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**RECREATIONAL MARIJUANA IN MICHIGAN:
WHAT EMPLOYERS NEED TO KNOW**

November 7, 2018

At yesterday's ballot-box, Michigan voters approved the enactment of the "Michigan Regulation and Taxation of Marijuana Act." The new legislation legalizes use and possession of recreational marijuana by individuals ages 21 and over. Individuals are permitted under the new law to possess up to 2.5 ounces of marijuana, cultivate or grow up to 12 marijuana plants, and store up to 10 ounces of marijuana (with anything in excess of 2.5 ounces to be stored in locked and secure receptacle) in their home without violating the law. The law also implements a number of state marijuana establishment licenses to cultivate, process, transport, distribute and sell marijuana and marijuana products to the public. The new law will take effect 10 days after the date of the official declaration of the vote. The legal sale of marijuana and marijuana products, however, will not be permitted until the state implements regulatory procedures and processes the various license applications, which could take over a year from the law's effective date.

The New Law Does Not Permit Operating Under the Influence. The new marijuana law does not permit anyone to operate a motor vehicle (or snowmobile, aircraft, ORV or motorboat) while "under the influence" of marijuana; it also prohibits motor vehicle passengers from consuming marijuana on Michigan roads. Employees who violate these laws may still be subject to charges and penalties for "Operating Under the Influence of Drugs" under the Michigan Motor Vehicle Code's zero-tolerance law.

Employers need to be mindful that the new law does not establish a "legal" driving level of marijuana consumption. Unlike alcohol, under MCL 257.625(8), the presence of any "controlled substance" in one's body while operating a motor vehicle, is considered being under its influence and, therefore, is a crime. Michigan law includes marijuana under the list of "controlled substance." MCL 333.7212(1). It is unclear if the new law will trump that aspect of the existing state law or if judges will continue to hold any amount in one's system as being "under the influence."

This could have serious implications for employers whose employees drive employer (or customer) vehicles as part of their job duties. It remains to be seen if an employer's insurance carrier will insist on mandatory, scheduled drug testing as part of providing coverage. Likewise, it remains to be seen to what extent an employer can be held liable for entrusting an employee to drive under the influence of marijuana, as defined by Michigan law, where no obvious signs of its use are present.

Enforcing a zero-tolerance policy before a problem surfaces will necessitate regular drug testing. Human observation will not be sufficient. And, unlike alcohol, the presence of marijuana cannot be detected by a breath test. Testing is not only time consuming but can be expensive as well. However, until the law has been adjudicated in an employment-based context, regular testing may be preferred.

The New Law Does Not Protect Employees From Termination. Although recreational use will now be legal, the law does not protect job applicants who are not hired due to failing a pre-employment drug screening, nor does it protect employees who violate workplace drug policies from being fired. The Act states:

This act does not require an employer to accommodate conduct otherwise allowed by this act in any workplace or on the employer's property. This act does not prohibit an employer from disciplining an employee for violating a workplace drug policy or for working while under the influence of marihuana. This act does not prevent an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person 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 marihuana.

Employers, therefore, remain free to enforce workplace drug policies that impose mandatory drug testing, and to discipline employees for violating those policies, even if the marijuana use occurs off the premises and outside of business hours.

Employers May Still Face Issues Because Of The New Law. While the new law does not legally restrict employment decisions, employers may still face a number of issues arising from the enactment of the new law. For example, it is anticipated that marijuana legalization will decrease the talent pool for those employers who wish to or are required to maintain a zero-tolerance drug policy. This is especially true for manufacturing, general labor and utility jobs. For this reason, employers in other states that have already legalized marijuana have considered implementing more relaxed workplace drug policies or testing only for drugs other than marijuana. This, however, may present certain safety issues which could lead to an increase in work-related injuries – for which the employer may be responsible.

If businesses are employing workers where safety is a concern, such as those that are required to operate motor vehicles or heavy machinery as part of their work conditions, or those employing workers in dangerous occupations, a zero-tolerance drug policy should still be

enforced. Under no circumstances should an employer ever permit marijuana use, ingestion of marijuana products or possession of marijuana on the business premises at any time.

Employees Fired For Marijuana Use May Still Be Entitled To Unemployment Benefits. Since the legalization of medical marijuana in 2008, Michigan courts have held that employees who had validly issued medical marijuana cardholders and who were discharged from employment for failing a drug test as a result of having used marijuana were not disqualified from receiving unemployment compensation. *Braska v Challenge Manufacturing Co.*, 307 Mich App 340 (2014). In that case, the employees, each of whom had a valid medical marijuana card, were terminated for failing the employer's mandatory drug test. There was no evidence, however, that the employees used (ingested or inhaled) the marijuana on the premises or during working hours. Under those circumstances, the court held that, while the employees were not wrongfully discharged, they were not disqualified from receiving benefits due to misconduct. While it is unclear at this point whether the same rule will apply to an employee discharged for failing a drug test due to the use of recreational marijuana, it is conceivable that the courts may issue a similar ruling under similar circumstances.

Businesses Must Know Each State's Laws In Which They Operate. Michigan will be the tenth U.S. State to legalize recreational marijuana; Canada has also recently legalized recreational marijuana. In addition, a total of 31 states, the District of Columbia, Guam and Puerto Rico have comprehensive legalized medical marijuana laws. Whether for medical or recreational use, each state's or country's marijuana laws are unique and may impose different restrictions on employers when enforcing its policies. Both national and international employers must be aware of the law applicable in each jurisdiction in which they operate so they can make appropriate employment decisions within the bounds of those laws.

Marijuana Is Still Illegal Under Federal Law. Employers must also be cognizant that, regardless of the State's marijuana legalization, marijuana is still illegal under Federal law. As such, a zero-tolerance drug policy will remain a requirement for employers who have federal contracts or employ federally licensed workers.

Up-To-Date Policies And Employee Training Is The Key. Regardless of your company's workplace drug policy, employers should expect employees to feel emboldened by the new law. This will result from employees knowing only that marijuana is legal, but not understanding the details of the new law. For this reason, employers may have to deal with employees who believe that they cannot be disciplined or fired for marijuana use. The best way to address this is to make sure your employment policies are up-to-date and to provide timely employee training. This will ensure that all employees are not only aware of your policies but will also understand how to remain compliant and avoid the risk of discipline or termination.

To review your company's workplace drug policy, schedule employee training, or discuss any questions you have about Michigan's new recreational marijuana law, please do not hesitate to contact either John R. McGlinchey, Esq. or Christopher R. Gura, Esq. at Abbott Nicholson, P.C. (313) 566-2500.