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From Bluegrass to Green Grass: Kentucky Legalizes Medical Marijuana

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In March 2023, Kentucky became the 38th state to legalize medical marijuana. The Kentucky Cabinet for Health and Family Services will draft regulations to regulate the production and sale of medical marijuana. The medical marijuana program is expected to begin operations by January 2025. The law contains extensive protections for employers.

At the outset, employers are not required to permit or accommodate the use, consumption, transfer, display, transportation, distribution, sale, or growing of medical marijuana in the workplace. A person who owns, occupies, or controls property generally may prohibit those activities on or in that property. Employers also may include in contracts provisions that prohibit employees' medical marijuana use.

Employers remain free to implement policies promoting workplace health and safety by restricting the use of medical marijuana by employees or by restricting the use of equipment, machinery, or power tools by employees who use medical marijuana if the employer believes that such use poses an unreasonable safety risk.

Employers also may establish and enforce a drug testing policy, drug-free workplace, or zero-tolerance drug policy. Thus, employers may determine whether an individual who is a registered medical marijuana cardholder is impaired. Good faith determinations of impairment include behavioral assessments of impairment (commonly referred to as reasonable cause/reasonable suspicion testing) and a drug test for marijuana. However, a registered cardholder cannot be considered to be under the influence of marijuana solely because of the presence of marijuana metabolites. If the employer determines an employee is impaired after behavioral assessment and a positive drug test, then the burden of proving non-impairment shifts to the employee.

Kentucky's medical marijuana law expressly provides that it does not permit a cause of action against an employer for wrongful discharge or discrimination. Further, employees are ineligible for unemployment compensation benefits if they are discharged for consuming medical marijuana at work, for working while under the influence of medical

marijuana, or for testing positive for a controlled substance in violation of an employment contract or established personnel policy.

Because the medical marijuana program will not be operational until 2025, employers have time to review their substance abuse policies and determine how they want to treat medical marijuana in the workplace. Contact your Vorys lawyer if you have questions about drug testing in jurisdictions in which you operate.