

## **Recreational/Medical Marihuana and the Workplace: An Explanation of Employer's Rights**

Effective December 6, 2018, marihuana is now legal for recreational use in Michigan. The use of medical marihuana has been legal in Michigan since 2008 when Michigan enacted the Michigan Medical Marihuana Act (MMMA).

Marihuana use is becoming mainstream as voters across the nation approve ballot incentives for the legalization of marihuana for recreational, social and medical use.

When Michigan passed incentives for the legalization of the recreational use of marihuana in December of 2018, Michigan joined nine other states and the District of Columbia.

States that have approved recreational and medical use of marihuana grapple with setting limits on marihuana use as it pertains to drivers behind the wheel.

THC, the impairment component in marihuana, can stay in the bloodstream for weeks after it has been ingested. A person can test positive for THC in their blood or urine long after ingesting the drug and long after the "high" passes.

Toxicologists, neurologists, and pharmacologists don't know how to measure when and to what extent marihuana causes impairment. At present, there is no agreed upon medical science as to how many nanograms of THC equals impairment.

For alcohol, the measure for impairment is a bright line test. If your blood alcohol is 0.08 or higher, you are impaired.

Michigan's legalization of both recreational and medical use of marihuana does not limit an employer's right to establish and enforce drug policies.

Many of the protections afforded under the MMMA are no longer necessary given the legalization of the use of recreational marihuana.

While Michigan law recognizes marihuana as a viable medical treatment, employers often express concerns over their ability to maintain safe worksites and the legal risks created by marihuana in the workplace. This article will help employers assess these legal risks, and will clarify employers' rights with regards to employees who use medical marihuana.

### ***Despite Being Generally Inconsistent, Michigan and Federal Law Agree on Employers' Right to Drug Test***

Many employers' confusion about their rights stems from the disparate treatment of marihuana under Michigan and federal law. While Michigan recognizes marihuana as a viable medical treatment, the Controlled Substances Act (CSA) lists marihuana as a Schedule I substance with no redeeming medicinal qualities. The Michigan legislature expressly acknowledged this conflict

with federal law when it enacted the MMMA in 2008, observing that "states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law." More recent changes to Michigan law have paved the way for the production and sale of marihuana infused products, have established a legal framework under which dispensaries can operate, and have established the Medical Marihuana Licensing Board to regulate virtually every aspect of marihuana production and distribution.

Despite Michigan's general tolerance for medical marihuana and a more recent relaxation of its marihuana laws, federal law remains contradictory. The Americans with Disabilities Act (ADA), which prohibits employers from discriminating against qualified individuals because of a disability, reflects the federal law position that marihuana is an unsafe substance with no legitimate medical use. Thus, the ADA allows private employers to test both applicants and employees for the presence of "illegal" drugs and make employment decisions based upon the results of that testing. The ADA accomplishes this, in part, by excluding from its definition of "qualified individual[s] with a disability," people engaged in the use of illegal drugs as defined under the CSA.

Given conflicting federal and state laws, many courts have addressed the question of which law applies to employers – federal or state. When faced with a decision between the two, the answer is federal. However, when examining an employer's rights concerning employees with medical marihuana prescriptions, answering this question is unnecessary. Instead, the MMMA specifically provides that "nothing in th[e] act shall be construed to require . . . [a]n employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana." MCL 333.26427(c)(2). Michigan law places further limitations on medical marihuana, including prohibiting people from performing tasks under the use of marihuana when doing so would constitute negligence or professional malpractice and possessing or using medical marihuana on a school bus, on school grounds, and in a correctional facility. Additional limitations include prohibitions against smoking marihuana on any form of public transportation, in any public place, or operating all manner of motor vehicles while under the influence of marihuana.

Despite general disagreements between Michigan and federal law regarding marihuana, Michigan law is consistent with federal law to the extent that employers can establish and enforce drug policies.

### ***Employer Drug Testing Guidelines***

Under both state and federal law, Michigan employers are not required to accommodate employees who choose to use medical marihuana. Employers have the right to:

- (1) Test for illegal drugs as a precondition to employment.
- (2) Test for illegal drugs or alcohol based on a reasonable suspicion that an employee is working under the influence of illegal drugs or alcohol.

