

In This Issue:

November 2010

Voter turnout was just high enough to pass Proposition 203, the Arizona Medical Marijuana Act, prohibiting employers from discriminating against registered medical marijuana cardholders.

Yes We Can[nabis]!: Voters Approve the Arizona Medical Marijuana Act

By Neil Alexander and Kristy Peters

On November 2, 2010, Arizona voters approved the Arizona Medical Marijuana Initiative by a slim 50.13% to 49.87% margin. Under the proposed amendment, a qualifying patient with a debilitating medical condition is able to apply to the Arizona Department for Health Services for an identification card that allows the patient to obtain, or in certain cases cultivate, a limited amount of marijuana.

The proposed amendment also prohibits discrimination by employers against registered cardholders. Specifically, unless a failure to do so would cause an employer to lose a monetary or licensing-related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination, or imposing any term or condition of employment or otherwise penalize a person based upon either:

1. The person's status as a cardholder;
2. A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment.

Practical Questions and Answers for Employers

As a result of the Arizona Medical Marijuana Act, should we modify our employee handbook?

Yes. Employers should update their drug testing policies to comply with the Arizona Medical Marijuana Act by taking out any language stating that the employer will not hire or will automatically terminate an employee who tests positive for marijuana. The policy should create exceptions for registered cardholders under the Act. However, employers can maintain a policy prohibiting intoxication, use, or possession of marijuana in the workplace and may terminate an employee for violating this policy. Employers should also update their anti-discrimination policies to prohibit discrimination against employees or applicants based on their status as a cardholder.

If an applicant tests positive for marijuana on a pre-employment drug test, can we refuse to hire the applicant on that basis?

Generally, no. Employers cannot discriminate against applicants for marijuana use if the applicant is a registered cardholder. This means that if an applicant tests positive for marijuana on a drug test, the employer cannot, on that basis alone, automatically choose not to hire the applicant. Rather, the employer must engage in an interactive process with the applicant to determine whether the applicant is a registered cardholder. If the applicant is a registered cardholder, then the employer is generally prohibited from basing its hiring decision on the applicant’s use of marijuana outside of the workplace. A fact-specific analysis will be required to determine if usage outside the workplace would pose a safety risk. It is anticipated that, for the vast majority of jobs, employers will only be able to reaffirm that possession or use of, or impairment from, marijuana in the workplace will not be tolerated.

If a current employee tests positive for marijuana on a random drug test, can we automatically terminate the employee?

Generally, no. Employers are not permitted to discriminate against current employees based on their status as registered cardholders. If a current employee tests positive for marijuana, the employer must engage in an interactive process to determine whether the employee is a registered cardholder. If the employee is a registered cardholder and was not using marijuana or under the influence of marijuana on the job, then the employer cannot terminate or otherwise discipline the employee due to the positive drug test.

In other words, marijuana use will be treated the same as any other lawfully prescribed drug that may impair functioning at work. Employers should consider adopting policies requiring employees not to report to work impaired and to notify a supervisor when taking any off-duty medication (without specifically identifying the drug) that could pose a safety hazard or otherwise affect an employee’s ability to focus or concentrate at work.

Can we terminate an employee due to using or being under the influence of marijuana on the job?

Yes. Under the Act, employers can prohibit the use of marijuana in the workplace and can discipline employees who are under the influence of marijuana in the workplace. Because employers are currently unable to accurately medically test impairment due to marijuana, it may be difficult to tell if an employee is under the influence at work. The employer should document any signs that suggest the employee is under the influence of marijuana at work, such as bloodshot eyes, slow reactions and impaired judgment. Factual investigations may result in admissions or eye witness testimony confirming use, possession or impairment at work.

.....
Neil Alexander is a Shareholder, and Kristy Peters is an Associate, in Littler Mendelson’s Phoenix office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Alexander at nalexander@littler.com, or Ms. Peters at kpeters@littler.com.