

The Implications of Legalized Marijuana in Ohio on Employers' Drug-Free Workplace Programs

by James B. Yates and Sarah E. Pawlicki

Proponents of legalized marijuana in Ohio are planning to place an amendment for legalized recreational marijuana on the November 2015 ballot. Although the petitions have not been approved yet by the Ohio Attorney General's office, the group ResponsibleOhio vows to have enough signatures by the July 1 deadline for the issue to be placed on the November ballot. A similar effort in 2014 failed to garner enough signatures by the deadline. The "Medical Marijuana and Personal Use Amendment" would legalize both medical marijuana and recreational marijuana for individuals over 21 years of age. The proposed Amendment also would provide for 10 sites in Ohio that would be authorized to grow marijuana. A 20% tax on marijuana sales is included in the Amendment. Currently, 23 states plus the District of Columbia have legalized medical marijuana. Alaska, Colorado, Oregon, Washington and Washington D.C. have legalized recreational marijuana as well. Marijuana continues to be classified as a Schedule I drug under the Federal Controlled Substances Act and, therefore, illegal under federal law; however, several proposals have been made to remove marijuana from the Schedule.

If ResponsibleOhio succeeds at obtaining an approved petition and collects enough signatures, will the initiative pass? Perhaps. A 2014 Quinnipiac University poll found 87% of Ohioans support the legalization of medical marijuana and 51% support the legalization of recreational marijuana.

So far, the passage of legalized medical and/or recreational marijuana in other states has not affected an employer's right to prohibit employees from reporting to work under the influence of marijuana. However, the law in this area is evolving rapidly as the courts interpret recently passed state laws. For example, a case pending before the Colorado Supreme Court is being watched closely by employers. In *Coats v. Dish Network*, Mr. Coats was discharged after a positive drug screen revealed his use of marijuana which was indisputably prescribed for medical reasons. Dish Network maintains a zero tolerance policy for drugs in the workplace. Colorado's law legalizing marijuana specifically states employers are not required to modify their drug-free workplace policies to accommodate employee drug use. Nonetheless, Mr. Coats is arguing his employer did not prove that he was "impaired" at work, despite testing positive, and therefore he could not have been lawfully fired under another Colorado statute prohibiting the termination of an

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employee for engaging in lawful activities outside of work. The Colorado Court of Appeals disagreed with Coats and upheld his termination. The Colorado Supreme Court heard oral arguments but has yet to issue a decision. Some states, such as Arizona, specifically prohibit employers from terminating employees for lawful marijuana use.

In *Casias v. Wal-Mart Stores, Inc.*, the Sixth Circuit Court of Appeals issued a decision interpreting Michigan's medical marijuana statute and held Michigan's statute does not prohibit an employer from terminating employees under an employer's drug-free workplace policy even if the employee is using marijuana pursuant to a lawfully-obtained prescription. The Sixth Circuit reasoned Michigan's statute did not apply to private employers. Recently, in *Braska v. Challenge Manufacturing Co.*, a Michigan state court of appeals found an employee terminated for violating an employer's drug testing policy was entitled to unemployment compensation. The court reasoned Michigan's medical marijuana statute restricted the government from penalizing lawful medical marijuana users and since unemployment compensation was a government benefit, the denial of that benefit was a prohibited act even though the termination of the employee by the private employer was lawful.

It remains to be seen whether Ohio will be added to the ever-growing list of states legalizing marijuana for medical or recreational use. In any event, now is a good time for Ohio employers to review and revise their drug testing policies and procedures to address the potential impact of legalized marijuana in the workplace.

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