

Voters in Five States Approve Marijuana Ballot Initiatives on Election Day

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Voters in Arizona, Mississippi, Montana, New Jersey, and South Dakota approved laws to legalize marijuana on Election Day 2020. Recreational marijuana was approved in Arizona, Montana, and New Jersey, while Mississippi voters approved medical marijuana. South Dakota voters approved *both* medical and recreational marijuana ballot initiatives.

Medical Marijuana

1. *Mississippi* – Mississippi Ballot Measure 1 *passed*, with 68% voting “yes” and 32% voting “no.” Ballot Measure 1 asked voters to generally cast a vote for “either measure” Initiative 65 or Alternative 65A, or against both measures. Voters who cast a vote for “either measure” were then required to cast an additional vote for their preferred measure. Mississippi voters *passed* Initiative 65 with 74% voting for it and 23% voting for Alternative 65A. (Percentages are those reported by *The New York Times* on Nov. 4, 2020, as of 12:15 p.m. EST.)

Initiative 65 allows the medical use of marijuana by patients who suffer from qualifying medical conditions. Qualified medical marijuana patients may possess up to 2.5 ounces of medical marijuana. The new law does not permit a qualifying patient to be “subject to criminal or civil sanctions for the use of medical marijuana.” However, it does not require “accommodation for the use of medical marijuana or require any on-site use of medical marijuana” in any place of employment. It also does not affect any “existing drug testing laws, regulations, or rules.”

The Mississippi State Department of Health has the authority to implement, administer, and enforce the law. It is required to issue final rules and regulations regarding medical marijuana by July 1, 2021. The Department must begin issuing medical marijuana identification cards and treatment center licenses no later than August 15, 2021.

2. *South Dakota* – South Dakota’s Initiated Measure 26 *passed*, with 69% voting “yes” and 31% voting “no.” The new law allows the medical use of marijuana by patients who suffer from a debilitating medical condition. Medical marijuana cardholders may possess up to three ounces of marijuana and cultivate marijuana plants. The law goes into effect July 1, 2021, but it may take up to a year before medical marijuana is available in the state.

Under the new law, medical marijuana cardholders are entitled to “all the same rights under state and local laws” as the person would be afforded if they were prescribed a pharmaceutical medication as it pertains to: (1) any interaction with a person’s employer; (2) drug testing by a person’s employer; and (3) drug testing required by any state or local law, agency, or government official.

The new law requires the South Dakota Department of Health to issue regulations regarding medical marijuana within 120 days after the law goes into effect (October 29, 2021) and to begin issuing registry identification cards to qualifying patients within 140

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days after the law goes into effect (November 18, 2021).

The new law does not apply to employers to the extent it would conflict with the employer's obligations under federal law or regulation or if it would disqualify an employer from a monetary or licensing-related benefit under federal law or regulation.

Although employers may discipline employees for ingesting marijuana in the workplace or for working while under the influence of marijuana, employers may not consider a qualifying patient to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in "insufficient concentration to cause impairment." Employers in South Dakota should take note of this language because there is no universally accepted concentration of marijuana that proves "impairment."

Recreational Marijuana

1. *Arizona* – The Smart and Safe Arizona Act *passed* with nearly 60% voting "yes" and 40% voting "no." Under the Smart and Safe Arizona Act, individuals 21 years of age or older may lawfully use and purchase less than one ounce of marijuana (except, not more than five grams may be in the form of marijuana concentrate) and may cultivate up to six marijuana plants for personal use at the individuals' primary residence (subject to certain restrictions). The new law does not include a delayed effective date, but it will likely be several months before Arizonans can purchase recreational marijuana.

The new law requires the Arizona Department of Health Services to begin accepting applications for marijuana establishment licenses from "early applicants" beginning January 19, 2021 through March 9, 2021. Licenses will be issued to qualified applicants within 60 days of receiving an application.

The new law does not restrict the rights of employers to "maintain a drug-and-alcohol free workplace" or prevent employers from having workplace policies "restricting the use of marijuana by employees or prospective employees." It also does not require employers to "allow or accommodate the use, consumption, possession, transfer, display, transportation sale or cultivation of marijuana in a place of employment," nor does it restrict employers from prohibiting or regulating marijuana use that occurs on or in their properties.

