



EMPLOYER NEWSLETTER

RECENT AMENDMENTS TO ARIZONA'S MEDICAL MARIJUANA ACT

May 4, 2011

On April 29, 2011, Governor Brewer signed into law employer-friendly amendments to Arizona's Medical Marijuana Act ("AMMA") -- an initiative that Arizona voters approved by a razor-thin margin in November 2010.

A. Overview of the AMMA

The AMMA prohibits Arizona employers from discriminating against medical marijuana users who have a registry identification card from the Arizona Department of Health Services (ADHS). Thus, employers cannot take adverse action against "cardholders" simply because they use medical marijuana. Also, the AMMA prohibits taking adverse action against an employee/cardholder unless (1) the employee used or possessed marijuana at work; (2) the employee was "impaired" at work; or (3) the employer would lose a monetary or licensing benefit under federal law by allowing the use of medical marijuana.

B. Confusion and Questions

Questions abounded almost immediately after voters passed the AMMA. For example, what happens if an employee's drug test is positive for marijuana? Is that enough, or must the employer show that the employee was "impaired" at work? What does it mean to be "impaired" -- after all marijuana and its metabolites can remain in the body for as long as a month? What if the employee's use of medical marijuana imposes a danger to himself or others? How can an employer really know if an employee is a "cardholder"?

C. Amendments to the AMMA

The AMMA amendments attempt to answer these questions and create a "safe harbor" for employers with written drug testing policies that comply with existing Arizona statutes. The definitions below are key to understanding the new law:

- "Impairment" is defined very broadly and lists symptoms causing reasonable suspicion of drug use (*e.g.*, speech, standing, walking, physical dexterity, odor, unusual behavior, injury, accident, etc.).
- Employers are permitted to identify "safety-sensitive positions" and exclude employees from them based on the employer's "good faith belief" that the employee is using a drug, including proscribed medications like medical marijuana.



- A safety sensitive position means “any job designated by an employer” in good faith as such, including:
 - Operating a motor vehicle, equipment, machinery, or power tools;
 - Repairing, maintaining or monitoring equipment, machinery or manufacturing process;
 - Performing duties offsite at the premises of a residential or commercial customer, supplier or vendor; or
 - Preparing or handling food or medicine.

- “Good faith belief” is defined broadly and includes the following:
 - observed conduct, behavior or appearance;
 - information reported by a person believed to be reliable, including a report by a person who witnessed the use or possession of drugs or drug paraphernalia at work;
 - written, electronic, or verbal statements;
 - lawful video surveillance;
 - records of government agencies, law enforcement agencies or courts;
 - results of a test for the use of alcohol or drugs; or
 - other information reasonably believed to be reliable or accurate.

The amendments also allow employers to use a verification system to be established by the ADHS to verify cardholder status.

D. What employers need to know:

1. Protected Class. A medical marijuana card holder remains in a “protected class” and cannot suffer adverse employment consequences because of that status alone.

2. Job impairment/use at work. A medical marijuana user/cardholder may be disciplined or terminated if the employer has a “good faith belief” that the cardholder/employee uses or possesses any drug (including marijuana) or has an impairment while on the premises or during work hours.

3. Positive drug tests. If a cardholder tests positive for marijuana, the employer who takes adverse action is shielded from potential liability if it believes in good faith that the employee used, possessed or was impaired by any drug (including medical marijuana) while on the premises or during work hours. However, an employer who relies on the results of a positive drug test must have a written drug testing policy that complies with Arizona’s drug testing statute. A.R.S. § 23-493 *et seq.*

4. Exclusion for safety-sensitive position. An employer may exclude¹ an employee from a safety-sensitive position if the employer has a good faith belief that the

¹ The law allows employers to reassign the employee to another position or place him on paid or unpaid leave.

employee is engaged in the current use of any drug that could cause impairment (like medical marijuana).

5. Verify status. The ADHS verification system may be used only to verify a registry identification card that is provided to an employer by an employee or an applicant who has received a conditional offer of employment.
6. Interplay with other laws. The AMMA does not affect the Americans with Disabilities Act, and a cardholder/employee may be afforded protections under that law.
7. Effective Date. The new law applies immediately.

E. **What Employers should do:**

1. Update non-discrimination policies to prohibit discrimination against authorized medical marijuana users.
2. Update and revise drug testing policies to conform to Arizona's drug testing statute and the recent amendments to the AMMA.
3. Identify "safety sensitive" positions and update job descriptions.
4. Train employees to recognize signs of impairment.
5. Consult with legal counsel familiar with the AMMA before taking adverse employment action against an employee/cardholder. Adverse action should be handled on a case-by-case basis supported by documentation demonstrating the employer's good faith reason(s) for the action.