

***Guide to Vermont's Laws on Marijuana in  
the Workplace***

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## **INTRODUCTION**

Many Vermonters are asking questions about how Vermont's new recreational marijuana law will affect their daily lives, especially in the workplace. While it is important to understand what the new law allows, it is also important to understand the law's limitations.

Vermont employers need to understand what protections the various marijuana laws provide, both for the employer and its employees. Vermont employers must understand how Vermont's marijuana laws interact with other workplace protections, such as legal protections for individuals with disabilities. This guide will address both Vermont's recreational and medical marijuana laws, as well as the interplay of those laws with existing employment laws. This guide will also explain Vermont's employee drug testing laws, the legal requirements for employee drug testing, and employee rights under the drug testing laws.

Before examining these Vermont state laws, it is important to keep in mind that **federal law still prohibits all use, sale or possession of marijuana**. Although it has been rare for federal prosecutors to target individuals using marijuana for medical or recreational reasons, there is no guarantee that will continue to be the case. The interplay between Vermont and federal law is discussed further below.

Finally, it is also important to remember **that this guide is not intended to serve as legal advice about how to handle specific issues or conflicts that arise in the employment context**. Laws change, courts issue new decisions interpreting those laws, and the scope of many employment rights and duties depend upon the facts of each individual case. Thus, employers and individuals should contact their own attorney to ensure they make important decisions with legal advice from counsel who is considering the relevant facts for their particular situation.

## **SECTION I: VERMONT'S LEGALIZATION OF RECREATIONAL MARIJUANA**

On January 22, 2018, Vermont Governor Phil Scott signed into law Act 86 (House Bill 511), *an act relating to eliminating penalties for possession of limited amounts of marijuana by adults 21 years of age or older*. Act 86 will go into effect **July 1, 2018**. While eight other states and Washington D.C.<sup>1</sup> have legalized recreational marijuana by ballot initiative, the passage and signing of Act 86 made Vermont the first State in the nation to legalize recreational marijuana through the legislative process.

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<sup>1</sup> These states are Alaska, Colorado, Maine, Massachusetts, Nevada, Oregon, Rhode Island, and Washington. Washington D.C. has also legalized the use of recreational marijuana.

### ***How does the new recreational marijuana law (Act 86) change Vermont law?***

Act 86 makes changes to Vermont law legalizing the private possession of smaller amounts of marijuana for those who are 21 or older. Specifically, Act 86 does away with criminal penalties for possessing (i) up to an ounce of marijuana or five grams of hashish and (ii) two mature and four immature marijuana plants.<sup>2</sup>

### ***How does Act 86 affect employers and workers?***

Employers should know that Act 86 explicitly states that:

- Employers are **not** required to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace;
- Employers **may prohibit or otherwise regulate** the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana on their premises;
- Employers may **adopt policies prohibiting the use of marijuana in the workplace**; and
- The law **does not create a legal cause of action** against an employer that discharges an employee for violating a policy that restricts or prohibits the use of marijuana by employees.<sup>3</sup>

### ***What does this final provision mean?***

Although most employers do not have policies addressing what employees do outside the workplace — especially what they do in the privacy of their own homes — the new law makes clear that if an employer *did* have a zero-tolerance policy for marijuana use both on and off the clock, an employee fired for violating that policy could not use Act 86 as a basis for suing the employer.

As discussed below in **Section III**, such a zero tolerance, on- and off-the-clock policy has the potential to create problems for employers when it comes to certain disability protections, for instance where an employee may have a medical marijuana card that permits them to use marijuana at home to treat a disability.

### ***What does Act 86 prohibit, if anything?***

Even though Act 86 does allow individuals to use or possess recreational amounts of marijuana, the law still prohibits:

- The cultivation or possession of larger amounts of marijuana than allowable for recreational use.<sup>4</sup> For offenses involving larger amounts of marijuana, individuals can

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<sup>2</sup> 18 V.S.A. § 4320; 18 V.S.A. § 4230a (**Note:** all Act 86 citations contained herein are current as of the effective date, July 1, 2018).

