

Avoiding the **Weeds** In Complying with Arizona's Marijuana Laws

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Marijuana Laws in Other Jurisdictions

- In 1996, California became the first state to legalize medical use and sale of marijuana.
- In 2012, Colorado and Washington became the first states to legalize recreational marijuana.
- Now, 36 states and the District of Columbia have legalized marijuana for medical use.
- 15 states and the District of Columbia have legalized recreational marijuana.
- At the federal level, marijuana remains classified as a Schedule I substance under the Controlled Substances Act with no accepted medical use.

Arizona Has Legalized Recreational Marijuana

- Arizona voters passed Proposition 207 (a.k.a. the “Smart and Safe Arizona Act”) with 60% of the vote in November 2020.
- The law allows limited marijuana possession, use, and cultivation by adults 21 and older.
- It eases criminal penalties for marijuana possession but bans smoking marijuana in public places.
- The law imposes a 16% excise tax on marijuana sales to fund public programs and authorizes state and local regulation of marijuana licensees.
- It allows expungement of past marijuana offenses.

How Does Prop. 207 Affect Arizona Employers?

- Short Answer: Not very much!
- Employers may still take adverse employment actions based on a positive drug test or alcohol impairment test that indicates a violation of the employer's drug and alcohol policy, or on the employee's refusal to submit to a drug or alcohol test.
- Adverse employment actions can include:
 - A requirement that the employee enroll in a rehab program
 - Suspension of the employee, with or without pay
 - Termination of employment
 - In the case of drug testing, refusal to hire an applicant
 - Other adverse employment action

Does Prop. 207 Allow Marijuana At Work?

- Short answer: NO!
- The new law expressly provides that it:
 - Does not restrict the rights of employers to maintain a drug and alcohol free workplace or affect the ability of employers to have workplace policies restricting the use of marijuana by **employees or prospective employees**, and
 - Does not require an employer to allow or accommodate the use, consumption, possession, transfer, display, transportation, sale, or cultivation of marijuana in a place of employment.

Other Potential Implications of Prop. 207

- Legalizing adult use of recreational marijuana likely will result in more people using the drug.
- The new law may also create the misimpression among workers that marijuana will be tolerated by employers.
- We may see fewer Arizona medical marijuana cardholders because they are expensive and no longer necessary.

Arizona's Medical Marijuana Act

- Employers Beware: Prop. 207 does not alter employee protections under Arizona's Medical Marijuana Act!
- Arizona's medical marijuana statute is unique:
 - Employers may not discriminate against a person in hiring, termination, or other terms or conditions of employment based on the person's **status as a cardholder**.
 - Employers may not discriminate based on a cardholder's **positive drug test for marijuana** unless the cardholder used, possessed, or was impaired by marijuana at work or during working hours.
- As of January 2021, approximately 300,000 Arizonans are registered medicinal marijuana cardholders.

What the AMMA *Does* and *Does Not* Do:

- The Act does not require employers to allow the use of medical marijuana at work or to allow any employee to work while under the influence of marijuana.
- The Act does not limit an employer's ability to test an employee or applicant for possible impairment or for the use of illegal drugs.
- The Act does not prevent an employer from disciplining an employee based on the employee's refusal to submit to a drug test.
- The Act does limit, in certain cases, the actions an employer can take when an applicant or employee who holds a valid medical marijuana card tests positive for marijuana use.

A Hazy Maze for Employers

- The Act also contains language permitting employers to “penalize” employees – including cardholders – who are “impaired” while on the job.
- However, the Act itself does not define “impairment.”
- The Act also makes clear that a positive test alone provides no basis for disciplining an employee who is a medical marijuana cardholder unless the test shows that marijuana was present in the employee’s system in **a sufficient amount to show impairment.**



What is Impairment? Clarity Up in Smoke

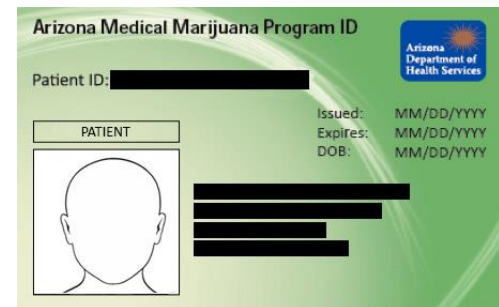
- How does an employer know if an employee is impaired?
- There are no “legal” levels for impairment of marijuana, unlike alcohol levels, which are stipulated in the DUI laws.
- Marijuana use is far harder for lay people to detect than alcohol use, especially with the widespread use of edibles.
- Urinalysis, the type of drug test most commonly used by employers, is largely ineffective in determining whether a marijuana user is impaired **at the time of the test**.
- Look for indications of marijuana impairment, such as dilated pupils, odor of marijuana, bloodshot eyes, sleepy appearance, reduced motivation, increased hunger, and difficulty thinking or concentrating.

Whitmire v. Wal-Mart Stores, Inc.

- No. 3:17-cv-08108 (D. Ariz. Feb. 7, 2018).
 - A federal district court judge granted *sua sponte* summary judgment in part for the employee on the question of Walmart’s liability for discrimination under the AMMA.
 - “Without any evidence that Plaintiff ‘used, possessed or was impaired by marijuana’ at work, ... it is clear that Defendant discriminated against Plaintiff in violation . . . of the AMMA by suspending and then terminating Plaintiff solely based on her positive drug screen.”
- Decision made clear: Employers cannot avoid liability under the AMMA by merely showing the employee tested positive because he or she had marijuana metabolites in their system, no matter how high the test result. Focus needs to be on signs that the employee is actually impaired at work.

