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Labor and Employment Alert: Red State, Blue State, Green State -- Medical Marijuana Legalization Trend Continues

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CLIENT ALERT | 11.16.2016

Spanning the country and the political divide, Election Day 2016 witnessed eight of the nine marijuana-related ballot measures pass in various states. Arkansas, Florida, Montana, and North Dakota each “legalized” medical marijuana, while California, Maine, Massachusetts, and Nevada all “legalized” the recreational use of marijuana by adults 21 and older (Arizona’s ballot measure to do so failed). For updates on recreational marijuana laws, read this [Labor and Employment Alert](#). As of now, 28 states and the District of Columbia have enacted laws legalizing or decriminalizing medical marijuana. Marijuana use and possession remains illegal under federal law whether its use is for medicinal or recreational purposes. Below we highlight the key provisions of interest to employers in the new medical marijuana laws.

Arkansas

Approved by 53% of the voters, the Arkansas Medical Marijuana Amendment of 2016 amends the state’s constitution to legalize medical marijuana use for individuals with 17 qualifying medical conditions (as well as anything else the Arkansas Department of Health determines is an appropriate qualifying medical condition). It became effective November 9, 2016, but the Department of Health has 120 days in which to adopt rules implementing its provisions. The amendment specifically protects qualifying patients and caregivers from arrest, prosecution, or penalty or from being denied any right or privilege or from disciplinary action by a business, occupational or professional licensing board, or bureau when medical marijuana is used in accordance with the amendment’s requirements. A school or landlord may not refuse to enroll or lease or penalize an individual solely because of his or her status as a qualifying patient or caregiver, unless it would put the school or landlord in violation of federal law or regulations. Further, an employer is prohibited from discriminating against an individual in hiring, termination, or in any term or condition of employment or otherwise penalizing an individual based on his or her past or present status as a qualifying patient or caregiver.

At the same time, the amendment specifically does not require: (1) a government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana unless federal law requires reimbursement; (2) an employer to accommodate the ingestion of marijuana in a workplace or an employee working while under the influence of marijuana; (3) an individual or establishment in lawful possession of property to allow a guest, client, customer, or other visitor to use marijuana on or in that property; (4) an individual or establishment in lawful possession of property to admit a guest, client, customer, or other visitor who is inebriated as a result of his or her medical use of marijuana; or (5) a landlord to permit a qualifying patient to smoke marijuana on or in leased property, except that a landlord may not prohibit the medical use of marijuana through means other than smoking on leased property by a qualifying patient.

Florida

Approved by 71% of the voters, Amendment 2 to the Florida Constitution expands the state's current – but more limited – medical marijuana law by permitting the use of other forms of marijuana and adding additional debilitating conditions for which it may be used. Amendment 2 is effective January 3, 2017. It vests considerable authority in the Florida Department of Health to adopt rules concerning procedures for the registration of centers that produce and distribute medical marijuana including procedures for the issuance, renewal, suspension, and revocation of registration, and standards to ensure proper security, record keeping, testing, labeling, inspection, and safety.

Nothing in the amendment (1) affects laws relating to the non-medical use, possession, production, or sale of marijuana; (2) authorizes the use of medical marijuana by anyone other than a qualifying patient; (3) permits operating any vehicle, aircraft, train or boat while under the influence of marijuana; (4) requires the violation of federal law or purports to give immunity under federal law; (5) requires any health insurance provider or any government agency or authority to reimburse any person for expenses related to the medical use of marijuana; or (6) affects or repeal laws relating to negligence or professional malpractice on the part of a qualified patient, caregiver, or physician. With respect to accommodating the medical use of marijuana, the amendment specifically provides that it does not “require any accommodation of any on-site medical use of marijuana in any correctional institution or detention facility or place of education or employment, or of smoking medical marijuana in any public place.”

Montana

Approved by 57% of the votes, Montana's Initiative 182 amends the state's current – and limited – medical marijuana law. The primary provisions of the law go into effect on June 30, 2017. Previously, providers of medical marijuana were limited to three patients. Initiative 182 eliminates that limit; allows providers to hire employees to cultivate, dispense, and transport medical marijuana; and expands the conditions for which a physician may certify medical marijuana to include chronic pain and PTSD.

Initiative 182 retains the provisions that a registered cardholder is not permitted to use marijuana: (1) in a health care facility; (2) in a school or a postsecondary school; (3) on or in any property owned by a school district or a postsecondary school; (4) on or in any property leased by a school district or a postsecondary school when the property is being used for school-related purposes; (5) in a school bus or other form of public transportation; (6) when in a correctional facility or program; (7) if a court has imposed restrictions

on the cardholder's use; (8) a public park, public beach, public recreation center, or youth center; (9) in or on the property of any church, synagogue, or other place of worship; (10) in plain view of or in a place open to the general public; or (11) where exposure to the marijuana smoke significantly adversely affects the health, safety, or welfare of children. **The medical marijuana law** does not permit any person, including a registered cardholder, to operate, navigate, or be in actual physical control of a motor vehicle, aircraft, or motorboat while under the influence of marijuana.

Moreover, Initiative 182 **does not require** (1) a government medical assistance program, a group benefit plan, or an insurer to reimburse a person for costs associated with the use of marijuana by a registered cardholder; (2) an employer to accommodate the use of marijuana by a registered cardholder; (3) a school or postsecondary school to allow a registered cardholder to participate in extracurricular activities; or (4) a landlord to allow a tenant who is a registered cardholder, provider, or marijuana-infused products provider to cultivate or manufacture marijuana or to allow a registered cardholder to use marijuana. An employer is not prohibited from including in any contract a provision prohibiting the use of marijuana for a debilitating medical condition. Finally, the law does not permit a cause of action against an employer for wrongful discharge under state's wrongful discharge law or discrimination.

North Dakota

Approved by 63% of the voters, North Dakota's Measure 5 was an initiated state statute. The North Dakota Compassionate Care Act provides for the use of medical marijuana 11 serious medical conditions (as well as any other medical condition or treatment added by the North Dakota Department of Health). The act becomes effective on December 8, 2016. It also requires medical marijuana patients and their caregivers to carry identification cards and certificates of registration.

Under the act, participating in the medical marijuana program does not: (1) prevent criminal prosecution or civil penalties for activities not authorized by the Act; (2) prevent liability for damages or criminal prosecution arising out of the operation of a vehicle while under the influence of marijuana; or (3) prohibit criminal prosecution or civil penalty for possession, distribution, or transfers of marijuana or use of marijuana: in a school bus or public vehicle; on school grounds or property; in the workplace; at a public park, recreation center, youth center or other public place; to a person not approved by the Department of Health; outside North Dakota or for attempts to obtain or transport marijuana from outside North Dakota; or that exceeds the allotted amount of usable medical use marijuana.

Conclusion

As the November election results show, support for legalizing medical marijuana crosses party lines. But it remains to be seen what happens under the new presidential regime in 2017. For example, will the new president take a more active stance on enforcing the nation's drug laws or will we see a shift at the federal law toward legalizing marijuana? In the interim, employers with operations in Arkansas, Florida, Montana, or North Dakota should review their employment and drug-testing policies to ensure that they comply with these new laws.