

# Smart and Safe Arizona Act: What Employers Need to Know About Arizona's Marijuana Legalization Ballot Initiative

September 24, 2020



At the end of 2019, we urged employers to keep an eye on a new recreational marijuana legalization voter initiative in Arizona: the Smart and Safe Arizona Act. Although many employers have been focused on the COVID-19 pandemic in 2020, they may want to be aware that the Arizona Secretary of State has officially certified the Smart and Safe Arizona Act as one of two voter propositions on the November 2020 ballot. In addition to approving the initiative, Secretary of State Katie Hobbs has also published arguments for and against the measure.



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Arizona narrowly [voted against](#) legalizing recreational marijuana in 2016, but the Smart and Safe Arizona Act aims again to allow “the legal adult use of marijuana” in Arizona. Despite opposition to the measure from Governor Doug Ducey and some citizens groups, as well as legal challenges before the Arizona Supreme Court, the ballot initiative will be placed before Arizona voters who will have another opportunity to legalize recreational marijuana. Specifically, Proposition 207 gives voters the following option:

A “YES” vote shall have the effect of allowing adults 21 years or older to use, possess, or transfer up to one ounce of marijuana and cultivate for personal use not more than six marijuana plants at a primary residence; banning smoking marijuana in public places and open spaces; amending criminal classifications and penalties for marijuana possession and use; allowing the retail sale of marijuana at licensed establishments; imposing a 16% excise tax on marijuana sales to fund community colleges, infrastructure, public safety, and public health programs; authorizing state and local

regulation of the sale and production of marijuana by a capped number of licensees; and allowing courts to vacate and expunge certain marijuana arrests, charges, adjudications, convictions, or sentences.

The Smart and Safe Arizona Act offers no explicit protections for employees but instead states that the law would “not restrict the rights of employers to maintain a drug-and-alcohol-free workplace.” From an employer’s perspective, the Smart and Safe Arizona Act brings up a familiar question: Can an employer fire an employee who uses recreational marijuana outside of work and then subsequently fails a drug test? Under the proposed Smart and Safe Arizona Act, the answer is likely yes.

Several provisions of the Smart and Safe Arizona Act relate directly to employers. Specifically, Proposition 207:

- “Does not restrict the rights of employers to maintain a drug-and-alcohol free workplace or affect the ability of employers to have workplace policies restricting the use of marijuana by employees or prospective employees.” Section 36-2851(1).
- “Does not require an employer to allow or accommodate the use, consumption, possession, transfer, display, transportation, sale or cultivation of marijuana in a place of employment.” Section 36-2851(2).
- “Does not restrict the rights of employers ... to prohibit or regulate conduct otherwise allowed by this chapter when such conduct occurs on or in their properties.” Section 36-2851(6).

Although it is difficult to predict how a court would interpret the law, if approved, the Smart and Safe Arizona Act appears to preserve employers’ ability to maintain and enforce zero-tolerance drug-free workplace policies. However, employers may want to consider whether having and enforcing these rules benefits their businesses. As more states legalize marijuana, employers in those states worry about their ability to attract and retain talent. Many employers are grappling with the threshold question of whether to test for marijuana at all, especially when it comes to pre-employment testing, and whether to prohibit off-duty marijuana use in their workforces.

Anecdotally, it appears that in states where the use of recreational marijuana is legal, the trend has been to move away from pre-employment testing for marijuana, especially by employers that are not governed by federal regulations (e.g., the [U.S. Department of Transportation’s regulations](#)) or that do not have large populations of safety-sensitive employees. While pre-employment testing for marijuana is largely a business decision for organizations, employers may want to continue to maintain post-employment testing for marijuana, such as for reasonable suspicion, even if marijuana is legalized for recreational use. When effective marijuana impairment tests are available (several companies have marijuana impairment tests in development), employers will have more options for addressing employees’ marijuana use and determining whether an employee is “fit for duty.”

With the November 2020 election less than two months away, employers may want to take this opportunity to prepare for Proposition 207, examine their substance abuse policies, and update them as necessary. Employers may want to make clear that their substance abuse policies prohibit the use or possession of, or impairment by, medical or recreational marijuana while working or on company property.

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Ogletree Deakins' [Drug Testing Practice Group](#) will continue to monitor developments with respect to Arizona's Proposition 207 and will provide updates on the [Drug Testing](#) blog.

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