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Labor and Employment Alert: Sometimes the Grass Really is Greener -- Recreational Marijuana Legalization Trend Continues

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Spanning the country and the political divide, Election Day 2016 witnessed eight of the nine marijuana-related ballot measures pass in various states. Arkansas, Florida, Montana, and North Dakota each “legalized” medical marijuana, while California, Maine, Massachusetts, and Nevada all “legalized” the recreational use of marijuana by adults 21 and older (Arizona’s ballot measure to do so failed). Alaska, Colorado, Oregon, Washington and the District of Columbia previously legalized the use of recreational marijuana. For updates on the medical marijuana laws, read this *Labor and Employment Alert*. Remember that marijuana use and possession currently remains illegal under federal law whether its use is for medicinal or recreational purposes. Below we highlight the key provisions of interest to employers in the new recreational marijuana laws.

California

Approved by 56% of the voters, California’s Proposition 64 (the Adult Use of Marijuana Act) legalizes recreational marijuana for individuals over the age of 21, allowing them to possess and purchase up to an ounce of marijuana and grow up to six plants for recreational use. The law also regulates the cultivation, distribution, sale, and use of marijuana. While the law became effective on November 9, 2016, the new California Bureau of Marijuana Control has until January 2018 to begin issuing licenses to the dispensaries that will sell recreational marijuana. This means that recreational marijuana currently cannot be purchased in California.

Proposition 64 does not amend, repeal, affect, restrict, or preempt any laws: (1) making it unlawful to drive or operate a vehicle, boat, vessel, or aircraft, while smoking, ingesting, or impaired by, marijuana; (2) concerning the sale or use of marijuana to or by a person under 21 years of age; (3) pertaining to smoking or ingesting marijuana in correctional institutions; and (4) providing that it would constitute negligence or professional malpractice to undertake any task while impaired from smoking or ingesting marijuana or marijuana products.

As to employment, Proposition 64 does not (1) affect the rights and obligations of public and private employers to maintain a drug- and alcohol-free workplace; (2) require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace; (3) affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees; or (4) prevent employers from complying with state or federal law. Moreover, Proposition 64 does not affect the ability of an individual or private entity to prohibit or restrict marijuana use or possession on the individual's or entity's privately owned property. The California Division of Occupational Safety and Health is required to evaluate and determine whether industry-specific regulations are required, such as on exposure to second-hand marijuana smoke or other work-related risks, by October 1, 2018.

Maine

Approved by just 50.17% of the voters (a margin of a few thousand votes), Maine's Marijuana Legalization Act passed but is subject to a recount, which may take a month to complete. Assuming the act stands, it would become effective in January 2017. The law would allow individuals over the age of 21 to possess and use up to 2.5 ounces of marijuana and grow up to six marijuana plants at home.

The law does not require an employer to permit or accommodate the use, consumption, possession, trade, display, transportation, sale, or growing of marijuana in the workplace. Nor does it affect the ability of employers to enact and enforce workplace policies restricting the use of marijuana by employees or to discipline employees who are under the influence of marijuana in the workplace. However, a school, employer or landlord may not refuse to enroll or employ or lease to or otherwise penalize a person 21 years of age or older solely for that person's consuming marijuana outside of the school's, employer's or landlord's property.

Massachusetts

Approved by 54% of the voters, Massachusetts' Regulation and Taxation of Marijuana Act becomes effective on December 15, 2016. The law permits those who are 21 and older to use or possess up to one ounce of marijuana in public, have up to ten ounces of marijuana at home, and cultivate up to six marijuana plants. The state's new Cannabis Control Commission has until January 1, 2018 to implement regulations regarding the sale of marijuana. Otherwise, the state's medical marijuana treatment centers may begin selling recreational marijuana on that date.

The law does not: (1) change existing penalties for operating, navigating, or being in actual physical control of any motor vehicle, train, aircraft, motorboat, or other motorized form of transport or machinery while impaired by or consuming marijuana; (2) permit the possession or use of marijuana by those under the age of 21; (3) prevent a person from prohibiting or otherwise regulating the consumption, display, production, processing, manufacture, or sale of marijuana and marijuana accessories on or in property the person owns, occupies, or manages, except that a lease agreement shall not prohibit a tenant from consuming marijuana by means other than smoking on or in property in which the tenant resides unless failing to do so would cause the landlord to violate a federal law or regulation; or (4) authorize the possession or consumption of marijuana or marijuana accessories on the grounds of or within a public or private preschool, elementary school, or secondary school, or in any correctional facility.

Specifically, with respect to employment, the law does not require an employer to permit or accommodate conduct otherwise allowed by this chapter in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees. Nor does the law amend existing penalties for conduct involving the performance of any task while impaired by marijuana that would constitute negligence or professional malpractice and shall not prevent the imposition of any civil, criminal, or other penalty for such conduct.

Nevada

Approved by 54% of the voters, Nevada's Regulation and Taxation of Marijuana Act becomes effective on January 1, 2017. The law legalizes the possession, use, and cultivation of one ounce or less of recreational marijuana by those age 21 and older. Nevada will begin receiving applications for marijuana establishments no later than January 1, 2018.

The law permits individuals 21 and older to use or possess up to an ounce of marijuana, and possess or cultivate up to six marijuana plants.

The law does not prohibit a public or private employer from maintaining, enacting, and enforcing a workplace policy prohibiting or restricting actions or conduct otherwise permitted under the law. Additionally, the law does not prevent the imposition of any civil or criminal penalty for operating a vehicle while impaired by marijuana or undertaking any task under the influence of marijuana that constitutes negligence or professional malpractice.

The law does not permit any person to engage in and does not prevent the imposition of any civil, criminal, or other penalty for: (1) driving, operating, or being in actual physical control of a vehicle, aircraft, or vessel under power or sail while under the influence of marijuana or while impaired by marijuana; (2) knowingly delivering, giving, selling, administering, or offering marijuana to a person under 21 years of age; (3) possessing marijuana within a correctional facility; (4) possessing marijuana in a preschool, kindergarten, or elementary or secondary school; or (5) undertaking any task under the influence of marijuana that constitutes negligence or professional malpractice.

As to employment specifically, the law does not prohibit a public or private employer from maintaining, enacting, and enforcing a workplace policy prohibiting or restricting the use or possession of recreational marijuana. Moreover, a person who occupies, owns, or controls a privately owned property may prohibit or otherwise restrict the smoking, cultivation, processing, manufacture, sale, delivery, or transfer of marijuana on that property.

Conclusion

As the November election results show, support for legalizing recreational marijuana crosses party lines. But it remains to be seen what happens under the new presidential regime in 2017. For example, will the new president take a more active stance on enforcing the nation's drug laws or will we see a shift at the federal law toward legalizing marijuana? In the interim, employers with operations in California, Maine, Massachusetts, and Nevada should review their employment and drug-testing policies to ensure that they comply with these new laws.