

Dinsmôre

# Workplace Safety – Up in Smoke or Business as Usual?

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## Some Facts About Marijuana

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- ▮ **Marijuana is the most frequently used “illicit” drug used/abused in the U.S. and the drug most often detected in workplace drug testing – Quest Diagnostics**
- ▮ **In 2014, about 6.8 million adults ages 18-25 (19.6%) and about 13.5 million adults ages 26 and older (6.6%) used marijuana – Substance Abuse and Mental Health Services Administration**
- ▮ **The largest growth among marijuana users is in the 55-64 age group, with an increase of 455% from 2002 to 2014**



## Some Facts About Marijuana

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- **Two primary compounds used in cannabis products**
  - THC (tetrahydrocannabinol): produced intoxicating effects
  - CBD (cannabidiol): generally considered to be non-intoxicating
  - No scientific consensus on what constitutes safe consumption
- **Effects tend to last between 2 to 6 hours**
  - Highly variable – large variance in physiological reactions among individuals



## Some Facts About Marijuana

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### → **Testing is imprecise:**

- Cannot determine whether an employee was impaired at a specific time
- Cannot determine when last used – so employees who test positive may not be impaired
- Various testing methods (saliva, urine, sweat, hair), each with different “windows of detection”



## Some Facts About Marijuana and Safety



- THC in marijuana affects depth perception, reaction time, coordination and other motor skills and creates sensory distortion
- Employees testing positive for marijuana had 55% more industrial accidents, 85% more injuries and 75% greater absenteeism compared to those who tested negative – National Institute on Drug Abuse; Journal of Occupational and Environmental Medicine (May 2015) (likely statistical association between illicit drug use, including marijuana, and workplace accidents)
- Addiction rates increased from 1.5% to 2.9% of the population between 2001 and 2013 (National Institutes of Health)

# Ohio's Medical Marijuana Program

## Medical Marijuana in Ohio

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### HB 523:

- At the time, Ohio became the 25<sup>th</sup> state to enact a comprehensive medical marijuana program when Governor Kasich signed Ohio HB 523 into law on September 8, 2016.
- Legalizes medical marijuana in Ohio and establishes the Medical Marijuana Control Program
- Permits patients, on the recommendation of a physician, to use medical marijuana to treat a qualifying medical condition.
- Does not require an employer to permit or accommodate an employee's use, possession, or distribution of medical marijuana.

### SB 57:

- Signed into law by Governor Mike DeWine on July 30, 2019.
- Decriminalizes hemp and hemp products and allows anyone to (1) buy, sell, or possess hemp or a hemp product, and (2) cultivate and process hemp, if properly licensed.





## Qualifying Conditions

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- **AIDS**
- **Amyotrophic Lateral Sclerosis**
- **Alzheimer's Disease**
- **Cachexia/wasting syndrome**
- **Cancer**
- **Chronic Traumatic Encephalopathy**
- **Crohn's Disease**
- **Epilepsy or another seizure disorder**
- **Fibromyalgia**
- **Glaucoma**
- **Hepatitis C**

- **Inflammatory Bowel Disease**
- **Multiple Sclerosis**
- **Pain that is either chronic and severe or intractable**
- **Parkinson's Disease**
- **Positive status for HIV**
- **Post-Traumatic Stress Disorder**
- **Sickle Cell Anemia**
- **Spinal Cord Disease or Injury**
- **Tourette's Syndrome**
- **Traumatic Brain Injury**
- **Ulcerative Colitis**



## Only the following forms of medical marijuana may be dispensed:

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- **Oils**
- **Tinctures**
- **Plant material**
- **Edibles**
- **Patches**
- **Any other form approved by the Marijuana Control**



## The following are legal methods of using medical marijuana :

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- **Vaporization;**
- **Oil;**
- **Tincture;**
- **Capsule or edible form;**
- **Metered oil or solid preparation or vaporization;**
- **Patches for transdermal administrations of lotions, creams or ointments for topical administration; and**
- **Plant material for administration with the use of vaporizing devices.**

## The following methods of administration are prohibited:

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- Vaporizing devices in which the medical marijuana comes in direct contact with the device's heating element;
- Vaporizing devices capable of being heated to temperatures at which the medical marijuana plant material will burn; and
- Smoking



# Medical Marijuana in the Workplace





## HB 523 Creates Protections for Ohio Employers

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### The law does not:

- Require an employer to permit an employee's use, possession or distribution of medical marijuana.
- Require an employer to accommodate an employee's use, possession or distribution of medical marijuana.



