

# RECREATIONAL MARIJUANA IN MICHIGAN AND EMPLOYER RIGHTS

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# WHAT WE WILL COVER

- Overview of Proposal 1
- Practical Considerations for Employers:
  - Written policies
  - Drug testing
  - Accommodations
  - Non-Discrimination
  - Drug Free Workplace

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# PROPOSAL 1 – LEGALIZED RECREATIONAL MARIJUANA

- On November 6, 2018, Michigan voters approved Proposal 1 by a 56-42 percent margin. In doing so, Michigan became the first state in the Midwest (and 10<sup>th</sup> state overall) to legalize recreational marijuana.
- The initiative that authorized Proposal 1 is four-pages long and addresses many issues regarding state licensing, taxation and municipalities' rights and obligations
- The Proposal becomes effective (an “Act”) 10 days after the official certification of the vote (likely sometime in early December)

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# PROPOSAL 1 – LEGALIZED RECREATIONAL MARIJUANA

- Once effective, the Act will legalize (under state law) possession, use and cultivation of marijuana, marijuana products and industrial hemp by persons 21 years or older
- It will still be a while until the state's commercial system is up and operational. Regulators have one year to determine rules for retail sales, and are expected to start accepting license applications for prospective marijuana businesses starting in December 2019.

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# PROPOSAL 1 – LEGALIZED RECREATIONAL MARIJUANA

- Marijuana remains an illegal drug under federal law
- The U.S. Attorneys for the Eastern and Western Districts of Michigan released a statement indicating they have “never focused on the prosecution of marijuana users or low-level offenders, unless aggravating factors are present. That will not change.”
- Governor-elect Whitmer has said she intends to use the governor’s clemency powers to free at least some of the thousands of people serving time in state prison for marijuana-related convictions

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# EMPLOYER RIGHTS AFTER PROPOSAL 1

- The Act does not require an employer to permit or accommodate marijuana in the workplace
- The Act does not prohibit an employer from disciplining or discharging an employee for violating a workplace drug policy
- The Act does not prohibit an employer from taking adverse employment action against because an employee was working while under the influence of marijuana
- The Act does not permit a person to consume or smoke marijuana where prohibited by the owner, occupier or manager of property
- The Act does not change federal regulations, such as DOT regulations for CDL holders

# PRACTICAL CONSIDERATIONS

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## WRITTEN POLICIES

- Employers should consider whether revisions to existing drug policies are needed
  - Consider revising policies that refer to “illegal drugs” or “illegal substances”
  - Focus on prohibiting employees from being impaired while working
  - Consider how strong of a stance you want to take as a company
- Employers should also consider whether re-publicizing existing drug use policies is needed to remind employees of your company’s rules and expectations
- Revisions to no smoking policies may also be needed

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# DRUG TESTING

- The Act does not prohibit an employer from conducting drug testing
- Unlike alcohol testing, a positive result does not reveal when marijuana was consumed or whether an employee is under the influence
  - Saliva swabs and urine samples only show if THC has been used over the last few days. Tests of hair samples will show THC levels going back as long as 90 days.

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# DRUG TESTING

- Pre-Employment Testing: Surveys show that employers in states where recreational use of marijuana is legal are gradually removing marijuana from pre-employment drug screening panels to expand candidate pools
- Reasonable Suspicion Testing: Employers conducting reasonable suspicion testing should be able to articulate an objective basis for a drug test, such as the employer's observations of the employee's behavior, documented co-worker complaints, etc. Otherwise, an employer could be accused of regarding an employee as disabled, or singling them out based on a protected characteristic.
- Random Testing: Ensure uniform, non-discriminatory random testing to avoid claims that "random" drug testing is discriminatory

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# WORKPLACE ACCOMMODATIONS

- The Act “does not require an employer to permit or accommodate conduct otherwise allowed by this act in any workplace or on the employer’s property”
- Likewise, under the Medical Marijuana Act, employers do not have a duty to accommodate use of medical marijuana. See *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012)(employee and medical marijuana user was lawfully terminated for positive drug test).

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# NON-DISCRIMINATION

- Use of marijuana is not a protected characteristic
- However, employers must be careful to maintain a consistent rationale for an employee's termination if premised on marijuana use which may arguably be connected to a disability:
  - In *EEOC v. The Pines of Clarkston* (E.D. Mich. 2015), an employee alleged she was terminated because of her epilepsy. The employer contended termination was for violation of its zero-tolerance policy barring marijuana use, including a belief she also sold drugs on the premises. However, the court denied the employer summary judgment because during the EEOC's investigation the employer's rationale focused on the employee's ability to perform her duties.

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# DRUG FREE WORKPLACE ACT

- Applies to corporations, partnerships or other entities with 25 or more employees who have been awarded a grant or contract with the federal government of \$5,000.00 or more
- Employer must certify the following:
  - That employer has notified employees that employer maintains a drug-free workplace; identify the specific disciplinary actions taken for unlawful drug use; and that employee will notify employer of any drug-related convictions
  - That employer has established a drug-free awareness program informing employees about the danger of drug use and of any EAP programs available to employees

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# QUESTIONS?



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# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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