

## Medical Marijuana: Impact On Personnel Laws

*This article is not intended to be a comprehensive treatment of the subject matter but is intended to highlight areas of potential liability for municipalities if they are not aware of and attentive to the risks associated with the applicable federal and state employment and labor laws and the Missouri constitutional provision covering medical marijuana.*

In the paragraphs below, we look to provide general guidance to local communities on the issues that arise in employment law and personnel administration as a result of the adoption of the Medical Marijuana Constitutional Amendment (Mo. Const. Art. XIV Sec. 1). As with any consideration of circumstances related to employment law or personnel administration, the facts of a specific case lead to the correct process to be followed in resolving the problem presented. Because of this, local entities are encouraged to seek guidance when a problem arises rather than to apply general principles to a case. Notwithstanding this advice, local governments can prepare to properly address medical marijuana personnel concerns by having good policies in place before a problem presents itself. Such policies are controlled by the various federal and state employment laws. This article will identify what laws need to be addressed and what policies a local government should have in place.



while at work or disciplining the employee or former employee, up to and including termination from employment, for working or attempting to work while under the influence of marijuana.”

Location of marijuana use is also controlled by Subsection 7(7) which states that:

“(7) No qualifying patient shall consume marijuana for medical use in a public place, unless provided by law. Violation of this prohibition shall subject the violator to sanctions as provided by general law.”

A “qualifying patient” means a Missouri resident diagnosed with at least one qualifying medical condition as defined by Subsection 2(16). The list of qualifying medical conditions is set out in Subsection 2(15) and the person who may prescribe medical marijuana is limited to “physician” as defined in Subsection 2(12).

### Impacted Federal And State Employment Laws

These sections are important to any analysis that a local entity must make to insure that it complies with the constitutional amendment and at the same time complies with the mandates of federal and state employment laws. The major applicable laws for which particular attention needs to be made are the Americans With Disabilities Act As Amended (42 USC 12101 et seq) and its implementing regulations (29 CFR 1630); the Family & Medical Leave Act (28 USC 2601 et seq) and its implementing regulations (29 CFR Part 825); the Omnibus Transportation Employee Testing Act of 1991 (Pub. Law 102-143) and its implementing regulations (49 CFR Part 40); the Drug Free Workplace Act (41 USC 701 et seq); the Missouri Human Rights Act (Sec. 213.055 and 213.070 RSMo); and the Missouri Workers’

### Employment Provisions Of The Amendment

The initial inquiry is to review the applicable sections of the medical marijuana amendment that address employment matters. Subsection 7(1)(d) is the initial protection for local communities. The section provides that:

“(1) Nothing in this section permits a person to:

(d) Bring a claim against any employer, former employer, or prospective employer for wrongful discharge, discrimination, or any similar cause of action or remedy, based on the employer, former employer, or prospective employer prohibiting the employee, former employee, or prospective employee from being under the influence of marijuana

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### Compensation Law (Sec. 287.120 RSMo).

While Missouri does not have a statute on collective bargaining, local communities need to know that the Missouri court decisions related to collective bargaining under the Missouri Constitution have the potential to reach enforcement of bargained agreements that contain any provisions related to drug testing and related disciplinary actions. In negotiating such agreements, significant care needs to be taken so as not to provide employees with employment protections that are not mandated by the medical marijuana amendment and the applicable laws noted above, as well as

to preserve the provisions of Subsection 7(1)(d) of the amendment.

The Americans With Disabilities Act As Amended (ADAA) and its implementing regulations provide employees with disabilities with protections from discriminatory actions. They also require employers to reasonably accommodate employees who have qualifying disabilities. Current use of controlled substances, of which marijuana is classified, are not considered disabilities under this law, but an employer is required to accommodate the underlying medical conditions of a disability which mandates consideration of reasonable accommodations for which medical marijuana may be prescribed as a treatment.

ADAA also permits employers to make determinations under its provisions concerning immediate threat of health and safety to the public and employees. Thus, when decisions are being made in relation to accommodations, the use of medical marijuana should be included as a potential threat in arriving at accommodations. Also, consistent with the amendment, current medical information must be used in assessing accommodations. Such medical information should only be accepted from licensed physicians as defined by Subsection 2(12) and not other medical providers.

Medical marijuana is still a controlled substance which under federal law is illegal, so employer considered accommodations should not include use of the illegal substance. The employer is not required as a reasonable accommodation to modify its work rules or collective bargaining agreements as these relate to possession and/or use

of marijuana on city property, or for operation of vehicles associated with consumption of marijuana and the potential impairments from consumption. Also, Subsection 7(7) of the amendment prohibits a qualifying patient from consuming marijuana for medical use in a public place. Public places would consist of any property owned or operated by a local government.

