



Virginia Legalizes Marijuana and Bolsters Employee Protections: What Employers Need to Know

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Ready or not, Virginia ? on July 1, 2021, marijuana becomes fully legal for adults to use and possess in-state.[i] Virginia is now the 16th state to legalize cannabis for recreational purposes.[ii] More importantly, for Virginia employers, is that Virginia becomes the 13th state to expressly provide employment protections for medical marijuana cardholders[iii] by prohibiting employers from terminating, disciplining, or otherwise discriminating against an employee ?for such employee's lawful use of cannabis oil pursuant to a valid written certification.?[iv]

These new statutes will affect Virginia employers in significant ways. Virginia employers will now have to address what they can do if a current employee is suspected of being impaired at work; what obligations do they have to reasonably accommodate medical marijuana cardholders; and overall, whether employers in certain industries can require drug testing for marijuana at all.

Implications for Employees Using Cannabis

Even though the 2021 laws provide employment protections to medical marijuana users, there are important caveats that should not be overlooked. Specifically, while the statutes provide anti-retaliation protections for an ?employee?s lawful use of cannabis oil based on a valid written certification,? the 2021 medical marijuana employment protection law does not:

- Restrict an employer's ability to take any adverse employment action for any work impairment caused by the use of cannabis oil or to prohibit possession during work hours. Va. Code Ann. § 40.1-27.4(C)(i).
- Require an employer to commit any act that would cause the employer to be in violation of federal law or that would result in the loss of a federal contract or federal funding. Va. Code Ann. § 40.1-27.4(C)(ii).
- Require any defense industrial base sector employer or prospective employer?[v] to hire or retain

any applicant or employee who tests positive for THC in excess of specified amounts Va. Code Ann. § 40.1-27.4(C)(iii).

As a practical approach when addressing these issues, employers should focus on the various types of cannabis-using employees ? namely, (A) employees who work in highly-regulated positions or for certain federal contractors; (B) employees who are recreational marijuana users only; and (C) employees who use marijuana and are certified medical marijuana cardholders.

A. Employees in Regulated Positions

Generally, employees who work in positions that are safety-sensitive or otherwise regulated by outside authorities, including employees specifically performing work under federal contracts or for certain federal contractors, will not be protected when it comes to marijuana use in any form. Safety-sensitive jobs are heavily regulated by federal agencies, as they greatly depend on employees being fully alert and aware of safety risks and potential hazards at all times. Due to the sensitive nature of these positions, federal regulations permit employers to lawfully ban employee marijuana use.

Virginia?s 2021 marijuana statutes acknowledge these potential restrictions and provide a safe harbor for Virginia employers to drug test employees who work in certain regulated jobs. Such testing can occur regardless of whether the employee shows signs of impairment at work or whether the employee has been certified to use medical marijuana.

Federal government contractors also received a carveout in Virginia?s new statute, which specifically provides that an employer is not required by the statute ?to commit any act that would cause the employer to be in violation of federal law or that would result in the loss of a federal contract or federal funding.? As such, employers who qualify for this exception may drug test for marijuana and may also discharge or discriminate against employees who test positive for THC.

However, it is important to note that contracting with the federal government does not automatically exempt employers from adhering to Virginia?s new employee protections for medical marijuana[vi] Rather, whether a workplace is required by federal law or as a condition to a federal contract to test certain employees for marijuana must be evaluated on an individual, case-by-case basis.

B. Employees Who Are Recreational Marijuana Users

Employees who use marijuana recreationally will not be protected from employment discrimination. Even though marijuana will be fully legalized July 1, 2021, Virginia remains an at-will employment state. Accordingly, employers can require drug testing before employment, at random times, post-accident or based on reasonable suspicion so long as there is no discrimination against employees who are legally allowed cannabis for medicinal reasons. However, Virginia employers may wish to consider only testing for reasonable suspicion or post-accident because medicinal THC can show up in an employee?s system much longer than alcohol.

