

Dazed and Confused? Here's Some Answers to How Measure 91 and Legal Marijuana Impacts the Workplace.

By: Shane P. Swilley, Employment Law Group

By passing Measure 91, Oregon joins Colorado, Washington, and Alaska in legalizing the recreational use of marijuana for individuals 21 and older. The law takes effect July 1, 2015. What does legal weed mean for Oregon employers? Here are answers to some of the questions we've been hearing leading up to and after the passage of Measure 91.

- ***Can I still prohibit my employees from using marijuana?***

Yes. Measure 91 did not include any protections for employees. Employers may still enforce their drug-free workplace policies prohibiting marijuana use, distribution and possession in the workplace and being under the influence at work. Employers may still discipline or terminate employees who test positive for marijuana (whether the drug test is pre-employment, reasonable suspicion, random, etc.), even if they used marijuana while off-duty and did not report to work under the influence. Likewise,

employers can continue to refuse to hire applicants who fail a pre-employment drug test.

- ***Do I have to accommodate medical marijuana use?***

No. Oregon's Medical Marijuana Act (OMMA), like Measure 91, did not include any job protections. The Oregon Supreme Court ruled that OMMA did not require employers to accommodate medical marijuana use because marijuana was still illegal under Federal law. Since Measure 91 does nothing to change the legality of marijuana under Federal law, the Oregon Supreme Court's decision is still good law. If the legal status of marijuana changes under Federal law, then employers may have a duty to accommodate medical marijuana use by employees if (1) the employee uses marijuana to treat a condition that qualifies as a disability, and if (2) doing so does not pose an undue hardship to the company or a health and safety risk to the employee or the workplace. Until the Feds change course on marijuana, feel free to continue enforcing your drug-free workplace policy regardless of why or when the employee used marijuana.

- ***Does Measure 91 change my obligations to comply with federal regulations governing employee drug use?***

No. If you are subject to federal regulations such as the FMCSA, FAA, DOT, etc. or are a federal contractor or subcontractor, Measure 91 does not alter or relieve you of your obligation to comply with federal regulations which prohibit the use of marijuana under federal law.



● ***What should I do now to prepare for the change in the law?***

First, update your drug-free workplace policy to include a specific statement on the use of marijuana (both medical and recreational use) and whether your company will prohibit marijuana use only in the workplace or also while off-duty. Obviously, use or impairment in the workplace should still be prohibited. If you choose to not prohibit off-duty use, then you should revise your testing procedures to define the procedures for when an employee will be tested and what will happen if they test positive for marijuana. Remember that marijuana has a tendency to remain detectable in a person's system for a long period of time, so you may need to have a conversation with your drug test administrator to determine what tests, if any, may be available to distinguish between off-duty and on-duty use and impairment.

After you update your policies, you need to train your managers and supervisors on how to administer the new policy. This may require additional training on reasonable suspicion and how to identify marijuana impairment. This training should be completed before July 1, 2015 and on a regular basis thereafter.

Finally, you should promptly remind employees in writing about your policy towards marijuana use and how it may change, if at all, when marijuana becomes legal on July 1, 2015. This is important because you may have employees who think that now that Measure 91 passed they can begin using today and there's nothing you can do about it. Obviously, you want to correct this misnomer as soon as possible and remind them of your policy and how marijuana use may impact their continued employment even after it becomes legal.

WHAT'S IN A NAME? VET AND PROTECT YOUR BRANDS

By: Russell R. Rotondi, Business Practice Group

Whether you are a fledgling entrepreneur or industry leader, you have likely invested significant time and money devising the ideal name or slogan for your company, product or venture. This brand name is important to you. It tells your unique story in a crowded marketplace. And soon you will invest a lot more time and money in reliance on that name, so it ought to be just right.

But before committing valuable marketing dollars, it would serve you well to consider—what could possibly go wrong? Of course, being the savvy business person that you are, you already know the answer: Your new brand name could conflict with an already established one, or another's new brand name could later conflict with yours.

In today's bustling business landscape, name conflicts, disputes and trademark infringement are a legitimate concern. So what can you do about it? A good way to protect against any such conflict is two-fold: (1) do your due diligence before selecting and investing in a brand name, and (2) as soon as

you've made a selection, secure trademark rights.

Due diligence is all about research, research and more research. The sooner you do your research to vet your brand name, the better. As a rule of thumb, if you have expended meaningful time or money selecting the name (as defined by you), it's time to clear it for use.

It's a good idea to start with your own Google search. Next you'll want to search



any industry publications and websites and clear your name with the Secretary of State's office. Researching social media and domain name registrations (www.NetSol.com) are also good ideas. Last but not least, the United States Patent and Trademark Office (www.USPTO.gov) offers a user-friendly search engine to look into filed and registered (both live and abandoned) marks.