<sup>3</sup> 18 V.S.A. § 4230a(e).

<sup>4</sup> 18 V.S.A. § 4230(a)(2)-(4).

still be subject to penalties that range from imprisonment for six months to fifteen years and fines of \$500-\$500,000, depending on the amount of marijuana in possession.<sup>5</sup>

- The dispensing or enabling of consumption of any amount of marijuana to any person under 21 years of age.<sup>6</sup> Criminal penalties are provided for violations.<sup>7</sup>
- The consumption of marijuana in a public place.<sup>8</sup> For purposes of the law, “public place” is defined as “any street, alley, park, sidewalk, public building other than individual dwellings” as well as any place of public accommodation and any place where the usage of tobacco or a tobacco substitute is prohibited by law.<sup>9</sup> An individual who uses marijuana in a public place may be assessed a civil penalty of between \$100 and \$500.<sup>10</sup>

It is also important to note that despite legalizing recreational marijuana in limited amounts, Vermont law does **NOT presently allow for commercial sale of marijuana.**

Act 86 also explicitly states the law does **NOT** do any of the following:

- Exempt a person from arrest, citation or prosecution for being under the influence of marijuana while operating a vehicle or any kind or for consuming marijuana while operating a motor vehicle;
- Limit the authority of schools to impose penalties for the possession of marijuana on school property;
- Prohibit municipalities from adopting civil ordinances to create additional penalties for consumption of marijuana in public places;
- Prohibit landlords from banning possession of marijuana in any lease agreement; or
- Allow an inmate in a correctional facility to possess or use marijuana or limit the Department of Corrections or Parole Board’s ability to impose penalties on offenders who use marijuana in violation of court order, conditions of release, or rules of a correctional facility.<sup>11</sup>

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<sup>5</sup> 18 V.S.A. § 4230.

<sup>6</sup> 18 V.S.A. § 4230f.

<sup>7</sup> *Id.*

<sup>8</sup> 18 V.S.A. § 4230a(a)(2)(A).

<sup>9</sup> *Id.*

<sup>10</sup> 18 V.S.A. § 4230a(a)(2)(B).

<sup>11</sup> 18 V.S.A. § 4230a(b)(2)(A)-(F).

***If Act 86 is a Vermont law, is marijuana is still illegal under federal law?***

Yes.

Act 86 only removes the possibility that individuals in Vermont would be prosecuted under *state law* for certain, minor recreational marijuana cultivation and use. It does not remove the possibility someone might nonetheless be prosecuted under *federal law*. Historically, federal authorities have not treated possession of small amounts of marijuana as an enforcement priority. That history, however, is no guarantee that federal priorities won't change in the future.

The federal Controlled Substances Act ("CSA") places marijuana into the same category (known as "Schedule I") as other more serious drugs, such as heroin and LSD, for which there is no permitted legal use.<sup>12</sup> (The CSA also categorizes marijuana as a more serious drug than cocaine, oxycodone or fentanyl, which have a lower, Schedule II classification). Although there have long been questions about treating marijuana as a Schedule I prohibited substance, Congress has not changed the law, even in the face of state laws that have moved away from criminalizing medical or recreational marijuana use.

***What does this mean for immigrants to Vermont, such as student or worker visa holders?***

Act 86 applies to all Vermonters and visitors to Vermont, regardless of citizenship status. Additionally, immigration enforcement is a matter of federal, not state law.

However, because marijuana is still illegal under federal law, non-citizens could still face both negative immigration and criminal consequences for growing, possessing, selling, or using marijuana. Those immigration consequences could include revocation of the person's visa, denial of re-entry into the country, or deportation.

Given recent changes in federal immigration enforcement, Vermont's non-citizen residents may wish to be especially wary of any involvement with marijuana, despite the passage of Act 86.

**SECTION II: MEDICAL MARIJUANA**

Act 86 is not Vermont's first effort to legalize the use of marijuana. In 2004, the Vermont legislature passed Act 135, *An Act Relating to Marijuana Use by Persons with Severe Illness*. Since 2004, Vermont's medical marijuana laws have been revised and expanded to allow for individuals with a wider range of medical conditions to qualify as registered patients and to allow for the creation of a state-licensed medical marijuana distribution system through dispensaries.

