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MARIJUANA IN THE WORKPLACE

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TABLE OF CONTENTS

© 2017 BLJohnsonLaw PLLC

TABLE OF AUTHORITIES

CASES

STATUTES

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CONSTITUTIONAL PROVISIONS

REGULATIONS

OTHER AUTHORITIES

I. HISTORY OF MARIJUANA REGULATIONS IN THE UNITED STATES

Over the past three decades, the United States has shifted from criminalizing all marijuana use to legalizing marijuana use, with twenty-one percent of the US population now living in a state where using marijuana is legal. Recreational marijuana use is legal in eight states plus the District of Columbia, and twenty-nine states have legalized medical marijuana use.

Marijuana legalization efforts are also enjoying success in the US's neighbors to the north and south. On April 13, 2017, Canadian Prime Minister Justin Trudeau introduced his marijuana legalization and regulation initiative to Parliament. The bill, expected to take effect in mid-2018, would make Canada the first industrialized nation in the world to legalize marijuana for recreational use (medical marijuana has been legal in Canada since 2001). Meanwhile, on June 20, 2017, Mexican President Enrique Peña Nieto signed off on a bill legalizing the use of marijuana for medical and research purposes. Mr. Nieto has previously spoken out about marijuana use as a "public health problem," urging decriminalization and even legalization. The bill had passed Mexico's Senate and Lower House of Congress with overwhelming support.

However, marijuana is still illegal under US federal law: the Controlled Substances Act (CSA) categorizes it as a Schedule I substance, reserved for drugs with the highest potential for abuse and no medicinal value. Many advocates argue this designation overstates marijuana's addictive properties and is unduly restrictive, especially in light of a growing body of scientific evidence suggesting the plant holds medical promise in treating pain, nausea, and other ailments. The Schedule I label undermines this promise, they say, imposing harsh federal penalties for marijuana use and possession and significantly impeding access to the drug for research purposes.

President Richard Nixon declared war on drugs in 1971, proclaiming that "America's public enemy number one is drug abuse." The prior year, in 1970, Congress had passed the CSA and classified marijuana as a Schedule I drug on a temporarily basis and subject to review. Neither Congress nor the Nixon administration were certain where to list marijuana. Several reports issued by the National Commission on Marihuana and Drug Abuse acknowledged it was a less-serious threat than other Schedule I drugs and unanimously recommended decriminalizing the possession and distribution of marijuana for personal use. However, many politicians at the time, reflecting attitudes of the general public, were wary of the perceived threat posed by the "marijuana epidemic." Prejudice against marijuana had been around long before the CSA (see, for example, the 1936 anti-marijuana film *Reefer Madness*). Ultimately, the efforts to resist

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marijuana re-classification won out and marijuana remained a Schedule I drug under the CSA.

Congress subsequently created the Drug Enforcement Agency (DEA) in 1973, which initiated Operation Intercept to pressure Mexico to regulate its marijuana growers. These federal efforts did reduce the influx of Mexican marijuana into the United States, but Columbia quickly took Mexico's place as the United States' primary marijuana supplier. The DEA's efforts to monitor and shut down the international drug trade resulted in well-known trade routes simply being rerouted. This inability to stem the flow of illegal drugs into the United States suggested that, as long as demand exists, people will be willing to risk smuggling drugs into the country. Perhaps reacting to this lack of success, eleven states decriminalized marijuana possession between 1973 and 1977. President Jimmy Carter ran on a platform that included marijuana decriminalization, and in October 1977 the Senate Judiciary Committee voted to decriminalize possession of up to an ounce of marijuana for personal use.

During Carter's presidency, cocaine use in the United States skyrocketed, increasing as much as 700 percent between 1978 and 1984. This increase went hand-in-hand with growing rates of adolescent marijuana use, leading many to speculate that marijuana was a "gateway drug." State and federal support for marijuana decriminalization dried up, and in 1981 President Ronald Reagan took office and launched an unprecedented expansion of the drug war. While his wife, Nancy Reagan, began her highly publicized "Just Say No" anti-drug campaign, President Reagan introduced a series of demand-side initiatives that aimed to "get tough" on drugs. These zero-tolerance policies, which were implemented throughout the 1980s, levied severe punitive measures against individuals caught possessing or using illegal drugs, including marijuana. Corresponding media reports of rampant drug use sweeping the country led Congress and state legislatures to respond in kind, greatly increasing the length of prison sentences for drug offenders. The media hysteria around drugs eventually died down by the early 1990s; however, these harsh criminal penalties remained, resulting in a ballooning prison population comprised of individuals arrested and convicted for non-violent drug-related offenses.

