

# You Auto Know®

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## UP IN SMOKE UPDATE

In the October 2015 You Auto Know®, we discussed the proposed bill that would have amended Ohio's Constitution to permit medical and recreational use of marijuana. The measure, in the November election, was resoundingly defeated primarily due to the fact that a monopoly was going to control the growing and distribution of the drug. Very quietly on June 8, 2016, Governor Kasich signed into legislation a law that would create a tightly controlled, permissible use, of medical marijuana. The law will go into effect 90 days from the date the Secretary of State officially files the law. The mechanics of the law are somewhat cumbersome, but it would be a regulated program controlled by the Ohio Department of Commerce, State Pharmacy Board and State Medical Board. I will not go into detail about the law since it is over 84 pages. The law specifically states that smoking or growing marijuana is strictly prohibited. The lawmakers believe that smoking would be detrimental to a person's health and would go against public health messages against cigarette smoking. Therefore, the only forms of medical marijuana that will be dispensed are oils, tinctures, plant material, edibles and patches. Further, there is an opening for "any other form approved by the State Board of Pharmacy" under Section 3796.061 of the Revised Code. It must be noted that vaporization of medical marijuana is permitted, but again, smoking it is not. There is a list of medical conditions that are approved for a patient seeking medical marijuana. For example, epilepsy, Crohn's disease, Parkinson's disease, PTSD, Tourette Syndrome, traumatic brain injury and others. The patient, through his physician, must seek approval from the previously mentioned Board in order to obtain the proper authorization. The application includes a statement by the physician indicating:

- There is a physician-patient relationship;
- The patient has been designated with a qualifying medical condition;
- The physician has informed the patient of the risk and benefits of medical marijuana; and
- The benefits outweigh the risk.

Thereafter, certain individuals in the State of Ohio will be able to use

marijuana for medical purposes. How does this affect you as an employer? First, patients who utilize medical marijuana will have "an affirmative defense" if they are arrested and prosecuted for marijuana possession. However, as reiterated in the October 2016 You Auto Know®, the possession, distribution and manufacture of Schedule 1 drugs (of which marijuana is included, with heroin and LSD) is illegal pursuant to federal law. As noted in the October article, the Department of Justice stated that enforcing federal marijuana laws was not high on its list. Regardless, federal tax laws do treat the marijuana industry as a criminal activity. However, if the State of Ohio is operating the system, it is doubtful that the IRS will become involved in any enforcement and highly unlikely that state prosecutors will file charges against anyone with the documented medical marijuana permission. The question that you are asking is whether or not you have to retain an employee who cannot pass a drug test for using medical marijuana. Section 3796.98(A) of the law specifically states, "Nothing in this chapter does any of the following:

1. Requires an employer to permit or accommodate an employee's use, possession, or distribution of medical marijuana;
2. Prohibits an employer from refusing to hire, discharging, disciplining or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions or privileges of employment because of that person's use, possession, or distribution of medical marijuana;
3. Prohibits an employer from establishing and enforcing a drug testing policy, drug free work place policy or zero tolerance drug policy.

In that regard, the employer cannot be sued by an individual for failing to hire, to discharge, to discipline or to seek discrimination or retaliation claims against the employer for terminating the individual for medical marijuana use. The termination will be deemed as discharged for just cause purposes in order for the business to have a drug free work place and zero tolerance policy or any other policies that the business has established through its employee handbook.

Well, there you have it in a nutshell. Simply because an individual has a medical marijuana permit does not mean that the dealership cannot terminate that employee for cause under its employee handbook for substance abuse.

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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.