***Who Can Obtain a Medical Marijuana Card?***

Vermont's medical marijuana law requires that, to receive the protections of the law and to lawfully purchase marijuana for medical treatment at a dispensary, an individual must apply to

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<sup>12</sup> See 21 U.S.C. § 812.

the Vermont Department of Public Safety to become a “registered patient” or “registered caregiver.”<sup>13</sup>

In order to qualify as a registered patient, a person must be diagnosed with a “debilitating medical condition” by a health care professional with whom they have an ongoing professional-patient relationship.<sup>14</sup> The law defines the term “debilitating medical condition” to include:

- Cancer;
- Multiple Sclerosis;
- HIV + Status;
- Acquired Immune Deficiency Syndrome (AIDS);
- Glaucoma;
- Crohn’s Disease;
- Parkinson’s Disease; or
- Post-Traumatic Stress Disorder (PTSD) (in some circumstances).<sup>15</sup>

In addition, the law states that **the treatment** for the above conditions may also be considered a “debilitating medical condition” if the disease *or* the treatment itself results in “severe, persistent, and intractable symptoms.”<sup>16</sup>

Individuals with PTSD may qualify for a medical marijuana card if they are undergoing psychotherapy or counseling with a licensed provider for their PTSD diagnosis.<sup>17</sup>

Diseases or conditions not listed above may also qualify as “debilitating medical conditions” if the condition or treatment for the condition is chronic, debilitating, and at least one of the following symptoms are present: (1) cachexia or wasting syndrome; (2) chronic pain; (3) severe nausea; or (4) seizures.<sup>18</sup>

Vermont law also allows individuals to apply to become registered caregivers for a medical marijuana patient.<sup>19</sup> A registered caregiver may only care for one registered patient at a time, and a registered patient may only have one registered caregiver, unless the patient is under 18 years of age.<sup>20</sup> Patients under 18 may have two registered caregivers.<sup>21</sup> Becoming a registered caregiver allows an individual to have certain protections under the law, as set forth in greater detail below.

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<sup>13</sup> 18 V.S.A. § 4473.

<sup>14</sup> 18 V.S.A. § 4473(a); see 18 V.S.A. § 4472(1), (4).

<sup>15</sup> 18 V.S.A. § 4472(4)(A).

<sup>16</sup> *Id.*

<sup>17</sup> 18 V.S.A. § 4472(4)(B).

<sup>18</sup> 18 V.S.A. § 4472(4)(C).

<sup>19</sup> 18 V.S.A. § 4474.

<sup>20</sup> 18 V.S.A. § 4474(c).

<sup>21</sup> *Id.*

### ***Medical Marijuana Cardholder Protections and Limitations***

If an individual is issued a valid medical marijuana card and is otherwise in compliance with Vermont's medical marijuana laws, they are exempt from state or local arrest or prosecution for possession of less than two ounces of marijuana or from the seizure by state or local law enforcement of any marijuana, marijuana-infused products, and marijuana supplies.<sup>22</sup> The law also prohibits state or local authorities from arresting or prosecuting someone for constructive possession of marijuana as the result of being in the vicinity of someone using marijuana for symptom relief.<sup>23</sup>

Vermont's medical marijuana law does **NOT** exempt a medical marijuana cardholder from arrest or prosecution for being under the influence of marijuana while:

- Driving any type of motor vehicle;
- Being in a workplace or place of employment; or
- Operating heavy machinery or handling a dangerous instrumentality.<sup>24</sup>

The law also does **NOT** exempt a medical marijuana cardholder or registered caregiver from arrest or prosecution for possessing marijuana for purposes other than symptom relief, or for endangering the health or wellbeing of another person.<sup>25</sup>

Finally, the law does **NOT** exempt a medical marijuana cardholder from arrest or prosecution for smoking marijuana in any public place, including on public transportation, on school grounds, in public parks, or in a workplace or place of employment.<sup>26</sup>

Vermont employers should understand that Vermont's medical marijuana laws still permits employers to ban marijuana in the workplace and prohibit all employees from working while under the influence of marijuana.

