

# PUBLICATION

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## Up In Smoke: Do New Marijuana Laws Trump Employers' Drug Testing Policies?

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Earlier this month, voters in Colorado and Washington passed initiatives directing their states to decriminalize the possession of marijuana by adults for recreational use. Massachusetts adopted a medical marijuana law that decriminalizes the use and possession of marijuana by individuals with debilitating medical conditions. These new laws join existing "medical marijuana" laws in 17 states and the District of Columbia.

Notwithstanding these developments, these laws are unlikely to impact private employers' drug-free workplace policies. For example, Colorado's law explicitly states that, "[n]othing in this Section is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace." It likewise disclaims any intent to "affect the ability of employers to have policies restricting the use of marijuana by employees."

Moreover, a significant constitutional hurdle remains to these laws given that the U.S. Supreme Court ruled in 2005 that the federal government had the power to criminalize marijuana-related conduct even where the marijuana is grown and used within a single state.

Practically speaking, the states that have adopted medical marijuana laws suggesting that employers are obligated to accommodate medical marijuana use by disabled workers have been routinely rebuffed by all of the state supreme courts that have taken up the issue. Specifically, the supreme courts of California, Washington, Montana and Oregon have each ruled that, so long as federal law prohibits the use of marijuana, their respective states cannot require employers to accommodate such use. The U.S. Courts of Appeals for the Sixth and Ninth Circuits reached similar conclusions.

In the interim, employers in states with medical or legalized marijuana laws would be well-advised to remind applicants and employees that their drug-free workplace policies remain in effect. This is especially true for employers in the transportation and other industries where federal regulations require routine testing for safety-sensitive positions.

If you have questions about your drug-free workplace policies or how recent state law changes could affect your business, please contact any of our more than 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.