The Missouri Human Rights Act parallels the ADAA, as stated above, when assessing the requirements to avoid disability discrimination and for making reasonable accommodations decisions.

The Family & Medical Leave Act (FMLA) and its implementing regulations relate to legally mandated absences from work without penalty for certain conditions and events. Inasmuch as medical marijuana is still an illegal controlled substance under federal law, employers need to be careful not to assess eligibility for absences based on the prescribing of medical marijuana. The mandated leave is controlled by the medical condition, not necessarily the treatment modality. It should also be noted that FMLA permits multiple types of healthcare professionals to determine the need for the leave. The medical marijuana amendment limits the issuance of prescriptions to physicians only so a careful scrutiny of the medical certification under FMLA should be made to eliminate all prescribers except physicians if or when medical marijuana is a part of the suggested treatment.

The question of potential impairment is yet another condition to be addressed when assessing a need for leave. Potential impairment should not be confused with “under the influence” as noted in Subsection 7(1)(b) and 7(1)(c). The amendment does not impose any more protections for employees than the other leave laws.

Many public employers have leave policies and collective bargaining agreements that contain provisions related to FMLA and its availability. These should be reviewed to determine if the use of medical marijuana is permitted now as those provisions were written before the amendment was adopted and not considered but which may be given new meaning.

The Omnibus Transportation Employee Testing Act of 1991 (OTETA) and the Drug Free Workplace Act also have an interaction with medical marijuana for covered employees. These laws require adoption of drug free workplace policies that restrict medical marijuana from use and consumption in the public employers’ workplaces. OTETA also mandates that certain employees be tested for marijuana and prohibit the employee who tests positive under the mandated standards from performing work until a period of time has passed and an employee no longer tests positive. Under the OTETA mandates, testing of certain safety sensitive employees is to be conducted randomly. Other drug testing is required when an employee is suspected of being impaired through objective observable standards, as well as after certain accidents have happened. Return to work testing is also mandated so an employee who consumes medical marijuana may not qualify to perform the essential functions of that employee’s job thus prohibiting them from returning to work.

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All employers should review their existing drug testing policies to ensure that the new amendment does not change the policies or the practices surrounding the policies. Policies that require disclosure to proper supervisors of consumption of prescribed substances that may impair an employee need to be followed so as to identify employees who are using medical marijuana and such policies need to be strictly enforced since Section 7(7) prohibits a qualifying patient from consuming marijuana for medical use in a public place. Public places would consist of any property owned or operated by a local government. Therefore, an employee is prohibited from working if medical marijuana is being used in the workplace.

The consequences of violation of the local government’s drug testing policy can result in disciplinary action. Such disciplinary action is not prohibited or protected under the amendment, but a collective bargaining agreement may contain protective language that provides protections not permitted by the amendment. Policies that allow for rehabilitation and reasonable accommodation as a condition to preserve a job from loss as a result of drug consumption should also be reviewed in light of the amendment.

The Missouri Workers’ Compensation Law provides employers some relief from benefits arising from a work-related accident when the accident is connected with drug consumption. The impact of the new amendment will need to be assessed by each employer until judicial guidance is issued through case decisions.

### Other Employment Issues for Consideration

There are other employment considerations that impact employment opportunities. Policies that relate

to operation of motor vehicles and equipment after consumption of medical marijuana need to be reviewed in light of Subsection 7(1)(c). Protection of medical records under the Affordable Care Act and ADA and HIPAA create issues for the public employer because of the privacy mandates associated with these two laws. Policies on personnel records associated with prescribed use of medical marijuana may be impacted.

### Advice And Conclusions

What the local government official and employers can clearly identify from this summary article is that all of the local entities' employment policies that have any relation to medical marijuana should be reviewed immediately before a problem arises. Existing collective bargaining agreements and those under negotiation need to be carefully scrutinized to avoid providing employee protections for the use of medical marijuana and from the consequences of disciplinary action when the use is discovered. Public employers are encouraged to look to the other states that have adopted medical marijuana laws in advance of Missouri for assistance in predicting how Missouri may react as the amendment is implemented in the future. States with information of value from years of employment law experiences impacted by medical marijuana include Colorado, Illinois, New Jersey and California.

At this early stage of the allowance of medical marijuana and the protections for employers, local governments should approach any changes to their existing policies and practices carefully. Our advice is to take slow and careful consideration in assessing the local government's own policies, procedures, and activities under the identified laws and their impact by the medical marijuana amendment. 🍃

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