

# What Arizona employers need to know about recreational marijuana law

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*A decade after passing the Arizona Medical Marijuana Act (AMMA) by ballot initiative, Arizona citizens enthusiastically voted yes on Proposition 207, the “Smart and Safe Arizona Act” (SSAA), in November. Arizona and three other states (Montana, New Jersey, and South Dakota) simultaneously joined ranks with 11 other states that permit recreational use. Now adults (21 years old and older) in Arizona may use, possess, or transfer up to one ounce of marijuana and cultivate for personal use no more than six plants at a primary residence. Although the Act doesn’t allow a person to smoke marijuana in a public place, employers find themselves wondering what implications the developments will have on their workforce. How should you approach substance abuse and drug testing in the workplace in light of the Act?*

### **Quick recap of AMMA**

First, let’s look back at the impact of medical marijuana’s legalization on the workplace. Under the AMMA, an employer may not discriminate against registered cardholders in hiring, termination, or any term or condition of employment or otherwise penalize them for testing positive for marijuana components or metabolites (unless failure to do so would cause it to lose a monetary or licensing-related benefit under federal law).

The AMMA doesn’t prohibit you from taking adverse employment actions against registered cardholders if they used, possessed, or were impaired by marijuana on company premises or during work hours. Keep in mind the fact that a cardholder tested positive for the presence of marijuana metabolites or components doesn’t necessarily mean the person is under the influence. Therefore, you should seek the advice of counsel about the next steps when confronted with a cardholder who tested positive for the presence of marijuana.

Shortly after the AMMA’s enactment, the legislature passed the Drug Testing of Employees Act (DTEA), which created the AMMA’s “safety-sensitive position” exception. For nearly a decade, employers relied on the exception when taking an adverse employment action against a medical marijuana cardholder who worked in a position classified as “safety-sensitive” for a positive drug test alone.

The U.S. District Court for the District of Arizona has called the safety-sensitive exception into question, creating uncertainty for employers with respect to the legislated “protection.” Although you likely shouldn’t rely on the exception, you may still take adverse action against cardholder-employees based on a good-faith belief they were impaired while working on the premises or during hours of employment.

### **Recreational pot law’s impact on employers**

From an employment standpoint, the SSAA doesn’t offer any employment protections to recreational marijuana users. It doesn’t require you to permit recreational use by your employees.

In fact, the SSAA stipulates it doesn’t restrict your right to maintain a drug- and alcohol-free workplace or prevent you from implementing a drug and alcohol testing policy as otherwise permitted under Arizona law.

### **Takeaways**

Overall, the SSAA preserves your ability to maintain a zero-tolerance drug-free workplace policy (subject of course to the already present restrictions under the AMMA). As recreational use becomes more accepted, however, you should consider whether, or the circumstances under which, marijuana testing will be conducted. Depending on the industry and the circumstances, you may want to consider doing away with applicant and random screening. Continuing with the screenings may severely limit the number of qualified candidates in the applicant pool.

Final caveat: The SSAA permits the expungement of marijuana arrests, charges, and convictions. If you conduct criminal background checks, be sure your decisions are based on the most up-to-date information. Or you may want to consider disregarding criminal convictions for marijuana possession and use since the applicant may be entitled to expungement of the record.

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