



Recreational Marijuana & the Workplace



Wednesday, February 17, 2021

By Laura J. Hamblin

Attorney & Human Resources Consultant



AGENDA

- ✱ AZ Recreational Marijuana Law
- ✱ AZ Medical Marijuana Law
- ✱ AZ Drug Testing Law
- ✱ HR Practices to Address Drug Use



Necessary Disclaimer:
Information that will be shared in today's presentation is for informational purposes only and does not constitute legal advice. Attending this presentation does not create an attorney-client relationship.



Proposition 207--“Smart & Safe Arizona Act”

- ✱ Passed by Arizona Voters in November 2020.
- ✱ What the Law Allows...
 - ✱ Adults 21 Years of Age + may *“use, possess, or transfer up to 1 ounce of marijuana and cultivate for personal use not more than 6 marijuana plants at a primary residence.”*
 - ✱ Focus is on the Responsible Adult Use of Marijuana.
 - ✱ A.R.S. §§ 36-2850 through 36-2865



What the Law Doesn't Do...

- ✱ 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.”*
- ✱ It 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.”*



More of What the Law Doesn't Allow...

- ✦ It DOES NOT allow *“driving, flying or boating while impaired even to the slightest degree.”*
- ✦ It DOES NOT allow passengers in motor vehicles, boats or aircraft to consume marijuana.
- ✦ It DOES NOT allow people to smoke marijuana in a public place or open space.
- ✦ It DOES NOT restrict employers, companies, or private entities from regulating conduct on their property that is allowed under the law.



Medical Marijuana Law Remains in Place

A.R.S. §36-2801, et seq.

- ✦ Medical Marijuana Cardholders are still protected.
- ✦ Employers MAY NOT discriminate against a cardholder in hiring, termination or other condition of employment because of:
 - ✦ Their status as a cardholder, or
 - ✦ A positive drug test for marijuana.
- ✦ Cardholders still cannot use, possess or be impaired by marijuana on the employer's premises or during hours of employment.



What's an Employer to Do?

- ✦ **Communicate expectations for a Drug-and-Alcohol-Free Workplace to Employees.**
- ✦ **Have a Written Policy---**
 - ✦ **State what you prohibit (no use, possession, impairment, etc.).**
 - ✦ **Include illegal drugs, drugs not taken as prescribed, alcohol and marijuana.**
 - ✦ **Be aware that you may need to accommodate prescription drug use if employees can perform essential job functions.**
 - ✦ **Include possible consequences for violating the policy.**



Should Employers Start Drug Testing?

- ✦ **If you're not drug testing now, this new law is probably not a reason to start.**
 - ✦ **Marijuana is detectable in urine for 3 to 30 days.**
 - ✦ **Positive test doesn't necessarily mean impairment, unless there are other behavioral indicators.**
 - ✦ **Positive test shows that they engaged in the legal consumption of marijuana at some time in the recent past.**
 - ✦ **You might lose good employees or applicants.**
 - ✦ **Many employers in states with recreational marijuana removed marijuana from their testing panels.**



Employers that Drug Test

- ✱ If marijuana will be included in testing,
 - ✱ Determine consequences for positive marijuana tests-- must be uniformly applied—can't fire some and keep others.
 - ✱ Medical Marijuana Cardholders—can't fire or not hire only based on a positive marijuana test (but you can if they're recreational marijuana users without medical marijuana cards).
- ✱ Communicate to the workforce your strict drug/alcohol-free workplace policy—any positive result, without a valid prescription, is grounds to fire or not hire.
- ✱ Written policy is important for employers who test.



Policies and Arizona Drug Testing Statute

A.R.S. § 23-493

- ✱ Employers are permitted to drug test in Arizona.
- ✱ If the employer has a detailed policy that meets the requirements of the law, there is a “safe harbor” from litigation if the employer takes action against an employee pursuant to the policy.
 - ✱ Such as not hiring or firing someone due to a drug test.
- ✱ Employers aren't required to have a detailed policy.



What if Someone Comes to Work High?

Follow the same steps for any type of impairment or intoxication—not just marijuana.

1. Two supervisors (if possible) note what they observe:

- ✱ **Behavior**: Delayed reactions, poor coordination, stumbling, slurring words, excitedly talking, not making sense, twitching
- ✱ **Appearance**: Red eyes, pinned/dilated pupils, dry mouth
- ✱ **Smell**: Odor of alcohol or marijuana, smell of vomit



What if Someone Comes to Work High?

2. Talk to the Employee, state what you observe, ask what could be causing that behavior.
 - ✱ Can ask if they took something.
 - ✱ Can ask if there might be a medical emergency.
3. If it may be a medical emergency, call 911.
4. If you have a testing program, drug test the employee.
5. After the conversation (or after testing), arrange to drive the employee home—DON'T ALLOW THEM TO DRIVE!
6. Schedule a meeting on the next work day to talk.



What if Someone Comes to Work High?

7. Follow up meeting with the employee...
 - ✦ Again state what you observed, wait for a response.
 - ✦ Ask what caused the behavior.
 - ✦ If you tested, wait to get the result to go to step 8.
8. Depending on what you learn, determine the consequences.
 - ✦ If it's a medical reason, ask for supporting documentation.
 - ✦ If it's not, then the employee has violated your drug/alcohol-free workplace policy, even without a drug test.
 - ✦ Final warning or discharge are typical responses.
9. Policy and documentation will help in unemployment claim.



What if Someone Comes to Work High?

Bottom Line—You Don't Have to Drug Test!

- ✦ If you do drug test, the results can reinforce the observable characteristics, but it's not absolutely necessary.
- ✦ Impairment is not protected (unless there was a justifiable medical reason for it).



Safety Sensitive Jobs

- ✦ Drug testing law allows employers to exclude from safety sensitive jobs those employees who currently use drugs that could cause impairment.
 - ✦ That provision is under legal scrutiny.
- ✦ Basic ADA Rule—If someone is taking a prescription drug that could affect judgment or coordination, and they work in a safety sensitive job--
 - ✦ Have an interactive discussion regarding accommodation.
 - ✦ Seek information from their doctor about work restrictions.
 - ✦ Ask for guidance.



Recap

- ✦ Employers can control the conduct in their workplaces.
- ✦ Have a written drug/alcohol-free workplace policy, even if you don't test.
 - ✦ Don't allow drug use, possession, or impairment at work.
 - ✦ Include illegal drugs, alcohol, marijuana, and drugs not taken as prescribed.
 - ✦ Include consequences for policy violations.
- ✦ If you drug test, do you want to include marijuana?
 - ✦ Positive results don't always reflect impairment.
- ✦ If you do test, consider the "safe harbor" long policy.





Laura Hamblin, JD, PLLC
laurajhamblinjd.com
laurajhamblinjd@gmail.com
928-308-8394



SBDC Services



Free Confidential Counseling



Affordable Workshops



Local Partnerships



Network Resources



Access to SBA and micro loans



YC.EDU/SBDC
(928) 717-7232

