

# THE CAVANAGH LAW FIRM

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### **PROPOSITION 205**

### **THE REGULATION AND TAXATION OF MARIJUANA ACT**

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This November, Arizona voters will have the opportunity to decide whether to become the fifth state to legalize the recreational use of marijuana by individuals who are 21 or older. The Regulation and Taxation of Marijuana Act raises many concerns for employers, particularly those in the construction industry and other safety sensitive industries. The experiences of employers in other states that have legalized recreational marijuana can help guide Arizona employers to prepare for the possibility of legalized marijuana.

Most importantly for employers, Prop 205 expressly provides:

This Chapter does not require an employer to allow or accommodate the possession or consumption of marijuana or marijuana products in the workplace and does not affect the ability of employers to enact and enforce workplace policies restricting the consumption of marijuana and marijuana products.

In that states that have legalized recreational marijuana (and most states with medical marijuana) courts have found that employers are permitted to maintain a drug-free workplace policy and separate the employment of individuals who test positive on a drug test.

This article will summarize key parts of Prop 205 identify what Prop 205 does not do, and conclude by providing tips and recommendations to employers. Based on the experiences of the states that have legalized recreational marijuana and concerns for workplace safety and efficiency, many employers may want to vote against Prop 205. Please keep in mind that this article relates to Prop 205 and recreational marijuana only. There are different regulations and rules that apply to medical marijuana under the Arizona Medical Marijuana Act.

#### **I. WHAT DOES PROPOSITION 205 DO?**

##### **A. Prop 205 Would Allow People 21 and Over to Possess One Ounce of Marijuana and Use it in Private, but Bans Public Consumption.**

Proposition 205 would legalize the possession of up to one ounce of marijuana by adults age 21 and over and would allow consumption of marijuana and marijuana products *in private*. Public use of

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marijuana would still be unlawful, but Prop 205 makes public consumption a “petty offense” punishable by a fine of not more than \$300. Individuals may not sell marijuana. Only licensed facilities can legally sell marijuana under Prop 205.

NOTE HOWEVER that marijuana continues to be a Schedule I substance that is unlawful under the Federal Controlled Substance Act. The Federal Government recently reaffirmed its intent that marijuana will remain illegal on a national level.

**B. Prop 205 Would Allow Adults to Grow Up to Six Plants in Their Home (no More than 12 Plants per Home) But Allows Landlords to Prohibit Growth or of Marijuana in Their Premises.**

Under Prop 205, adults could grow up to six (6) marijuana plants in an enclosed, locked space within their residence and possess the marijuana in the location which it is grown. No more than twelve (12) plants can be grown in a single residence. Individuals may not sell or transport the marijuana that they grow in their home. Further, property owners and landlords have the right to prohibit tenants from growing marijuana on their property.

**C. Prop 205 Would Create the Department of Marijuana Licenses and Control to Oversee Licensed Marijuana Production, Testing, and Retail Facilities and to Assume the Responsibility for the Medical Marijuana Program.**

Prop 205 would create the Department of Marijuana Licenses and Control. The Department would assume responsibility for the current medical marijuana program. It would also assume responsibility for licensing businesses to grow marijuana, sell marijuana, produce marijuana products (such as edibles and lotions), and test marijuana for potency and the presence of harmful contaminants.

Prop 205 has been widely criticized for favoring existing medical marijuana dispensaries. If the law passes, licenses for marijuana cultivating and sales establishments would be awarded first to existing medical marijuana dispensaries in good standing. Only after those licenses are issued would new applications be accepted.

The number of marijuana retail locations is limited under Prop 205 to 10 percent of the retail liquor licenses issued in Arizona, which would currently allow approximately 180 marijuana retailers to be licensed by the end of 2017.

Businesses engaged in the production or sale of marijuana would be required to comply with certain safety, packaging, and security requirements, similar to those imposed upon medical marijuana dispensaries.

**D. Prop 205 Would Impose a 15% Tax on Marijuana Sales to be Used to Operate the Department of Marijuana Licenses and Control with Additional Revenue Dedicated to the Department of Education and Department of Health.**

Prop 205 would impose a 15% tax on marijuana sales. While some people have suggested a higher tax, studies have shown that imposing too high of tax discourages patrons from purchasing

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marijuana from an established (and taxed) business and encourages continued unlawful and unregulated sale of marijuana.

The taxes would be placed in a fund to be used for the operating expenses of the Department of Marijuana Licenses and Control. Any excess licensing fees or taxes would be paid:

- (1) Forty percent (40%) to the Department of Education for school construction, maintenance, and operating costs;
- (2) Forty percent (40%) to the Department of Education for full-day kindergarten programs;
- (3) Twenty (20%) to the Department of Health Services for programs relating to public education about the harms of alcohol, marijuana, and other substances.

