

Maine Recreational Marijuana Law Limits Drug Testing, Disciplinary Consequences Imposed by Employers

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A provision of Maine's recreational marijuana law prohibits employers from taking adverse employment actions for off-premises marijuana use, as of February 1, 2018. This law effectively prevents Maine employers from testing for marijuana for pre-employment purposes. The law also affects employers who employ employees subject to federal drug and alcohol testing regulations, as well as those employers who are exempt from complying with Maine's drug testing law.

Background

Maine voters approved the recreational marijuana law in November 2016. The law originally was scheduled to take effect on January 30, 2017. However, emergency legislation passed three days before that date delayed implementation of certain provisions of the law to allow the legislature to review and revise provisions on the retail sales of marijuana. Once the legislature did so, the Governor, on November 3, 2017, vetoed the law. The legislature sustained the Governor's veto.

Despite the veto, portions of the recreational marijuana law that were not under review were scheduled to take effect on February 1, 2018. As no action was taken prior to that date to delay or stop implementation of those provisions, they went into effect as scheduled.

Employer Provisions

One of the provisions that took effect on February 1 provides that employers are not required to permit or accommodate the use, consumption, possession, trade, display, transportation, sale, or growing of marijuana in the workplace. Further, employers are permitted to enact and enforce workplace policies restricting the use of marijuana by employees and discipline employees who are under the influence of marijuana in the workplace.

However, the law prohibits employers from *"refusing to employ a person 21 years of age or older solely for that person's consuming marijuana outside of the ... employer's property."* This language presents a problem for employers that conduct drug testing because a drug test does not reveal *where* someone may have used marijuana. It is impossible to learn from a drug test result whether marijuana was "consumed outside the employer's property," because marijuana can stay in the human body for days or weeks.

The Maine Department of Labor is taking the position that employers may not test for marijuana as part of a pre-employment drug test. However, the Department has stated that probable cause (*i.e.*, reasonable suspicion) drug testing for marijuana still is permissible in Maine, because the recreational marijuana law allows employers to discipline employees who are under the influence of marijuana in the workplace.

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Impact on Employers Exempt from Compliance with Maine Drug Testing Law

Employers with employees who are subject to federally mandated drug and alcohol testing regulations already are exempt from compliance with Maine's drug testing statute with regard to those employees as well as their non-federally regulated employees. 26 Maine Rev. Stat. § 681(8). These employers, however, are *not* exempt from Maine's recreational marijuana law. While federal regulations (such as the U.S. Department of Transportation's drug and alcohol testing regulations) require testing for marijuana, they do not address the employment consequences for testing positive (other than requiring the employee to stop performing safety-sensitive functions). Employers regulated by the Department of Transportation, therefore, must consider what employment consequences will be imposed for positive marijuana test results, keeping in mind that the Maine recreational marijuana law does not permit employers to take adverse actions based on off-premises marijuana use. Additionally, these employers may not test their non-federally regulated employees for marijuana as part of *any type of drug test (e.g., pre-employment, post-accident, and random)*, other than a drug test based on reasonable suspicion in Maine.

Employers that conduct drug testing in Maine should review their drug and alcohol testing policies and ensure compliance with the requirements of the Maine recreational marijuana law. Jackson Lewis attorneys are available to assist employers with this and other workplace issues.