THOMPSON HINE

Cannabis Practice Update

November 2023

Ohio Says Yes to Cannabis. Now What?

On November 7, 2023, Ohio joined 23 other states and the District of Columbia in legalizing recreational marijuana. Ohioans backed the ballot proposal, known as Issue 2, with almost 57% of statewide voters approving the measure and about 43% voting against it. Issue 2, which goes into effect December 7, 2023, legalizes and regulates the cultivation, manufacturing, testing, and sale of marijuana. The law will allow Ohioans 21 and over to buy and possess up to 2.5 ounces of cannabis or 15 grams of extract and legalize home grow with a limit of six plants per person and 12 plants per residence.

Products will be taxed 10% on top of the state sales tax, with revenue earmarked for social equity and job programs, state efforts to address substance abuse, and municipalities that are home to dispensaries. A recent Ohio State University Drug Enforcement and Policy Center study estimates the potential annual tax revenue from legalizing marijuana ranges from $276 million to $403 million in the fifth year of an operational cannabis market in Ohio.

The measure also provides that a division within the Ohio Department of Commerce will "regulate, investigate, and penalize adult use cannabis operators, adult use testing laboratories and individuals required to be licensed." The division will be tasked with producing a detailed set of regulations determining how and where marijuana will be sold in Ohio and will have nine months to implement a plan and start issuing the first round of adult use licenses. The division will also be required to provide preferential treatment to certain license applicants that have qualified for a cannabis social equity and jobs program based on social disadvantage, which includes membership in a racial or ethnic minority group, disability, gender or long-term residence in an area of high unemployment.

Issue 2 also provides for limits on state criminal liability for certain financial institutions that provide financial services to any lawful cannabis operator or laboratory licensed by the division. Because marijuana remains a controlled substance under federal law, banks can be penalized for providing services to companies involved in or related to the cannabis industry. This results in cannabis-related enterprises having limited access to the regular financial systems used by businesses and imposes a burden on the cannabis industry overall. While the passage of Issue 2 cannot and does not relieve this obstacle under federal law, it does attempt to provide some protection for financial institutions at the state level.

Additionally, because Issue 2 was an "initiated statute," the state legislature will be able to amend or repeal provisions and parts of the law. Already, some lawmakers have indicated they expect to consider substantive regulatory and statutory changes to the law, including as to THC limits and tax rates.

So, what does the passage of Issue 2 mean for Ohio employers? Practically speaking, not much. Consistent with Ohio's treatment of medical marijuana, Issue 2 does not carry any protections for Ohio employees or applicants who use marijuana, much less protection for employees' lawful off-duty use. Ohio's employment rules are not unique; the majority of states that have legalized marijuana do not provide employment protections. Employers in Ohio may continue to set and enforce their own rules regarding cannabis use and testing, including enforcing zero-tolerance drug policies with no exceptions for off-duty use. Businesses will not be required to permit or accommodate an employee's use or possession of cannabis and may still discipline or refuse to hire employees for reasonable suspicion or positive drug screens. For employers that participate in the voluntary drug-free workplace program established in accordance with rules adopted by the administrator under Chapter 4123 of the Revised Code, Issue 2 similarly does not affect the authority of the administrator of workers' compensation to grant rebates or discounts on premium rates.

Issue 2 aside, off-duty marijuana use and its overlap with employment remains a complex issue. Employers must evaluate whether:

- They are bound by federal regulations that mandate marijuana testing;
- They receive workers compensation discounts for testing for marijuana;
- Continued pre-employment testing will limit employee hiring; and
- Managers are sufficiently trained to identify potential impairment of employees due to drug use.

After evaluating these issues and formulating policy, employers will then need to clearly communicate and enforce these policies.

These considerations are complex and hinge on the employer's business needs, composition of their workforce, and how an organization believes it can or should accommodate employees who use marijuana, either recreationally or medically.

FOR MORE INFORMATION

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