

New Laws Legalizing Recreational Use of Marijuana Do Not Prohibit Employers from Restricting Use at Work

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On April 21, 2023, Governor John Carney announced his intention to allow House Bills 1 and 2 (respectively, “HB 1” and “HB 2”) to be enacted into Delaware law without his signature, legalizing certain recreational use and possession of marijuana and marijuana-related paraphernalia in the State of Delaware. HB 1 and HB 2 became effective immediately, on April 23, 2023, and April 27, 2023, respectively.

The new law allows individuals who are 21 years or older to possess and use up to one ounce of marijuana. Growing marijuana, driving under the influence, and public consumption remain illegal. The sale of marijuana will be taxed in a manner similar to alcohol.

As Delaware joins a growing list of states legalizing recreational adult use of marijuana, employers should review their drug and alcohol policies to make sure they are complying with Delaware’s marijuana laws. The new law provides that employers may still impose restrictions on an employee’s use or possession of marijuana while at work, just as they would alcohol. Specifically, the law states, “Nothing in [the law] is intended to impact or impose any requirement on employers with respect to terms and conditions of employment including but not limited to accommodation, policies, or discipline.” Accordingly, for example, employers may still discipline if an employee is impaired at work and subsequently tests positive for marijuana. However, employers will need to consider carefully whether pre-hire screening should include marijuana and whether marijuana should be listed and dealt with as an illegal drug in substance-abuse policies. Marijuana is still illegal under federal law and this can impact certain employment positions, such as those with federal licensing and DOT requirements.

Employers should take note that HB 1 and HB 2 do not change the provisions of the Delaware Medical Marijuana Act, which provides that “an employer may not discriminate against a person in hiring, termination, or any term or condition of employment ... if the discrimination is based upon ... [t]he person’s status as a cardholder; or [the] registered qualifying patient’s positive drug test for marijuana,” so long as the employee testing positive did not use, possess, or become impaired by marijuana during his or her hours of employment or while on work premises.

Links to the enacted bills are <https://legis.delaware.gov/BillDetail/129970> and <https://legis.delaware.gov/BillDetail/129969>.

If you have any questions, please contact an RLF employment attorney.

