of action for wrongful discharge or discrimination is created by an employer's failure to accommodate or tolerate medical marijuana use.

North Dakota (Measure 5)

North Dakota voters have passed Measure 5, adding a new chapter to North Dakota law providing for the medical use of marijuana for defined debilitating medical conditions, including cancer, AIDS, hepatitis C, ALS, glaucoma, and epilepsy. The Act creates procedures for monitoring, inventorying, dispensing, and cultivation of marijuana to be regulated and enforced by the Department of Health. A qualified patient may be dispensed up to three ounces of usable marijuana.

Participation in the medical marijuana program does not relieve the qualified patient or primary caregiver from the possibility of being penalized for possessing, distributing, or transferring marijuana or using marijuana in the workplace.

What Now for Employers?

Marijuana remains a Schedule I drug under the federal Controlled Substances Act; nevertheless, it is likely that many workers will assume that state legalization renders workplace policies against such use ineffective. As such, employers should clearly communicate their position – and perhaps to update their policies – to workers to ensure understanding. Employers with drug-free workplace policies should consider the following:

- **Make clear that as marijuana is still illegal under federal law, it is considered an illegal drug under the drug-free workplace policy.** If an employer wishes to (or is required to) stand by its current drug-free workplace policy, ensure that it is clear to workers that the use of marijuana is a policy violation, and that the employer reserves the right to take adverse action based upon such use.
- **Consider risks of negligence actions and safety concerns that may be caused by employee marijuana use, and take steps to minimize those risks.** None of the states that have legalized marijuana have eliminated the risk that an employer could be found responsible for the actions of an employee who operates a vehicle with marijuana in his or her system, or who causes harm to co-workers or third parties while impaired.
- **Have discussions with vendors regarding testing protocols and how positive marijuana tests will be handled and reported where medical marijuana is approved.** In the event of a positive marijuana test, medical review officers should be instructed to have a discussion with an employee regarding whether he or she has a state-issued medical marijuana identification card, so that the employer can consider how to respond in states where employee protections exist.