No taxes would be imposed on the sale of medical marijuana under the Arizona Medical Marijuana Act.

## II. WHAT PROP 205 DOES NOT DO.

### A. Prop 205 Does Not Prohibit Drug Free Workplace Policies.

As discussed above, Prop 205 expressly provides:

This Chapter does not require an employer to allow or accommodate the possession or consumption of marijuana or marijuana products in the workplace and does not affect the ability of employers to enact and enforce workplace policies restricting the consumption of marijuana and marijuana products.

This provision, contrary to the Arizona Medical Marijuana Act, expressly provides that employees who use recreational marijuana are not protected from adverse employment action and that employers are able to maintain drug free workplace policies and testing programs.

### B. Prop 205 Does not Allow Individuals to Consume or Be Impaired by Marijuana While Driving or Operating Machinery.

Prop 205 expressly states that it does not prohibit fines or penalties (including criminal penalties) to be imposed against anyone who operates a motor vehicle, train, plane, motorboat, other motorized transportation, **or machinery** while impaired by marijuana or consuming marijuana (or a marijuana product) while operating motorized transportation or machinery.

The prohibition against operating vehicles or machinery while impaired or under the influence provides construction employers with additional justification for them to enforce their drug free workplace programs.

### C. Prop 205 Does Not Authorize Public Use of Marijuana, Does Not Permit Minors to Possess or Use Marijuana and Does Not Permit Sale Of Marijuana Without a License.

Under Prop 205 possession of more than one ounce of marijuana by an adult or any possession of marijuana by a minor would remain illegal. Sale of marijuana without the required licenses would

also be illegal, as would selling or giving marijuana to minors. Marijuana would remain illegal under Federal law.

**III. IF MARIJUANA IS NOT AGAINST THE LAW, WHAT SHOULD EMPLOYERS BE CONCERNED ABOUT?**

With the legalization of medical marijuana in approximately 25 states and the legalization of recreational marijuana in 4 states, many employers are considering whether to make their drug policies more flexible. Employers, however, may have strong reasons to continue to enforce a zero tolerance policy, despite the fact that marijuana may not be unlawful at the state level. In addition, it may become more difficult to recruit and hire and retain employees who can pass a drug test, increasing expenses related to employee turnover.

**A. States with Legalized Recreational Marijuana Have Seen a Rise in Positive Drug Tests and Increased Employee Absenteeism.**

According to a September 2014 analysis by Quest Diagnostics, the percentage of drug tests positive for marijuana increased on a national level from 1.6% to 1.7% in 2013, an increase of 6.25%. During the same time period, the rate of positive drug tests in Colorado increased by 20% and in Washington the positive results for marijuana increased by 23%, almost four times the national average.

The Colorado Contractors Association campaigned against legalized marijuana in Colorado. Two years after the legalization of marijuana, the CCA reported that its contractors are having a hard time in the strong economy finding employees who pass the initial drug test. With the construction economy in Arizona continuing to be strong, it is possible that after the legalization of marijuana that it will become more difficult to recruit employees.

Additionally, the National Survey on Drug Use and Health found that 15% of individuals who had used marijuana within the last 30 days admitted that at some point they did not show up for work because they just didn't feel like working, while only 7.4% of those not using marijuana (or other drugs) admitted to skipping work. Other studies have also shown increased absenteeism as an effect of regular marijuana use.

**B. OSHA General Duty Clause Requires Employers to Provide a Safe Workplace & Employers Could Be Held Liable for Accidents or Injuries Caused by Employees Using Marijuana.**

The "general duty" clause of the Occupational Safety and Health Act requires employers to provide a workplace that is "free from recognizable hazards that are causing or likely to cause death or serious harm to employee." Although we are not aware of any cases in which the general duty clause was applied to require a drug-free workplace program, there is a strong argument that if an employer allows employees to test positive for marijuana and continue working then the employer is knowingly placing its employees at risk.

Studies in Colorado have shown that employees who tested positive for marijuana on pre-employment tests but were hired had more industrial accidents and injuries than those who did not test positive. Employees who operate machinery or equipment or operate at heights or engage in other safety

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sensitive work while impaired risk not only harm to themselves but also to others. If an employee has tested positive for marijuana and the employer hires or continues to employ the individual, other workers or third parties who are injured because of an accident caused by the employee who tested positive may argue that the employer knowingly created the risk and acted negligently, and therefore should be responsible for any damage.

