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This information comes out of Ohio as they address legalization of marijuana on their ballots.

WHAT SHOULD EMPLOYERS BE ASKING ABOUT LEGALIZED MARIJUANA?

No CommentsUncategorized

(Fall 2015) If Issue 3 passes, Ohio will be the first state to legalize both medicinal and personal use of marijuana at the same time. The amendment language directly dealing with workplaces and employer responsibilities is very limited:

“Nothing in this section is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, or transportation of medical marijuana, marijuana, homegrown marijuana, marijuana-infused products or marijuana accessories in the workplace or to affect employers’ ability to restrict the use of such products by employees, except that a patient with a medical marijuana certification may self-administer the medical marijuana subject to the same conditions applied to administration of prescribed medications.” (Section J)

This is non-threatening, sounds clear and, therefore, one assumes there will be minimal impact on employers and their workplaces. Businesses will be able to restrict the personal use of marijuana. However, they will have to accommodate the use of medical marijuana.

Unfortunately, the ramifications are anything but simple or clear.

Whatever issues not addressed in the proposed Ohio amendment will be governed by other existing laws (federal, state, local) and/or cost money and time to be sorted out through legal interactions in and out of courtrooms. Conflicts and missing details are the case with Issue 3. For example, Issue 3 does not supersede the federal law which classifies marijuana as an illegal substance with, “no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse.” This is a root point to many workplace concerns.

Legalized marijuana will result in complications for employers in three categories:

1. Workforce readiness

2. Workplace operations
3. Legal consideration

1. Workforce Readiness

Ohio employers are complaining that it is difficult to find candidates who can pass pre-employment drug tests. Across the nation, marijuana is the number one drug for positive tests in the workplace. In states with legalized marijuana, the data demonstrates an exponentially higher rate of marijuana-positive tests (e.g., a 5% national average increase for positive marijuana tests compared to Colorado with a 20% increase and Washington with a 23% increase in marijuana positives).

Although we do not have definitive research to know exactly how long after smoking or otherwise ingesting marijuana an employee will experience compromising effects, we do know that common side effects of marijuana include: impaired eye/hand coordination, other visual issues (e.g., depth perception); judgement; balance and coordination; divided attention; slowed reaction time; and problems mentally and visually tracking subjects – all issues that prevent clear-mindedness.

It is important to note that the person who ingests marijuana will experience these effects whether it was consumed for

With legalization comes greater access, which will likely contribute to an overall less ready, available workforce in today's market. And what about the workforce of *tomorrow*, our youth? Data shows that [states with legalized marijuana have substantially higher youth use](#) than other states.

These are but a few of the workforce readiness concerns we need to think through as our state considers marijuana legalization.

2. Workplace Operations

Under the Occupational Health & Safety Act (OSHA), employers have a duty to provide a safe workplace. Additionally, the efforts to limit and insure against liability are substantial operating costs for employers. We implement safety programs and drug-free workplace programs. We establish policies to avoid discrimination, accommodate disabilities and discipline employees. We purchase commercial auto, fleet and liability insurance. We are accountable for workers' compensation and unemployment insurance. It is reasonable to expect that these costs will escalate because exposure increases with the availability and use of marijuana.

We now statistically know that in Colorado, where marijuana is legalized for personal and medical use, there have been increased rates of:

- driving-under-the-influence arrests and auto fatalities involving marijuana,
- marijuana-related emergency room visits, and

- adult arrestees testing positive for

Other studies have shown employees who tested positive for marijuana on pre-employment tests but were hired had more industrial accidents and injuries and are more absent as employees

How will corporate operational policies, e.g., drug testing, safety, discipline and social media, need to be adjusted?

Issue 3 requires an employer to accommodate the medical use of marijuana, although it permits the employer to restrict other employee use. This begs the question, “How easy will it be for an employee to qualify for a medical marijuana certificate and thereby permitted to consume at work?”

