

1-9-2023

## **RE-EXAMINING THE LANDSCAPE OF EMPLOYEE DRUG-TESTING IN MISSOURI POST-AMENDMENT 3**

Paige Hume

Follow this and additional works at: <https://scholarship.law.slu.edu/lawjournalonline>



Part of the [Criminal Law Commons](#), and the [Food and Drug Law Commons](#)

---

**RE-EXAMINING THE LANDSCAPE OF EMPLOYEE DRUG-TESTING  
IN MISSOURI POST-AMENDMENT 3**

**Paige Hume\***

On November 8, 2022, Missouri residents voted to amend the state constitution to legalize the recreational use of marijuana.<sup>1</sup> The law, called Amendment 3, “makes it legal for adults 21 and older to purchase and possess up to three ounces of non-medical cannabis.”<sup>2</sup> The amendment also allows individuals convicted of “certain marijuana-related offenses to petition for release from prison or parole and probation and have their records expunged.”<sup>3</sup> Yet, despite the passage of the Amendment, many critique the law and question whether it was the right way to legalize marijuana in the state.<sup>4</sup> However, whether one is for or against the new amendment, it was passed into law, and with it comes a new host of challenges- including the landscape of employee drug-testing in the state.

Missouri currently provides no regulations on private employment drug testing and, in fact, is one of only a few states that that have no laws addressing this.<sup>5</sup> Missouri’s policy on private employment drug testing, or the lack thereof, can be seen through its case law. For example, consider

---

\* J.D. Candidate, May 2024, Saint Louis University School of Law

<sup>1</sup> Taiyler Simone Mitchell, Morgan McFall-Johnsen, and Hanna King, *Results: Missouri votes to legalize marijuana for personal use*, INSIDER (Nov. 9, 2022), <https://www.businessinsider.com/results-missouri-amendment-3-legalizing-marijuana-personal-use-2022-11>.

<sup>2</sup> Mary Jane Gibson, *A mixed night for marijuana on the ballot*, VOX (Nov. 9, 2022), <https://www.vox.com/2022/11/7/23445044/results-marijuana-legalization-bill-maryland-missouri>.

<sup>3</sup> *Missouri Amendment 3, Marijuana Legalization Initiative (2022)*, BALLOTPEDIA, [https://ballotpedia.org/Missouri\\_Amendment\\_3,\\_Marijuana\\_Legalization\\_Initiative\\_\(2022\)](https://ballotpedia.org/Missouri_Amendment_3,_Marijuana_Legalization_Initiative_(2022)) (last visited Nov. 27, 2022).

<sup>4</sup> Nicholas Phillips, *Budding Prospects: Is Amendment 3 the best way for Missouri to legalize recreational marijuana – or is it “a scam”?*, ST. LOUIS MAG. (Sept. 7, 2022), <https://www.stlmag.com/longform/missouri-recreational-marijuana-amendment-three/>.

<sup>5</sup> Lisa Guerin, *Workplace Drug Testing in Missouri*, NOLO, <https://www.nolo.com/legal-encyclopedia/workplace-drug-testing-missouri.html> (last visited Nov. 27, 2022).

*Rothweil v. Wetterau, Inc.*, where the employee was terminated after a randomly conducted drug test revealed marijuana in his system.<sup>6</sup> The employee admitted to a dependence on marijuana and asked the employer for the opportunity to undergo rehabilitation.<sup>7</sup> This request was denied, and the employee was later terminated.<sup>8</sup> The employee sued on several grounds, including the argument that his termination was based on a handicap.<sup>9</sup> The court reasoned, however, that “handicap excludes from protection, an employee who is currently engaging in the illegal use of drugs.”<sup>10</sup> This was so because, at the time the opinion was issued, the Missouri legislature considered the use of marijuana illegal.<sup>11</sup> The court also noted Missouri is an at-will employment state and, as such, an employer can discharge an employee for cause or without cause.<sup>12</sup> The court continued that the employee’s discharge did not fall within a recognized exception to the at-will employment doctrine because, as discussed, the employee did not qualify for protection under the Missouri Human Right’s Law or for public policy reasons.<sup>13</sup> Importantly, the court stated that the state statutes did not “impose a duty on an employer to refrain from firing an employee with a self-inflicted addition to illegal drugs.”<sup>14</sup>

