



# Marijuana Guide

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Marijuana is now fully legal in Arizona. With the legalization of medical marijuana in the November 2010 election and the legalization of marijuana for recreational use in the November 2020 election, Arizona is one of 15 states, plus Washington D.C. that have legalized both medical and recreational marijuana.

This guide presents an overview of Arizona's medical and recreational marijuana laws and voluntary drug testing statute. The guide also answers frequently asked questions regarding marijuana and its impact on Arizona workplaces. However, the issue of marijuana and employees is complex, especially in the area of medical marijuana, and this guide is not intended to provide and is not a substitute for legal advice.



# Recreational Marijuana

THE SMART AND SAFE ARIZONA ACT (PROPOSITION 207)

## Overview

On November 3, 2020, Arizona voters approved Proposition 207, the Smart and Safe Arizona Act, to legalize the retail sale and adult use of recreational marijuana (“Prop 207”). Prop 207 legalizes limited possession and use of marijuana for adults 21 years or older, and permits individuals to grow up to six marijuana plants at their primary residence. The law imposes a 16 percent tax on recreational marijuana sales to fund public programs across the state.

Prop 207 appears to preserve employers’ ability to maintain and enforce zero-tolerance drug-free workplace policies, and does not provide any explicit job protections for employees. Specifically, Prop 207:

- “Does not restrict the rights of employers to maintain a drug-and-alcohol free workplace or affect the ability of employers to have workplace policies restricting the use of marijuana by employees or prospective employees.” Section 36-2851(1).
- “Does not require an employer to allow or accommodate the use, consumption, possession, transfer, display,

transportation, sale or cultivation of marijuana in a place of employment.” Section 36-2851(2).

- “Does not restrict the rights of employers ... to prohibit or regulate conduct otherwise allowed by this chapter when such conduct occurs on or in their properties.” Section 36-2851(6).

As a result, employers can still refuse to hire, discipline, or terminate applicants or employees who test positive for marijuana unless such individuals are protected under the AMMA.

## Recreational Marijuana FAQs

### 1. Can employers still require pre-employment drug testing for marijuana?

Yes. Prop 207 does not limit an employer’s ability to drug test for marijuana

### 2. Can I refuse to hire an applicant who tests positive for marijuana?

Yes, unless the person is protected under the AMMA. Under Prop 207, recreational marijuana users do not have any express job protections. Employers can still enforce their drug free workplace policies. Prop 207 does not, however, change an employer’s obligations to qualified medical marijuana cardholders under the AMMA. Employers still cannot discriminate against medical marijuana cardholders.

Of course, nothing in Prop 207 requires employers to test for marijuana or to decline to hire someone based on a positive drug test for marijuana. Now that recreational marijuana is legal in Arizona, some employers may voluntarily choose to stop pre-employment testing for marijuana especially for positions that are not safety-sensitive. Instead, such employers may treat marijuana similarly to alcohol, and only test for marijuana when there is reasonable suspicion or following an accident where the employee contributed to the accident.

### 3. Can an employer terminate an employee who impaired by marijuana during working hours?

Yes. Employers never have to tolerate an employee being impaired by marijuana during working hours or in the workplace. However, as explained in Question No. 5 in the Medical Marijuana FAQ, there is no currently accepted test for marijuana impairment. Most drug tests only show recent use from marijuana. Employers should document their observations of impairment prior to sending an employee for reasonable suspicion testing.

### 4. Now that marijuana is legal in Arizona, should employers continue to conduct pre-employment drug testing for marijuana? Should employers change their zero-tolerance policy on marijuana?

In general, Arizona employers are not required to drug test or take any action based on a positive drug test for marijuana (this does not apply to federally-regulated positions). Whether an employer chooses to conduct drug testing for marijuana is a business decision unless the position is governed by a federal contract or federal regulations.

While employers are free to enforce zero-tolerance rules towards marijuana (except as provided by the AMMA, employers may want to consider whether having and enforcing zero tolerance rules towards marijuana benefits their businesses. With marijuana legalized, some employers worry about their ability to attract and retain talent. Many employers are grappling with the threshold question of whether to test for marijuana at all, especially when it comes to pre-employment testing, and whether to prohibit off-duty marijuana use in their workforces.