However, it is important to note that medical marijuana can have other implications for employers related to disability protections for employees. Those implications are discussed in more detail in **Section III** below.

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<sup>22</sup> 18 V.S.A. § 4474b(a); 18 V.S.A. § 4230(a).

<sup>23</sup> 18 V.S.A. § 4474b(c).

<sup>24</sup> 18 V.S.A. § 4474c(a)(1)(A)-(C).

<sup>25</sup> 18 V.S.A. § 4474c(a)(2).

<sup>26</sup> 18 V.S.A. § 4474c(a)(3)(A)-(E).

### **SECTION III: INTERPLAY OF VERMONT'S MARIJUANA LAWS WITH VERMONT'S EMPLOYMENT DISCRIMINATION AND DISABILITY LAWS**

While the above shows that in recent years state laws regarding marijuana have become increasingly permissive with regards to use and possession of marijuana for certain purposes, employers still have certain rights under the law when it comes to marijuana in the workplace.

As discussed above, Act 86 does not require employers to allow or accommodate workplace use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana.<sup>27</sup> In fact, the law specifically states employers may still (i) ban or otherwise regulate marijuana in the workplace, (ii) create policies prohibiting the use of marijuana in the workplace and (iii) discharge employees for violations of that policy.<sup>28</sup>

Similarly, Vermont's medical marijuana law does not require employers to permit or accommodate the use of marijuana in the workplace.<sup>29</sup>

These rights for employers are especially important not only for workplace safety issues, but for federal contractors or federal grant recipients who must comply with the federal Drug Free Workplace Act in order to receive federal funding.<sup>30</sup>

Nonetheless, there are a few narrow instances in which Vermont law does restrict how employers may deal with marijuana use by its employees, as set forth below.

#### ***Disability Protections for Employees Under Vermont Law & Interplay with Substance Abuse***

There is no question that our country and state are in the middle of an opioid epidemic, and employers must face difficult situations related to substance abuse when managing their employees. The same questions may arise with regards to employees who abuse recreational marijuana. Navigating how to handle employee drug or alcohol dependence issues is a multi-layered issue.

#### ***Disability Protections***

Vermont's Fair Employment Practices Act ("VFEPa") provides employment protections for employees of companies that have one or more employee.<sup>31</sup> Under VFEPa, it is unlawful for any employer, employment agency, or labor organization to discriminate against a "qualified individual with a disability."<sup>32</sup> Discrimination means not only intentional mistreatment of a disabled employee or applicant, but also failure to provide a reasonable accommodation to that

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<sup>27</sup> 18 V.S.A. § 4230a(e).

<sup>28</sup> *Id.*

<sup>29</sup> 18 V.S.A. § 4474c(a)(3)(A)-(E).

<sup>30</sup> Under the Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 8101-8106, government contractors and recipients of federal funding must prohibit in their workplace the unlawful manufacture, distribution, dispensation, possession of all controlled substances — including marijuana— regardless of state law. It also requires covered employers to notify employees about these prohibitions and provide them educational materials regarding the risks of drug abuse.

<sup>31</sup> See 21 V.S.A. § 495d.

<sup>32</sup> 21 V.S.A. § 495(a).

individual. As discussed in detail below, employees carrying a medical marijuana card and those dealing with substance abuse issues may be protected under VFEPA's disability provisions.

Who counts as a **“qualified individual with a disability?”** The definition of disability under VFEPA is broad and in most cases the same as the definition used by its federal counterpart, the Americans with Disabilities Act (“ADA”).<sup>33</sup>

This guidance will focus on disability-related protections as they relate to marijuana or other drug use. First, both VFEPA and the ADA treat alcoholism and drug addiction as disabilities. Thus, employers cannot discriminate against employees or applicants based upon an employee or applicant's addiction. Employers also may have a duty to accommodate an alcohol- or drug-addicted employee's need to seek medical treatment for their disability. In this way, addiction is treated much the same way as other mental health or physical disabilities, such as Bipolar Disorder or Epilepsy.

