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John M. Semmens, Editor

The Impact of Marijuana Legalization on Montana Employers

By Gabrielle Gee

Montana is now one of seventeen states that have legalized both medical and recreational marijuana. In November 2020, Montana voters passed Initiative 190 ("I-190"), which enacted the Montana Marijuana Regulation and Taxation Act (the "Act"). On May 18, 2021, Governor Greg Gianforte signed House Bill 701 ("HB 701") into law. HB 701 revised the Act as originally passed. It also repealed a substantial portion of the Montana Marijuana Act, which previously had regulated medical marijuana, and consolidated Montana laws governing recreational and medical marijuana into one statutory scheme.

In light of these developments, employers should carefully review their policies to ensure their workplace drug policies align with state and federal law, and plan for how marijuana legalization might affect their workplace.

I. Marijuana under Montana and Federal Law.

The Act went into effect on January 1, 2021, and is now codified in the Montana Code Annotated, as revised by HB 701. Montana law now allows for possession of one ounce or less of marijuana, permits a limited amount of at-home cultivation, requires the Montana Department of Revenue to license and regulate the production and sale of marijuana products, and allows people who have been convicted of certain marijuana-related crimes to petition for expungement. Marijuana intoxication while driving remains prohibited, and drivers must ensure that marijuana remains in a locked glove compartment, trunk, or out of the driver's reach. Possession is prohibited on school grounds, in hotels or motels, and in healthcare facilities, among other places. Consumption of marijuana is prohibited in public spaces, except as allowed by the Department of Revenue.

Even though the Act decriminalized recreational marijuana possession beginning in 2021, Montanans cannot legally purchase adult-use marijuana until 2022. Even then, HB 701 established that dispensaries may only conduct sales in counties where a majority of voters approved I-190. Where the initiative did not pass by a majority vote, the counties must hold a local election to determine if dispensaries will be permitted in their county. Until June 2023, only medical marijuana providers in good standing may be granted a license for sale of recreational marijuana.

While many other states have legalized recreational marijuana, the drug remains illegal under federal law. The Controlled Substances Act of 1970 ("CSA") labels marijuana a Schedule I drug, similar to drugs like heroin or LSD. Despite that classification, the U.S. Department of Justice issued a memo in August 2013 (the "Cole Memo") announcing it would not enforce the CSA in states that had legalized marijuana, as long as the states had implemented a strong regulatory scheme. The Biden administration thus far has signaled its intention to conform with the Cole Memo, and Congress ultimately may declassify marijuana as a Schedule I substance.

II. Effect of Montana's Marijuana Laws on Montana Employers.

Under Montana law, employers have no obligation to accommodate recreational or medical marijuana use in the workplace. Title 16, Chapter 12 of the Montana Code Annotated contains the Act's new statutory scheme regulating both recreational and medical marijuana production. Under Montana Code Annotated § 16-12-108(4) (2021), the Act cannot be construed to:

• require an employer to permit or accommodate conduct otherwise allowed by this chapter in any workplace or on the employer's property;

• prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while intoxicated by marijuana or marijuana products;

• prevent an employer from declining to hire, discharging, disciplining, or otherwise taking an adverse employment action against an individual with respect to hire, tenure, terms, conditions, or privileges of employment because of the individual's violation of a workplace drug policy or intoxication by marijuana or marijuana products while working;

• prohibit an employer from including in any contract a provision prohibiting the use of marijuana for a debilitating medical condition; or

• permit a cause of action against an employer for wrongful discharge pursuant to 39-2-904 or discrimination pursuant to 49-1-102.

Accordingly, the Act safeguards employers' rights to prohibit both medical and recreational marijuana use by employees in the workplace. However, the Act also establishes that marijuana is now a "lawful product," which generally means employers cannot discriminate against employees who use "off the employer's premises during non-working hours." See Mont. Code Ann. § 39-2-313(1) (2021). That general rule is subject to certain exceptions enumerated in the Act amending Montana Code Annotated § 16-12-108(4) (2021) and § 39-2-313(3) (2021).