AMMA Card Verification System

- Employers have a lawful means to confirm an employee's or applicant's card status through the system established by Arizona Department of Health Services.
- The verification system does not permit employers to search for employees to see if they are cardholders.
- Rather, the system is limited to the verification of a registry card provided to the employer by either a current employee or an applicant.
- The verification system is available at:
<https://www.azdhs.gov/licensing/medical-marijuana/index.php#id-verify-employers>



The Arizona Legislature's Response to AMMA

- In April 2011, the Arizona Legislature amended Arizona's twenty-year old drug testing statute (A.R.S. § 23-493, *et seq.*) by defining certain terms and adding protections for employers.
- The statute details specific requirements for what must be included in an employer's written policy.
- Although no penalty exists for not complying with the drug testing statute, the statute provides a "safe harbor" from certain civil lawsuits for employers who choose to comply.
- The constitutionality of the amended drug testing statute is currently being challenged because the AMMA was a voter-approved initiative.

Safety-Sensitive Positions



- The drug testing law also provides that an employer is protected from litigation based on actions to exclude an employee from performing a “safety-sensitive position.” See A.R.S. § 23-493.06(A)(7).
- This may include “reassigning the employee to another position or placing an employee on paid or unpaid leave.”
- An employer may base this exclusion on the employer’s “good faith belief that the employee is engaged in the current use of any drug, **whether legal, prescribed by a physician or otherwise**, if the drug could cause an impairment or otherwise decrease or lessen the employee’s job performance”
- Employers may look to a number of factors in evaluating the “effects” a drug may have, including drug or alcohol test results, warning labels, statements by the employee, information from a physician or pharmacist, information from reputable reference sources, or any other information the employer in good faith believes to be reliable.



Safety-Sensitive Positions



- Employers have latitude in designating positions as “safety-sensitive.”
- A safety-sensitive position is “any job designated by an employer” as such, or “any job that includes tasks or duties that the employer in good faith believes could affect the safety or health of the employee performing the task or others.”
- Examples include the operation of a motor vehicle, other vehicle, equipment, machinery or power tools; repairing, maintaining or monitoring certain equipment; performing duties in the residential or commercial premises of a customer, supplier or vendor; preparing or handling food or medicine; and working in any occupation regulated by Title 32 of the Arizona Revised Statutes, which includes Arizona’s regulated industries, such as the medical profession.

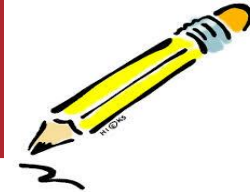


Proceed with Caution – Don't Be Test Case!

- Employers should keep in mind that under the terms of the Arizona Medical Marijuana Act, discrimination based on cardholder status in employment remains specifically prohibited and can be the basis for a private lawsuit.
- The constitutionality of the “safety sensitive position” exception and other protections under Arizona’s drug testing statute have not been determined.
- As with any employment policy, employers should ensure that all policies related to drugs, alcohol and testing are applied uniformly and in a non-discriminatory manner.



What Your Policy Should Include



- A statement of the employer's policy regarding drug and alcohol use.
- A description of those employees or prospective employees subject to testing.
- The circumstances under which testing may be required.
- A description of the testing methods and collection procedures.
- The consequences of a refusal to participate in the testing.
- Any adverse personnel action that may be taken based on the testing procedure or results.
- The right of an employee, on request, to obtain the written test results.
- The right of an employee, on request, to explain in a confidential setting, a positive test result.
- The employer's policy regarding the confidentiality of test results.
- See A.R.S. § 23-493.04 for other requirements and restrictions.

Steps to Avoid the Weeds

- Despite the fact that Proposition 207 does not dramatically alter an employer's obligations under Arizona law, its practical effects may dramatically alter the perception of marijuana use and employer restrictions in the workplace.
- Employers should revisit their policies and practices to ensure that they provide for both a practical approach and a safe workplace.
- Be sure that your company's policy complies with Arizona's Drug Testing statute.
- Make clear that while your company will not discriminate based on cardholder status, your company will take action against a cardholder if the employee uses marijuana on the job, possesses marijuana in the workplace, or is working while impaired by marijuana.

Steps to Avoid the Weeds

- Some Arizona employers have decided to stop testing for marijuana, or to not take adverse employment actions based on a positive test for marijuana.
- Employers should focus on signs that an employee is actually impaired while at work, including the individual's behavior or appearance.
- Managers and supervisors should be trained to recognize, sufficiently verbalize, and document signs of impairment.
- Although the “safety-sensitive positions” exception has yet to be tested in the courts, employers should classify qualifying positions as “safety-sensitive.”

What about the Americans with Disabilities Act?

- The ADA is clear that individuals currently engaging in the illegal use of drugs are not protected by the ADA. See 42 U.S.C. § 12114; 29 C.F.R. § 1630.3.
- Because federal – as opposed to state – law does not recognize the medical use of marijuana, arguably current use of marijuana, even if permitted under *state* law and prescribed by a physician, would still be considered illegal drug use under *federal* law.



How Could Prop. 207 Affect Immigration?

- Because marijuana is still illegal under federal law, there could still be consequences for noncitizen employees who use and possess marijuana in Arizona.
- A noncitizen who admits to an immigration official that he used or possessed marijuana could be found inadmissible, denied entry into the United States, or have his application for lawful status or naturalization denied.
- This could happen even if the conduct was permitted under state law, the noncitizen was never convicted of a crime, and the conduct took place in their own home.
- As a result, employers with foreign national employees should consider educating employees on the consequences of using or possessing marijuana even if it is legal in Arizona.

Questions?