Anecdotally, it appears that in states where the use of recreational marijuana is legal, the trend has been to move away from pre-employment testing for marijuana, especially by employers that are not governed by federal regulations (e.g., the U.S. Department of Transportation's regulations) or that do not have large populations of safety-sensitive employees. Many employers have begun treating

off-duty marijuana use similarly to the way they treat off-duty alcohol use with a focus on fitness for duty.

While pre-employment testing for marijuana is largely a business decision for the company, employers should continue to maintain post-employment testing for marijuana, such as for reasonable suspicion. Employers must train supervisors and managers to spot signs of impairment and send employees for testing if impairment is suspected.

At a minimum, employers should prohibit employees from possessing, using, or being under the influence or impaired by marijuana during work hours or in the workplace.

#### **5. Do I need to update my substance abuse policies to address recreational marijuana use?**

While no change is required by Prop 207, employers should review their policies to make sure their company's position on marijuana is clear to their employees. Employees may assume that because marijuana is now legal in Arizona, their use of marijuana will not violate company policy. Employer's policies should make it clear to employees when marijuana use is prohibited and what conduct may lead to disciplinary action. See Policy Consideration section below.



# Arizona Medical Marijuana Act

## Overview

In 2010, Arizona voters passed Proposition 203, legalizing the possession and use of marijuana for medical purposes in Arizona. The Arizona Medical Marijuana Act (AMMA) allows a “qualifying patient” with a “debilitating medical condition” and a “designated caregiver” to obtain (from a registered medical marijuana dispensary) and possess up to 2.5 ounces of marijuana in a 14-day period. In specific instances, the AMMA allows a “qualifying patient” and a “designated caregiver” to cultivate up to 12 marijuana plants. A.R.S. § 36-2801 et seq.

To qualify as a patient under the AMMA, a person must be diagnosed by a physician as having one of the defined medical conditions listed in the AMMA. “Debilitating medical condition” means one or more of the following:

- cancer, glaucoma, positive status for Human Immunodeficiency Virus (HIV), Acquired Immune Deficiency Syndrome (AIDS), Hepatitis C, Amyotrophic Lateral Sclerosis, Crohn’s Disease, agitation of Alzheimer’s Disease, or the treatment of these conditions;
- a chronic or debilitating disease or medical condition or its treatment that produces one or more of the following:

cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including those characteristic of epilepsy; or severe and persistent muscle spasms, including those characteristic of multiple sclerosis; or

- any other medical condition or its treatment added by the department pursuant to A.R.S. § 36-2801.01.

The AMMA provides specific registration requirements for qualifying patients, designated caregivers, and nonprofit medical marijuana dispensaries. A.R.S §§ 36-2804.01, 36-2804.02. A qualifying patient must register with the Arizona Department of Health Services (ADHS) by submitting a written certification from his or her physician, specifying the debilitating medical condition. A.R.S. § 36-2804.02. ADHS is responsible for regulating the use and distribution of medical marijuana. The statute also provides that the public may petition ADHS to add additional debilitating medical conditions. A.R.S. § 36-2801.01.

The AMMA prohibits discrimination based on an individual's status as a medical marijuana cardholder (or his or her designated caregivers and nonprofit medical marijuana dispensary agents). A.R.S. § 36-2813. Employers may not refuse to hire, discharge, or otherwise discipline an employee or applicant solely because of his or her cardholder status. *Id.* The AMMA also prohibits discrimination against a qualifying

cardholder due to his or her positive drug test for marijuana. *Id.* This provision does not apply if the employee used, possessed, or was impaired by marijuana at or during work. In other words, an employer may prohibit employees from—and discipline employees for—using or possessing marijuana, or being impaired by marijuana, while working or being on the job. A.R.S. § 36-2814. Employers should note that the AMMA's nondiscrimination provisions do not apply if employing a cardholder would cause an employer to lose monetary or licensing-related benefits under federal laws or regulations. A.R.S. § 36-2813.