- (3) Test for drugs, randomly, if such tests are job-related and consistent with a business necessity.
- (4) Enforce disciplinary policies evenhandedly for positive drug tests, up to an including termination.

### ***Federal Case Law Demonstrates Employers' Ability to Drug Test***

***Casias v Wal-Mart Stores, Inc***, 695 F.3d 428 (6<sup>th</sup> Cir. 2012), provides a helpful demonstration of a Michigan employer's ability to enforce a zero-tolerance drug policy under the MMMA's employer protections. Plaintiff, a Wal-Mart employee, was prescribed medical marihuana – and carried a valid medical marihuana card – for treatment of sinus cancer and an inoperable brain tumor. Plaintiff was injured at work, and a post-injury drug test at occupational health returned positive for marihuana. Plaintiff was terminated for violating his employer's drug policy. Plaintiff brought suit, arguing that he was wrongfully terminated because the plain language of the MMMA protects patients from disciplinary action in a private employment setting when the patient is legally taking. Interpreting the MMMA, the court confirmed that the MMMA does not impose restrictions on private employers.

### ***Practical Considerations and Best Practices for Drug Testing***

Even with an employer's ability to administer a robust drug testing policy, unencumbered by Michigan's marihuana laws, workers with prescriptions for medical marihuana will still be on the job site, which can raise liability concerns. In addressing these concerns, the importance of maintaining a strong substance abuse policy cannot be overstated. Employers with consistently applied, zero-tolerance substance abuse policies will be able to assert a willful misconduct defense in a workers' compensation case and will be better-equipped to address other potential legal issues. In administering these policies, employers should be sure to:

- 1) Provide employees with a written substance abuse policy at the time of hire.
- 2) Develop guidelines to help supervisors identify signs of potential impairment.
- 3) Only test employees based on current observations.
- 4) Obtain a second opinion when a supervisor suspects impairment.
- 5) Test as soon as possible after relieving an employee from duty due to suspected impairment.
- 6) When a sample is obtained, maintain and document a chain of custody.
- 7) Maintain confidentiality.
- 8) Educate supervisors and employees on your company's policy.

- 9) Consistently enforce your company's policy.
- 10) Keep thorough records.

### ***Medical Marijuana Remains a Non-Reimbursable Treatment Under the Workers' Disability Compensation Act***

From a workers' compensation insurance perspective, medical marijuana remains a non-reimbursable treatment under Michigan's Workers' Disability Compensation Act. Whether medical marijuana eventually becomes a reimbursable treatment will depend on medical evidence. Currently, the Official Disability Guidelines (ODG), American College of Occupational and Environment Medicine Guidelines (ACOEM), and state medical treatment guidelines fail to list marijuana as a viable treatment option. This is due to the fact that there are no quality controlled clinical data with cannabinoids, which is partially the result of marijuana's Schedule I classification under the CSA.

### ***Employer Rights to Test for Medical Marijuana are Intertwined with the Controlled Substances Act***

If marijuana's classification under the CSA were to be downgraded from Schedule I, without corresponding amendments to the ADA, employees with medical marijuana prescriptions would be afforded much greater protections from drug testing. The CSA classification of marijuana is vital to the operation of the ADA. The ADA relies on this classification to define "illegal" drugs as well as for determining what a "medical examination" is. If marijuana were no longer a Schedule I drug under the CSA, then it would likely not be an "illegal" drug for someone with a valid prescription under the ADA. And if medical marijuana is not an "illegal" drug under the ADA, testing for marijuana likely would become a "medical examination" under the statute. And if testing for marijuana is a "medical examination" under the ADA, only drug tests for job-related inquiries would be proper, rather than the broader level of testing employers currently enjoy.

Despite some general confusion resulting from the disparity between Michigan and federal law as it pertains to marijuana, employers have the ability to enforce robust drug testing policies. Employers with strong drug testing policies are better able to protect themselves from liability issues, and ensure maintenance of a safe workplace.

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*For additional advice on developing, maintaining, and enforcing substance abuse policies, contact Hanba & Lazar at (810) 767-9400.*