To qualify for the medical marijuana certification, a physician must verify the employee has one of the listed debilitating diseases or conditions. The list of conditions will be determined and updated by the Ohio Marijuana Control Commission, a board of seven, governor-appointed, Ohio residents consisting of “a licensed Ohio physician, a sworn Ohio law enforcement officer, a licensed Ohio attorney experienced in administrative law, and Ohio-based patient advocate, an Ohio resident with demonstrated experience in owning, developing, managing and operating business, an Ohio resident with demonstrated experience in the legal marijuana industry and a public member.”

The research about the viability of marijuana for use as medicine is very limited (most recently reviewed by the respected *Journal of American Medical Association*), so what qualifies these individuals to make such judgments?

By legalizing access to marijuana, which has been (and still is at the federal level) an illegal substance, Issue 3 raises some questions as it relates to employer operations. The cost to workplace operations and productivity can merely be glimpsed at this point but is certainly something we need to consider.

3. Legal Considerations

Legal considerations will be the crux of any gray area between legalized marijuana and employer objectives of workplace readiness and workplace operations. There are numerous unknowns, and history demonstrates that where there is a lack of clarity, a legal exchange or battle is the likely avenue to resolution. This trajectory will cost employers time and dollars.

For example, to defend and defeat a wrongful termination lawsuit, an employer can spend \$35,000-\$75,000 in legal fees alone for discovery and the attempt to keep the situation from going to trial. If it *does* go to trial, the employer can easily spend another \$75,000 to \$150,000. Then there's the appeal.

Let's focus on the single employer responsibility addressed in Issue 3; an employer is required to treat medical marijuana with "the same conditions applied to administration of prescription medications." But what exactly does this mean? This issue is filled with the lack of clarity we referenced above and, therefore, likely to result in a legal battle or exchange and determined in a court of law.

Marijuana is not a prescription medication. The established federal process has not deemed it medicine for quality assuring and vetting medicinal substances, nor do the risk management requirements and protections exist:

- Physicians cannot prescribe marijuana and pharmacies cannot sell it.
- There are no scientific guidelines for dosing or the administration of the substance.
- We lack scientific knowledge and guidelines about
 - how it could react with other drugs,
 - adverse reactions due to ingestion, and
 - functional limitations, g., driving, safety sensitive and security-sensitive job functions.

Employers can find themselves caught in a legal battle between an employee who feels justified, with some level of state-issued legal protection, to consume marijuana and federal law wherein no use is permitted. Additionally, without the risk management and protections provided under the prescription process, how is an employer to ensure the safety of coworkers or the public from an employee using medical marijuana?

Thinking ahead, here are just a few questions related to marijuana that will likely be subject to legal challenges:

- What does this mean for issues connected with the Americans with Disabilities Act?
- Will employers need to prove when an employee consumed marijuana that is found in his or her system?
- Will employers need to accommodate an employee's medical marijuana use with work activities that do not put coworkers or the public at risk?
- Do employers have to allow consumption of medical marijuana on the premises, or can they qualify how and where it can be consumed on their property?
- What effect will an employee's use have on coworkers and what obligations will an employer be subject to?
- How will employers manage safety issues connected to medical marijuana use on the job?
- What latitudes does Issue 3 open for employees and how might that impact workplace drug testing?
- Can an employee with a medical marijuana certification be tested?
- If marijuana stays in the system past the immediate time of ingestion, what latitude does an employer have when an employee has it in his or her system as a result from personal use off-the-job?
- How will the employer know if the employee is consuming more than whatever limits are established?
- How will insurance – workers' compensation, unemployment, liability, etc. be affected?

- If an employee has a public violation due to use, can the employer take adverse employment action?
- What other corporate policies, e.g., discipline, discrimination, time off, social media and scope of work, will intersect with an employee's use of marijuana?

As you see, the legal issues for employers are broad and reach far beyond medicinal use alone as the complications to workforce readiness and workplace operations are endless.

Ohio employers will be impacted greatly if Issue 3 passes. There are about 14 pages of the amendment's summary and full text. To really know what you are being asked to vote on, officially titled *Marijuana Legalization Amendment*, employers need to

- take the time to [read the actual amendment](#) and [ballot language](#), and
- contemplate the additional factors that govern the practical application of what the amendment states and how *your* business will be affected.