

**Model Legislation:  
Rice University's Baker Institute and  
the South Texas College of Law  
Drug Policy Collaboration 2013**

Part 4 of 8: Marijuana Testing and the Employment Relationship

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The following is one of several collections of model statutes produced by the legislation class at South Texas College of Law (STCL) during the spring 2013 semester. The class was offered in collaboration with Rice University's Baker Institute. Students attended lectures on drug policy, legislation, and statutory interpretation conducted by Dru Stevenson, J.D., STCL professor and Baker Institute Scholar; Nathan Jones, Ph.D., Alfred C. Glassell III Postdoctoral Fellow in Drug Policy; and William Martin, Ph.D., Harry and Hazel Chavanne Senior Fellow in Religion and Public Policy and director of the Baker Institute's Drug Policy Program. Each student completed a project addressing one aspect of marijuana legalization or postlegalization regulation through a model statute or ordinance. Links to each of the model statutes can be found at [bakerinstitute.org/model-legislation-2013](http://bakerinstitute.org/model-legislation-2013). Neither the Baker Institute nor the South Texas College of Law endorse any particular policy. The model legislation has not undergone editorial review by the Baker Institute.

## **Introduction to This Collection**

By Dru Stevenson, J.D., Helen and Harry Hutchins Research Professor, South Texas College of Law, and Baker Institute Scholar

The right or authority of employers to subject their employees to drug tests is a developing area of law, with a growing number of states restricting the practice by statute. A similarly transitional area of law is the trend of statutes to prohibit employers from taking adverse actions against employees based on at-home consumption of legal drugs or intoxicants, such as alcohol or tobacco.

The applicability to marijuana legalization is obvious. Legalization that decriminalizes marijuana – whether permitting medical or recreational use – does not automatically change the legal rights of employees or employers regarding consumption in or out of the workplace. In theory, until prohibited specifically by statute, employers can continue to test employees for marijuana use and could fire employees for using marijuana, even where such use is legal. The statute below is a *very* moderate step toward addressing this issue.

For an excellent academic discussion of current state laws in this area, *see* Jessica Roberts, *Healthism and The Law of Employment Discrimination*, Iowa Law Review (forthcoming), available at <http://ssrn.com/abstract=2118960>. Roberts notes that states with statutes shielding employees from workplace mistreatment over their use of legal products or lawful behaviors are California, Colorado, Illinois, Minnesota, Montana, Nevada, New York, North Carolina, North Dakota, Oregon, Tennessee, and Wisconsin. Tobacco use by employees receives specific statutory protection in Connecticut, Indiana, Kentucky, Louisiana, Maine, New Hampshire, New Jersey, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, Virginia, West Virginia, and Wyoming, as well as DC. Roberts also observes that some statutes include exceptions for nonprofit employers whose mission includes discouraging use of certain products, such as alcohol or tobacco, and other statutes have specific exceptions where the employer can demonstrate that addictive substances or intoxicants are interfering with job performance for individual employees. On the other hand, at least twenty-one states permit employers to punish workers for tobacco use.

## **STATUTE**

### **Workplace and Employment Environment Drug Act**

#### **Short Title: The WEED Act**

#### **Section 1: General Provisions**

- A. This statute shall not be construed to limit or alter the state's fundamental employment laws, such as at will employment, Americans with Disabilities Act, and any fair employment practices laws and regulations.
- B. This statute shall not be construed to limit an employer's ability to reasonably prohibit the use of marijuana or other legal controlled substances during working hours, or to discipline employees for being under the influence of marijuana or other legal controlled substances during working hours.

#### **Section 2: Employer Testing for Marijuana and Other Legal Controlled Substances**

##### **A. Pre-Employment Testing**

- 1) An employer may not conduct pre-employment drug testing to check that any employee or prospective employee has used any legal drugs, including those prescribed by physicians as well as those available over the counter for personal medical or recreational use.
- 2) An employer may not condition employment on pre-employment drug testing for any legal controlled substance, except as provided in Section 4.