Neither law, however, requires employers to permit employees to use alcohol or use drugs illegally in the workplace. Nor do they require employers to tolerate employees (i) working while under the influence; (ii) failing to meet performance standards; or (ii) engaging in misconduct. Instead, disability-rights laws seek to lower barriers to employing people who suffer from addiction so that they can compete on a level playing field with other, non-disabled workers.

VFEPA and the ADA do differ, however, when it comes to employees who are *currently* using illegal drugs. That topic is addressed next.

### ***Current Substance Abuse***

The ADA flat-out excludes from its disability-rights coverage individuals who are currently using illegal drugs — even if they are addicted.<sup>34</sup> Because marijuana is illegal under federal law, the ADA does not require employers to accommodate employees with medical marijuana cards.

On the other hand, Vermont law is more protective of employees. Under VFEPA, employees' current illegal drug use does not disqualify the employee from protection under Vermont's disability laws unless that use (i) prevents them from performing the duties of their job, or (ii) constitutes a “direct threat to the property and safety of others.”<sup>35</sup> In other words, Vermont law protects workers who can safely do their job, even if they are currently struggling to overcome addiction.

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<sup>33</sup> For a full statutory definition of qualified individual with a disability under Vermont law, see 21 V.S.A. § 495d(6)-(12).

<sup>34</sup> 42 U.S.C. § 12114(a); 29 C.F.R. § 1630.3(a).

<sup>35</sup> 21 V.S.A. § 495d(6)(B).

### ***Medical Marijuana and Disability***

While Vermont’s medical marijuana laws do not require employers to tolerate the consumption or possession of marijuana in the workplace, the laws do not permit employers to discriminate against disabled applicants or employees who use medical marijuana outside of work to treat their disability. Remember that Vermont issues medical marijuana cards only to persons certified as having a “debilitating medical condition.” In many instances, such conditions count as legally-protected disabilities under VFEPA.

Thus, if an employer becomes aware that an employee or job applicant is a medical marijuana cardholder, the law may treat the employer as being on notice that the employee or job applicant has a disability. Even if the employer does not learn of the specific debilitating condition, the employer will gain an understanding that the employee has a medical condition that is sufficiently debilitating to grant the employee the right to obtain marijuana from a state medical marijuana dispensary.

Employers must be careful that any employment decisions they make are not based on any actual or perceived underlying disability that may be related to the medical marijuana use. It is also important to remember privacy and confidentiality laws that may apply, and employers should not disclose the employee or applicant’s disability in a manner inconsistent with the law.

### ***Interaction with Act 86***

Employers may question whether employee’s rights under Vermont’s disability laws conflict with Act 86, which states that employers cannot be sued for enforcing a no-marijuana policy, even regarding home use.

However, strictly speaking, there is not a conflict between the two laws. Act 86 does not limit any legal protections that already exist for individuals with disabilities. Instead, Act 86 states that it does not create a *new* legal claim for employees who are fired for violating a policy prohibiting marijuana use.

### ***Enforcement of Vermont’s Employment Discrimination and Disability Laws***

If an employee believes an employer has discriminated against them based on disability or any other protected category under the law, the employee may pursue a private court action seeking damages or a court order requiring that the discrimination cease immediately.<sup>36</sup> Employees may also seek damages, back pay and other benefits, reinstatement, attorney’s fees, and other appropriate relief.<sup>37</sup>

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<sup>36</sup> 21 V.S.A. § 495b(b).

<sup>37</sup> *Id.*

Employees can also seek government enforcement and the same remedies through the federal Equal Employment Opportunity Commission, the Vermont Attorney General's Office, or (for state employees) the Vermont Human Rights Commission.

#### **SECTION IV: VERMONT'S EMPLOYER DRUG TESTING LAWS**

Some employers choose to utilize employee drug testing to regulate drug and alcohol use in the workplace. **While Vermont law does allow employers to drug test employees, employers may only do so in very limited circumstances.** Before considering drug testing employees or applicants, it is important that employers understand the specific requirements of the law, as set forth below.

