



CUT AND PASTE POST FEBRUARY, 2022

Marijuana in Montana

During the last GVHRA Board meeting, when I asked for ideas for the *Cut N Paste Post*, it was suggested I address the issues related to Montana’s recreational marijuana law, including how an employer maintains a safe workplace under the new rules.

First Things First. If you have employees subject to drug and alcohol testing under federal law (for example, commercial drivers tested under federal motor carrier rules), the federal law still applies. What follows only applies to employees not covered by any federal drug/alcohol testing statute.



Montana’s Recreational Marijuana law. As of January 1, 2022, individuals 21 years of age or older may use marijuana or marijuana products, in private. While the law makes the use of marijuana and marijuana products legal statewide, marijuana sales may only occur in counties where the recreational marijuana initiative passed with a majority of the votes.

In the employment setting, the off duty use of marijuana and marijuana products is now treated in the same manner as the off duty use of alcohol and tobacco products. That means employers may not refuse to hire, and may not discriminate against an individual with respect to compensation, promotion, or the terms, conditions or privileges of employment because the individual legally uses marijuana or marijuana products off the employer's premises during nonworking hours.

What the law does not protect:

The law permits employers to take action based on the use of marijuana while working. Specifically, employers may:

- Prohibit the use and possession of recreational marijuana or marijuana products on the employer’s property;
- Discipline employees for violating workplace drug policy or for working while intoxicated by marijuana or marijuana products;
- Decline to hire, or may discharge, discipline, or otherwise take adverse employment against an individual because of the individual’s violation of a workplace drug policy or intoxication by marijuana or marijuana products while working; and
- Include in any employment contract a provision prohibiting the use of marijuana for a debilitating medical condition.

The law also permits employers to take action based on off-duty marijuana use if:

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- The use of marijuana affects an individual's ability to perform their job or the safety of other employees;
- The use of marijuana (even if it's used for medical purposes) conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment;
- An individual has a professional services contract with an employer and the nature of the services provided authorizes the employer, as part of the service contract, to limit the use of certain products;
- The employer is a nonprofit organization that, as one of its primary purposes or objectives, discourages the use of marijuana by the general public; or
- The employer acts based on the belief that its actions are permissible under an established substance abuse or alcohol program or policy, professional contract, or collective bargaining agreement.

Unlike Montana's alcohol and tobacco protections, employees may not file a wrongful termination suit against an employer who fires them because of work-related marijuana use.

What about Workplace Safety?



As noted above, employers may prohibit the on duty use and possession of marijuana, and may take corrective action if off duty use 'affects in any manner ... the safety of other employees'. This, combined with the prohibition against operating motorized vehicles while impaired, means employers may maintain a safe work place. It's likely your personnel and safety policies already prohibit the use, possession, or being under the influence of, alcohol at work. Just make sure these documents also prohibit the use/possession, or being under the influence, of marijuana or marijuana products at work.

Employers should remind employees about existing prohibitions related to the possession or use of marijuana at work, as well as their safety responsibilities. Companies without a drug and alcohol testing policy may want to adopt one, so everyone knows the rules related to drugs in the workplace.

What about Drug Testing?

Drug and alcohol testing in Montana must comply with the provisions of the Workforce Drug and Alcohol Testing Act, which begins at MCA [39-2-205](#). This law limits the categories of employees subject to workforce drug and alcohol testing to individuals engaged in the performance, supervision, or management of work in a:

- (i) hazardous work environment;
- (ii) security position; or
- (iii) position:
 - (A) affecting public safety or public health;
 - (B) in which driving a motor vehicle is necessary for any part of the individual's work duties; or
 - (C) involving a fiduciary responsibility for an employer.

Let me say that again because, from time to time, I have seen employers violating this: in Montana, *to be subject to workforce drug and alcohol testing, an employee must perform one of the jobs listed above.*

(Another common error I've seen is employers who do "random tests" on all employees when they suspect one employee is abusing drugs or alcohol. This is likely not legal in Montana: random drug testing must comply with MCA [39-2-208](#).)

You can still hold accountable those employees you suspect to be under the influence of drugs or alcohol, but who are not eligible for workforce drug and alcohol testing. All you need to do is

document your reasonable suspicion observations and follow your normal personnel policies and practices.

- ☞ Montana law requires that employers provide reasonable suspicion training to anyone who oversees or is otherwise involved in the reasonable suspicion testing process. Here is link to great reasonable suspicion training: <https://transit-safety.fta.dot.gov/DrugAndAlcohol/Tools/ReasonableSuspicion.aspx>

In summary, the legalization of recreational marijuana in Montana did not create a “wild, wild west” of marijuana use and abuse:

- Employers don't have to accommodate marijuana use or possession on the employer's property or in the workplace.
- Employers don't have to hire someone with a record of work-related marijuana use.
- Employees can't drive or operate equipment while they are impaired or under the influence of marijuana.
- Employers can put a clause in their employment handbooks prohibiting the use of marijuana to treat medical conditions, even serious ones, if there is a conflict with a bona fide occupational qualification that is reasonably related to the employee's work.
- If an employee violates a workplace drug policy or works while intoxicated, the employer can fire them, discipline them or take some other adverse action.
- Employers may establish policies which prohibit the off duty use of marijuana that affects the safety of other workers or the employee's ability to perform his or her job.

In Montana, it is a crime to operate a motor vehicle with 5 ng/mL or more THC in your blood. However, driving while impaired is also illegal, and may occur at a level below 5 ng/mL.

Most HR Professionals have probably dealt with alcohol abuse in the workplace. If you approach the issue of recreational marijuana the same way you approach alcohol use/abuse, you will be fine! If you have questions, GVHRA stands ready to help!

Vaccine Mandates Update

On January 13, 2022, the U.S. Supreme Court:

- **Blocked** the Biden administration from enforcing OSHA's vaccine-or-test requirements emergency temporary standard (ETS) for large private companies. For now, the ETS has been withdrawn, but OSHA has basically proposed making the ETS a **Final Rule**. The public comment period for this ended January 19th. We'll keep you updated.
- **Allowed** a vaccine mandate to stand for medical facilities that take Medicare or Medicaid payments. In response, the Center for Medicare Services issued two guidelines implementing the vaccination requirement in the states (including Montana) where the mandate was previously enjoined. See the guidelines [here](#) and [here](#). Montana Governor Gianforte has asked for Montana to be exempted from these rules.

On January 26, 2022, a Georgia District Court clarified that its earlier nationwide injunction against the Federal Contractor Vaccine Mandate applies to the vaccination requirement, but not to any of the other requirements in that Mandate.

- ☞ On February 1, 2022 an Arizona court enjoined this mandate, but this injunction only applies to the state of Arizona.

Stay tuned for the latest on what seems to be a never ending saga of vaccine mandates.