



AN ACT CLARIFYING EMPLOYER RIGHTS RELATED TO WORKERS' COMPENSATION, DRUG TESTING, AND DISCIPLINARY ACTION INVOLVING AN EMPLOYEE'S MEDICAL USE OF MARIJUANA; EXPANDING THE TYPES OF EMPLOYEES COVERED BY THE WORKFORCE DRUG AND ALCOHOL TESTING ACT; CREATING EMPLOYMENT-RELATED EXCEPTIONS TO THE PROTECTIONS OF THE MEDICAL MARIJUANA ACT; PROVIDING DEFINITIONS; AMENDING SECTIONS 39-2-206, 39-2-210, 39-2-313, 39-71-407, 50-46-201, AND 50-46-205, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

WHEREAS, employers who are concerned about public and workplace safety have increasingly faced issues associated with employees and potential employees who are approved for or associated with the medical use of marijuana; and

WHEREAS, clarifications are necessary to affirm employers' rights in the hiring and termination process, drug testing, and other issues related to the medical use of marijuana in an employee's course and scope of employment.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 39-2-206, MCA, is amended to read:

**"39-2-206. Definitions.** As used in 39-2-205 through 39-2-211, the following definitions apply:

(1) "Alcohol" means an intoxicating agent in alcoholic beverages, ethyl alcohol, also called ethanol, or the hydrated oxide of ethyl.

(2) "Alcohol concentration" means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath, as indicated by an evidential breath test.

(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.

(4) (a) "Employee" means an individual engaged in the performance, supervision, or management of work in a:

(i) hazardous work environment;

(ii) security position; or

(iii) position;

(A) affecting public safety; or public health;

(B) in which driving a motor vehicle is necessary for any part of the individual's work duties; or

or

(C) involving a fiduciary ~~position~~ responsibility for an employer.

(b) and The term does not include an independent contractor. The term includes or an elected official who serves on the governing body of a local government.

(5) (a) "Employer" means a person or entity that has one or more employees and that is located in or doing business in Montana.

(b) The term includes the governing body of a local government.

(6) "Governing body" means the legislative authority of a local government.

~~(6)~~(7) "Hazardous work environment" includes but is not limited to positions:

(a) for which controlled substance and alcohol testing is mandated by federal law, such as aviation, commercial motor carrier, railroad, pipeline, and commercial marine employees;

(b) that involve the operation of or work in proximity to construction equipment, industrial machinery, or mining activities; or

(c) that involve handling or proximity to flammable materials, explosives, toxic chemicals, or similar substances.

(8) "Local government" means a city, town, county, or consolidated city-county.

~~(7)~~(9) "Medical review officer" means a licensed physician trained in the field of substance abuse.

~~(8)~~(10) "Prospective employee" means an individual who has made a written or oral application to an employer to become an employee.

~~(9)~~(11) "Qualified testing program" means a program to test for the presence of controlled substances and alcohol that meets the criteria set forth in 39-2-207 and 39-2-208.

~~(10)~~(12) "Sample" means a urine specimen, a breath test, or oral fluid obtained in a minimally invasive manner and determined to meet the reliability and accuracy criteria accepted by laboratories for the performance of drug testing that is used to determine the presence of a controlled substance or alcohol."

**Section 2.** Section 39-2-210, MCA, is amended to read:

**"39-2-210. Limitation on adverse action.** ~~No~~ Except as provided in 50-46-205, no adverse action, including followup 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."

**Section 3.** Section 39-2-313, MCA, is amended to read:

**"39-2-313. Discrimination prohibited for use of lawful product during nonworking hours -- exceptions.** (1) For purposes of this section, "lawful product" means a product that is legally consumed, used, or enjoyed and includes food, beverages, and tobacco.

(2) Except as provided in subsections (3) and (4), an employer may not refuse to employ or license and may not discriminate against an individual with respect to compensation, promotion, or the terms, conditions, or privileges of employment because the individual legally uses a lawful product off the employer's premises during nonworking hours.

(3) Subsection (2) does not apply to:

(a) use of a lawful product, including the medical use of marijuana as defined in 50-46-102, 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) An employer may offer, impose, or have in effect a health, disability, or life insurance policy that makes distinctions between employees for the type or price of coverage based on the employees' use of a product if:

(a) differential rates assessed against employees reflect actuarially justified differences in providing employee benefits;

(b) the employer provides an employee with written notice delineating the differential rates used by the employer's insurance carriers; and

(c) the distinctions in the type or price of coverage are not used to expand, limit, or curtail the rights or liabilities of a party in a civil cause of action."

**Section 4.** Section 39-71-407, MCA, is amended to read:

**"39-71-407. Liability of insurers -- limitations.** (1) For workers' compensation injuries, each insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer covered under plan No. 1, plan No. 2, and the state fund under plan No. 3 that it insures who receives an injury arising out of and in the course of employment or, in the case of death from the injury, to the employee's beneficiaries, if any.

