

No Changes for Ohio Employers under the State's New Medical Marijuana Law

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Ohio's new medical marijuana law went into effect on September 8, 2016. Ohio became the 26th state, plus the District of Columbia, to legalize marijuana for medical or recreational use. And as several other states are set to vote on legalizing marijuana to varying degrees in the November elections, this remains an issue for employers to watch. But at least for employers operating in Ohio, nothing will change as a result of the state's new law.

In Ohio, individuals with certain "qualifying medical conditions" will be able to legally use medical marijuana.^[1] There are currently 21 qualifying medical conditions included in the law, such as cancer, epilepsy, AIDS, PTSD, fibromyalgia, inflammatory bowel disease, spinal cord disease or injury, and pain that is either chronic and severe or intractable. Patients must receive a "recommendation" (not a prescription) from a physician in order to obtain medical marijuana.

The new law expressly addresses employment issues, resolving each of these issues clearly in favor of employers. Specifically, in Ohio:

- Employers are not required to permit or accommodate an employee's use, possession, or distribution of medical marijuana;
- Employers are permitted to terminate or discipline an employee or refuse to hire an applicant based on the use, possession, or distribution of medical marijuana;
- Employers are permitted to establish and enforce a drug testing policy, a drug-free workplace policy, or zero-tolerance drug policy;
- Employers may obtain workers' compensation premium discounts or rebates for participating in the drug-free workplace program established by the Ohio Bureau of Workers' Compensation;
- Employers have "just cause," for purposes of unemployment compensation, to terminate an employee for use of medical marijuana in violation of the employer's drug-free workplace policy, zero-tolerance policy, or other applicable policy; and
- An employee is not entitled to receive workers' compensation benefits if the employee was under the influence of marijuana at the time of injury and the use of marijuana was the proximate cause of that injury.

In addition, the law offers protection to Ohio employers from a broad range of potential lawsuits that might otherwise be filed by employees who use medical marijuana under the new law and then suffer adverse employment actions as a result. The law states that it does not permit a person to sue an employer for refusing to hire, terminating, disciplining, discriminating, retaliating, “or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment related to medical marijuana.”

In short, Ohio employers are not required to make any changes as a result of the new law. Employers operating in the state may continue to require testing as required by their policies and may discipline or discharge for policy violations, even where an employee uses medical marijuana pursuant to the law. Employers may not, however, make employment decisions or take actions against an employee or applicant based on the individual’s underlying medical condition. Actions based on the underlying medical condition may violate the Americans with Disabilities Act or corresponding state law.

Review your policies. With the increasing number of states legalizing marijuana in some form, employers should review their drug policies to ensure that these policies are consistent with the applicable state laws. In Ohio, for example, an employer’s drug policies should be clear that drug use will not be tolerated in the workplace and that disciplinary action will be taken for policy violations, even if the violation is based on marijuana use and the marijuana was used off-duty and recommended by a doctor. Significantly, however, in Arizona and Delaware patients who use medical marijuana do receive certain employment protections under state law. For example, employers in Delaware are prohibited from discriminating against a “registered qualifying patient” based on a positive drug test for marijuana unless the patient used, possessed, or was impaired by marijuana on the employment premises or during employment hours. It is important for employers to ensure that their policies comply with all applicable laws and for employers to review their policies periodically to ensure compliance as this area of law continues to evolve.

[1] It may take another two years before the regulations implementing the new law are actually written and go into effect and before the infrastructure is in place to register, grow, test, and sell medical marijuana in the state. In the meantime, individuals with these qualifying medical conditions may be

able to obtain medical marijuana from other sources – such as in Michigan, where medical marijuana is already legal – and bring it back to the state.

These patients have an “affirmative defense” under the new law against a drug charge if they have a doctor’s recommendation and meet other

requirements under the law.

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