C. Employees Who Are Medical Marijuana Cardholders

Medical marijuana cardholders are afforded the greatest employment protections pursuant to Virginia's statutes. Although medical marijuana has been legal in Virginia in some form since 2015, previously, a medical marijuana card only protected individuals from criminal prosecution and not from potential adverse employment actions. However, as of July 1, 2021, the Virginia Code prohibits an employer from discharging, disciplining, or discriminating against an employee for lawful use of cannabis oil based on a valid written certification.^[vii] Under the Virginians with Disabilities Act (VDA)^[viii] and the Virginia Human Rights Act (VHRA),^[ix] an employee must disclose his or her medical marijuana authorization status when and if an accommodation is needed; which, with regard to medical marijuana, typically occurs when an employee is presented with a drug test.

Under the new Virginia employment protections law, if the employee discloses that he or she has a medical marijuana card, and the drug test then comes back positive for marijuana, the employer may not terminate or discipline the employee solely on the basis of the positive test. Employers should therefore be careful to document well all of the other reasons that would support an adverse employment action.

Remember also that, while Virginia's new medical marijuana law applies to all employers in Virginia, as set forth in Part A above, federal contractors and other companies working in certain federally-regulated industries are statutorily excluded from having to comply with the law if doing so would put them in violation of federal law or in breach of their federal contract.

This also means that, if a (non-mandated) workplace wants to allow "passes" on a marijuana test for employees with a medical marijuana recommendation, the employer has two options. The employer can remove marijuana from the panel of drugs to be tested for or the employer may continue testing for marijuana, and, in the case of a positive marijuana result, follow the actions declared in the employer's policy for responding to an employee's claim that his or her marijuana use is medically authorized.

Either way, employers should have policies in place pertaining to medical marijuana card holders, which may be similar to those for employees who may require reasonable accommodation for unrelated reasons, such as religion or disability. In such a policy, employers should clearly instruct employees how to engage in an interactive process to determine what reasonable accommodation, if any, can be made with regard to an employee's off-site marijuana use. Employers should then consistently follow the established procedures. As always, Virginia employers should consult with skilled legal counsel prior to taking any adverse actions, especially in situations where an employee may have medical authorization.

[i] Virginia Senate Bill 1406 | House Bill 2312 legalize up to one (1) ounce for personal use, beginning July 1, 2021. The legalization law also permits Virginians to grow up to four (4) marijuana plants per household.

[ii] Here, "marijuana" and "cannabis" are used interchangeably and

refer to raw marijuana and cannabis-derived products with minimum levels of tetrahydrocannabinol (THC) that has been determined by regulators to have certain psychoactive qualities.

[iii] As of April 2021, twelve states have similar employment protection laws for authorized medical marijuana users, including Arizona; Colorado; Connecticut; Delaware; Illinois; Maine, Minnesota, Nevada, New Mexico, New York, Oklahoma, Oregon, and Rhode Island.

[iv] Va. Code Ann. § 40.1-27.4 (H.B. 1862) (July 1, 2021).

[v] For a list of authorized employers, visit <https://www.cisa.gov/defense-industrial-base-sector-council-charters-and-membership#> (last viewed April 28, 2021).

[vi] Although some federal contracts and specific job positions do require drug testing by regulation, neither the CSA nor the Drug Free Workplace Act (DFWA) requires drug testing, nor do these laws expressly prohibit federal contractors from employing an individual who uses marijuana outside of the workplace, unless specifically mandated. Instead, the DWFA requires only that employers make a ?good faith effort? to maintain drug-free workplaces and prohibits the use, distribution, and possession of drugs on federal contracting worksites. See 41 U.S.C. § 8102(a)(1)(G).

[vii] Va. Code. Ann. § 40.1-27.4(B).

[viii] The Virginians with Disabilities Act (VDA) prohibits employment practices that discriminate against qualified individuals with a disability (VA Code Sec. 51.5-41). The VDA covers *all* employers, regardless of size (*Yates v. Volunteer Health Care Sys.*, 783 F. Supp. 1002 (W.D. Va. 1992)).

[ix] Effective July 1, 2021, the Virginia Human Rights Act (VHRA) prohibits employment practices that discriminate based on disability (VA Code Sec. 2.2-3900 *et seq.*). The 2021 amendments to the VHRA also require employers with five or more employees to provide a reasonable accommodation for the known physical and mental impairments of an otherwise qualified person with a disability if necessary to assist that person in performing a particular job unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer (VA Stat. Sec. 2.2-3905).

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