

## Seven States Pass New Marijuana Laws on Election Day

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Election Day 2016 saw voters approve new marijuana laws in seven states. There are now a total of 28 states (plus the District of Columbia) with medical marijuana laws and 8 states (plus the District of Columbia) with recreational marijuana laws. Arizona's proposed recreational marijuana law did *not* pass.

### Medical Marijuana

1. **Arkansas** – The Arkansas Medical Cannabis Act *passed* (approximately 53% “Yes” and 47% “No”). The law amends the state constitution and took effect November 9, 2016. However, the Department of Health has until March 9, 2017, to adopt rules governing certain aspects of the law, including rules on marijuana testing standards, dispensaries and cultivation facilities, and the manner in which it considers applications for and renewals of registry identification cards.

The law allows the medical use of marijuana by patients who suffer from qualifying medical conditions. It does not permit a qualifying patient to be “denied any right or privilege, including but not limited to a civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for medical use of cannabis in accordance with [the law].”

In addition, “[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.” However, the law does not require an employer to accommodate the use of marijuana in the workplace or to permit an employee to work while under the influence of marijuana. It also prohibits undertaking any task while under the influence of marijuana “when doing so would constitute negligence or professional malpractice,” and further prohibits the operation of a vehicle while under the influence of marijuana.

2. **Florida** – The Florida Medical Marijuana Legislation Initiative *passed* (approximately 71% “Yes” and 29% “No”). The law goes into effect on January 3, 2017. Regulations will be implemented no later than July 3, 2017, and the Department of Health is required to begin issuing identification cards no later than October 3, 2017.

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The constitutional amendment provides that individuals with certain debilitating medical conditions may use marijuana as prescribed by a physician. It does not require employers to permit the use of marijuana in the workplace, and it prohibits the operation of a vehicle while under the influence of marijuana.

**3. North Dakota** – The North Dakota Compassionate Care Act *passed* (approximately 64% “Yes” and 36% “No”). The law goes into effect on December 8, 2016. According to a report filed with the North Dakota Secretary of State by the North Dakota Department of Health, the Department of Health does not have the necessary funding to implement the law. The report noted that a similar law had taken another state 18 months to implement.

The law permits marijuana use by patients with debilitating medical conditions. It states that medical marijuana users are not relieved from criminal prosecution or civil penalty for possession, use, distribution, or transfer of marijuana in the workplace. In addition, medical marijuana users are not relieved from liability for damages or criminal prosecution arising out of the operation of a vehicle while under the influence of marijuana.

## Recreational Marijuana

**1. California** – California’s Proposition 64, the Adult Use of Marijuana Act, *passed* (approximately 56% “Yes” and 44% “No”). The Bureau of Marijuana Control has until January 1, 2018, to begin issuing dispensary licenses. Thus, at present, recreational marijuana cannot be purchased in California.

The law legalizes the non-medical use and possession of up to one ounce of marijuana, up to 6 marijuana plants, and up to 8 grams of concentrated marijuana products for those 21 and older.

The law states that it does not alter or amend the rights and obligations of public and private employers to maintain drug- and alcohol-free workplaces and to have policies prohibiting the use of marijuana by employee and applicants. It further does not require employers to permit or accommodate the use of marijuana in the workplace, or prevent employers from complying with state or federal law. Smoking or ingesting marijuana is prohibited in public or while driving or riding in a vehicle.

The law also requires the Division of Occupational Safety and Health to convene an advisory committee by March 1, 2018, to evaluate whether there is a need for industry-specific regulations, such as on exposure to second-hand marijuana smoke by employees or other work-related risks. By October 1, 2018, the committee will decide whether industry-specific regulations are necessary.

**2. Maine** – Maine’s Marijuana Legalization Act *passed* (just over 50% “Yes”). The law goes into effect 30 days after the Governor announces the result (which must be done within 10 days of the determination of the vote). The state licensing authority must adopt rules implementing the law within 9 months of the effective date, and must start accepting applications within 30 days after the rules are implemented.