While President Bill Clinton ran on a platform of treatment rather than incarceration for drug offenses, during his presidency he (and his successor, George W. Bush) largely continued the zealous drug strategies of the Reagan administration. For example, he refused to end the federal ban on funding for syringe access programs and rejected a Federal Sentencing Commission recommendation to eliminate the sharp disparity between crack and powder cocaine sentences.

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Still, before leaving office, President Clinton suggested a full re-examination of the nation's drug policies and advocated for marijuana's decriminalization.

With the drug war slowly losing momentum, national attitudes towards drug use, especially marijuana use, began to relax during the presidencies of George W. Bush and Barack Obama. A slew of states passed laws regulating the use and distribution of medical marijuana, and in 2012 Colorado and Washington State became the first of several states to legalize the recreational use of marijuana. In 2015 alone, Colorado's legal marijuana industry created over 18,000 new full-time jobs and generated $2.4 billion in economic activity, including $121 million in tax revenue for the state. However, despite legalization, an unregulated (and substantial) black market for marijuana persists in these states, to the frustration of regulators who had argued legalization would cause these illicit markets to gradually disappear or fade away.

Today, the legal marijuana market in North America posted $6.7 billion in revenue in 2016, up thirty percent from the previous year. This number will likely increase in 2017 given the legalization of marijuana in four additional states during the 2016 election, including California (the sixth-largest economy in the world). By 2021 the market is projected to exceed $20.2 billion, though possible federal efforts, led by President Donald Trump and Attorney General Jeff Sessions, to fight state marijuana legalization might halt this rapid growth.

In the context of employment law, courts have upheld the ability of employers to conduct workplace drug testing programs and discipline employees who test positive for marijuana use. However, several states have passed discrimination laws protecting employees who are registered marijuana users and have a right, under state law, to use marijuana for medical purposes. In some of these states, an employer can only terminate an employee for marijuana use if the employee was observably "under the influence" of marijuana in the workplace, which negatively affected his job performance (a positive drug test alone does not satisfy this requirement). The waters are further muddied by recent Congressional efforts such as the Rohrabacher-Farr Amendment, which prohibits the Department of Justice from using federal funds to prosecute the users and distributors of medical marijuana in states that have passed laws regulating the medical marijuana market.

This paper discusses current state and federal laws addressing the use of marijuana and, in some jurisdictions, the impact of marijuana legalization on workplace substance abuse programs. The paper also reviews marijuana laws in several states, contradictions between state and federal marijuana laws, and the related implications under state and federal disability laws.

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II. THE SUPREMACY CLAUSE AND FEDERAL LAW

A. The Supremacy Clause. U.S. CONST. art.VI, cl. 2.

Article VI of the U.S. Constitution mandates federal law "shall be the supreme Law of the Land." Judges in every state must follow the Constitution and laws of the federal government. The doctrine of preemption, based on the Supremacy Clause, states that when federal and state law are at odds, federal law reigns supreme.

There are three types of preemption: express, field, and conflict. In the context of state medical marijuana laws, courts have found that neither express preemption (where Congress has explicitly prohibited states from regulating a particular area via legislation) nor field preemption (where Congress has enacted such a pervasive legal regime that there is no room for state involvement) apply. This is due to the distinction between decriminalization—removing criminal penalties for marijuana use and possession—and legalization—permitting marijuana recreational use and possession. Based on this distinction, some courts have held that decriminalizing medical marijuana use and possession does not prevent federal officials from enforcing federal law, unlike legalization. *Cf. Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus*., 230 P.3d 518 (Or. 2010) (finding that the provision of the Oregon Medical Marijuana Act *legalizing* possession of marijuana impeded the enforcement of federal law and thus was preempted).