##### **B. During Employment**

- 1) An employer may conduct random drug testing of employees, in accordance with its own written policies regarding drugs in the workplace. An employer may not test for marijuana or other legal controlled substances absent reasonable suspicion.
- 2) An employer may conduct employee drug testing based on reasonable suspicion when it has specific evidence that the employee has violated the employer's written policy. Specific evidence shall include specific, objective and articulable facts and reasonable inferences drawn from those facts in light of experience.
- 3) Determination of current intoxication by marijuana or other controlled substance shall be limited to blood testing. (four hour, according to Drug Detection Laboratories)

#### **Section 3: Drug Free Workplace Policy**

- A. Employers should institute a thorough and consistent written policy regarding use of, and testing for use of, marijuana and other legal controlled substances in the workplace to prevent misunderstanding between the employer and employee.
- B. An employer may institute a written policy commitment to a drug free workplace, to comply with state or incentive programs.

- 1) Employer policy may include prohibition of use or possession of marijuana or other legal controlled substances on company property, to include parking lots.
  - 2) Employer policy may include prohibition against employees entering employer property with a detectable odor of marijuana on the employee or on the employee's personal property, to include clothing, bags, and motor vehicles.
  - 3) Employer policy may prohibit or limit employee conduct with regard to use of marijuana or other legal controlled substance both inside and outside the workplace, when such conduct could reasonably have a negative effect on the employer's business, including monetary losses, legal liabilities, and reputation.
- C. An employer should recognize that use of marijuana or other legal controlled substance may improve productivity when consumed appropriately.
- D. An employer may not violate this statute in order to comply with written policy or state or federal incentive programs.

#### **Section 4: Medical Marijuana in the Workplace**

- A. An employer shall not discriminate against employees or prospective employees for their use of marijuana or other legal controlled substances when such use occurs outside the workplace, the use is part of a medical treatment plan supervised by a physician, and/or the treatment is for a disability recognized by the state or federal government.
- B. An employer is not required to accommodate use of marijuana or other legal controlled substance inside or outside of the workplace by employees or prospective employees.
- C. An employer may require the employee to limit or suspend consumption of marijuana or other legal controlled substance while in the workplace, if the employer has a reasonable belief that the employee or prospective employee is, or would be, unable to perform the job duties adequately, or would pose a threat to the employees or others.
- D. Employers may require self-reporting of the use of marijuana or other legal controlled substances when the job involves public safety, such as police officers and firefighters.
- E. Employers may require employees or prospective employees to limit or suspend consumption of marijuana and other legal controlled substances during working hours when the job is safety sensitive, such as commercial drivers, construction workers, heavy machinery operators, and industrial and nuclear plant workers.

#### **Section 5: Employee Violations (Workplace Accident or Injury)**

- A. The state may suspend, reduce, or terminate an employee's right to worker's compensation, unemployment insurance benefits, and other payments from the state related to workplace injury when the employee has been shown to have willfully violated written company policy regarding use of marijuana or other legal controlled substance in the workplace, and that violation was the direct cause of the injury.
- B. An employer may suspend temporary or permanent disability payments, and other payments and benefits established to provide for employee welfare when injured in the workplace when the employee has been shown to have willfully violated written company policy regarding use of marijuana or other legal controlled substance in the workplace, and that violation was the direct cause of the injury.

## **Section 6: Employer Violations (Drug Testing and Adverse Employment Actions)**

- A. The Attorney General may fine any employer who violates Section 2 of this statute up to \$500 for the first offense and \$1,000 for subsequent offenses.
- B. Employees shall have standing to pursue civil remedy against any employer who violates Sections 2 or 4 of this statute.

### **Commentary**

This statute is an attempt to clarify rules for employers upon legalization, or decriminalization, of marijuana in the state. Rather than providing guidance only for use of marijuana by employees, this statute used the phrase “marijuana or other legal controlled substance.” The intent for this usage was to include other legally prescribed or over the counter medications. Recent case law indicates that employers have had some difficulty in determining the limit of their authority to prohibit or limit employees’ use of legally prescribed drugs (particularly in the class of narcotic pain killers), as well as the employer’s ability to include such a screening on a pre-employment or post-employment drug tests.

### **Section 1**

Employment law is a complex and interwoven scheme linking federal and state legislation, as well as a multitude of court rulings on numerous aspects of it. The intent of this statute is to disrupt the public policy of that scheme as little as possible. In reviewing court decisions in states in which marijuana has been legalized, courts have interpreted the laws to impose no additional duty to the employers to accommodate the use of medical marijuana. While some legalization advocates may find this to be a seeming contradiction, the reasoning is sound. Referenda has shown that the public in those states supports the right of the individual to obtain, without fear of criminal prosecution, marijuana when it might alleviate pain or other symptoms of disease or debilitating medical condition. The public in those states has not, however, voted or otherwise indicated a desire to impose an affirmative duty for employers to accommodate the marijuana use of their employees. Indeed, to protect marijuana users from workplace discrimination would be to grant them a status above that of tobacco users, because numerous states have repealed legislation that once prohibited employers from discriminating against employees based on tobacco use.

