

## EMPLOYMENT LAW

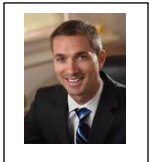
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### IN THIS ISSUE

*Erik W. Legg and Samantha Thomas-Bush review two recent West Virginia statutes of interest to employers.*

## West Virginia Addresses Workplace Drug Testing and Medical Marijuana Use

### ABOUT THE AUTHORS



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### ABOUT THE COMMITTEE

The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee's membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

Last summer, the West Virginia Legislature passed two laws of interest to employers and employees relating to the use of intoxicating substances. The West Virginia Safer Workplace Act, which took effect in July 2017, expressly permits employers to test current and prospective employees for drugs and alcohol and sets permissible parameters for the testing and the use of the test results.<sup>1</sup> In the same legislative session, West Virginia passed the Medical Cannabis Act, allowing the treatment of medical marijuana by patients with certain serious medical conditions who obtain a certification from a qualified physician. Although the Medical Cannabis Act is not as directly related to employment issues as is the Safer Workplace Act, it does include some provisions that address the potential impact of the medical marijuana use on employers and the public at large. This article will provide an overview of these two new laws as they relate to employment interests.

West Virginia employers who promulgate written drug testing policies and implement them consistently with the statute enjoy liability protections under the Safer Workplace Act.<sup>23</sup> How an employer frames its drug testing policy and whether it follows

its own policy is of prime importance to help insulate it from employment claims. Although the Safer Workplace Act does not mandate the creation of drug testing policies<sup>4</sup>, it provides a framework for crafting and implementing such policies, and establishes a number of obligations and protections for both employers and employees where such policies are implemented.

The Act expressly permits employers to take adverse actions, up to and including termination or refusal to hire, for violations of an appropriate drug or alcohol testing policy.<sup>5</sup> Protections for employers under the Act include immunity for actions taken as the result of a positive test or an employee's refusal to submit to a test<sup>6</sup>, the freedom to decide what drugs or conditions to test for<sup>7</sup>; the freedom to terminate its testing or substance abuse prevention program<sup>8</sup>; immunity for defamation claims so long as there is no outside disclosure of the test results which satisfies the common law elements of defamation<sup>9</sup>; immunity for actions taken in good faith reliance upon a false positive test result (creating a rebuttable presumption that the test result was valid where the employer complied with

<sup>1</sup> W. Va. Code § 21-3E-1, *et seq.* (2017).

<sup>2</sup> W. Va. Code § 21-3E-4, 11.

<sup>3</sup> It should be noted that the Safer Workplace Act applies only to employers "not previously made subject of drug and alcohol testing statutory provisions established by the Legislature", such as requirements under the Office of Miners' Health,

Safety and Training, for example. W. Va. Code § 21-3E-3.

<sup>4</sup> W. Va. Code § 21-3E-14.

<sup>5</sup> W. Va. Code § 21-3E-9.

<sup>6</sup> W. Va. Code § 21-3E-11(1).

<sup>7</sup> W. Va. Code § 21-3E-5, 11(2-3).

<sup>8</sup> W. Va. Code § 21-3E-11(4).

<sup>9</sup> W. Va. Code § 21-3E-13.

this statute)<sup>10</sup>; and immunity for actions taken in reliance on a false negative.<sup>11</sup> Furthermore, so long as the employer's written policy provides notice that compliance with the policy is a condition of employment and provides notice of the consequences of a failed drug test or refusal to submit to a test, the employer is immune from unemployment claims and workers compensation claims based on actions taken in enforcement of the policy.<sup>12</sup> The statute does not create a duty on the employer's part to implement any drug testing policy, nor does it require an employer to establish an employee assistance program or a treatment or counseling program (although it must provide employees with information "as to the existence and availability of" such programs).<sup>13</sup>

The Act also protects employees in several respects. First and foremost, the employer is obligated to provide the employee (and to make available to a prospective employee) a copy of the written testing policy.<sup>14</sup> Not surprisingly, the employer must also bear the cost of the testing, as well as compensate the employee for missed work time spent submitting to the testing. To the extent that the employee incurs travel expenses secondary to the testing, the employer is required to reimburse such reasonable costs.<sup>15</sup> Perhaps most importantly, all positive results must be

confirmed by a second test of the original sample, by a different testing technique which must be a chromatographic technique. An employer for whom a positive test result is returned has the right to challenge the results by having another lab of the employee's choosing test the sample (at the employee's expense).<sup>16</sup> The employee also has the right to volunteer information that could impact the test results, such as by identifying prescription medications that they take.<sup>17</sup> Test results are confidential, and they are not admissible or subject to discovery in legal proceedings "except in a proceeding related to an action taken by an employer under" the Act itself.<sup>18</sup>

Marijuana is, of course, among the substances for which a valid drug testing program under the Safer Workplace Act may screen. Thus, there is bound to be intersection between the Safer Workplace Act and the Medical Cannabis Act<sup>19</sup>, which establishes a program for the use of medical marijuana to treat patients with serious medical conditions.<sup>20</sup>

The Medical Cannabis Act defines what constitutes a permissible medical condition that may qualify for medical marijuana use, and these serious conditions can range from cancer to certain categories of chronic pain.<sup>21</sup> As of the time of publication of this article, medical marijuana is still not being

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<sup>10</sup> W. Va. Code § 21-3E-12.

