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LABOR AND EMPLOYMENT

WHAT EMPLOYERS NEED TO KNOW ABOUT EMPLOYEE MARIJUANA USE UNDER PROPOSAL 1

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Following the passage of Proposal 1 on the 2018 Michigan mid-term ballot, Michigan became the 10th state to legalize, regulate, and tax cannabis use. Under Proposal 1, certain portions of which may become effective as early as December 2018, all adults 21 and older may possess and use marijuana for any purpose, including recreational purposes, as set forth in the governing law.

Proposal 1 does not affect an employer's ability to terminate an employee for a positive marijuana test performed in accordance with company policies, even if the employee has a medical marijuana card, because nothing in Michigan's existing marijuana laws or Proposal 1 changes the State's normal rules concerning employment and drug screening.

Proposal 1 specifically provides that:

- Employers are not required to "permit or accommodate" marijuana use or possession "in any workplace or on the employer's property."
- Employers are not prohibited from "disciplining an employee for violation of a workplace drug policy or from working while under the influence of marijuana."
- Employers are not prevented from "refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's violation of a workplace drug policy or because that person was working while under the influence of marijuana."

The difficulty for employers is that, unlike alcohol testing, there is no definitive test available for establishing whether someone is under the influence of marijuana at work. Current technology cannot distinguish whether a person is "high" at work or whether that person used cannabis at some point prior to work during personal time. This may lead to difficulty in hiring qualified applicants who do not test positive for marijuana. It also may result in difficulty making informed termination and disciplinary decisions following an on-the-job positive drug test.

Employers operating in any state which permits recreational and/

or medical use of marijuana have choices to make about employee use of marijuana based on their particular business operations and preferences. Employers can permit or accommodate the use of medical marijuana or not. Employers can permit or accommodate the use of recreational marijuana during off-hours or not. In any scenario, however, employers should prohibit marijuana use by employees in safety sensitive jobs. In addition, employers having federal contracts or whose employees are licensed by federal agencies must have a zero-tolerance policy for marijuana as the federal government still considers marijuana an illegal substance. Employers should deal proactively with these issues through their written policies and procedures.

Employers should also be aware that use of medical marijuana in some states is protected by applicable disability laws including the Americans with Disabilities Act. And, in some states, including Michigan, medical marijuana users who are terminated as a result of marijuana use remain eligible for unemployment benefits. The overlap of various employment laws is a developing area in Michigan and elsewhere, and we anticipate changes in Michigan law following the implementation of Proposal 1. Accordingly, it is imperative that employers remain abreast of forthcoming legal developments and cater their policies accordingly.

In making proactive decisions concerning Proposal 1, employers should consider taking the following actions:

- Review and potentially update your company's substance abuse policy paying special attention to definitions of permissible and impermissible conduct as it concerns "off duty" usage.
- Stay on top of developments in cannabis-related disability law in every state in which the company has employees.
- Revisit all job descriptions, particularly those for safety-sensitive positions, to ensure a focus on motor and cognitive skill capabilities.
- Train management and supervisory staff on how to discern and document possible impairment or working under the influence.
- Know the requirements of customers, business partners, funding entities, insurers and federal regulators with whom your company interacts.

Employers are encouraged to consult knowledgeable counsel concerning decisions with respect to policies and treatment of employees under Michigan's marijuana laws.

CLIENT ALERT

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