The law permits individuals 21 and older to use and possess up to 2.5 ounces of marijuana and accessories and to cultivate plants in the home, among other things.

The law states that it does not require employers to permit or accommodate the use, consumption, possession, trade, display, transportation, sale, or growing of marijuana in the workplace. In addition,

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the law will not affect an employer's ability 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. Despite that language, however, the law prohibits employers from refusing to employ a person solely because that person consumed marijuana outside the employer's property.

### 3. **Massachusetts** – Massachusetts' The Regulation and Taxation of Marijuana

Act *passed* (approximately 54% "Yes" and 46% "No"). The law goes into effect on December 15, 2016. The Cannabis Control Commission is required to adopt initial regulations no later than September 15, 2017, and it must implement regulations no later than January 1, 2018. Medical marijuana treatment centers may begin selling recreational marijuana on January 1, 2018, if the Commission fails to promulgate the necessary regulations by that date.

The law permits individuals 21 and older to use or possess up to 1 ounce of marijuana, keep up to 10 ounces of marijuana at home, and to cultivate up to 6 marijuana plants.

It does not require an employer to permit or accommodate conduct allowed by the law and does not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees. The law also does not amend existing penalties for the operation of a vehicle or machinery while impaired by marijuana or marijuana products or for performing a task while impaired by marijuana that would constitute negligence or professional malpractice.

### 4. **Nevada** – Nevada's Regulation and Taxation of Marijuana Act passed (approximately 54% "Yes" and 46% "No"). The law is effective January 1, 2017. Nevada will begin receiving applications for marijuana establishments no later than January 1, 2018.

The law permits individuals 21 and older to use or possess up to 1 ounce of marijuana, and possess or cultivate up to 6 marijuana plants.

The law does not prohibit a public or private employer from maintaining, enacting, and enforcing a workplace policy prohibiting or restricting actions or conduct otherwise permitted under the law. Additionally, the law does not prevent the imposition of any civil or criminal penalty for operating a vehicle while impaired by marijuana or undertaking any task under the influence of marijuana that constitutes negligence or professional malpractice.

## **Implications**

Despite the proliferation of state marijuana laws, marijuana remains a Schedule I drug under the federal Controlled Substances Act. The drug's Schedule I status means it is illegal under federal law, regardless of state law to the contrary. While the federal government has taken a "hands off" position with regard to state marijuana laws under the Obama Administration, it is unclear what the federal government's position will be when President-elect Donald Trump takes office.

The fact that marijuana is illegal under federal law but legal under certain state laws, continues to challenge employers, especially those who operate in multiple states. In many states, the marijuana laws contain employer-friendly language permitting implementation of policies prohibiting marijuana and stating that employers need not accommodate marijuana use. However, in certain states, the medical marijuana laws contain language prohibiting employment discrimination against medical marijuana users (*i.e.*, Arkansas, Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, New York, Nevada, Pennsylvania, and Rhode Island). This means that there may be a potential risk of a state law claim (such as for disability discrimination) in these states by medical marijuana users who

are subjected to adverse employment actions for medical marijuana use.

Recreational marijuana use generally is easier for employers to address because employers still can prohibit its use in the workplace, just as employers may prohibit alcohol use in the workplace. Except for Maine's, none of the current recreational marijuana laws provide employment protections to employees. The difficult aspect of recreational use is that urine drug tests can detect marijuana use within the last few days, making it difficult to know exactly when it was used (and whether it was during work time). The Maine recreational use law does not permit employers to take adverse action when the marijuana was used off-site. This language will make it difficult for employers in Maine to enforce their drug testing policies. The best practice for employers who drug test in other states is to state clearly in a written testing policy that illegal drugs include marijuana and that positive drug test results caused by recreational use will lead to disciplinary action.

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