

Montana Will Protect Off-Duty Use of Marijuana Next Year

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Montana Governor Greg Gianforte signed legislation on May 18, 2021 that will provide protections for off-duty use of marijuana starting on January 1, 2022.

Montana citizens voted to legalize recreational marijuana in November 2020. The ballot initiative did not provide employment-related protections and focused on employer restrictions of *on-duty* use of the drug. The newly-signed recreational marijuana law still permits employers to take action based on the use of marijuana while working. Specifically, the law does not:

- Require employers to permit or accommodate recreational marijuana use (or other conduct permitted by the recreational marijuana law) in any workplace or on the employer's property;
- Prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while intoxicated by marijuana or marijuana products;
- Prevent an employer from declining to hire, discharging, disciplining, or otherwise taking adverse employment against an individual because of the individual's violation of a workplace drug policy or intoxication by marijuana or marijuana products while working;
- Prohibit an employer from including in any contract a provision prohibiting the use of marijuana for a debilitating medical condition; or
- Permit a cause of action against an employer under the State's wrongful discharge or freedom from discrimination law.

However, employers should take note that the new bill also amended the lawful off-duty conduct statute. As revised, marijuana will be considered a "lawful product" under the law and employers may not refuse to hire or discriminate against an individual with respect to compensation, promotion, or the terms, conditions or privileges of employment because the individually legally uses marijuana off the employer's premises during nonworking hours.

Notwithstanding the above restrictions, an employer *can* take action based on off-duty marijuana use if:

- The use of marijuana affects in any manner an individual's ability to perform job-related employment responsibilities or the safety of other employees;
- The use of marijuana conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment;
- An individual has a professional services contract with an employer (on a personal basis) and the unique nature of the services provided authorizes the employer, as part of the service contract, to limit the use of certain products;
- The employer is a nonprofit organization that, as one of its primary purposes or objectives discourages the use of marijuana by the general public; or
- The employer acts based on the belief that its actions are permissible under an established substance abuse or alcohol program or policy, professional contract, or collective bargaining agreement.

For employers with drug testing programs, it may be difficult to take adverse employment actions for positive marijuana test results, particularly for pre-employment and random drug tests. In addition, the law does not define "intoxication." Moreover, Montana has a restrictive drug testing statute that limits the categories of employees who can be subjected to employer drug testing in the first place.

Montana employers are encouraged to review their policies regarding marijuana and drug testing before the law takes effect on January 1, 2022.

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