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## The law does not:

- **Prohibit an employer from taking any action that it may take under current law because of a person’s use, possession or distribution of marijuana. An employer may refuse to hire , discharge or take adverse employment action due to an individual’s use, possession or distribution of marijuana.**
- **Prohibit an employer from keeping or establishing and enforcing a drug-free workplace policy.**
- **Prohibit an employer from keeping or establishing and enforcing a lawful drug-testing policy.**



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## The law does not:

- **Supercede any federal rules governing employment in federally-regulated industries.**
- **Create a private right of action against employers.**





## Workers' Compensation

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**If marijuana is the proximate cause of a workplace injury, the employee is not entitled to benefits.**

- Positive test within 32 hours of an injury creates presumption that marijuana intoxication was the cause.

**If the employer has a written policy addressing the use of drugs in the workplace, may constitute voluntary abandonment of position.**

## Unemployment Compensation

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**A medical marijuana user who is discharged for having tested positive will be considered discharged “for cause” for unemployment purposes if the employer had a written policy addressing the use of drugs.**



## Issue 2 – Legalizes Recreational Marijuana in Ohio



## Issue 2

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- **On November 7, 2023, Ohio voters passed Issue 2 by a margin of 57% to 43%.**
- **Result: Effective December 7, 2023, adults who are 21 or older can now legally consume marijuana for recreational purposes.**
- **In addition, Ohioans 21 or older can legally grow their own marijuana plants in their home.**
- **On December 7, 2023, the Ohio legislature passed Ohio Revised Code Chapter 3780 (Adult Use Cannabis Control).**



## Ohio Revised Code Chapter 3780

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- **Some key points:**

- Establishment of Division of Cannabis Control within the Department of Commerce (3780.03).
- Establishes rules for cultivators, cannabis operators, and testing laboratories.
- Establishes rights of of Ohio employers (3780.35).

- **Allowable forms of use:**

- Plant material and seeds, live plants, clones, extracts, drops, lozenges, oils, tinctures, edibles, patches, smoking or combustibles products, vaporization of product, beverages, pills, capsules, suppositories, oral pouches, oral strips, oral and topical sprays, salves, lotions or similar cosmetic products, and inhalers.



## Ohio Revised Code Chapter 3780

### Ohio employers may still:

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- Refuse to permit or accommodate an employee's use, possession or distribution of adult-use cannabis;
- Refuse to hire, discharge, discipline, or otherwise take an adverse employment action against an individual with respect to hire, tenure, terms, conditions, or privileges of employment because of that individual's use, possession, or distribution of cannabis.
- Establish and enforce a drug testing policy, drug-free workplace policy, or zero tolerance drug policy.



## Ohio Revised Code Chapter 3780

### ▫ **The law does not:**

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- Interfere with any federal restrictions on employment, including the regulations adopted by the U.S. Department of Transportation;
- Allow an employee to commence a cause of action against an employer for refusing to hire, discharging, disciplining, discriminating, retaliating, or otherwise taking an adverse employment action against an individual with respect to hire, tenure, terms, conditions, or privileges related to the individual's use of cannabis.



## Sample drug use policy language

### ▫ *Drug Use:*

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The use, possession or being under the influence of alcohol or drugs while on the job or on Company business in a customer facility (including any breaks) or anywhere on Company property (including parking lots and company vehicles) is prohibited. “Drug” means any drug that is not legally obtainable or that is legally obtainable but has not been legally obtained. This includes the misuse of prescription or over the counter drugs. To the extent permitted by law, \_\_\_\_\_ will treat marijuana, including medical marijuana, as a “drug” under this policy. Off the job use, possession, or being under the influence of drugs or alcohol, which adversely affects an employee’s job performance, which has an adverse effect on the Company, or which jeopardizes the safety or property of other individuals is prohibited. The distribution or sale of drugs at any time or any place, or conviction (or similar result) for any drug related offense will lead to immediate discharge. \_\_\_\_\_ will comply with applicable state laws regarding drug testing.





