# Let's Stay Out of the Weeds – Arizona's Recreational Marijuana Proposition

*September 21, 2020*

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This November, Arizona voters will decide whether to legalize the recreational use of marijuana. One burning question for employers: How does this impact operations?

We consider some of the issues here.

**Smart and Safe Arizona Act**

Dubbed the "Smart and Safe Arizona Act," Proposition 207 seeks to legalize the possession and use of marijuana for persons who are at least 21 years old under certain circumstances, enacts a tax on marijuana sales, and requires the state Department of Health and Human Services to develop rules to regulate marijuana businesses. If passed, Arizona would join California, Colorado, Washington, Oregon, and Alaska as states with legalized recreational marijuana. Montana, South Dakota, and New Jersey are also set to vote on the issue.

Prop 207 is not the first time Arizona voters have considered the issue. This initiative follows Prop 205 from 2016, which also sought to legalize the possession and use of marijuana for individuals aged 21 and above. Prop 205 was narrowly defeated by voters by approximately 51.3 percent to 48.7 percent, while at the same time similar initiatives were passed in California, Massachusetts, and Nevada. This led some pundits to conclude that a similar initiative on Arizona's 2020 ballot may receive enough support to pass.

Does Proposition 207 propose to allow marijuana in the workplace?

The short answer is no. The proposed A.R.S. § 36-2851 of Chapter 28.2 expressly provides that the Chapter: (1) "[d]oes not 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"; and (2) "[d]oes not require an employer to allow or accommodate the use, consumption, possession, transfer, display, transportation, sale or cultivation of marijuana in a place of employment."

In other words, passage of Prop 207 would maintain the status quo as to employers and employees with respect to marijuana. However, there are still lingering issues for employers under two other Arizona statutes: the Drug Testing of Employees Act ("DTEA") and the Arizona Medical Marijuana Act ("AMMA").

**1. Arizona Drug Testing of Employees Act and Arizona Medical Marijuana Act**

The DTEA protects employers from liability in a number of ways. For example, the DTEA provides that "[a]n employer may take adverse employment action based on a positive drug test…" A.R.S. § 23-493.05. That same provision states that an employer may use a positive test result that violates its written policy, or the refusal to submit to a drug test, as a basis for discipline, including termination of employment or refusal to hire a prospective employee. *Id.* The DTEA further restricts claims against employers for actions in good faith based on the results of a positive drug test and the employer's good faith belief that an employee used, possessed, or was impaired by any drug while on the employer's premises or during work hours. *See* A.R.S. § 23-493.06(A)(1); *see also* A.R.S. § 23-493.07(A). For protection under these safe harbor provisions, the employer must have an established policy and testing program that complies with the DTEA. *See id.; see also* A.R.S. § 23-493.04.

The AMMA, on the other hand, prohibits an employer from discriminating against a person based on either: (i) their status as a medical marijuana cardholder; or (ii) a cardholder's positive drug test for marijuana components or metabolites, subject to certain exceptions. *See* A.R.S. § 36-2813(B)(1)-(2). The same statute proscribes a defense for employers if the cardholder who tested positive for marijuana used, possessed, or was impaired by marijuana while on the employer's premises or during work hours. *Id.* at § 36-2813(B)(2). This defense seemingly overlaps with the DTEA's safe harbor provisions. However, under the AMMA, a cardholder may not be deemed under the influence of marijuana solely due to the presence of marijuana components or metabolites "that appear in insufficient concentration to cause impairment." A.R.S. § 36-2814(A)(3).

**2. The *Whitmire* Case**

In February 2019, we reported here on the *Whitmire v. Wal-Mart Stores Inc.* decision from the U.S. District Court for the District of Arizona that considered

the interplay between the AMMA and the DTEA. There, the plaintiff employee held a valid medical marijuana card. After sustaining a work-related injury, the employee was given a drug test for which she tested positive for marijuana metabolites at the highest level the test could record. Her employer terminated her employment based on its zero-tolerance drug policy and the results of the employee's drug test.

The employee filed suit, claiming discrimination under the AMMA. The employer claimed relief under the DTEA, arguing that the high level reported in the positive drug test supported its good-faith belief that the employee was impaired at work.

The *Whitmire* court ruled in the employee's favor, finding that the employer failed to establish that the employee was impaired at work. The Court held that "[a]n employer cannot be sued for firing a registered qualifying patient based on the employer's good-faith belief that the employee was impaired by marijuana at work, where that belief is based on a drug test sufficiently establishing the presence of 'metabolites or components of marijuana' sufficient to cause impairment." The issue there was whether the employee's positive drug test at a high level alone was sufficient to support the employer's good-faith belief that the employee was impaired by marijuana at work. The Court did not answer whether a drug test itself could prove impairment, but concluded that it was a scientific matter that required expert testimony. Because the employer did not offer expert testimony demonstrating that the employee's drug screen showed marijuana metabolites or components in a sufficient concentration to cause impairment, the employer was unable to prove that the employee's drug screen gave it a good-faith basis to believe the employee was impaired at work.

While the *Whitmire* court found no conflict between the AMMA and the DTEA, the latter statute is currently the subject of a judicial challenge on whether the Arizona legislature improperly amended the AMMA. *See Lee v. Albertson's LLC*, No. CV-19-04493-PHX-DWL (D. Ariz.) (pending summary judgment motion). That issue is beyond the scope of this alert, but some observers believe that the DTEA may not survive in its current form as the AMMA was adopted by initiative. Until that challenge is resolved, the analysis and risk for employers relying on the DTEA defenses remains cloudy. Understanding that risk, employers may seek to invoke the DTEA as a way to limit claims made under the AMMA. For more recommendations for employers, click here.

**Immigration Consequences**

While marijuana may become legal at the state level, it remains a Schedule I drug under federal law. *See* Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; *see also* Drug-Free Workplace Act, 41 U.S.C. § 8101 *et seq.*

In turn, this can have immigration consequences for noncitizen employees. For immigration purposes, federal law controls. Specifically, a noncitizen who admits to an immigration official that she possessed marijuana can be found inadmissible, denied entry into the United States, or have her application for lawful status or even naturalization denied. Depending on the circumstances, it can make a lawful permanent resident deportable. This is true even if the conduct was permitted under state law, the person never was convicted of a crime, and the conduct took place in her own home.

As a result, employers with foreign national employees should consider educating employees on the consequences of engaging in such activity even if legal at the state level.

**Takeaways for Employers**

Prop 207 does not appear to change the legal landscape when it comes to marijuana use, possession, or impairment in the workplace.

For example, can an employer discipline an employee who tests positive for marijuana if he or she has never held a valid medical marijuana card? The answer is yes, both currently and if Prop 207 passes.

However, legalization of recreational marijuana will likely increase the frequency with which employers have to address the complicated issues associated with marijuana use. It is important to have up-to-date policies in place. Employers still have to navigate a multitude of hazards associated with marijuana. This includes the unclear interplay between the AMMA and DTEA with respect to *medical* marijuana and the collateral immigration consequences that legalization at the state level could bring for noncitizen employees. Employers should consult with counsel on ways to minimize their risk.