

What Vermont's Legalization of Recreational Marijuana Means for Employers

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Vermont's recreational marijuana law, which goes into effect on July 1, 2018, lifts penalties for individuals possessing limited amounts of marijuana. However, the new law does not require employers to tolerate marijuana possession or use in the workplace. Further, employers may continue to test for marijuana, though any adverse employment actions must be considered carefully for the risk of disability discrimination claims.

To assist employers, the Vermont Office of the Attorney General has released its [*Guide to Vermont's Laws on Marijuana in the Workplace*](#). The *Guide* provides employers an overview of the changes to Vermont's marijuana laws and summarizes existing employment laws relating to drug testing in the workplace. It also reminds employers that they must comply with Vermont's strict limitations on drug testing.

Recreational Marijuana

Under the recreational marijuana law, individuals will no longer face criminal penalties for possessing: (i) up to an ounce of marijuana or five grams of hashish; and (ii) two mature and four immature marijuana plants.

Employer rights are unchanged. Employers in Vermont:

- Are not required to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace;
- May prohibit or otherwise regulate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana on their premises; and
- May adopt policies prohibiting the use of marijuana in the workplace.

Moreover, the law does not create a legal cause of action against an employer that discharges an employee for violating a policy that restricts or prohibits employees' use of marijuana.

For more on the new law, see [Vermont's Governor Signs Recreational Marijuana Law](#).

Medical Marijuana

Vermont's medical marijuana law permits individuals with certain debilitating medical conditions to use and possess medical marijuana. However, it prohibits medical marijuana users from being under the influence of marijuana in a workplace or place of employment, or while driving a motor vehicle, operating heavy machinery, or handling a dangerous instrumentality. Therefore, employers may maintain policies banning the use or possession of medical marijuana at work or for being under the influence of medical marijuana at work.

Users Protected as Disabled

The *Guide* reminds employers that under Vermont's Fair Employment Practices Act (VFEPa), it is unlawful for an employer, employment agency, or labor organization to discriminate against a "qualified individual with a disability." Similar to the federal

Americans with Disabilities Act, VFEPA protects recovering and recovered substance abusers. According to the *Guide*, however, VFEPA differs from the ADA with regard to current illegal drug use. The ADA does not protect current users of illegal drugs. Under VFEPA, an employee's current illegal drug use does not automatically disqualify the employee from protection under Vermont's disability laws, unless that use: (i) prevents him or her from performing the duties of the job, or (ii) constitutes a "direct threat to the property and safety of others." Thus, Vermont law protects workers who can safely do their jobs, even if they are struggling to overcome addiction.

Additionally, if an employer becomes aware that an employee or applicant is a medical marijuana cardholder, the employer may be deemed to be on notice that the employee or applicant has a disability. Even if the employer does not learn of the specific debilitating condition, the employer will gain an understanding that the employee has a sufficiently debilitating medical condition to grant the employee the right to obtain marijuana from a state medical marijuana dispensary. Employers must be careful that employment decisions are not based on any actual or perceived underlying disability that may be related to the medical marijuana use.

Conflict with Recreational Marijuana Law?

Vermont's disability law may appear to conflict with the recreational marijuana law. The recreational marijuana law states that employers cannot be sued for enforcing a no-marijuana policy, even with regard to off-duty use. There is no conflict between the two laws, the *Guide* explains, because the recreational marijuana law states that it does not create a *new* legal claim for employees who are fired for violating a policy prohibiting marijuana use. An applicant or employee with a valid claim of disability discrimination related to medical use of marijuana is not barred by the recreational marijuana law from making such a claim.

Drug Testing Law

The *Guide* reminds employers of Vermont's restrictive drug testing law, which permits pre-employment testing and probable cause testing *only*. Automatic post-accident testing and random testing are prohibited. Employers must have a written drug testing policy, use laboratories approved by the Vermont Department of Health, have all drug test results reviewed by a Medical Review Officer, and comply with many other technical requirements. In addition, employees may not be terminated for a first-time positive test result; rather, the employee must be offered an opportunity to participate in an Employee Assistance Program and may be discharged only if he or she refuses to participate or subsequently tests positive after completing rehabilitation.

Vermont is one of nine states to have legalized recreational marijuana. More than a dozen states have legalized medical marijuana. Employers with multistate operations should continue to monitor developments across the nation and consult experienced counsel to address their specific circumstances. Please contact Jackson Lewis if you have any questions.

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