



## EMPLOYER NEWSLETTER

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### Arizona's New Medical Marijuana Law: Weeding Out the Employment Issues

On November 2, 2010, Arizona narrowly approved Proposition 203 -- the "Arizona Medical Marijuana Initiative." Arizona is now the 15<sup>th</sup> state to legalize medical marijuana. A "high"-light of the new law<sup>1</sup> enables a "qualified patient" who is registered with the Arizona Department of Health Services, to legally obtain an "allowable amount of usable marijuana" from a "nonprofit medical marijuana dispensary" and possess and use the marijuana to treat or alleviate symptoms associated with a "debilitating medical condition."

On December 17, 2010, the Arizona Department of Health Services published a 47-page draft of the rules: <http://www.azdhs.gov/prop203/documents/Medical-Marijuana-Draft-Rules.pdf>. The program is projected to be fully functional by the summer of 2011, when dispensaries have had time to grow the plants.

### Impact on Employers:

The new law presents several issues and concerns for Arizona employers:

1. Non-discrimination against Users. Under the new law, 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 on the person's status as a medical marijuana cardholder or for a registered qualified patient's positive drug test for marijuana components or metabolites.
2. Discipline or Termination of Employment for Impairment. The law does not protect employees who use or possess marijuana on the workplace premises or who are impaired during work time. However, the law says that a "registered qualifying patient shall not be considered under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment." Unfortunately, there is no guidance on what an "insufficient concentration" means or how "impairment" is defined. This is especially problematic because marijuana or its metabolites can remain in the body for up to 30 days.
3. Interplay with other Employment Laws. No one really knows how the legal issues – and they are many – will play out. Many questions will be resolved only when real cases are litigated and the courts issue formal opinions. We also expect that the new law will affect employers' policies and practices under federal laws such as the

<sup>1</sup> The Arizona Medical Marijuana Act is codified at A.R.S. § 36-2801 *et seq.*

Family Medical Leave Act, the Americans with Disabilities Act, Genetic Information Non-Discrimination Act, HIPAA, and state worker's compensation laws.

**Recommended Employer Action:**

Employers should work closely with employment counsel to review and revise their employment manual, policies, and procedures. We also recommend that employers do the following:

- Modify Substance Testing and Zero-Tolerance Policies – Create an exception from disciplinary action for a positive test result by a registered cardholder. Employers should also modify “zero-tolerance” policies to include an exception for registered cardholders.

This means that an employer should not automatically rescind an employment offer because of a test result confirming marijuana use or terminate a current employee for the same reason. Basically, an employer must treat a cardholder who uses marijuana like any other employee who uses prescription medication when not working.

- Review/modify drug-free workplace policies to state clearly that unauthorized use or possession of illegal drugs in the work place is prohibited.
- Train management staff and key personnel to recognize signs of impairment (red bloodshot eyes, dilated pupils, poor concentration, impaired perception of time, loss of energy, and impaired perception of distance) and adopt procedures to properly handle impairment situations and positive drug test results.
- Work closely with employment law counsel before terminating cardholder employees because of drug test results or conducting internal investigations about an employee's impaired status.
- Maintain records of cardholder status to comply with the ADA – The Americans with Disabilities Act requires employers to keep employee medical records separate and apart from other personnel records. Records regarding cardholder status should be treated in the same way.