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Red State, Blue State, Green State: More States Legalize Marijuana on Election Day

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According to the latest Gallup Poll, 68% of Americans support legalizing marijuana. The November 2020 elections reflected this as recreational marijuana was “legalized” in Arizona, Montana, New Jersey and South Dakota, while medical marijuana was “legalized” in Mississippi and South Dakota. Now, 37 states and D.C. permit medical marijuana; 15 states permit recreational, or adult-use, marijuana. But marijuana use and possession remain illegal under federal law – although the House of Representatives passed the first-ever federal marijuana decriminalization bill on December 4, 2020 (which is unlikely to proceed through the Senate).

While each state’s marijuana law differs, they all contain protections for employers, which are outlined below (New Jersey’s provisions are detailed in a separate alert). At the same time, however, courts are increasingly called upon to weigh employers’ rights to control their workplace against employees’ rights to use marijuana in light of state civil rights, workers’ compensation, unemployment compensation, and lawful use statutes. A key issue, for example, involves accommodating medical marijuana users who test positive during a drug test. This area of the law continues to evolve, and employers need to be mindful of both statutory requirements and judicial interpretations. Contact your Vorys lawyer if you have questions about the effects of marijuana legalization in states in which you do business.

Arizona

The Smart and Safe Arizona Act permits the possession, use, and home-grow of marijuana by adults who are 21 and older. The law does not restrict the rights of employers to maintain a drug- and alcohol-free workplace or affect their ability to have workplace policies restricting the use of marijuana by employees or applicants. Nor does the law restrict the rights of employers to prohibit or regulate conduct otherwise permitted if it occurs on or in their property. Employers are not required to accommodate or allow the use, consumption, possession, transfer, display, transportation, sale, or cultivation of marijuana at work. Finally, the Act does not require an employer to violate federal law or

fail to implement a restriction relating to marijuana in the workplace if doing so would cause the employer to lose a benefit under federal law (for example, federal contractors must still maintain a drug-free workplace and the U.S. Department of Transportation (DOT) has a zero tolerance policy for marijuana use by DOT-covered employees).

Mississippi

An amendment to the Mississippi Constitution permits individuals with certain defined debilitating medical conditions to seek certification from a Mississippi-licensed physician to obtain medical marijuana. The amendment does not: permit a person to operate a vehicle while consuming or impaired by medical marijuana; require employers to accommodate the use of medical marijuana or require its on-site use at work; require any health insurance provider or government agency to reimburse a person for expenses associated with medical marijuana; affect any existing drug testing laws, regulations, or rules; or override any public or private rules related to smoking.

Montana

An amendment to the Montana Constitution permits the sale and possession of marijuana by adults who are 21 and older. The amendment does not: require an employer to permit or accommodate conduct not otherwise allowed in any workplace or its property; prohibit an employer from disciplining an employee for violating a workplace drug policy or working while intoxicated by marijuana; or prevent an employer from declining to hire, discharging, or disciplining an individual because he or she violated a workplace drug policy or was intoxicated by marijuana while working. Additionally, a person may generally prohibit or regulate the consumption, cultivation, distribution, processing, sale, or display of marijuana, marijuana-infused products, and marijuana paraphernalia on its property. Finally, marijuana use is not permitted if its use endangers others or would constitute negligence or professional malpractice.

South Dakota

South Dakota voters approved an initiated measure to legalize medical marijuana. A person is prohibited from undertaking any task under the influence of marijuana when doing so would constitute negligence or professional malpractice. Smoking marijuana in any public place is also prohibited.

A medical marijuana patient must be afforded all the same rights under state and local law as the person would be afforded if solely prescribed a pharmaceutical medication as to: any interaction with a person's employer; drug testing by a person's employer; or drug testing required by any state or local law, agency, or government official. This protection does not apply if it conflicts with an employer's obligations under federal law or would disqualify an employer from a benefit under federal law.

Employers are not required to allow the use of medical marijuana at work or allow an employee to work while under the influence of marijuana. However, a patient may not be considered to be under the influence solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.

South Dakota voters also adopted a constitutional amendment legalizing recreational use of marijuana for those 21 and older. The amendment does not permit: smoking marijuana where smoking tobacco is prohibited; consuming marijuana in a public place; or undertaking any task under the influence of marijuana if doing so would constitute negligence or professional malpractice. An employer is not required to permit or accommodate recreational marijuana use, possession, or consumption. Further, an employer retains the ability to restrict employees' marijuana use as well as the ability to prohibit or regulate conduct on or in its property.