Much of the court’s analysis in *Rothweil* hinges on the fact that, at the time, the recreational use of marijuana was illegal. However, with the passage of Amendment 3, the law has changed. This begs the question of what employee drug testing now looks like in Missouri. This is particularly important as termination of employment based on illegal activity can affect an individual’s ability to collect workers’ compensation benefits<sup>15</sup> or

---

<sup>6</sup> *Rothweil v. Wetterau, Inc.*, 820 S.W.2d 557, 558 (Mo. Ct. App. 1991).

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

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 559.

<sup>10</sup> *Id.*

<sup>11</sup> *Rothweil*, 820 S.W.2d at 559.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 560.

<sup>15</sup> MO. ANN. STAT. § 288.050 (West 2014).

unemployment compensation<sup>16</sup>. Notably, the new Amendment says that employers can still fire employees for the use of marijuana in the workplace or for coming into work high, but it does not lay out any guidelines for punishing employees for the use of such during their personal, off-time.<sup>17</sup> In fact, it seems inevitable that the lack of clear guidelines on the future of employee drug testing will cause confusion for Missourians regarding their now-legal right to use marijuana recreationally, especially when balanced against the possibility of adverse employment action as a result of doing so. There seems to be two options available for Missouri to address this concern.

The first option would be to leave the law as is. Though this may cause confusion for Missourians regarding their rights and responsibilities regarding marijuana and their workplaces, this seems to be the implication of Amendment 3, since specific language about protection against employee drug-testing was left out of the law.<sup>18</sup> The other reasonable option seems to be enacting similar employee drug testing policies as that of other states. For example, many states allow employee drug testing only on advance notice.<sup>19</sup> Take Washington, which allows for drug testing if the employee is given 60 days' notice.<sup>20</sup> Other states, including Oregon, allow drug testing if there is a reasonable suspicion that the employee is under the influence of alcohol or other controlled substances.<sup>21</sup> Adopting employee drug testing practices such as those of other states would create a more understandable, and therefore more equitable and accessible, guideline for Missourians.

---

<sup>16</sup>John Vering, *Missouri Overhauls Unemployment Compensation Laws*, 16 NO. 6 EMP. L. LETTER 1 (Aug. 2006).

<sup>17</sup> Annika Merrilees, *Legal pot raises questions about the future of workplace drug policies in Missouri*, ST. LOUIS POST-DISPATCH (Nov. 13, 2022), [https://www.stltoday.com/business/local/legal-pot-raises-questions-about-the-future-of-workplace-drug-policies-in-missouri/article\\_036974f1-8e7d-5563-a4c7-d1f155451b2e.html](https://www.stltoday.com/business/local/legal-pot-raises-questions-about-the-future-of-workplace-drug-policies-in-missouri/article_036974f1-8e7d-5563-a4c7-d1f155451b2e.html).

<sup>18</sup> *Id.*

<sup>19</sup> ACLU, *State-By-State Workplace Drug Testing Laws*, <https://www.aclu.org/other/state-state-workplace-drug-testing-laws>, (last visited Nov. 27, 2022).

<sup>20</sup> *Id.*

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

For now, though, it is clear that even though the use of recreational marijuana is now legal in Missouri, the use of such could violate employer drug policies and cause an individual to be subject to discipline, or even termination.<sup>22</sup> While this may, and likely will, cause confusion for both employees and employers, it is up to the legislature to change or clarify.

Edited by Allison Frisella

---

<sup>22</sup> Kynala Phillips, *Can jobs drug test once marijuana is legal in Missouri? What to know about weed & work*, THE KANSAS CITY STAR (Nov. 11, 2022), <https://www.kansascity.com/news/politics-government/article268601437.html>.