*After July 1, 2018, can employers still drug test employees for marijuana?*

**Yes, provided there is a legal basis to conduct the drug test under existing law.** In other words, Act 86 did not change Vermont's existing laws strictly regulating when and how employers may drug test. Those rules are described below.

#### ***Drug Testing Job Applicants***

Under Vermont law, employers may not require or request that an applicant for employment submit to a drug test *unless all the following conditions are met:*

- The employer has already extended a conditional offer of employment to the applicant to be tested, contingent upon the applicant receiving a negative drug test result;
- The employer gives the applicant written notice of the drug testing procedures and a list of the drugs to be tested. This notice must also state that any therapeutic levels of medically prescribed drugs will not be reported to the employer; and
- The drug test is administered in accordance with specific statutory requirements, including being tested by a laboratory approved by the Vermont Department of Health. These specific requirements are laid out in more detail below.<sup>38</sup>

In this context, "applicant" means someone looking to start working for an employer; it does not mean someone who is already employed and simply applying for a promotion or new position.<sup>39</sup> Thus, employers cannot apply the above standards to current workers seeking promotion or a change in job status. In the case of promotions or internal hires, as well as for all other drug testing of existing employees, the employer must apply the standards described below.

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<sup>38</sup> 21 V.S.A. § 512(a)-(b).

<sup>39</sup> 21 V.S.A. § 513(a).

### ***Probable Cause Drug Testing***

Once an employee is hired, Vermont law generally prohibits employers from requesting or requiring that an employee submit to a drug test as an expressed or implied condition of employment.<sup>40</sup>

However, employee drug testing is allowed under the law *if all the following circumstances are met*:

- The employer has **probable cause** to believe that the employee is using or is under the influence of a drug on the job;
- The employer has available for the employee a bona fide rehabilitation program for alcohol and drug abuse, and this program is either provided by the employer or is available through employee health insurance, an employee assistance plan, or other contractual service;
- If the employee tests positive, the employer does not terminate if the employee agrees to participate in the employer-offered rehabilitation program; and
- The drug test is administered in accordance with the same specific statutory requirements as required for applicant drug testing, including being tested by a laboratory approved by the Vermont Department of Health. These specific requirements are laid out in more detail below.<sup>41</sup>

If the employee participates in a rehabilitation program, the employer may place the employee on unpaid leave for the time required to complete the program, but not longer than three months.<sup>42</sup> (Note, however, that employees with any already-earned paid sick time (or other accrued paid time off) may be able to use that accrued leave during leave to attend rehab.) The employee may be terminated if, after the employee returns to work following the rehabilitation program, the employee is subjected to another lawful drug test (again requiring probable cause) and the test result is positive.<sup>43</sup>

### ***What constitutes “probable cause”?***

In the context of employee drug testing, “probable cause” generally means that the employer has come across *facts* sufficient to lead a reasonable person to conclude that the employee is using or under the influence of substances while at work. An employer may draw a probable cause determination from a combination of signs exhibited by the employee, such as stumbling, slurring of speech, odors of alcohol or other substances, presence of drug paraphernalia, or observing someone use in the workplace.

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<sup>40</sup> 21 V.S.A. § 513(a).

<sup>41</sup> 21 V.S.A. § 513(c)(1)-(4).

<sup>42</sup> 21 V.S.A. § 513(c)(3).

<sup>43</sup> *Id.*

**Probable cause will always involve a fact-specific inquiry and varies depending on the specific circumstances.** Note that probable cause is a higher standard than “reasonable suspicion.” “Reasonable suspicion” is a lower standard of proof and would not justify drug testing Vermont employees. Just as the police need probable cause to obtain a search warrant for a residence, employers need probable cause to obtain a drug test.

***What about drug testing workers who’ve been involved in an accident?***

Employers still need probable cause that the employee was using or under the influence on the job. The mere fact of an accident — which can happen for many reasons — isn’t enough.

***Is random testing or company-wide testing permitted?***

No, unless federal law expressly requires such testing.

