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Arizona's Medical Marijuana Act and its Impact on Employers

With Arizona's recent passage of Proposition 203, the Medical Marijuana Act ("MMA"), individuals can legally obtain and use marijuana to treat certain debilitating medical conditions. MMA's protections extend to the workplace. Specifically, Arizona employers may not: (1) discriminate against an individual who is a registered medical marijuana user in hiring, terminating or other terms and conditions of employment; or (2) penalize such an individual for testing positive for marijuana.

However, there are limits to the protections afforded to workers under the MMA. Workers lose the MMA's protections if:

- An employer failing to take action would cause the employer to lose a monetary or licensing benefit under federal law;
- The worker used, possessed or was *impaired by* marijuana on the employment premises or during hours of employment.

According to the MMA, an individual is not considered to be "under the influence of marijuana solely because of the presence of marijuana in the person's system that appears in a concentration insufficient to cause impairment." Unfortunately, neither the MMA nor the proposed rules issued by Arizona's Department of Health Services ("DHS") clarify what would be considered "a concentration sufficient to cause impairment."

This leaves employers with a dilemma when confronted with a positive drug test for marijuana since the mere presence of marijuana in an employee's system does not necessarily mean the employee is "impaired." Until DHS issues clarifying guidance, employers would be prudent to:

- Ensure they have a comprehensive substance abuse policy that prohibits the use or possession of marijuana, or being impaired by marijuana, on company premises or during work time, even if the employee is a registered medical marijuana user;
- Ensure their testing process provides employees with an opportunity to explain a positive marijuana result without unnecessarily probing into the employee's medical condition (to avoid ADA issues);
- Train your supervisors to detect behavior that would suggest an employee is under the influence of marijuana so the employer can point to specific behavior that would justify taking disciplinary action against that employee if he/she tests positive for marijuana; and
- Consult with legal counsel before taking an adverse employment action against an employee or applicant who discloses he/she is a registered medical marijuana user.