



MEMORANDUM

To: Brandon Lynaugh, Battleground Strategies

From: Wendy Block, Michigan Chamber

Date: March 10, 2017

Subject: Concerns with the Michigan Regulation and Taxation of Marihuana Act

Thank you for meeting with us on February 28 to discuss your efforts to legalize marijuana in Michigan. Knowing that you intended to circulate petitions and get this issue on the November 2018 ballot, this memo is intended to articulate what can be done to better clarify the proposal so to avoid the most obvious adverse consequences legalization could have on employers and the workplace.

When our members reviewed and debated the three ballot proposals being circulated in 2016, they overwhelmingly expressed concerns about how legalization would threaten the ability of employers to maintain a safe and drug-free workplace. Specifically, our members raised concerns about the following.

- **No clear statutory protections for employers.** This lack of clarity raises a host of questions related to drug-free workplace policies and employer rights. Because of this lack of clarity regarding employer rights, courts would be positioned as a super-legislature to set policy establishing how businesses will be affected by legalization. For example, will a Michigan employer be able to:
 - Enforce drug-free workplace policies on or off the job;
 - Terminate an employee who tests positive for marijuana;
 - Define impairment regardless of whether an on-demand definitive test is ever developed;
 - Terminate employees for cause due to a positive drug test without eligibility for unemployment benefits; and/or
 - Deny workers' compensation benefits if a workplace injury was caused by the injured employee's use of marijuana?

- **Open-ended liability.** Employers have a responsibility to protect all employees. Under the federal Occupational Safety and Health Administration, employers are required to provide their employees with a place of employment that "is free from recognizable hazards that are causing or likely to cause death or serious harm to employees." Failure to do so opens employers to liability and lawsuits. Yet, there is no way to regulate marijuana in the workplace outside of current drug testing protocols. Furthermore, Michigan law does not remove an employer from payment of workers' compensation in instances where a workplace injury was caused by an injured employee's use of drugs or alcohol.
- **No impairment test.** Given the lack of an on-demand test to determine impairment, employers are forced to rely solely on blood and urine tests, neither of which can reliably provide information about present impairment or whether an employee is "under the influence." The lack of an impairment test will create significant human resources dilemmas for employers if marijuana becomes legal in Michigan.
- **No way to make the language "bulletproof."** Although the ballot language could be improved by specifying that it does not regulate private employment or protect employees against disciplinary actions by businesses, there is no way to make the language completely secure or protect employers and workplace safety in all scenarios.
- **Marijuana is still an illegal drug under federal law.** As such, employers cannot be forced, through state legislation, to ignore federal law.

To help alleviate the above concerns in the Marijuana Policy Project proposal, we would suggest the following amendments to the draft provided on Feb. 28:

Section 4.1 – Add to "This act does not authorize:"

(k) possessing, consuming, distributing or being under the influence of marihuana by an employee of an employer during work hours or in the premises, facilities, property, or vehicles of his or her employer or customer if such employer prohibits the conduct by written policy;

(m) worker's disability compensation benefits to be paid, or the employer to have liability for an injury or lost wages, if marihuana was a contributing factor in the workplace injury or if the employee was under the influence of marihuana at the time of the injury and the employer prohibits the conduct by written policy; or

(n) unemployment compensation benefits to be paid if the employee was discharged for possessing, consuming, distributing, or being under the influence of marihuana during work hours or in the premises, facilities, property, or vehicles of his or her employer or customer if such employer prohibits the conduct by written policy.

Section 4.3 – Clarify the accommodation provision by reworking the current subsection to read:

Nothing in this act does any of the following:

- (a) Requires an employer to accommodate conduct otherwise allowed by this act during work hours or in the premises, facilities, or vehicles of an employer or any employee working while under the influence of marihuana;
- (b) Prohibits an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's use, possession, or distribution of marihuana during working hours or on the property or vehicles of the employer or its customers;
- (c) Prohibits an employer from establishing, enforcing and disciplining employees for violations of a written drug testing policy or drug-free workplace policy, including the maintenance of a zero-tolerance drug policy;
- (d) Prohibits an employer from refusing to hire an applicant or disciplining or continuing to employ an employee who tests positive for marihuana;
- (e) Permits a person to commence a cause of action against an employer for refusing to hire, discharging, disciplining, discriminating, retaliating, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment related to marihuana.

Section 4.4 – Clarify private property rights after “consumption,” by adding “possession, distribution,”

Section 5 – Modify to mirror suggested language in Section 4.1(m) and (n), language to deny workers' compensation where the employee was injured while under the influence of marihuana and deny unemployment compensation benefits if the employee violated the employer's written drug policy. (Note: The suggested UI language is similar to alcohol polices which allow discipline for bringing legal alcohol into work.)

Sec. 18 – Give the Legislature discretion to make changes to the act when an on-demand definitive test is developed.

- Rationale: If a breathalyzer or other test is developed to determine whether an individual is “under the influence,” akin to that now available to test an individual's blood alcohol level, the Legislature should have discretion to adopt these standards into state law by a majority vote.

Thank you for your consideration. Please do not hesitate to contact me with any question at wblock@michamber.com or 517/371-7678.