Vermont’s drug testing law specifically states employers cannot even *ask* employees to submit to random or company-wide drug testing, much less require them to do so.<sup>44</sup>

The prohibition against even *requesting* that employees participate in random or company-wide drug testing means, for instance, that employers and employees cannot agree to a random or company-wide drug testing plan in a collective bargaining agreement or other contractual agreement between the parties, even if the employee agrees with such a contractual term.

The ban on company-wide tests would also apply to scheduled drug testing of employees, such as an annual drug test of all employees.

The Vermont drug testing law states that the one exception to all of the above arises when a federal law or regulation *requires* conduct random or company-wide drug tests. Such testing may be required of employers who are subject to specific federal laws or regulations such as the federal motor carrier, aviation, and nuclear safety regulations.<sup>45</sup>

***What is a “Drug” Under Vermont’s Drug Testing Laws?***

The law defines “drug” as any drug listed or classified by the U.S. Drug Enforcement Administration as a Schedule I drug, or its metabolites, and alcohol.<sup>46</sup>

The definition also includes other drugs or their metabolites which are likely to cause impairment to the individual on the job, which includes: amitriptyline, amphetamines, barbiturates, benzodiazepines, cannabinoids, cocaine, doxepin, glutethimide, hydromorphone, imipramine, meperidine, methadone, methaqualone, opiates, oxycodone, pentazocine, phenytoin, phencyclidine, phenothiazines, and propoxyphene.<sup>47</sup>

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<sup>44</sup> 21 V.S.A. § 513(b)

<sup>45</sup> See e.g. 49 CFR part 40; 10 CFR part 26.

<sup>46</sup> 21 V.S.A. § 511(3).

<sup>47</sup> *Id.*

Vermont's drug testing laws also allows the Vermont Commissioner of Health to add drugs to this list that are not recognized as commonly abused but may be likely to cause impairment of an employee on the job.<sup>48</sup>

### ***Specific Drug Testing Requirements***

As explained above, if an employer is lawfully drug testing its applicants or employees pursuant to Vermont's employer drug testing laws set forth above, any testing must be done in accordance with specific provisions set forth in the law.<sup>49</sup>

Vermont law requires that all pre-employment and probable cause drug testing be *performed in compliance with **all** the following requirements:*

- The employer provides all individuals tested with a **written policy that identifies the following:**
  - The circumstances under which the individual may be subjected to drug testing;
  - The specific testing procedures;
  - A list of the drugs that will be screened;
  - A statement explaining that over-the-counter medications and other substances may result in a positive test: and
  - The consequences of a positive test result;<sup>50</sup>
- The employer uses a laboratory designated by the Vermont Department of Health<sup>51</sup>;
- The employer contracts with a certified medical review officer ("MRO") who is licensed physician with knowledge of the medical use of prescription drugs and the pharmacology and toxicology of illicit drugs. The MRO shall review and evaluate all drug tests results and report the results to the individual tested, and report confirmed drug test results to the employer;<sup>52</sup>
- The employer designates a collector to collect specimens from job applicants and employees. The specimen collector must establish a chain of custody procedure that assures the anonymity of the individual being tested and verifies the identify of each sample and each test result;<sup>53</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> 21 V.S.A. § 514.

<sup>50</sup> 21 V.S.A. § 514(2).

<sup>51</sup> 21 V.S.A. § 514(4); a current list of laboratories designated by the Vermont Department of Health can be found here: <http://www.healthvermont.gov/public-health-laboratory/laboratory-certification-or-approval/drug-testing-laboratory-approval>

<sup>52</sup> 21 V.S.A. § 514(11).

<sup>53</sup> 21 V.S.A. § 514(12).

