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THE HIGH ART OF MARIJUANA INSURANCE COVERAGE ISSUES

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Until 2011, an individual possessing less than half an ounce of cannabis in Connecticut could have been charged with, and found guilty of, a class C misdemeanor and imprisoned for up to three months.[1] However, in 2011, Connecticut decriminalized cannabis use, although one could still be charged with an infraction for possessing small amounts.[2] More recently, on June 22, 2021, Governor Lamont signed into law Public Act 21-1, an Act Concerning Responsible and Equitable Regulation of Adult-Use Cannabis ("RERACA"), now codified at Title 21a Chapter 420H. RERACA is significant because it subjects nonexempt employers who discipline their employees for off-duty cannabis use to serious penalties. Other states that have legalized recreational use cannabis have similar statutory provisions. Employers, however, are still free to take disciplinary action against employees who are or are suspected to be under the influence of cannabis in certain circumstances.

With such substantial changes to cannabis laws over a short period of time, many employers are left wondering where their own cannabis policies stand and how the change in the law could impact them. Comparing Connecticut's cannabis laws with those of states that have already legalized cannabis may provide valuable insight of what to expect in states considering implementing recreational cannabis use laws.

An employer is wise to determine, in consultation with counsel, whether they are classified as exempt or nonexempt for RERACA applicability purposes.

A. Determining Exemption Status

If an employer fits into one of the following exempt categories, the employer generally would not have to worry about amending existing drug policies or excusing off-duty cannabis use. RERACA defines an "exempted employer" as an employer whose primary activity is (1) mining, (2) utilities, (3) construction, (4) manufacturing, (5) transportation/delivery, (6) educational services, (7) health care/social services, (8) justice/public order, or (9) national security/international affairs.[3]

RERACA also lists "exempted positions" of which the law does not apply to. Such positions include for example firefighters, emergency medical technicians (EMTs), police officers, jobs funded by a federal grant, and jobs requiring the care of children or medical patients, among a variety of others.

Unlike Connecticut, other states are in the process of reviewing or have failed to pass similar laws that apply to certain employers. For example, California's AB-2188 regulates a person's "off the job and away" cannabis use and exempts "employees in the building and construction trades."[4] The bill, however, is currently undergoing its third reading in the legislative review process. In Colorado, HB 22-1152, which

[1] P.A. 11-71 § 3 amended Conn. Gen. Stat. § 21a-267 to remove ½ oz. cannabis from substances warranting a class C misdemeanor. Conn. Gen. Stat. § 53a-36 sets the punishment for a class C misdemeanor.
[2] CONN. GEN. STAT. § 21a-267 § 3(d) (West 2022).
[3] CONN. GEN. STAT. § 21a-422o (West 2022).
[4] A.B. 2188, 2021–22 Sess. (Cal. 2022).

would have applied to most employers at the state and local level, was defeated in March 2022.[5] In Massachusetts, the Supreme Judicial Court held that employers cannot enforce a zero-tolerance policy on cannabis use.[6] If the employee has a qualified disability for which they were prescribed medical marijuana, an employer must engage in an interactive process in determining reasonable accommodations for that off-duty use.[7]

B. RERARCA Rules Employers Should Know

- **Maintaining a drug free work environment.** While the provisions of RERACA affect employers differently based on how the law classifies them, as either exempt or nonexempt, no matter the classification, RERACA emphasizes that no employer is required to allow their employees to perform their duties while under the influence of cannabis or permit employees to have cannabis on the workplace premises. RERACA does, however, carve out an exception for those employees who are prescribed cannabis for medical purposes.

- **Cannabis use no longer a sufficient reason for adverse employment decisions.** Perhaps one of the biggest changes arising from RERACA is that nonexempt employers are no longer at liberty to take disciplinary actions (such as firing, reducing compensation, etc.) against their employees solely because the employee does or does not use cannabis outside of the workplace. Similarly, nonexempt employers cannot base a hiring decision solely on cannabis use.

- **Powerful effect of anti-cannabis policies.** While such rules may appear strict, RERACA grants an employer more freedom to base hiring/disciplinary decisions off cannabis use, provided certain procedural requirements are adhered to. An employer can implement an enforceable anti-cannabis policy and avoid the liability as discussed above so long as the policy is (1) in writing and (2) made available to each employee before the policy is enacted. Once an anti-cannabis policy is in effect, an employer is free to take disciplinary action against an employee for the sole reason of off-duty cannabis use. Take note, however, that RERACA provides safeguards to prevent a job applicant, who is applying for a position, from facing rejection merely because they used cannabis in the past. A nonexempt employer, regardless of whether it has implemented an anti-cannabis policy, is no longer free to base a hiring decision solely on the applicant's prior, off-duty cannabis use. Assuming the employer has a proper anti-cannabis policy, it should be provided to any prospective employees at the time an employment offer is made. Once the policy is in effect, an employer is free to test for cannabis and make disciplinary decisions based on said test results in accordance with the policy.

- **Adverse employment action permitted if certain criteria are met.** Employers are able to discipline an employee, or take other appropriate action, upon reasonable suspicion that an employee is performing their duties while under the influence or if the employee manifests "specific, articulable symptoms of drug impairment" while working that negatively impact the employee's

[5] H.B. 22-1152, 73d Gen. Assemb., Reg. Sess. (Colo. 2022).
[6] *See Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37, 46 (2017) (holding that an employer may not terminate an employee's medical marijuana usage absent reasonable accommodations).
[7] *Id.* at 47–48.

job performance. Such "specific, articulable symptoms of drug impairment" include, but are not limited to: (1) speech impairment; (2) mobility/dexterity impairment; (3) unusual behavior; (4) carelessness; (5) disregard for the safety of others; (6) involvement in an accident that causes serious damage to equipment or property; (7) disruption of a production or manufacturing process; and (8) carelessness that results in injury to the employee or others.

- **Proceed with caution in implementing drug tests.** Under the new law, an employer is generally not able to discipline an employee for the sole reason that they test positive for cannabis (and no other drugs). RERACA, however, does provide for exceptions. A positive cannabis test can form the sole basis for disciplining a nonexempt employee if: (1) the failure to do so would implicate the employer's business with the federal government; (2) the employer reasonably believes the employee is under the influence while performing his or her duties; (3) the employee manifests other specific, articulable symptoms of drug impairment while performing his or her duties as described above; or (4) the employer has a policy in place that complies with the requirements as addressed above.

C. Conclusion

Employers should not interpret RERACA to mean that they must tolerate Connecticut employees using cannabis at work or bringing cannabis onto work premises. However, RERACA is new and as such, many employers' classification as "exempt" or "nonexempt" will be subject to interpretation. With employers facing potential consequences such as being forced to reinstate a terminated employee, pay back wages, and even pay attorney's fees for violating RERACA, employers are wise to familiarize themselves with the applicable laws and consult with an attorney to make sure their existing policies and disciplinary actions are in compliance with those laws.