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MARCH 2021

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Article first published in ACC South Florida Newsletter

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Reprinted from



Florida's current employee drug testing laws, codified as the Drug-Free Workplace Act in sections 112.0455 and 440.102, *Florida Statutes*, provide certain benefits to private employers—like discounts on workers' compensation premiums. And they place virtually no limits on an employer's ability to adopt anti-drug policies and implement employee drug testing.

But in 2016, Florida passed a “medical marijuana law” with 71% of the vote. That law is codified in section 381.986, *Florida Statutes*. There is also a high probability of future legislation allowing for recreational marijuana consumption in Florida as there are pro-cannabis groups currently pushing for a 2022 ballot measure to legalize such use. Given these significant developments, you may be asking yourself: How will my company's employee drug screening policies be impacted over the coming years? The short answer tracks the old adage—the more things change, the more they stay the same—and not much will likely change. At least not in the short term.

Unfortunately, Florida does not presently have any case law analyzing the interplay between the Drug-Free Workplace Act and Florida's

medical marijuana law. Yet because most states tend to look at what others have done as a blueprint for future action, we can gaze outside the Sunshine State to predict what may emerge in Florida once all the smoke clears.

At least 34 other states permit medical marijuana use. And as of late 2020, a significant number of jurisdictions—including California, Colorado, Washington, District of Columbia, Oregon, Alaska, Maine, Massachusetts and Nevada—have passed laws decriminalizing recreational marijuana use. This push will likely continue well into 2021 and beyond. Already, numerous state legislatures including Hawaii, Maryland, Mississippi, Nebraska, Oklahoma and Virginia have introduced a cloud of cannabis-related bills aimed at adopting a variety of pro-cannabis policies.

Yet despite this legislative push toward allowing some form of legal marijuana use, thus far employers are largely free to drug test employees. Florida and other similarly situated states that only allow medical marijuana use (like Georgia, Hawaii, Montana, New Jersey, New Hampshire and Ohio) do not require employers to accommodate such use in the workplace. In fact, even most jurisdictions that have entirely decriminalized marijuana do not protect employees from being disciplined or terminated for off-duty marijuana use. For example, California, Colorado, Oregon, Washington and the District of Columbia—all of which already

allow both medical and recreational consumption—do not require employers to accommodate medical or recreational use in the workplace and let them discipline employees who test positive for marijuana. And two of those states, California and Colorado, have gone so far as to allow employers to punish employees with a valid medical marijuana card for off-duty marijuana use.

Given the makeup of our state’s legislature and in light of the foregoing, we anticipate that any Florida law decriminalizing marijuana will, at least initially, have no direct impact on an employer’s ability to regulate its workplace under the Drug-Free Workplace Act. This is particularly probable considering the types of employer protections already found in Florida’s medical marijuana law. Specifically subsection 15 of the statute—titled “Applicability”—does not compel employers to create special accommodations for medical marijuana users, and permits them to enforce drug-free workplace policies. Importantly, it also “does not create a cause of action against an employer for wrongful discharge or discrimination.”

Additionally, any legal challenges to existing employer drug-free workplace policies that may make their way to the Florida Supreme Court will likely bear little fruit in the near term. Courts in states that decriminalized marijuana have generally upheld the right of employers to drug test and punish employees for marijuana use. For example, in *Roe v. Teletech Customer Care Management*, the Washington Supreme Court affirmed an employer’s right to terminate a call-center employee for medical marijuana use, even though she had a valid medical marijuana card. Similarly, in *Coats v. Dish Network*, the Colorado Supreme Court upheld an employer’s right to terminate a quadriplegic

employee who had a valid state-issued medical marijuana license and used cannabis to control leg spasms. The *Coats* court noted that although medical marijuana is legal under state law, it is still illegal under federal law and therefore not protected as a “lawful” activity under a state law that prohibits employers from discharging employees based on their lawful outside-of-work activities. Courts in California and Oregon have also ruled against employees in comparable situations. Similar results are highly likely in Florida particularly given our Supreme Court’s current conservative bend.

So, absent some unexpected legislative act or judicial ruling, the status quo will initially remain intact in the short term, even if Florida decriminalizes marijuana. Private employers will likely continue to have the right to prohibit marijuana use, whether medical or recreational, and conduct drug testing as prescribed under Florida’s Drug-Free Workplace Act.

But this does not mean that companies should sit idly by, because change is coming. Not only are more states proposing laws to legalize marijuana use, but there is also a growing push for legalization at the federal government level. Even Florida’s own Nikki Fried recently asked the Biden-Harris administration to work with Congress to federally legalize marijuana for adult use. Assuming momentum continues in this direction, marijuana will likely become socially and legally more akin to alcohol. And it will be important for companies to have drug policies that embrace these changes, both to lessen their potential exposure and to recruit and retain talented employees who may value their legal off-duty marijuana use. Businesses should be proactive and engage experienced legal counsel in order to identify, assess and mitigate future risks. ●

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