In response to the passage of the AMMA, employers lobbied for changes to the Arizona Drug Testing of Employees Act (“DTEA”). The amendments added additional definitions, such as for “impairment” and “safety-sensitive position” and expanded certain safe harbor protections for employers. See section below on Drug and Alcohol Testing – DTEA.

## Medical Marijuana FAQs

- 1. If an applicant is a registered medical marijuana cardholder, can an employer refuse to hire the applicant based on their status as a medical marijuana cardholder?**

No. Under the AMMA, an employer cannot refuse to hire an applicant based solely on his or her status as a medical

marijuana cardholder unless the employer would lose a monetary or licensing related benefit under federal law or regulation. If the position is safety-sensitive, there may be other considerations. See Question 6 below.

## **2. What if the applicant fails a pre-employment drug test?**

Under the AMMA, an employer cannot refuse to hire an applicant based solely on a positive drug tests for marijuana or metabolites unless the employer would lose a monetary or licensing related benefit under federal law or regulation.

First, employers should determine if the applicant is a registered cardholder. The Arizona Department of Health Services website has an ID Card Verification portal for employers to use to verify a qualifying patient's medical marijuana identification card. Pursuant to ARS§36-2807(A), "...employers may use the verification system only to verify a registry identification card that is provided to the employer by a current employee or by an applicant who has received a conditional offer of employment."

If the card is valid, an employer cannot revoke the offer of employment based solely on the applicant's positive test for marijuana. However, if the position is safety-sensitive, there may be situations where an employer determines that it cannot hire an applicant because their off duty use of

marijuana (employers never have to allow marijuana use or impairment at work) creates a safety risk in the workplace.

## **3. Can employers prohibit marijuana use in the workplace?**

Yes. The AMMA does not protect an employee who uses, possesses, or is impaired by marijuana in the workplace or during working hours. Employer's substance abuse policies should make clear that the use or possession of marijuana or being under the influence of marijuana in the workplace or during working hours is prohibited.

Medical marijuana should be treated similarly to other legally prescribed drugs that may cause impairment. Remember applicants and employees using medical marijuana may have an underlying medical condition that qualifies as a disability under federal and/or state law. While you never have to accommodate medical marijuana use in the workplace or an employee being under the influence of marijuana during work hours or on company property, you may need to engage in the interactive process with the employee to discuss other possible reasonable accommodations.

## **4. An employee says he need to use medical marijuana during his break. Does the employer have to allow use during meal and rest breaks?**



No. Employers can prohibit an employee's use of medical marijuana during work hours, even during meal and rest breaks. Employees should not be under the influence of marijuana during work hours or on company property. See also Question No. 3 above.

**5. Can an employer terminate an employee who is impaired by marijuana during working hours or in the workplace?**

Yes. The AMMA does not provide protection to an employee who is impaired by marijuana in the workplace or during working hours. However, under the AMMA, "a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment."

It is difficult to determine marijuana impairment. At this time, there is no widely accepted drug test for marijuana impairment. Standard urinalysis drug tests typically used by employers only show recent use, which for regular users may go as far back as thirty days. Company managers should be trained to spot signs of impairment, and on what steps to take if they believe an employee is impaired. If a manager has a good faith belief that an employee is impaired during work, this good faith belief coupled with a positive drug test for marijuana may be enough to take

disciplinary action, even if the employee is a registered marijuana cardholder.

Before sending an employee for testing based on reasonable suspicion of impairment, employers should document all observations indicating possible impairment. It is a good practice to have more than one manager document the observed signs of possible impairment.

The DTEA defines "impairment" as symptoms that an employee while working may be under the influence of drugs or alcohol that may decrease or lessen the employee's performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, walking, standing, physical dexterity, agility, coordination, actions, movement, demeanor, appearance, clothing, odor, irrational or unusual behavior, negligence or carelessness in operating equipment, machinery or production or manufacturing processes, disregard for the safety of the employee or others, involvement in an accident that results in serious damage to equipment, machinery or property, disruption of a production or manufacturing process, any injury to the employee or others or other symptoms causing a reasonable suspicion of the use of drugs or alcohol.