The Act's revisions to Montana Code Annotated § 16-12-108(4)(b) (2021) effectively permits employers with drug testing policies to regulate marijuana use outside of the workplace. If employees are subject to mandatory drug tests that cannot distinguish between marijuana use inside the workplace and outside of the workplace, then those employees effectively are barred from all marijuana use. Under Montana law, employers may only conduct drug testing if their employees work in certain fields, however, including: (1) a hazardous work environment; (2) a security position; or (3) a position involving public health, driving motor vehicles, or a fiduciary responsibility. See Montana Code Annotated § 39-2-206(4). The Act also allows employers to prohibit medical marijuana use to treat a debilitating condition. See Mont. Code Ann. § 16-12-108(4)(d) (2021). This

provision may be useful for employers who drug test regularly, but it may not be enforceable for employers who do not drug test.

Similarly, the Act permits employers to regulate employees' use of marijuana outside of the workplace if doing so: (i) "affects in any manner an individual's ability to perform job-related employment responsibilities or the safety of other employees"; or (ii) "conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment." Mont. Code Ann. § 39-2-313(3)(a)(i)-(ii) (2021). Nonprofit organizations that, as one of their "primary purposes or objectives, discourage[] the use of one or more lawful products by the general public" also may refuse to employ individuals who use marijuana. Mont. Code Ann. § 39-2-313(3)(c) (2021).

Because marijuana is still illegal under federal law, employees who suffer an adverse employment action due to marijuana use have had limited success prevailing on federal claims against their employers. For instance, the Americans with Disabilities Act of 1990, which prohibits discrimination against individuals with disabilities in the workplace, specifically excludes individuals who engage in the use of illegal drugs. Similarly, state claims under Montana's former medical marijuana statutes were not recognized by federal courts. The former Montana Marijuana Act (largely repealed by HB 701) contained employer protections similar to provisions in the Act, which established that an employer was not required to permit or accommodate an employee's use of marijuana in the workplace. That provision was upheld as lawful by a federal district court and later by the Ninth Circuit in 2018. See Carlson v. Charter Commc'ns, LLC, No. CV 16-86-H-SEH, 2017 WL 3473316, at *3 (D. Mont. Aug. 11, 2017), aff'd, 742 F. App'x 344 (9th Cir. 2018).

III. Effect of Montana's Marijuana Laws on Montana Employers' Drug Policies.

In crafting a drug policy to address the legalization of marijuana, employers will first want to consider whether they are eligible to implement a drug testing policy, if they do not have one in place already. A valid drug testing policy is important to protect employers who want to prohibit any use of marijuana. Employers should also consider the implications of a zero-tolerance drug policy and the limitations it will impose on their employment pool. While the Act does not require employers to accommodate marijuana use, employers are free to develop their own policies surrounding its use. In addition, employers should consider whether they are subject to a collective bargaining agreement or federal laws that regulate workplace drug policies, such as the Drug Free Workplace Act of 1988.

For Employers with Additional Questions

For employers with additional questions, Crowley Fleck PLLP has an experienced team of attorneys who can assist with all manner of employment questions, including questions related to Montana's new marijuana laws. If you would like more information, please contact Crowley Fleck's Employment Practice Group.

Montana Enacts Law Prohibiting Vaccination Discrimination

By: Mark R. Feddes

Montana employers and companies doing business in the state should take note of Montana's recent enactment of HB 702, an expansive new law that generally prohibits discrimination based on an individual's vaccination status or possession of an immunity passport. HB 702 will be codified as part of the Montana Human Rights Act. The law effectively creates a new protected class based on vaccination status for the purposes of employment, public accommodation, and government services. Like other discrimination claims, the Montana Human Rights Bureau will investigate complaints and successful claimants may recover attorney fees and other monetary damages. While

the new law was precipitated by the COVID-19 pandemic, it is not limited to COVID-19 vaccines; rather, it generally applies to all vaccines. HB 702 went into effect on May 7, 2021.