- The person collecting the samples ensures that a portion of any positive sample is preserved for at least 90 days after the date the individual receives their results and in a manner that will allow for accurate retesting;<sup>54</sup>
- All drug testing is administered in a manner that only detects the presence of alcohol or drugs as defined under the law (see definition above), at nontherapeutic levels;<sup>55</sup>
- The employer does not request or require that drug testing be done via blood sample;<sup>56</sup>
- If urinalysis is used,<sup>57</sup> the employer:
  - Requires that the laboratory performing the test confirm any sample that tests positive by using gas chromatography with mass spectrometry or an equivalent method; and
  - Provides the person tested with an opportunity, at the individual's request and expense, to have a blood sample drawn at the time the urine sample is provided so that it can be preserved and tested at a later time;<sup>58</sup>
- The testing laboratory reports that a urine sample tests positive only if both the initial test and the confirmation test are positive for a particular drug;<sup>59</sup>
- Any detection of a drug at a therapeutic level is reported as a negative test result, and shall not be mentioned in the laboratory's report;<sup>60</sup>
- The laboratory provides the MRO with a written report of the drug test result, and the medical review officer shall review the report and discuss the results with the individual tested. The written report includes the following:
  - A unique identifying code for the individual tested;
  - The type of test conducted for both the initial and confirmation screening;
  - The results of each test;
  - The detection level, i.e., cut-off or measure used to distinguish positive from negative samples on both the initial and confirmation screening;
  - The name and address of the laboratory; and
  - Any other information provided by the lab regarding that individual's test.<sup>61</sup>

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<sup>54</sup> 21 V.S.A. § 514(10).

<sup>55</sup> 21 V.S.A. § 514(1).

<sup>56</sup> 21 V.S.A. § 514(3).

<sup>57</sup> Presently, urinalysis is the only applicant or employee drug testing method approved by the Vermont Department of Health.

<sup>58</sup> 21 V.S.A. § 514(6).

<sup>59</sup> 21 V.S.A. § 514(7).

<sup>60</sup> 21 V.S.A. § 514(8).

<sup>61</sup> 21 V.S.A. § 514(9).

Unless *all* the above criteria are met, employers may not drug test applicants or employees.

### ***Penalties and Enforcement for Drug Testing***

Vermont law provides both a private right of action and a state enforcement action in the event the drug testing laws are violated.<sup>62</sup> An employee or applicant may bring a private civil action for damages, injunctive relief (*e.g.*, reinstatement or an order that the employer stop the unlawful practice), and attorneys' fees and court costs.<sup>63</sup> If an aggrieved individual files a lawsuit, the law places upon the employer the burden of proving its actions were lawful.<sup>64</sup>

Employees or applicants may also file a complaint with the Civil Rights Unit of the Vermont Attorney General's Office ("CRU"). The CRU investigates claims of violations of Vermont's drug testing laws. If the State finds that a violation has occurred, they may bring a state action to enforce civil penalties of between \$500 and \$2,000 for violations of the law.<sup>65</sup>

Finally, the State of Vermont may bring a criminal action against any employer who knowingly violates the drug testing laws.<sup>66</sup> Such criminal penalty shall be between \$500 and \$1,000 for a violation, imprisonment of up to six months, or both.<sup>67</sup>

### **SECTION IV: PUBLIC INPUT; FUTURE UPDATES**

The Office of the Attorney General welcomes public input on this guidance to ensure employers and employees have a fair chance to comply with their legal obligations and exercise the legal rights granted to them. To that end, we expect to update this guidance periodically to address new questions that may arise in the future. Comments should be directed to our Civil Rights Unit at [ago.civilrights@vermont.gov](mailto:ago.civilrights@vermont.gov) or (802) 828-3657.

### **RESOURCES**

Vermont Office of the Attorney General  
Civil Rights Unit  
109 State Street  
Montpelier, VT 05609-1001  
Toll Free in Vermont: (888) 745-9195, or (802) 828-3657

Vermont Human Rights Commission (for state employees)  
14-16 Baldwin Street  
Montpelier, VT 05633-6301  
Toll Free in Vermont: (800) 416-2010; or (802) 828-1635  
[human.rights@vermont.gov](mailto:human.rights@vermont.gov)

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<sup>62</sup> 21 V.S.A. § 519.

<sup>63</sup> 21 V.S.A. § 519(a).

<sup>64</sup> 21 V.S.A. § 519(b).

<sup>65</sup> *Id.*

<sup>66</sup> 21 V.S.A. § 519(d).

<sup>67</sup> *Id.*