(2) (a) An insurer is liable for an injury, as defined in 39-71-119, if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that:

(i) a claimed injury has occurred; or

(ii) a claimed injury aggravated a preexisting condition.

(b) Proof that it was medically possible that a claimed injury occurred or that the claimed injury aggravated a preexisting condition is not sufficient to establish liability.

(3) (a) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:

(i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement and the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or

(ii) the travel is required by the employer as part of the employee's job duties.

(b) A payment made to an employee under a collective bargaining agreement, personnel policy manual,

or employee handbook or any other document provided to the employee that is not wages but is designated as an incentive to work at a particular jobsite is not a reimbursement for the costs of travel, gas, oil, or lodging, and the employee is not covered under this chapter while traveling.

(4) ~~An~~ Except as provided in subsection (5), an employee is not eligible for benefits otherwise payable under this chapter if the employee's use of alcohol or drugs not prescribed by a physician is the major contributing cause of the accident. ~~However, if the employer had knowledge of and failed to attempt to stop the employee's use of alcohol or drugs, this subsection does not apply.~~

(5) (a) An employee who has received written certification, as defined in 50-46-102, from a physician for the medical use of marijuana and who is otherwise eligible for benefits payable under this chapter is subject to the limitations of subsections (5)(b) through (5)(d).

(b) An employee is not eligible for benefits otherwise payable under this chapter if the employee's medical use of marijuana, as defined in 50-46-102, is the major contributing cause of the injury or occupational disease.

(c) Nothing in this chapter may be construed to require an insurer to reimburse any person for costs associated with the medical use of marijuana, as defined in 50-46-102.

(d) In an accepted liability claim, the benefits payable under this chapter may not be increased or enhanced due to a worker's medical use of marijuana, as defined in 50-46-102. An insurer remains liable for those benefits that the worker would qualify for absent the worker's medical use of marijuana.

(6) The provisions of subsection (4) do not apply if the employer had knowledge of and failed to attempt to stop the employee's use of alcohol or drugs not prescribed by a physician. This subsection (6) does not apply to medical marijuana, which is not a prescribed drug.

~~(5)(7)~~ If there is no dispute that an insurer is liable for an injury but there is a liability dispute between two or more insurers, the insurer for the most recently filed claim shall pay benefits until that insurer proves that another insurer is responsible for paying benefits or until another insurer agrees to pay benefits. If it is later proven that the insurer for the most recently filed claim is not responsible for paying benefits, that insurer must receive reimbursement for benefits paid to the claimant from the insurer proven to be responsible.

~~(6)(8)~~ If a claimant who has reached maximum healing suffers a subsequent nonwork-related injury to the same part of the body, the workers' compensation insurer is not liable for any compensation or medical benefits caused by the subsequent nonwork-related injury.

~~(7)~~(9) An employee is not eligible for benefits payable under this chapter unless the entitlement to benefits is established by objective medical findings that contain sufficient factual and historical information concerning the relationship of the worker's condition to the original injury.

~~(8)~~(10) For occupational diseases, every employer enrolled under plan No. 1, every insurer under plan No. 2, or the state fund under plan No. 3 is liable for the payment of compensation, in the manner and to the extent provided in this chapter, to an employee of an employer covered under plan No. 1, plan No. 2, or the state fund under plan No. 3 with an occupational disease that arises out of or is contracted in the course and scope of employment.

~~(9)~~(11) Occupational diseases are considered to arise out of employment or be contracted in the course and scope of employment if:

- (a) the occupational disease is established by objective medical findings; and
- (b) the events occurring on more than a single day or work shift are the major contributing cause of the occupational disease in relation to other factors contributing to the occupational disease.

~~(10)~~(12) When compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease.

~~(11)~~(13) When there is more than one insurer and only one employer at the time that the employee was injuriously exposed to the hazard of the disease, the liability rests with the insurer providing coverage at the earlier of:

- (a) the time that the occupational disease was first diagnosed by a treating physician or medical panel;
- or
- (b) the time that the employee knew or should have known that the condition was the result of an occupational disease.

~~(12)~~(14) In the case of pneumoconiosis, any coal mine operator who has acquired a mine in the state or substantially all of the assets of a mine from a person who was an operator of the mine on or after December 30, 1969, is liable for and shall secure the payment of all benefits that would have been payable by that person with respect to miners previously employed in the mine if acquisition had not occurred and that person had continued to operate the mine, and the prior operator of the mine is not relieved of any liability under this section.

~~(13)~~(15) As used in this section, "major contributing cause" means a cause that is the leading cause contributing to the result when compared to all other contributing causes."

