

New Hawaii Medical Marijuana Law Bars Use in Workplace; Zero Tolerance Policies Still Enforceable

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Closing a gap in Hawaii's medical marijuana law, a new law sets up a regime of vertically integrated grow facilities and retail dispensing licenses for the delivery of medical marijuana to "cardholders" in Hawaii. The stated intent of the new law, signed by Governor David Ige on July 14, 2015, is to ensure a commercialized system for the delivery of marijuana to "seriously ill" individuals in Hawaii.

The new law amends an existing 15-year-old law that allowed the use of medical marijuana, but provided no legal way to obtain the drug. The new retail dispensing provisions close that gap in Hawaii's law.

The new law, however, did not modify existing Hawaii law on workplace use of marijuana, continuing to recognize the right of employers to maintain "zero tolerance" policies regarding drug use. It expressly states that "the authorization for the medical use of marijuana shall not apply to the medical use of marijuana in the workplace of one's employment." Further, even in its medicinal form, marijuana remains a Schedule I drug (similar to heroin) under both Hawaii and federal law — meaning, by law, "no currently accepted medical use and a high potential for abuse."

The active ingredient of marijuana is fat soluble and it tends to show up on drug tests for a considerable number of days following consumption. Depending on the frequency of use, marijuana can be detected in urine for a period of between a week and a month after consumption. Thus, some Hawaii attorneys representing employees have argued that simply having marijuana metabolites detected during a drug test does not indicate "use" in the workplace. To date, neither the Hawaii Civil Rights Commission nor an appellate court in Hawaii has decided the issue. Thus, while it is an almost universal practice of Hawaii employers to consider a positive marijuana drug test result as a disallowed "use" in the workplace, the issue remains open. Further, the Hawaii courts have not provided any guidance as to whether an employer must allow the use of a Schedule I drug as part of a reasonable accommodation of an employee's underlying medical condition (i.e., disability). Accordingly, employers should consult with employment counsel to analyze each case of employee marijuana use on an individual basis.

National Law Review, Volume V, Number 206

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