## 6. What about employees in safety-sensitive positions who use medical marijuana?

The AMMA does not provide an express statutory exception for safety-sensitive positions. While the AMMA does not authorize cardholders to engage in any task under the influence of marijuana that would constitute negligence or professional malpractice, it does not address the off-duty use of marijuana by safety-sensitive employees. These can be complex issues, and employers should confer with their legal counsel prior to taking any adverse employment action. Also see the Drug & Alcohol Testing - DTEA section below for a discussion of the “safety-sensitive position” safe harbor in the DTEA.

## Drug and Alcohol Testing

### DTEA

Arizona law does not impose any mandatory restrictions on drug and alcohol testing of employees; however, if an employer’s testing complies with the DTEA, an employer will gain “safe harbor” protection against employee lawsuits arising out of the testing procedures, the test results, or actions taken by the employer based on an employee’s impairment by or use/possession of drugs or alcohol. There is no penalty for noncompliance with the DTEA as compliance is voluntary.

In order to test reliably for the presence of drugs or for alcohol impairment, an employer may require samples from its current and prospective employees. A.R.S. § 23-493.01. All drug testing must be conducted at a certified laboratory, include confirmation testing, and comply with scientifically accepted analytical methods and procedures. A.R.S. § 23-493.03.

The employer must pay (1) all actual costs for testing required of employees by the employer; (2) reasonable transportation costs to current employees if their required tests are conducted at a location other than the employee’s normal work site; and (3) wages for the employee’s time to take the test. A.R.S. § 23-493.02. An employer may, at its discretion, pay the costs for drug testing of prospective employees. *Id.*

In order to receive the statutory safe harbor protections, the employer must prepare and distribute a written policy before conducting any testing. A.R.S. § 23-493.04 requires that the policy contain certain specific items, including, but not limited to the following:

1. a statement of the employer’s policy respecting drug and alcohol use by employees;
2. a description of which employees will be subject to testing;
3. the circumstances under which testing may be required;
4. the substances for which tests may be given;

5. a description of the testing methods and collection procedures to be used;
6. the consequences for refusal to submit to a test and the potential adverse action based on the results of the test;
7. the employer's policy regarding the confidentiality of the results; and
8. the right of the employee, upon request, to obtain the test results and to explain a positive test result in a confidential setting.

Furthermore, all compensated employees, including officers, directors, and supervisors, must be uniformly included in the testing policy. *Id.*

An employer's policy may require testing for any job-related purpose consistent with business necessity, including in connection with (i) investigation of possible individual employee impairment; (ii) investigation of accidents in the workplace; (iii) maintenance of safety for employees, customers, clients, or the public at large; (iv) maintenance of productivity, quality of products or services, or security of property or information; or (v) reasonable suspicion that an employee may be affected by drugs or alcohol and that such use may adversely affect the employee's job performance or work environment. A.R.S. § 23-493.04(B). Arizona law also

allows drug testing of employees or groups of employees on a random basis. A.R.S. § 23-493.04(C).

An employer that takes an adverse employment action in good faith based on a positive drug test or alcohol impairment test is covered by the statute's safe harbor provision. If an employee tests positive for drugs or alcohol, the employer has a broad range of options. The employer may require rehabilitation or counseling, or the employer may suspend the employee with or without pay, or discharge the employee. A.R.S. § 23-493.05. If the person tested is a job applicant, the employer may refuse to hire the applicant.

Moreover, the safe harbor protects employers from litigation for actions taken based on an employer's good faith belief that an employee used or possessed any drug or had an impairment while working. A.R.S. § 23-493.06. The statute defines "impairment" as "symptoms that a prospective employee or employee while working may be under the influence of drugs or alcohol that may decrease or lessen the employee's performance of the duties or tasks of the employee's job position." A.R.S. § 23-493. An employer may establish a good faith belief in determining an employee's impairment by:

1. observed conduct, behavior, or appearance;
2. information reported by a person believed to be reliable;

3. written, electronic, or verbal statements;
4. lawful video surveillance;
5. records of government agencies, law enforcement agencies, or courts;
6. results of a test for the use of alcohol or drugs; or
7. other information reasonably believed to be reliable or accurate.