**Section 5.** Section 50-46-201, MCA, is amended to read:

**"50-46-201. Medical use of marijuana -- legal protections -- limits on amount -- presumption of medical use.** (1) ~~Except as provided in 50-46-205,~~ a person who possesses a registry identification card issued pursuant to 50-46-103 may not be arrested, prosecuted, or penalized in any manner or be denied any right or privilege, including but not limited to civil penalty or disciplinary action by a professional licensing board or the department of labor and industry, if:

(a) the qualifying patient or caregiver acquires, possesses, cultivates, manufactures, delivers, transfers, or transports marijuana not in excess of the amounts allowed in subsection (2); or

(b) the qualifying patient uses marijuana for medical use.

(2) A qualifying patient and that qualifying patient's caregiver may not possess more than six marijuana plants and 1 ounce of usable marijuana each.

(3) (a) A qualifying patient or caregiver is presumed to be engaged in the medical use of marijuana if the qualifying patient or caregiver:

(i) is in possession of a registry identification card; and

(ii) is in possession of an amount of marijuana that does not exceed the amount permitted under subsection (2).

(b) The presumption may be rebutted by evidence that the possession of marijuana was not for the purpose of alleviating the symptoms or effects of a qualifying patient's debilitating medical condition.

(4) A physician may not be arrested, prosecuted, or penalized in any manner or be denied any right or privilege, including but not limited to civil penalty or disciplinary action by the board of medical examiners or the department of labor and industry, for providing written certification for the medical use of marijuana to qualifying patients.

(5) An interest in or right to property that is possessed, owned, or used in connection with the medical use of marijuana or acts incidental to medical use may not be forfeited under any provision of law providing for the forfeiture of property other than as a sentence imposed after conviction of a criminal offense.

(6) A person may not be subject to arrest or prosecution for constructive possession, conspiracy, as provided in 45-4-102, or other provisions of law or any other offense for simply being in the presence or vicinity of the medical use of marijuana as permitted under this chapter.

(7) Possession of or application for a registry identification card does not alone constitute probable cause to search the person or property of the person possessing or applying for the registry identification card or otherwise subject the person or property of the person possessing or applying for the card to inspection by any governmental agency, including a law enforcement agency.

(8) A registry identification card or its equivalent issued by another state government to permit the medical use of marijuana by a qualifying patient or to permit a person to assist with a qualifying patient's medical use of marijuana has the same force and effect as a registry identification card issued by the department."

**Section 6.** Section 50-46-205, MCA, is amended to read:

**"50-46-205. Limitations of Medical Marijuana Act.** (1) This chapter does not permit:

(a) any person to operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marijuana;

(b) the use of marijuana by a caregiver; or

(c) the smoking of marijuana by a qualifying patient:

(i) in a school bus or other form of public transportation;

(ii) on any school grounds;

(iii) in any correctional facility; or

(iv) at any public park, public beach, public recreation center, or youth center.

(2) Nothing in this chapter may be construed to require:

(a) a government medical assistance program ~~or, a private health insurer~~ group benefit plan that is covered by the provisions of Title 2, chapter 18, an insurer covered by the provisions of Title 33, or an insurer as defined in 39-71-116 to reimburse a person for costs associated with the medical use of marijuana; or

(b) an employer to accommodate ~~the medical use of marijuana in any workplace~~ the medical use of marijuana.

(3) Nothing in this chapter may be construed to:

(a) prohibit an employer from including in any contract a provision prohibiting the medical use of marijuana; 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.

~~(3)~~(4) Nothing in this chapter may be construed to allow a caregiver to use marijuana or to prevent criminal prosecution of a caregiver who uses marijuana or paraphernalia for the caregiver's personal use."

**Section 7. Coordination instructions.** (1) If both House Bill No. 161 and [this act] are passed and approved, then [sections 2 through 6 of this act] are void.

(2) If House Bill No. 175 is approved by the electorate in 2012, then [sections 2 through 6 of this act] are void on [the effective date of House Bill No. 175].

**Section 8. Effective date.** [This act] is effective on passage and approval.

- END -

I hereby certify that the within bill,  
HB 0043, originated in the House.

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Chief Clerk of the House

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Speaker of the House

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2011.

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President of the Senate

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2011.

HOUSE BILL NO. 43

INTRODUCED BY G. MACLAREN, D. SANDS

BY REQUEST OF THE CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES INTERIM COMMITTEE

AN ACT CLARIFYING EMPLOYER RIGHTS RELATED TO WORKERS' COMPENSATION, DRUG TESTING, AND DISCIPLINARY ACTION INVOLVING AN EMPLOYEE'S MEDICAL USE OF MARIJUANA; EXPANDING THE TYPES OF EMPLOYEES COVERED BY THE WORKFORCE DRUG AND ALCOHOL TESTING ACT; CREATING EMPLOYMENT-RELATED EXCEPTIONS TO THE PROTECTIONS OF THE MEDICAL MARIJUANA ACT; PROVIDING DEFINITIONS; AMENDING SECTIONS 39-2-206, 39-2-210, 39-2-313, 39-71-407, 50-46-201, AND 50-46-205, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.