<sup>11</sup> W. Va. Code § 21-3E-12(c).

<sup>12</sup> W. Va. Code § 21-3E-16.

<sup>13</sup> W. Va. Code § 21-3E-8(b).

<sup>14</sup> W. Va. Code § 21-3E-8, 21-3E-16.

<sup>15</sup> W. Va. Code § 21-3E-6.

<sup>16</sup> W. Va. Code § 21-3E-7(6).

<sup>17</sup> W. Va. Code § 21-3E-7(3)(B).

<sup>18</sup> W. Va. Code § 21-3E-15.

<sup>19</sup> W. Va. Code § 16A-1-1, *et seq.*

<sup>20</sup> W. Va. Code § 16A-3-1 (2017).

<sup>21</sup> W. Va. Code §§ 16A-2-1, 16A-3-1.

dispensed within West Virginia, as State health officials work to create the necessary framework upon which the medical marijuana will be policed and regulated. Certification and dispensing is anticipated to be fully functional in 2019.<sup>22</sup>

The law requires that the potential marijuana patient have a serious medical condition, meet the requirements for certification under the act, and be a resident of West Virginia.<sup>23</sup> The drug may only be dispensed in certain forms, including as pills, oils, and gels. Dispensing of marijuana in its plant form is expressly disallowed.<sup>24</sup> Safeguards were built into the law to reduce diversion and doctor shopping, including a requirement that physicians who wish to certify under the law must register with the Bureau of Public Health within the West Virginia Department of Health and Human Resources. The certifying physicians must also complete an education course and obtain approval by the Bureau.<sup>25</sup> As a further deterrent to minimize the potential for abuse, physicians must treat patients at least six months prior to issuing a certification for medical marijuana.<sup>26</sup>

Once the medical marijuana dispensaries are fully functional in West Virginia, employers

who drug test their employees and prospective employees will have to wrestle with the juxtaposition of drug testing policies and authorized cannabis treatment. The employment-related section of the Medical Cannabis Act provides that an employer may not “discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee’s compensation, terms, conditions, location or privileges solely on the basis of such employee’s status” as a certified medical cannabis patient.<sup>27</sup> However, the statute expressly provides that an employer has no duty to accommodate the patient’s use of medical cannabis in the workplace, and it expressly permits the employer to discipline an employee under who is under the influence of medical marijuana where the “employee’s conduct falls below the standard of care normally accepted for that position.”<sup>28,29</sup>

At least one direct intersection with the Safer Workplace Act is hinted at in the Medical Cannabis Act. According to the Centers for Disease Control and Prevention (CDC), marijuana use affects the brain with respect to “memory, learning, attention, decision making, coordination, emotions, and reaction time.”<sup>30</sup> Just as the Safer

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<sup>22</sup> W. Va. Code § 16A-16-1.

<sup>23</sup> W. Va. Code § 16-A-2-1(22).

<sup>24</sup> W. Va. Code § 16A-3-2(a)(B)(2)-(3).

<sup>25</sup> W. Va. Code § 16A-4-1(a).

<sup>26</sup> W. Va. Code § 16A-2-1.

<sup>27</sup> W. Va. Code § 16A-15-4(b)(1).

<sup>28</sup> W. Va. Code § 16A-15-4(b)(2).

<sup>29</sup> This article does not focus on the positions in the workforce for which federal law has carved out

exceptions and requires different treatment of those categories of employees/workers, including but not limited to, positions such as federal contractors. To that end, West Virginia’s Medical Cannabis Act explicitly states that it does not require any employer to commit an act that would be a violation of federal law. W. Va. Code § 16A-15-4(b)(3).

<sup>30</sup> Marijuana and Public Health: Fast facts and Fact Sheets, Centers for Disease Control and Prevention;

Workplace Act includes special provisions for “sensitive” employees - which the statute defines as those in positions “where an accident could cause loss of human life, serious bodily injury, or significant property or environmental damage”<sup>31</sup> – the Medical Cannabis Act expressly prohibits medical marijuana use in patients performing employment duties “at heights or in confined spaces” (such as mining).<sup>32</sup> The employer is also authorized to prohibit the patient from performing tasks deemed life-threatening to the employee or others and “from performing any duty which could result in a public health or safety risk”, while under the influence of the treatment. These prohibitions shall not be deemed adverse employment actions even if they result in financial disadvantage to the patient.<sup>33</sup>

In the coming months, West Virginia employers will be watching the implementation and legal interpretation of these two important new statutes with interest, as will observers from other jurisdictions that have passed or are considering similar legislation.

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<https://www.cdc.gov/marijuana/fact-sheets.htm>

(last accessed Jan. 29, 2018).

<sup>31</sup> W. Va. Code § 21-3E-9.

<sup>32</sup> W. Va. Code § 16A-5-10.

<sup>33</sup> W. Va. Code § 16A-5-10.

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