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Employers Need to be Concerned About the Proposed Constitutional Amendment to Legalize Marijuana in Ohio

In November 2015, Ohio voters will determine whether to enshrine the use of recreational and medical marijuana in the Ohio Constitution. Sponsored by a group called ResponsibleOhio, the proposed constitutional amendment (which will be Issue 3 on the November ballot) would, among other things:

- Legalize marijuana for both recreational and medicinal use – although marijuana use, distribution and possession would remain illegal under federal law;
- Legalize the production of marijuana-infused products like edibles (such as candy infused with THC, marijuana's principle psychoactive ingredient);
- Endow exclusive rights for commercial marijuana growth, cultivation, and extraction to self-designated landowners who own 10 predetermined parcels of land; and
- Permit the retail sale of recreational marijuana at up to 1,100 locations throughout the state.

Regardless of the debate over whether marijuana should be legalized or whether it has medicinal value, employers need to understand Issue 3's implications for their operations should it pass.

At the outset, Issue 3 enshrines in the Ohio Constitution itself the right to use marijuana for recreational and medicinal use. The language of Issue 3 runs more than 6,500 words. Many of its provisions are ambiguous, and the parameters of this new "right" will be left to the courts to define. Because Issue 3 is a constitutional amendment, it will be very difficult for the General Assembly to later address employers' concerns through legislation, and Issue 3 expressly limits the ability to change its provisions by statute or administrative rule. This creates considerable uncertainty for employers and increases the risks of litigation. For example:

Will employers be required to accommodate employees' use of medical marijuana?

Issue 3 does not require employers to “permit or accommodate the use, consumption, possession, transfer, display, or transportation” of marijuana in the workplace. But Issue 3 does require employers (including schools and prisons) to permit employees with a medical marijuana certification to “self-administer the medical marijuana” like any other prescription medicine. And employees don't need to smoke marijuana, since it can be ingested in a marijuana-infused product like candy or brownies. At this point, it's unknown how this accommodation squares with the Americans with Disabilities Act, Department of Transportation regulations for motor carriers, OSHA's General Duty Clause, or the Drug Free Workplace Act requirements for federal contractors.

Can an employer terminate an employee who tests positive in a drug test for using marijuana off-duty?

In *Coats v. Dish Network*, the Colorado Supreme Court unanimously held that employers may still terminate employees who use medical marijuana – even though medical marijuana use is specifically authorized by the Colorado Constitution and even though Colorado law protects employees' lawful off-duty conduct. The Court held that marijuana use (whether for medicinal or recreational use) remains unlawful under federal law and so medical marijuana use cannot be deemed “lawful” under the state's off-duty conduct law. While this issue was ultimately decided in the employer's favor, the outcome was uncertain and took several years of expensive litigation. In *Casias v. Wal-Mart Stores*, the Sixth Circuit Court of Appeals held that Michigan's medical marijuana statute did not protect employees who use medical marijuana from termination under a drug-free workplace policy. It's unclear whether Ohio courts will interpret the constitutionally protected right to use marijuana in the same way.

Will employees who are terminated for marijuana use be entitled to unemployment compensation?

In *Braska v. Challenge Manufacturing*, a Michigan appellate court awarded unemployment compensation to a medical-marijuana using employee who was terminated after a positive drug test. Whether Ohio courts will interpret marijuana use under Issue 3 the same way is unknown.

Employers need predictable laws in order to plan for and manage their businesses. If Issue 3 is enacted, employers face an uncertain future in attempting to comply with their new obligations under a constitutional right to use marijuana while, at the same time, complying with their obligations under federal law. Contact your Vorys lawyer if you have questions about Issue 3 or marijuana legalization and its effect on your operations.