## Sample drug use policy language

### ▫ *Employee Requirements:*

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- a) **Employees may be required to submit to drug and alcohol screening test(s) under the following circumstances:**
  - i) **Pre-employment screening**
  - ii) **Reasonable suspicion - at employer request**
  - iii) **Post occupational accident - immediately following**
  - iv) **Post medical leave over 60 days - prior to return to work**
  - v) **Vehicle accident - within 24 hours**
  - vi) **Property damage - within 24 hours**
  
- b) **An employee must notify his or her supervisor if taking any substance, including prescription or over the counter medication, that would render the employee unable to complete his or her assigned work in a safe and proper manner.**



## Sample drug use policy language

### ▫ *Testing Methods and Procedures:*

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- a) All testing will be conducted by a licensed independent medical laboratory, which will follow testing standards established by the state or federal government. Employees will be tested for the presence of drugs in the urine and/or alcohol on the breath.
  
- b) Employees will be considered to be engaged at work for the time spent in taking any tests, and will be compensated for such time at their regular rate excluding pre-employment screenings.
  
- c) The Company will pay for the cost of the testing, including the confirmation of any positive test result. The testing lab will retain samples in accordance with state law, so that an employee may request a retest of the sample at his/her own expense if the employee disagrees with the test result.



## Sample drug use policy language

### ▢ *Covered Substances:*

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- a) Employees will be tested for their use of commonly-abused controlled substances, which include: Amphetamines, Barbiturates, Benzodiazepines, Opiates, Cannabinoids, Cocaine, Methadone, Methaqualone, Phencyclidine (PCP), Propoxyphene, and chemical derivatives of these substances.
- b) Employees must advise testing lab employees of all prescription drugs taken in the past month before the test, and to be prepared to show proof of such prescription to testing lab personnel.



## Sample drug use policy language

### ▫ *Positive Tests and Refusals:*

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#### 4) Refusal to Undergo Testing

- a) Employees who refuse to submit to a test are subject to immediate discharge.

#### 5) Positive Test

- a) If an employee tests positive on an initial screening test, the employee will be temporarily suspended while the confirmation test is being conducted. On receipt of the confirmation test, the employee will be subject to disciplinary action, up to and including discharge.



## Sample drug use policy language

- **Other policy language you could consider:**
- Confidentiality of results and right-to-review
- Treatment, termination and rehire considerations
- Company sponsored events (no liability for company)
- Pre-employment screening?
- Testing of temp workers?



## Ohio Revised Code Chapter 3780

### ▫ **Workers' Compensation:**

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- The administrator of workers' compensation may still grant rebates or discounts on premium rates to employers that participate in a drug-free workplace program established in accordance with the rules adopted under Chapter 4123 of the Revised Code.
- Probable cause drug testing versus 100% post-accident drug testing?



## Ohio Revised Code Chapter 3780

### ▢ **Unemployment Compensation:**

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- ▢ An individual who is discharged from employment because of that individual's use of cannabis shall be considered to have been discharged for just cause for purposes of unemployment compensation if the individual's use of cannabis was in violation of an employer's drug-free workplace policy, zero policy, or other formal program or policy regulated the use of cannabis.



## Work from Home

### ▫ **Strategies for employers to address remote workers who may be using marijuana:**

- It is important for Ohio employers to have a work-from-home marijuana policy.
  - A work-from-home marijuana policy should look very similar to a company's general zero-tolerance drug use policy.
  - A work-from-home marijuana policy may be best understood by employees if it is simply woven into a company's general zero-tolerance drug use policy.
  - Drug testing can occur at an off-site collection center.
  - National companies should be aware of each state's position on recreational marijuana.
  - Ensure your incident and injury reporting policies extend to the at-home workplace, and those policies may need to be *even more stringent* in terms of timing, written documentation, etc.
  - Consider a remote workplace hygienist. Why?





## What's Next?

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- **Determine best practices for your business.**
  - Does your business have safety-sensitive positions?
  - Will you have a zero tolerance policy for marijuana?
  - Under what circumstances will you drug test?
  - What will be the effect of a positive result for marijuana?



## What's Next?

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- **Action steps.**
  - Train managers to recognize the signs of cannabis use.
  - Review policies to see if they should be changed.
  - Ensure that your policies are clearly communicated to your employees.

▫ **QUESTIONS?**





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