
## Coppersmith Briefs

# Recreational Marijuana and the Arizona Workplace

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In November 2020, Arizona voters approved Proposition 207 by a wide margin, clearing the way for legalization of the sale, possession, personal cultivation, and use of certain amounts of marijuana by adults 21 and older. With retail marijuana sales now underway, many employers have questions about how the new law will affect their workplaces, and whether they have to tolerate employees bringing marijuana to work or being high on the job. We have good news: Prop 207 was drafted in a way that protects employers' rights to maintain a safe, drug-free workplace.

**Recreational Marijuana Use Is Not Protected**

Unlike Arizona's medical marijuana law, Prop 207 (the Act) creates no special protections for applicants or employees who are recreational marijuana users. The Act also makes clear that it does not do any of the following:

- "require an employer to allow or accommodate the use, consumption, possession, transfer, display, transportation, sale, or cultivation of marijuana in a place of employment;"
- "restrict the rights of employers to maintain a drug-and-alcohol-free workplace or affect the ability of employers to have workplace policies restricting the use of marijuana by employees or prospective employees;"
- "restrict the rights of employers…to prohibit or regulate conduct otherwise allowed by this chapter when such conduct occurs on or in their properties."

In short, employers may continue to prohibit employees from using, selling, possessing, and being impaired by marijuana in the workplace and while on duty. If the long dispensary lines are any indication, legalization is likely to result in increased usage of marijuana in the general population, making this the perfect time to review and update existing policies.


**Practical Testing Considerations**

Although some Arizona employers are required to implement drug and alcohol testing to comply with federal or state regulations, most have a choice about whether and under what circumstances to administer drug tests to applicants or employees.

With both medical and recreational use of marijuana now legal in the state, a practical consideration is whether to conduct drug testing of applicants, and if so, whether to test for marijuana. Testing and excluding applicants for marijuana usage may limit the pool of otherwise qualified workers. Arizona employers also must take into account that, except for safety-sensitive jobs, a positive test for marijuana metabolites cannot, by itself, be used to reject an applicant who is a qualifying medical marijuana patient.

Once a worker is hired, an employer may choose to test for a variety of reasons. The most common are reasonable suspicion that an employee is impaired or under the influence while on duty, and investigation of accidents that result in injury or property damage. Arizona law also recognizes other legitimate business reasons for testing, including maintenance of productivity, security, and/or the quality of the employer's products or services, and protection of safety for employees and third parties. Random testing for all employees or certain groups of employees also is permitted, and can be effective in deterring employees from reporting to work impaired.

**Aligning Testing Policies with Arizona Law**

For employers who test, we recommend adopting a drug and alcohol policy that meets the requirements of Arizona's drug testing statute (A.R.S. §23-493 *et seq*.). Although there is no penalty for not complying with the statute, doing so provides employers with several valuable protections from litigation related to test results and actions taken based on those results. The 10 elements that a compliant policy must include are:

- A statement of the employer's policy regarding drug and alcohol use by employees;
- A description of the employees or prospective employees who are subject to testing;
- The circumstances under which testing may be required;
- The substances as to which testing may be required;
- A description of the testing methods and collection procedures to be used;
- The consequences of a refusal to participate in the testing;
- Any adverse personnel action that may be taken based on the testing procedure or results;

- The right of an employee, on request, to obtain the written test results;
- The right of an employee, on request, to explain in a confidential setting, a positive test result; and
- A statement of the employer's policy regarding the confidentiality of the test results.

The statute also has requirements related to scheduling of tests (including when the employer must pay for the costs of testing and transportation to the test site); sample collection and testing procedures; confidentiality of test results; and the applicant's or employee's right to access their own results.

To take full advantage of the law's protections, a policy also should make clear that refusal to test when required is a violation of the policy, and should define "refusal" to include alteration, dilution or substitution of a sample. The policy should provide for a range of potential disciplinary actions, up to and including termination of employment.

The drug testing statute recognizes that employers may decide to allow an employee who violates the policy to enroll in a treatment or counseling program, with or without additional testing, as a condition of continued employment. Employers should consider referencing this possibility in their policies, and should document any such arrangements in a written agreement with the employee. Additionally, employers who are covered by the Family and Medical Leave Act (FMLA) should be mindful that participation in a substance abuse treatment program may be a "serious health condition" that qualifies an eligible employee for FMLA leave.

Finally, the policy must apply to all compensated employees, including officers, directors, and supervisors, and it must be distributed in the same way that the employer distributes other personnel policies to employees (such as in a handbook, or a notice posted in the workplace). Prospective employees also must be notified of any testing requirement.

**Litigation Protection and Safety-Sensitive Positions**

Having a testing policy and program that satisfies the statutory requirements gives an employer protection from certain legal claims that otherwise might be brought by an aggrieved applicant or employee. Most notably, no claim may be brought challenging any of the following:

- employer action that was "based on the employer's good faith belief that an employee used or possessed any drug while on the employer's premises or during the hours of employment";
- employer action that was "based on the employer's good faith belief that an employee had an impairment while working while on the employer's premises or during hours of employment"; and

- an employer's decision to "exclude an employee from performing a safety-sensitive position, … based on the employer's good faith belief that the employee is engaged in the current use of any drug, whether legal, prescribed by a physician or otherwise, if the drug could cause an impairment or otherwise decrease or lessen the employee's job performance or ability to perform the employee's job duties."

To benefit from these protections, the employer must have acted based on a "good faith belief." This term is defined generously in the drug testing statute, and it's likely that an employer will be able to meet the standard in most situations.

The statute also broadly defines "safety-sensitive position" to include "any job designated by an employer as a safety-sensitive position or any job that includes tasks or duties that the employer in good faith believes could affect the safety or health of the employee performing the task or others." Specific examples cited in the statute include positions that involve (1) operating vehicles, equipment, machinery or power tools; (2) repairing, maintaining or monitoring the performance or operation of any equipment, machinery or manufacturing process, the malfunction or disruption of which could result in injury or property damage; (3) performing duties in the residential or commercial premises of a customer, supplier or vendor; (4) preparing or handling food or medicine; and (5) working in any occupation regulated by Title 32 (which includes a wide range of health care occupations, along with occupations such as cosmetologists, security guards, contractors, engineers, architects, accountants, private investigators, and real estate agents).

Despite the broad discretion granted by the statute, employers should be wary of over-designating positions as safety-sensitive, as this can undermine an employer's position that it acted in "good faith." For example, office-based clerical positions are unlikely to have safety-related implications. The focus should be on positions where impairment of skills and behaviors such as alertness, focus, judgment, reaction time, physical coordination, motor skills, balance, and communication could cause serious safety problems for the employee or those around the employee. Employers should designate such positions in writing, such as in each position's job description or in a separate list, and preferably in advance of any hiring decision.

**Have Questions or Need a Policy Review?**

The Coppersmith Brockelman team is well-versed in Arizona's marijuana and drug testing laws. We stand ready to answer questions and assist with policy review and development as Arizona joins the growing number of states that have legalized marijuana.