This leaves the third type of preemption, conflict (or obstacle) preemption: a state law is in conflict with federal law because (1) it is impossible to comply with both simultaneously (i.e., physical impossibility), or (2) it interferes with the objectives of the federal law or is an obstacle to the accomplishment of federal purpose. Conflict preemption is the most complex type of preemption, with courts forced to determine the purpose of the federal law in question and how that purpose is impacted by the operation of the state law. While the extent to which this type of preemption applies to state marijuana laws is unclear, some courts have flatly rejected it. *See, e.g., City of Palm Springs v. Luna Crest Inc.*, 245 Cal. App. 4th 879, 885 (2016) (holding that California's medical marijuana laws, far from conflicting with federal drug laws in violation of the Supremacy Clause, are actually consistent with the purpose of the Controlled Substances Act in combatting recreational drug abuse and drug trafficking).

B. The Comprehensive Drug Abuse Prevention and Control Act of 1970, a.k.a. the Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq*. (2016).

The Controlled Substances Act (CSA), combined with the Supremacy Clause, preempts

any conflicting state law with respect to controlled substances. It serves as the federal government's primary drug regulatory regime, criminalizing the manufacture, importation, possession, use, and distribution of certain substances classified in any of the CSA's five Schedules. Marijuana is categorized as a Schedule I substance, the most restricted in terms of access and use. *See id.* § 844. A Schedule I substance has three elements: (1) a high potential for abuse, (2) no currently accepted medical use in treatment in the United States, and (3) a lack of accepted safety for use under medical supervision. Under the CSA, it is illegal to open, use, lease, or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance. *Id.* § 856(a)(1). The only exception to these broad prohibitions is the possession and use of marijuana in federally-approved research projects. *Id.* § 823(f). Heroin, ecstasy, and LSD are also listed as Schedule 1, while cocaine and methamphetamine are listed one level lower, as Schedule II (which may be dispensed and prescribed for medical use).

1. *Gonzales v. Raich ("Raich I")*, 545 U.S. 1 (2005).

a. Plaintiff was a California resident who suffered from several medical conditions and took medical marijuana in compliance with the state's Compassionate Use Act (CUA). *Id*. at 6. DEA agents came to Plaintiff's home and seized six cannabis plants, even though the agents concluded her use was lawful under the CUA. *Id*. at 7. Plaintiff sued, "seeking injunctive and declaratory relief prohibiting the enforcement of the [CSA] . . . to the extent it prevents [her] from possessing, obtaining, or manufacturing cannabis for [her] personal medical use." *Id*. Plaintiff did not dispute marijuana's Schedule I classification; instead, she argued "the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause." *Id*. at 15.

b. The Supreme Court ultimately held that Congress's authority under the Commerce Clause includes the power to prohibit local, private cultivation and use of marijuana. *Id*. at 23. Namely, Congress's "power to regulate interstate commerce extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. To

effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I substances—both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic activities (simple possession)." *Id*. at 39-40 (internal citations omitted); *see also Wickard v. Filburn*, 317 U.S. 111 (1942). The Court went on to find that the exemptions permitting marijuana use under the CUA significantly impact both the supply and demand sides of the marijuana market: they provide physicians with an economic incentive to grant their patients permission to use the drug, which "can only increase the supply of marijuana in the California market." *Id.* at 31.

c. On remand, the Plaintiff presented a claim for substantive due process under the Fifth Amendment, arguing she had a fundamental right to cultivate and use marijuana to treat her medical conditions. *Raich v. Gonzales ("Raich II")*, 500 F.3d 850, 857 (9th Cir. 2007). While the Ninth Circuit acknowledged that, since 1996, medical marijuana had been legalized in eleven states, the right to use medical marijuana had not yet reached the point of being "fundamental" and "implicit in the concept of ordered liberty." *Id.* at 866. However, it noted medical marijuana might attain such status "sooner than expected." *Id.*

2. In *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483 (2001), DOJ brought an action under the CSA against the Oakland Cannabis Cultivators Club and its executive director, seeking to enjoin them from distributing and manufacturing medical marijuana. *Id*. at 487. The Supreme Court reversed the decision of the Ninth Circuit, which had found that the Club's medical necessity argument was a legally cognizable defense. *Id.* at 488. Rather, the Court held that marijuana's Schedule I classification "reflects the federal government's determination that marijuana has no currently accepted medical use at all." *Id.* at 492 n.5 (internal quotation marks omitted). As a result, the Court determined there is no medical necessity exception to the CSA's prohibitions on manufacturing and distributing marijuana. *Id.* at 490 (noting that neither a medical necessity nor public interest defense is apt where Congress has made, for purposes of classifying

marijuana as a Schedule I drug, a "determination of values"); *see also Raich II*, 500 F.3d at 857 (doubting whether a medical necessity defense remains legally viable in light of the Supreme Court's holding in *Oakland Cannabis*).