In addition, the DTEA safe harbor protects an employer from actions to exclude an employee from a “safety-sensitive position” if it has a good faith belief the employee is engaged in current drug use (including the legal use of medical marijuana), and that use could cause an impairment or decrease or lessen job performance or the employee’s ability to perform his or her job duties. A.R.S. § 23-493.06. Employers may look to a number of factors in evaluating the effects a drug may have, including drug or alcohol test results, warning labels, statements by the employee, information from a physician or pharmacist, information from reputable reference sources, or any other information the employer in good faith believes to be reliable. *Id.* A “safety-sensitive position” is defined as “any job designated by an employer as a safety-sensitive position or any job that includes tasks or duties that the employer in good faith believes could affect the safety or

health of the employee performing the task or others.”

These tasks may include:

1. operating a motor vehicle, other vehicle, equipment, machinery, or power tools;
2. repairing, maintaining, or monitoring the operation of any equipment or machinery;
3. performing duties in the residential or commercial premises of a customer, supplier, or vendor;
4. preparing or handling food or medicine; or
5. working in any occupation regulated pursuant to Title 32, A.R.S. § 23-493.

The “safety-sensitive position” exception has been subject to legal challenge. On October 6, 2020, a federal court judge tentatively ruled that the “safety-sensitive position” exception was an unconstitutional amendment to the Arizona Medical Marijuana Act because it violated the Voter Protection Act, which restricts the legislature’s authority to modify or repeal voter-enacted laws. Specifically, the court found that the “safety-sensitive position” exception created an additional circumstance for employers potentially to discriminate against medical marijuana users based solely on their cardholder status. Although the ruling did not become final, the “safety sensitive position” exception may be subject to future legal challenges.

Finally, A.R.S. § 23-493.09 requires employers to keep drug and alcohol testing results confidential. Information related to drug and alcohol testing results should be kept in confidential medical file, which is separate from the employee's personnel file.

## *Policy Considerations*

Employers should review their current substance abuse policies to ensure they address marijuana. Each employer needs to determine how it wants to treat the recreational use of marijuana. Some employers take the position that marijuana is still illegal under federal law and unless state law requires otherwise (e.g. AMMA), prohibit marijuana use by employees. Other employers treat marijuana similarly to alcohol and do not regulate off-duty use, but expect employees to be fit for duty at all times.

If an employer chooses to treat the recreational use of marijuana like alcohol use, the employer may also decide not to conduct pre-employment or random testing for marijuana. However, most employers still conduct reasonable suspicion and/or post-accident testing for marijuana. A company's substance abuse policy should put employees on notice as to what the company's policy is with respect to marijuana.

Employers risk losing good employees because the employee did not know the company's stance on marijuana use. The Company's substance abuse policy should make it clear what conduct is prohibited with respect to marijuana use. At a minimum, all substance abuse policies should make it clear that use, possession, or being under the influence or impaired by marijuana during work hours or on company property is strictly prohibited.

Employers should also review their policies to make sure they are properly addressing medical marijuana. Employers cannot have blanket prohibitions against marijuana users. There must be exceptions for medical marijuana cardholders in accordance with the AMMA. Employers should consider adding language to their policy regarding the use of legal drugs, which includes medical marijuana. The policy may include a statement that the company does not discriminate against applicants or employees with disabilities and will engage in an individualized interactive process to determine if an applicant or employee can safely perform their job while using a prescription drug (this would include medical marijuana), which may cause impairment.

Finally, employers should make sure all managers are trained on the company's substance abuse policies, including policies on marijuana. Managers should receive training on identifying the signs of impairment and the steps to take if they believe an employee is impaired.



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Rayna Jones is a Shareholder with Ogletree Deakins. Rayna is the national Co-Chair of Ogletree’s Drug Testing Practice Group. Rayna has spent her entire career representing and counseling employers on all aspects of employment law. She regularly advises employers on navigating multi-state drug testing issues and on recreational and medical marijuana laws. She has particular expertise in drafting drug testing policies, and conducting training on drug testing, marijuana laws and accommodations, and “reasonable suspicion.”

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