



MONTANA MUNICIPAL INTERLOCAL AUTHORITY RISK MANAGEMENT BULLETIN

Please distribute to all appropriate personnel.

Date:	December 15, 2020
To:	MMIA Member Cities and Towns
Re:	MT Initiative I-190 Legalization of Marijuana

On November 3, 2020 Montanans voted to approve the legalization of recreational marijuana. The commercial sales of marijuana will take effect in October 2021, but personal consumption becomes legal as of January 2021. This initiative creates numerous questions for cities and towns. One such question is related to employment policy, including drug and alcohol testing. After reviewing the provisions of this Initiative, the MMIA is providing the following observations:

I. Drug and Alcohol-Free Workplace Policy

The legalization of recreational marijuana does not prevent an employer from having a prohibition of use while at work. Most cities and towns have a policy that prohibits consumption or sale of alcohol or drugs while at work or on work premises. These policies can remain written and enforced as they were prior to January 2021.

II. Drug and Alcohol Testing-Commercial Driver's License (CDL) Positions

Cities and towns must continue to follow the policies for testing of employees who hold a CDL. The legalization of recreational marijuana does not prevent an employer from drug testing employees who hold a CDL. Some positions within a city or town require a CDL and holding a CDL subjects the employee to a federally mandated drug and alcohol testing program.

III. Drug and Alcohol Testing-Non CDL Positions

The legalization of recreational marijuana may create uncertainty, which could result in potential risk for the continued practice of drug testing non-CDL holding employees for marijuana. I-190, section 16(b) states that this initiative does not prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while intoxicated by marijuana; (c) 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 while working.

However, conflicting language in several Montana Codes presents risk for drug testing non-CDL employees, specifically as it relates to discipline for use of marijuana. For this reason, MMIA advises cities and towns who conduct non-CDL drug testing to consult with their city/town attorney for guidance on whether marijuana should continue to be on the testing panel. The following MCAs are examples of conflicting language to consider when evaluating risk for continuing to drug test non-CDL employees for marijuana.

- 1) [MCA 39-2-206 Definitions \(3\)](#): "Controlled Substance" means a dangerous drug, as defined in 49 CFR, part 40, except a drug used pursuant to a valid prescription or as *authorized by law*.
- 2) [MCA 39-2-207 Qualified Testing Program 1\(c\)](#): the employer's standards of conduct that regulate the use of *controlled substances* and alcohol by employees;
- 3) [MCA 39-2-210 Limitation on Adverse Action](#): Except as provided in [50-46-320](#), no adverse action, including follow up testing, may be taken by the employer if the employee presents a reasonable explanation or medical opinion indicating that the original test results were not caused by *illegal use* of controlled substances or by alcohol consumption. If the employee presents a reasonable explanation or medical opinion, the test results must be removed from the employee's record and destroyed.
- 4) [MCA 39-2-313 Discrimination prohibited for use of lawful product during non-working hours-exceptions: \(3\)](#) Subsection (2) does not apply to:
 - a) use of a lawful product that:
 - 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;
 - b) an individual who, on a personal basis, has a professional service contract with an employer and the unique nature of the services provided authorizes the employer, as part of the service contract, to limit the use of certain products; or
 - c) an employer that is a nonprofit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public.
- (4) An employer does not violate this section if the employer takes action based on the belief that the employer's actions are permissible under an established substance abuse or alcohol program or policy, professional contract, or collective bargaining agreement.

- 5) [MCA 39-2-903 Wrongful Discharge From Employment-Definitions \(5\)](#): "Good cause" means reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. The legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason, unless the employer acts within the provisions of [39-2-313\(3\)](#) or (4).

- 6) [MCA 50-46-320 Montana Medical Marijuana Act - Limitations of the Act \(5\)](#): Nothing in this part may be construed to:
 - a) prohibit an employer from including in any contract a provision prohibiting the use of marijuana for a debilitating medical condition; or
 - b) permit a cause of action against an employer for wrongful discharge pursuant to [39-2-904](#) or discrimination pursuant to [49-1-102](#).

If a city or town decides to discontinue drug testing of marijuana for non-CDL employees, MMIA advises that your policy be updated to remove the mention of marijuana and prompt notice be given to the testing facility to remove marijuana from the non-CDL drug testing panel. If a city or town decides to continue drug testing of marijuana for non-CDL employees, MMIA advises that your policy be updated to clearly reflect that marijuana will continue to be tested for. All updates to drug and alcohol policies must be submitted to the MMIA for underwriting review for a city/town to maintain their employment practice coverage endorsement.

It is likely that the Montana Legislature which convenes in January will review this initiative and make changes to the drug testing and employment laws referenced above. As such it is possible guidance could change over the next few months. MMIA will issue updated guidance as necessary based on changes that the legislature may make to existing statutes.