I. Prohibited Discrimination Under HB 702.

HB 702 generally makes it an unlawful discriminatory practice for:

• "a person or a governmental entity to refuse, withhold from, or deny to a person any local or state services, goods, facilities, advantages, privileges, licensing, educational opportunities, health care access, or employment opportunities based on the person's vaccination status or whether the person has an immunity passport";

• "an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment based on the person's vaccination status or whether the person has an immunity passport"; or

• "a public accommodation to exclude, limit, segregate, refuse to serve, or otherwise discriminate against a person based on the person's vaccination status or whether the person has an immunity passport."

As defined under the new law, "vaccination status" means "an indication of whether a person has received one or more doses of a vaccine." An "immunity passport" is any record "indicating that a person is immune to a disease, either through vaccination or infection and recovery." Under Montana law, a "public accommodation" generally means any "place that caters or offers its services, goods, or facilities to the general public subject only to the conditions and limitations established by law and applicable to all persons." See Mont. Code Ann. § 49-2-101(20)(a). In short, HB 702 dramatically expands Montana law by establishing that employers, businesses, and other places open to the public generally are prohibited from discriminating against individuals—including applicants, employees, customers, clients, or patrons—based on their vaccination or immunity status.

II. HB 702's Narrow Exceptions.

Although broad, the new law does provide a few narrow exceptions. First, HB 702 does not apply to Montana laws requiring certain vaccines for children who attend schools or day-care facilities. Second, a "health care facility," as that term is defined under Montana law, is permitted to ask an employee to volunteer their vaccination or immunization status and implement "reasonable accommodation measures" to protect the health of employees, patients, and visitors who are not vaccinated or immune. Third, licensed nursing homes, long-term care facilities, and assisted living facilities generally are exempt from complying with HB 702 to the extent it would result in a violation of regulations or guidance issued by the Centers for Medicare & Medicaid Services or the Centers for Disease Control and Prevention ("CDC"). Finally, HB 702 states it is not a violation for employers to merely recommend employees receive a vaccine.

III. Practical Considerations.

HB 702 raises a number of important practical considerations for businesses and employers. Notably, in order to comply with Montana law they now generally cannot: (i) require their employees or customers to be vaccinated; or (ii) otherwise treat unvaccinated employees or customers any differently than vaccinated employees or customers. Employers and businesses should carefully evaluate whether their existing policies comply with these prohibitions. For example, an employer policy designed to incentivize employee vaccinations could be found to violate HB 702 if it provides benefits to vaccinated employees—such as de minimis gift cards or additional paid time off—but denies those same benefits to unvaccinated employees. By its terms, HB 702 only permits employers to "recommend that an employee receive a vaccine." Similarly, while HB 702 allows health care facilities to ask employees about vaccination status, it does not extend that right to any other

employers. Unless they operate a health care facility, employers generally should avoid collecting and/or storing employee vaccination information, even if voluntarily provided.

HB 702 also likely prohibits employers, businesses, and government services from establishing or enforcing selective mask requirements based on vaccination status. Notably, current CDC recommendations state: "Fully vaccinated people can resume activities without wearing a mask or physically distancing[.]" See https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html (last accessed June 15, 2021). However, HB 702 likely prohibits policies or signage requiring only unvaccinated individuals to wear masks, as that could constitute unlawful discrimination based on vaccination status. Employers and businesses do retain their ability to: (i) require that all employees and customers wear masks regardless of vaccination status; and (ii) state that mask wearing is recommended or voluntary.

For Employers with Additional Questions

For employers with additional questions, Crowley Fleck PLLP has an experienced team of attorneys who can assist with all manner of employment questions, including questions related to compliance with HB 702. If you would like more information, please contact Crowley Fleck's Employment Practice Group.

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