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Medical Marijuana Use and Private Employers

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Marijuana use and possession remains a federal crime. In addition, employers are obligated to maintain safe working conditions and to that end may implement drug-free workplace policies. Complicating matters, half of our states have legalized medical marijuana and a few jurisdictions have legalized recreational marijuana.

Michigan voters legalized medical marijuana in 2008 via the Michigan Medical Marijuana Act. In September the state legislature sent a package of new bills to the Governor overhauling the state's medical marijuana scheme which will, among other things, allow for the operation of dispensaries and offer protections for use of alternative forms of marijuana. If you are a private employer in Michigan you may be wondering how the legality of medical marijuana impacts your drug-testing and zero-tolerance policies.

The Act does not require an employer to allow employees holding medical marijuana cards to use marijuana in the workplace or work under the influence of marijuana. But the use of marijuana will result in a positive drug test for quite some time after use. In accordance with their policies, employers have routinely discharged employees who test positive for drug use, regardless of the circumstances or timing of that use. An employee who was fired following a positive drug test for marijuana use, which he obtained and used pursuant to Michigan's medical marijuana law, challenged the firing as a violation of the Act. In 2012, the United States Court of Appeals for the Sixth Circuit found that the Act did not regulate private employment and dismissed the employee's claims for wrongful discharge.

A bill to amend the Act has been introduced in the State House which would prohibit employers from terminating licensed users of medical marijuana from their jobs provided the employee's use of marijuana complies with the Act and "the use is not incompatible with and does not hinder job performance." Criticisms of the bill include the difficulty in determining whether an employee was under the influence of marijuana at the time of the test and/or an incident triggering a test, because marijuana use will be reflected by a test for quite some time after actual use. There is also some concern that a medical marijuana user could be afforded an unfair "allowance" over an employee not using substances, where the former would not lose their job after an incident but the latter would after the same type of incident.

Pros and cons aside, unless and until the House bill or some corollary is signed into law, private employers are not required to retain employees who violate the employers' drug policies, regardless of the nature of the use of the marijuana. However, an employee terminated for using marijuana in violation of a no-drug-use policy is not precluded from receiving unemployment benefits if the employee has a medical marijuana card.