### **Section 2**

Employers frequently require, as a condition of employment, that employees and prospective employees refrain from using illegal drugs, whether or not such use is during working hours. Drug testing is fundamental for employers to determine whether employees are complying with these policies. Employers have recently been troubled with split circuit decisions on whether or not they may test employees and prospective employees for legal drugs, whether a physician prescribes them or obtained over the counter in a drug store.

While it may be reasonable for employers to enforce restrictions on the use of some substances in the workplace, such as prescription pain killers, physicians have indicated that employees should be fully able to complete all of their job duties normally when taking medicine according

to the prescribed treatment plan. In fact, employees may even discover increased productivity because of pain relief.

### **Section 3**

The state may choose to incentivize a written drug policy by employers through other programs, which are not contained within this statute. A thorough and consistent policy can resolve most disputes employers and employees regarding drug usage and testing. Further, if disputes arise that require judicial intervention, the court will have a document detailing the behavior upon which both employer and employee agreed.

### **Section 4**

Most states enacting marijuana legalization have done so as part of a medicinal use policy, involving registration and other factors. While the legalization of marijuana for recreational use has passed, this is a minority view. The majority, however, would benefit from the clarification provided for in this section.

Marijuana legalization thus far has not imposed a duty for employers to accommodate its use by employees, either inside or outside the workplace. Thus, subsection B clearly states that **no accommodation is mandated by this statute**. Existing employment law, however, prohibits an employer from discriminating based on disability. For this reason, subsection A includes a three-part test, which includes a recognized disability. Employers abiding by this statute will avoid conflicting with protections put in place by the Americans with Disabilities Act.

### **Section 5**

As previous sections have made clear, employers have the burden to provide information regarding policy and to communicate clearly. Once this is complete, however, the employee is obliged to follow the rules. When employees fail to do so, they may suffer loss of financial benefits (though not direct financial payments, as with employers). Both subsections indicate that the state and the employer have discretion in application of this punishment.

### **Section 6**

The primary intent of this statute is to provide clear information regarding appropriate employer behavior with regard to marijuana use by employees. The statute would be little more than a policy letter, however, if it failed to provide for some small level of accountability for employers who fail to adhere to its guidelines. Because the entire statute cannot easily be read as concrete directives to employers, only violations of applicable sections may result in fines.

## Sources

While the preceding statute is wholly and sole my original work, some of the concepts and words that I employed were inspired or paraphrased from other writers. These sources include the following:

- 57 ALR 6th 285 (2010). Jay Zitter, MD. *Propriety of Employer's Discharge of or Failure to Hire Employee Due to Employee's Use of Medical Marijuana*.
- Arizona Code 26-2813 *Discrimination Prohibited*
- California Code §11362. 5 *Medical Use of Marijuana*
- Connecticut Code 31-40 *Smoking or Use of Tobacco Products Outside of the Workplace*
- Drug Testing Law, Technology and Practice (2013). David Evans. *Medical Marijuana in the Workplace – Employer Guidelines*.
- Indiana Code 22-5-4-1 *Condition of Employment; Discrimination; Financial Incentives*
- Investigating Employee Conduct Database (2013). William Hartsfield. Appendix E7: *Medicinal Use of Marijuana*.
- Louisiana Code 23:966 *Prohibition of Smoking Discrimination*. (repealed)
- Mississippi Code 71-7-33 *Tobacco Products*
- Nevada Employment Law Letter (1997). Hicks & Walt. *Marijuana in the Workplace: The Impact of Proposition 215*.
- Oklahoma Code 40:500 *Nonsmoking as Condition of Employment*
- Oregon Code §61:51 *Medical Marijuana Act*
- 26 No. 6 Term of Employment Bulletin 1 (2010). James Castagnera, Patrick Cihon, Andrew Morriss. *Medical Marijuana Laws: What is an Employer to Do?*
- West Virginia Code 21:3:19 *Discrimination for Use of Tobacco Products Prohibited*. (repealed)