

One Minute Memo®



Maine Employees Now Protected From Repercussions of Off-Duty Marijuana Use

By Jennifer L. Mora

Seyfarth Synopsis: On November 8, 2016, Maine voters approved “Question 1 – An Act to Legalize Marijuana” (“the Act”), which allows for, among other things, the recreational use of marijuana. The Act contains within it an anti-discrimination in employment provision, which is effective today, February 1, 2018, making it the first law of its kind in the nation because it protects employees and applicants from adverse employment action based on their use of off-duty and off-site marijuana.

The Act prohibits employers from refusing to employ or otherwise taking any adverse action against any person age 21 or older based on that individual’s “consuming marijuana outside the ... employer’s ... property.” However, the Act permits employers to bar the use and possession of marijuana “in the workplace” and to “discipline employees who are under the influence of marijuana in the workplace.” Employers may no longer test job applicants for marijuana. Moreover, according to the Maine Department of Labor, an employee’s positive drug test, by itself, will not be sufficient to prove that the employee is “under the influence” of marijuana. Of course, employers required to comply with federally mandated testing for marijuana (e.g., U.S. Department of Transportation regulated employers) are not subject to the Act.

As a reminder, Maine employers may drug test applicants and employees if they have a written drug testing policy that has been approved by the Maine Department of Labor. This is no small feat because the policy must, among other things, address specific topics set out in the statute (such as, among others, which positions will be subject to testing, substances tested for and cutoff levels, and the consequences of a positive result), and the employer **must** “appoint an employee committee to develop a written policy” and consult with those employees in the “development of any portion of a substance abuse testing policy ... that relates to the employees.” However, the employer is not required to consult with the employees on those portions of a policy that relate only to applicants. It is only after the policy is submitted to and approved by the state can the employer drug test Maine applicants and employees.

In the meantime, Maine employers that do have a state-approved workplace drug-testing policy should consider (1) modifications to their existing policy, (2) whether to continue testing employees for marijuana, except when the test is based on reasonable suspicion of an impairment at work, (3) immediately discontinuing testing applicants for marijuana and (4) determining how best to address any employee positive test result for marijuana. Maine employers also must continue to be mindful of the state’s medical marijuana law. It remains to be seen, however, whether the anti-discrimination portion of the Act will be upheld given the conflict between it and federal law, which still considers marijuana an unlawful controlled substance.

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