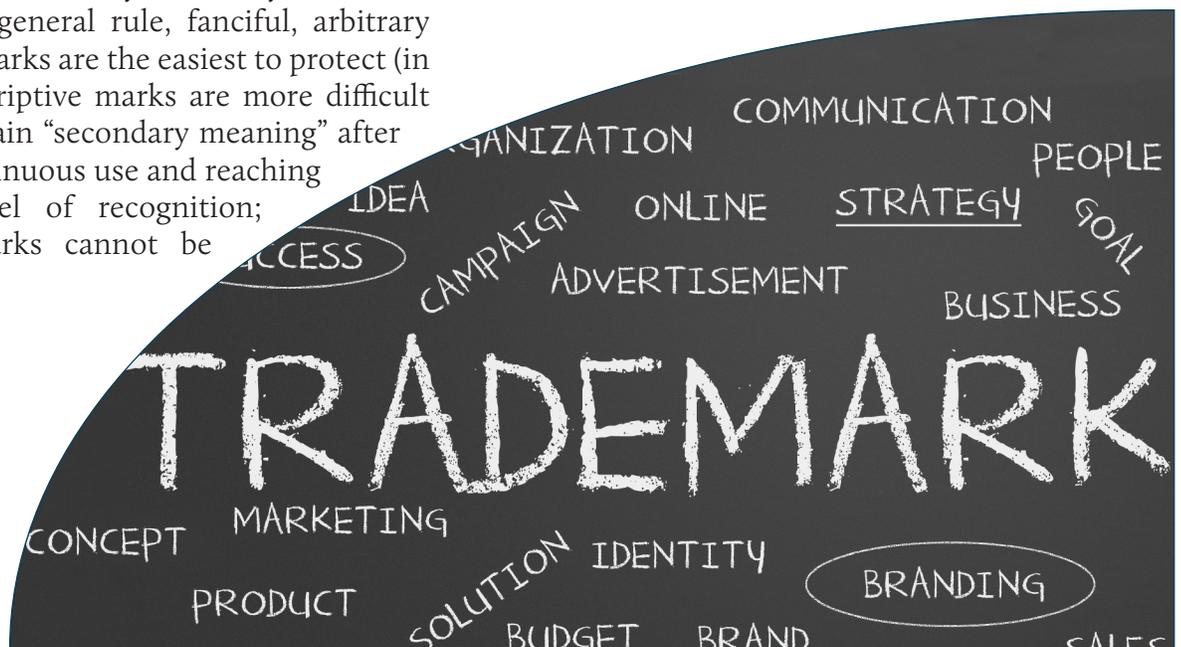
You might be amazed (and disappointed) that your brilliant, one-of-a-kind, brand name is already in use in your industry and it took you 30 minutes or less to rule it out. Back to the drawing board, but at least you haven't ordered thousands of dollars of swag that will only serve as an instant tax write-off.

A few words about choosing a brand name that will serve as a strong mark. You want a brand that is federally registrable and legally defensible. That is to say, "not all trademarks are created equal." There are five basic categories, ranked in descending order of inherent distinctiveness: (1) fanciful (made-up word—Kodak, Exxon), (2) arbitrary (meaning unrelated to its industry—Apple Computer), (3) suggestive (suggests a quality—Greyhound, Jaguar) (4) descriptive (descriptive of the product or service—Kentucky Fried Chicken), and (5) generic (describes the very product or service). While your chosen brand name may not always fit neatly into these categories, as a general rule, fanciful, arbitrary and suggestive marks are the easiest to protect (in that order); descriptive marks are more difficult but they can obtain "secondary meaning" after five years of continuous use and reaching a necessary level of recognition; and generic marks cannot be registered.

Assuming you have cleared a strong candidate through your own due diligence, you should hire an attorney to complete an independent search (sometimes coupled with an additional third-party search) across all platforms, including the USPTO. An attorney can also counsel you on whether any similar results may rise to the level of "likelihood of confusion" in the industry, potential trademark infringement or dilution, and evaluate the relative strength of the mark.

When you put your new name into commerce for the first time, you establish state common-law rights in that name. But those rights are not presumptive, and they are confined to your company or product's geographic reach at any given time. If you have any designs to expand the scope of your business across state lines (i.e., interstate commerce), an attorney can counsel you on the proper trademark strategy (e.g., filing basis, G&S classification, disclaimers, etc.) and file the mark to establish and protect your exclusive federal rights.

Upfront costs to research and establish these rights are no drop in the bucket, especially for a start-up business living the dream on a shoestring. But the peace of mind, and cost of not taking such prudent steps, is difficult to overstate.



EMPLOYMENT LAW UPDATES

- **4th Quarter Events:**

Shane Swilley and Tim Coleman will be presenting on Employment Law, to a group of Woodburn business owners on December 10th, 2014.

Shane Swilley will be presenting, “Marijuana is Legal in Oregon - Now What?”, to the Central Oregon Estate Planning Council on December 16, 2014.

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If you have any questions about the content of this newsletter, please contact Shane P. Swilley at (503) 276-6074 or swilley@cosgravelaw.com.

Take advantage of our free consultation to review the current state of their employment policies and procedures. This service is invaluable to ensure compliance with current employment laws. For more information or to schedule an appointment, contact Shane Swilley.

If you or your company has been threatened with litigation, or a lawsuit or complaint has been filed, then contact the head of Cosgrave's Employment Law Group, Tim Coleman, at (503) 219-3810 or tcoleman@cosgravelaw.com for a consultation.