### **C. Federal Contractors are Required to Have a Drug Free Workplace under the Federal Drug Free Workplace Act.**

The Drug Free Workplace Act requires federal contractors and federal grant recipients to have a drug free workplace policy and certify to the federal government that their workplaces are drug free. The DFWA does not require mandatory drug testing, but if an employer were to tolerate a drug test that is positive for marijuana, it could be argued that the employer was in violation of its duty to maintain a drug free workplace.

### **D. Employers Who Do Not Have a Drug Free Workplace and Testing Policy May Lose Workers' Compensation Discounts.**

Arizona, like many other states, allows a discounted workers' compensation premium for employers who have a drug-testing program that meets the standards of Arizona's drug testing statute. Employers who tolerate a positive drug test may lose the benefits of discount.

## **IV. MOST COURTS WHO HAVE DECIDED THE ISSUE DO NOT PROTECT EMPLOYEES WHO USE MARIJUANA IN VIOLATION OF COMPANY POLICY.**

Most courts who have decided the issue have found that employees who test positive for marijuana are not protected from adverse employment action even if it is legal in the state in which they are using it. For example, in *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6<sup>th</sup> Cir. 2012), the Sixth Circuit Court of Appeals held that private employers do not have to accommodate the use of marijuana and employees are not protected from termination or other disciplinary action..

Since 2008, California, Montana, Oregon, Washington, and most recently Colorado have held that employers have the ability to terminate the employment of employee who tests positive for marijuana, even if they are doing so legally under state law. The Courts often based their analysis on the fact that marijuana remains illegal on the national level.

In one of the most recent cases, the Colorado Supreme Court held in *Coats v. Dish Network*, 350 P.3d 849 (Colo. 2015), that Dish Network could terminate an employee for using marijuana even though he legally used the drug while outside of work. Colorado law protects employees' lawful off-duty conduct and prohibits employers from taking adverse action against employees based on lawful off-duty conduct. Coats, a paraplegic who was a registered medical marijuana user, argued that marijuana was legal in Colorado. The Court concluded that because using marijuana is still illegal under the Controlled Substances Act, such use was not "lawful conduct" protected by the Colorado statute.

**V. RECOMMENDATIONS.**

Employers should review their drug and alcohol testing policies and programs and if marijuana is legalized for recreational use in Arizona, employers should ensure that their policies make clear that even if marijuana use is legal, it is not tolerated at the company and that a drug test positive for marijuana will result in disciplinary action, up to and including termination of employment.

Employers should become familiar with the various methods that employees can use to consume marijuana, including marijuana edibles and lotions and using vapor pens, which can look like e-cigarettes, to smoke THC or marijuana derivatives or wax or dabs.

Companies should train supervisors and managers to identify signs of impairment or intoxication in employees. We recommend using a reasonable suspicion checklist to document signs of impairment in employees and help to justify reasonable suspicion drug tests.

Employers should also review job descriptions and ensure that they designate positions as safety sensitive. Under the Arizona Drug Testing Statute, A.R.S. §23-493, *et seq.*, employers with a compliant drug testing policy are protected if they take adverse action against an employee based on a good faith belief that the employee is impaired while in a safety sensitive position. Under the law, impairment can include impairment by alcohol, illegal drugs, or legal drugs. Therefore, even if marijuana is legalized in Arizona, the Arizona drug testing statute provides protections for employers who take adverse action based on a positive drug test if the employee is in a safety sensitive position.

If recreational marijuana becomes legal in Arizona, employers should also take steps to educate their workforce regarding the adverse effects and the risks of marijuana use. Employers should also educate employees regarding the employer's drug-free workplace policy, to ensure that employees understand that even if marijuana use will not land them in jail in Arizona, it could land employees in the unemployment line.

We recommend that construction companies use a safety toolbox talk on prescription drugs and marijuana regarding safety in the workplace. It is important to educate employees regarding impairment, because this is a significant issue in the workplace and can cause injuries and even death.



*Julie Pace's practice handles employment law, handbooks, drug and alcohol policies, I-9 and E-Verify compliance, OSHA, independent contractor and alleged misclassification issues with DES and other government agencies, and defends claims of sexual harassment, employment discrimination, retaliation, whistleblower, and wrongful discharge, and against charges by the EEOC or ACRD. She handles matters involving OSHA, ICE, OFCCP, DOL, NLRB, ADA, FMLA, ERISA, ACA, Davis-Bacon, FAR, SCA, government contracts, and wage and hour laws. She regularly provides training to companies and assists with investigations. Julie can be reached at 602.322.4046 or [jp@cavanaghlaw.com](mailto:jp@cavanaghlaw.com)*