

You AUTO KNOW®

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UP IN SMOKE

The Ohio November election will have an issue that, if passed, will amend the Ohio Constitution to permit medical and recreational use of marijuana. This You Auto Know is not going to get into the political aspect of the bill but will attempt a very brief overview of the legal issues.

Briefly, America's marijuana use, including hard narcotics such as cocaine, was not banned until the early 20th century. However, the use of marijuana may have come under the scrutiny of the alcohol industry which may or may not have influenced the banning of the drug. In fact, in 1937, the federal government passed the Marijuana Tax Act which led to marijuana being dropped from the approved list of federal pharmaceuticals. Surprisingly, the American Medical Association opposed the ban on marijuana, however, others associated it with crime. Marijuana was officially banned in 1970 by the passage of the Controlled Substances Act. Marijuana was lumped in with other serious narcotics such as LSD and heroin and was thereby classified as a Schedule I drug. Schedule I drugs are classified as highly addictive with no safe dose.

As you know, the possession, distribution or manufacture of Schedule I drugs can be punishable by life imprisonment for large volumes. Recently however, the view towards the use of marijuana has softened substantially with several states passing laws that permit individuals to use it for medical purposes and/or outright use for any purpose. Colorado was one of the first states to pass such a law. However, just because a state has passed a law permitting marijuana use does not mean that the specter of the federal prohibition does not weigh heavily. In many instances, banks, attorneys, potential investors, insurance companies and others have been hesitant to provide the necessary support for the marijuana industry to properly function.

Further, individuals who use marijuana in compliance with state laws are still subject to federal laws regarding narcotic use and, therefore, risk the loss of jobs, parental rights, job benefits and government benefits. It must be noted that in the fall of 2013, the Department of Justice stated that enforcing federal marijuana laws was not high on its list. But again, to obtain the legal, financial and other services necessary to build an infrastructure for the business is difficult. Further, federal tax laws can and do treat the marijuana industry as a criminal activity. Remember, it is still a Schedule I drug.

In November 2013, Colorado and Washington State passed marijuana laws permitting its use and thereby setting up a state system to tax and regulate same. In those states, production and sale is permitted for recreational use and the states have reaped benefits through its taxation.

Again, the basic marijuana business infrastructure is still shaky at best especially for banking purposes. Banks are hesitant to become involved with the industry simply because there is an enormous threat of money laundering. Specifically, Federal Tax Rule 280(E) requires that any business operation in violation of federal law has to pay taxes at a highly disadvantaged rate. For example, the usual write-offs for a business cannot be used as a basis for reducing taxes, the marijuana businesses are paying taxes on their gross and not net income.

Even the legal profession is in turmoil regarding representation. The Model Rules of Professional Responsibility and Ethics in every state prohibit an attorney from facilitating a client's illegal activity. Therefore, any assistance an attorney provides to a thriving marijuana business could be in violation of federal law. Specifically, Colorado states that attorneys are at risk if they perform many legal tasks for marijuana clients, however, Arizona has taken the opposite position. Therefore, even if the law passes in Ohio, the marijuana industry still has numerous minefields to maneuver through.

We have gone through this initial dissertation regarding the conflict between the federal law prohibiting marijuana as a Schedule I drug and a state's passage of laws to permit the use of marijuana. How does this affect your business? What happens if you catch an employee during a break smoking marijuana, or that employee comes to the dealership under the influence of marijuana, or does not pass a random drug test? In the Colorado case of *Coates v. Dish Network, LLC*, the plaintiff, a quadriplegic, utilized marijuana for medical purposes and was fired when his private use of marijuana was discovered during a random drug test. Naturally, the plaintiff argued that under Colorado law he had every right to indulge in marijuana. However, the Colorado Appellate Court held that the firing did not violate the state statute because marijuana was not legal, it was still a federal crime to possess and use the drug. In essence, the court said that for marijuana use to be legal, it must not only be permitted by state law but permitted by federal law. It must be noted that the decisions for the use of medical marijuana are, quite frankly, all over the board. At this time, there are several federal marijuana-related bills in the U.S. Congress to align the federal law with the state's law, however, those bills have not yet been passed.

Why this article at this time? Well, if the law passes in Ohio, businesses will be confronted with the same issues as Colorado, California, Arizona and other states that have passed marijuana laws. Until such time

as the law is actually passed, implemented and litigation ensues regarding the legal parameters of marijuana use, businesses will have to rely on what could be differing opinions of legal counsel. However, it would appear based upon the Colorado case that an employer would be able to terminate employment of an employee if the employee fails a drug test due to marijuana use. Also, it will probably be treated no differently than alcohol. Therefore, the same parameters will apply. Further, if the company policy requires an employee to pass a drug test and he or she fails, the company would have the right to terminate the employee. However, the company has to have policies in writing to prohibit the activity. Again, however, there is no such law at this time in Ohio. This is pure speculation.

Recently, I was asked by a car dealer whether or not he could invest in the marijuana industry, obviously trying to get in on the ground floor of what could be a multi-billion dollar business. Since federal law still deems marijuana as a Schedule I drug, I advised him that there could be federal criminal consequences regarding investment in the business. Further, every franchise agreement has what amounts to a morality clause which states that if the franchisee is convicted of a felony, then in that instance, the franchisor can terminate the franchise agreement. The basic question I posed to my client was, "Is there more money in metal or in mother nature?" As of right now, we do not know if the law will pass at this time. However, at some future date, your dealership will be confronted with the multitude of issues that will emanate from the passage of a marijuana law.

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As always, these are highlights of the law and are not to be construed as containing the entire law. This is not to be construed or relied upon as a legal opinion. If you are presented with this problem, contact your legal counsel for advice.

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Having been a Chevrolet dealer, Robert A. Poklar's business background and experience in the automotive industry aid him in his representation of numerous Ohio automotive dealerships. He also represents after-market service companies, trade organizations, dealers, advertising associations and corporations. Pursuant to certain ethical standards, this may be construed as advertising.