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What are the implications of Amendment 2 for employers?

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Amendment 2 on the November ballot will protect a qualifying patient from criminal and civil liability for the medical use of marijuana. What happens when this new protected class applies for a job or goes to work? Do employers need to change drug-testing policies? Can employers apply a zero-tolerance policy to marijuana use, even when legitimately used for medical purposes? Must an employer provide accommodation to individuals with disabilities who use marijuana to treat a debilitating medical condition?


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Florida's Drug Free Workplace Act permits employers to test individuals prior to employment or after a workplace accident. Testing is not mandated by the law. Among the classes of drugs that an employer can test for is cannabinoids. While the law does not require any particular action upon a positive test, it does provide that an employer can refuse to hire an applicant or terminate an employee for use of the drug after a positive test. This is true even though the test would not indicate that an employee has ever been under the influence while on the job. Employers can also terminate an employee who refuses to submit to a drug test.

Under federal law, employers are prohibited from making inquiries of an applicant relating to medical impairments, including the use of medication that would reveal the existence of a condition. Nor can an employer ask an employee about medical conditions unless there is a business reason to do so. Both the federal and Florida disability statutes require employers to provide reasonable accommodations to conditions which meet the definition of a disability. Under these laws, most chronic conditions for which medical marijuana would be recommended by physicians, would qualify as a protected disability.

Finally, Florida is an "at-will" employment state. This means that an employer can terminate an employee at any time, with or without

cause, as long as the reason is not prohibited by law.

What will be the effect of the amendment if passed? As drafted, the proposal explicitly states that it does not require "any accommodation of any on-site medical use of marijuana in any place of education or employment, or of smoking medical marijuana in any public place. This limitation appears to express the intent of the drafters not to confer any workplace rights to employees. The language stands in stark contrast to statutes in Montana which prohibit "penalizing in any way" and Rhode Island which prohibit employers from refusing to employ a person solely for his status as a registered qualifying patient (of medical marijuana). However, the Florida Amendment does not seem to go as far as the New Jersey law which provides that the Act does not require an employer to accommodate the use of marijuana in any workplace. The question that will have to be determined is whether the qualifier in the Florida law, which seems to limit the employer's ability to act only when there is "on-site medical use," is a distinction that makes a difference."

In states that have medical marijuana laws, the courts have consistently sided with the employers when wrongful termination claims are brought by former employees. The reason is that there is no provision which protects these employees from adverse employment action. Therefore, they continue to be employed "at will."

Of course, employers can internally legislate, through company policies, circumstances under which the use of medical marijuana will not result in a loss of employment. Creative workplace solutions to a difficult issue may prevent unintended results in a competitive marketplace. A case by case policy that retains the essence of zero tolerance for workplace usage is possible. Once again, the workplace may need to adapt, as the times they are a-changing.

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