Arizona passed the Arizona Medical Marijuana Act in 2010, prohibiting employers from discriminating against medical marijuana patients. The recreational marijuana law expressly states that it is not intended to limit any privilege or right of a qualifying patient under the Arizona Medical Marijuana Act.

2. *Montana* – Montana's Initiative 90 and Constitutional Initiative 118 both *passed* with approximately 57% voting "yes" and 43% voting "no" for Initiative 90. Effective January 1, 2021, individuals age 21 or older may possess, use, or transport one ounce or less of marijuana, and grow up to four mature marijuana plants and four seedlings on the grounds of a private residence. The Montana Constitution provides that a person 18 years of age or older is an adult for all purposes, except that a different legal age may be established for purchasing, consuming, or possessing alcoholic beverages. Effective October 1, 2021, the Montana Constitution will similarly permit a different legal age (*i.e.*, 21 years of age or older) to be established for the purchase, consumption, or possession of marijuana.

Certain provisions of the new law go into effect on October 1, 2021, which is the deadline for the Department of Revenue to issue rules and regulations related to licensure of adult-use marijuana providers and dispensaries. The Department must begin accepting applications from dispensaries, providers, and manufacturers on or before January 1, 2022. However, for the first 12 months, the Department will only accept such applications from providers and dispensaries licensed under Montana's medical marijuana statute.

The new law does not impose restrictions on employers. It states that it may not be construed to: (1) require an employer to permit or accommodate recreational marijuana use (or any other conduct permitted by the law) in any workplace or on the employer's property; (2) prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while intoxicated by marijuana; (3) prevent an employer from declining to hire, discharging, or otherwise taking adverse action against an individual with respect to hire, tenure, terms, conditions, or privileges of employment because of the individual's violation of a workplace drug policy or intoxication by marijuana while working.

Montana has had a medical marijuana law since 2004.

3. New Jersey – New Jersey's Question 1 *passed* with 67% voting "yes" and only 33% voting "no." Effective January 1, 2021, the New Jersey Constitution will be amended to legalize recreational use of marijuana for adults ages 21 and older. The constitutional amendment provides for the Cannabis Regulatory Commission to regulate recreational marijuana and subjects all retail sales of recreational marijuana products to state sales tax.

The Cannabis Regulatory Commission and New Jersey lawmakers will address the regulatory issues that will determine the amount individuals can possess legally, the requirements for operating dispensaries for sale of cannabis, and taxation by state and local authorities. This process is expected to take up to approximately one year.

New Jersey has approved the use of medical marijuana since 2013. Under 2019 amendments to the Jake Honig Compassionate Use Act, employers are not permitted to discriminate against those who use cannabis for medical reasons.

4. South Dakota – South Dakota's Constitutional Amendment A *passed* with 53% voting "yes" and 47% voting "no." Effective July 1, 2021, the new law permits individuals 21 years of age or older to possess and use one ounce or less of marijuana and to grow up to six marijuana plants on the grounds of a private residence.

No later than April 1, 2022, the South Dakota Department of Revenue is required to issue rules and regulations related to the commercial sale, cultivation, and testing of marijuana. The new law also directs the legislature to pass laws regulating the cultivation, processing, and sale of hemp and medical marijuana by April 1, 2022.

The new law does not require employers to permit or accommodate conduct authorized by it. It also does not affect an employer's ability to restrict the use of marijuana by employees.

Next Steps

Employers should review their drug and alcohol policies — especially drug and alcohol testing policies — for compliance with applicable state laws.

While marijuana remains a Schedule I drug under the federal Controlled Substances Act, the trend in the courts over the last three years is to disregard marijuana's status under federal law and to enforce state laws instead (with the exception of federally regulated employees such as those regulated by the U.S. Department of Transportation).

Employers must be familiar with the marijuana laws in the states where they operate before taking employment actions against those who use marijuana. Jackson Lewis attorneys are available to assist.

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