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Marihuana is legal under Michigan law. What does that mean for employers?

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On November 6, 2018, Michigan voters passed a referendum which will make the recreational use and possession of marihuana legal under Michigan law.[1] The law will take effect 10 days after the official election results are certified, which should occur sometime in early December 2018. The legalization of recreational use and possession of marihuana raises a number of practical and legal questions, but we will focus here on questions employers may have.

To answer the primary question employers have, the new law **does not** require employers to allow the use of marihuana by their employees. The new law does not create a “right” to use marihuana. It simply makes use and possession – within the strictures of the law – no longer illegal under Michigan law. In many practical ways, marihuana may now be similar to alcohol; a legal substance (under Michigan law) which is strictly regulated in the workplace by almost every employer.

The text of the proposal specifically states that employers are not required to:

Permit or accommodate conduct otherwise allowed by this Act in any workplace or on the employer’s property. This Act does not prohibit an employer from disciplining an employee for violation of the workplace drug policy or for working while under the influence of marihuana. This Act does not prevent an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person’s violation of the workplace drug policy or because that person was working while under the influence of marihuana.

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The new law will not require employers to continue to employ employees who violate company policies and drug testing protocols relating to marihuana use. There have been a few cases from states that have gone before Michigan in legalizing recreational use of marihuana and they have consistently held that employers retain their right to prohibit employees from using marihuana in the workplace and discipline or terminate for positive test results.

However, that is not the end of the story. There are still practical and legal issues. Employers need to give some thought to how they will handle the issue of legal marihuana use and they may need to change policies or adopt new policies as a result. For example, if your policy prohibits being under the influence of drugs, how will impairment be measured. Testing methods for marihuana have not necessarily caught up with the law, and unlike alcohol, there is no accepted standard for what constitutes impairment.

Also, it is important to remember that marihuana remains an illegal drug under Federal law and that under Federal law its possession and use are illegal. Companies (and employees) which operate under Federal drug testing requirements or other areas where Federal laws or regulations can impact employees (e.g. security clearances) need to be aware that those Federal requirements remain in place.

One notable example is Department of Transportation (DOT) regulated drivers. The DOT regulations set forth specific drug testing protocols for covered drivers which include marihuana as a prohibited substance. These Federal requirements remain in place. For any industry employing DOT regulated drivers, and other industries which are subject to specific federal compliance or testing regulations, those requirements still apply and must be complied with.

Also, the Drug Free Workplace Act applies to many businesses that do business with the Federal government. That Act requires government contractors to take steps to maintain a “drug free” workplace, including maintaining policies prohibiting illegal drug use by employees. The fact that the State of Michigan has made recreational use and possession of marihuana legal will not affect obligations under the Drug Free Workplace Act

For those employers that are free of additional Federal regulation, there may be more latitude in how recreational marijuana use is addressed. Employers may want to examine and update current policies to make clear to their employees what the employer’s expectations are.

For example, the Michigan law does make clear that smoking marihuana in public is prohibited and that individuals or entities can prohibit the use of marihuana on property they own, occupy or control. Employers may want to specifically ban smoking of marihuana in your facility and parking lots if you have not already done so.

Employers may wish to reiterate to their employees that just because possession is legal, possession of marihuana at work is not allowed.

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There is nothing which prohibits employers from giving alcohol and marihuana different treatments with regard to use at company functions or events, because alcohol use is not illegal, while marihuana possession and use remains illegal under Federal law.

Marihuana can now be legally consumed by smoking or through 'edibles' and both are legal under the new state law. It may be advisable to specifically ban edibles from the workplace in any form to avoid inadvertent ingestion.

Employers who learn that an individual has a medical marihuana card can be open to claims that the employee was "regarded" as having a protected disability. And if policies that implicate marihuana use are not consistently applied (as with all policies) employers can be subject to claims of discriminatory enforcement.

The list of practical issues to consider is long and unique to every employer. Each employer should identify those issues of importance to them, and be sure they are addressed clearly with employees and in company policies.

The takeaway for employers is that they are not required to allow marihuana use in the workplace. The principal issues revolve around companies making decisions as to how they wish to address this newly-legalized intoxicant and, if necessary, adapting or developing policies to communicate the employer's expectation to employees. Employers, particularly those in federally-regulated industries or who have federal contracts, should closely examine how marihuana use by their employees, even if legal under state law, could affect the company.

If you are interested in additional information or have additional questions as to how this new law affects your workplace, contact your Butzel Long Labor and Employment attorney.

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[1] The law uses the "h" spelling of marihuana rather than the more traditional "j" marijuana version.