3. In *Emerald Steel*, the Oregon Supreme Court discussed the Supremacy Clause and preemption at length, noting that because the CSA does not allow the administration of marijuana, physicians may not prescribe it. 230 P.3d at 535. Furthermore, because Plaintiff's physician was not administering the substances legally to him under the CSA, he was illegally using marijuana and was justly terminated for that reason. *Id*. Finally, the Court held that "to the extent that [the Oregon Medical Marijuana Act (OMMA)] authorizes the use of medical marijuana, the [CSA] preempts that subsection." *Id*. at 536. The Court made no determination whether OMMA's subsections decriminalizing medical marijuana use were also preempted by federal law. *Id.* at 526 n.12.

4. Conversely, in *State v. Nelson*, 195 P.3d 826 (Mont. 2008), the Montana Supreme Court noted that Montana's Medical Marijuana Act (MMA) does not affect or prevent the federal government from enforcing the CSA against medical marijuana users if it so desires; thus, there is no preemption issue. *Id.* at 834. The Court also emphasized how one of federalism's key aspects under the Constitution is that Congress cannot directly compel states to enact and enforce a federal regulatory program such as the CSA. *Id.* at 833.

5. Recent efforts to amend the CSA have stalled in committee. For example, the Medical Marijuana Research Act of 2016, 144 H.R. 5549, would have amended the CSA to make marijuana more accessible for use by qualified medical marijuana researchers, as well as for other purposes. The bill failed to pass the Committee on Energy and Commerce. In addition, on June 15, 2017, Senators Rand Paul (R-KY), Corey Booker (D-NJ), and Kirsten Gillibrand (D-NY) (with Mike Lee (R-UT) and Lisa Murkowski (R-AK) as co-sponsors) introduced the Compassionate Access, Research, Expansion, and Respect States (or "CARERS") Act of 2017, which would end the federal prohibition of medical marijuana. Specifically, the Act would allow individuals and entities to possess, produce, and distribute medical marijuana if they are in compliance with state medical marijuana laws.

The Act would also open up greater medical marijuana research opportunities. The Act was previously introduced during the 114th Congress on March 10, 2015.

C. Memorandum on *Guidance Regarding Marijuana Enforcement* (2013).

Under President Obama, the Department of Justice (DOJ) narrowed its CSA enforcement to drug trafficking by large criminal networks. In August 2013, Deputy Attorney General James M. Cole issued a memorandum asserting that DOJ would use "its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way." James M. Cole, Memorandum For All United States Attorneys: *Guidance Regarding Marijuana Enforcement* (2013). Significant threats included marijuana distribution to minors, revenue from the sale of marijuana from going to criminal enterprises, and violence in the cultivation and distribution of marijuana, regardless of state law. *Id*. In the context of states that had legalized or otherwise authorized marijuana-related conduct, Cole expected such states to strongly regulate the cultivation, distribution, sale, and possession of marijuana. *Id.*

A subsequent clarifying memo issued on October 20, 2014 stated that DOJ's non-interference policy also applied toward federally recognized American Indian reservations. *See* Monty Wilkinson, Memorandum For All United States Attorneys: *Policy Statement Regarding Marijuana Issues in Indian Country* (2014). Consequently, federal attorneys were not to prevent American Indian tribes from growing or selling marijuana on their sovereign lands, even in states that otherwise ban the practice. The memo also made clear that DOJ would continue to legally support tribes that wished to prohibit marijuana's use, possession, or sale on their lands.

D. Rohrabacher-Farr Amendment to the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014).

The Amendment prevents DOJ from spending federal funds to interfere with "State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *Id.* § 538. Congress extended the force of § 538 by passing, with bipartisan support, the Continuing Appropriations Act of 2016, Pub. L. 114-113, § 542, 129 Stat. 2242 (2015). The Amendment was extended again in 2016 and 2017, *see* Consolidated Appropriations Act of 2017, H.R. 244 (2017). Each of these omnibus spending bills also has renewed the so-called Harris Amendment, which bars the District of Columbia from regulating marijuana for adult use.

1. In *United States v. Marin Alliance*, 139 F. Supp. 3d 1039 (N.D. Cal. 2015), the District Court for the Northern District of California rejected DOJ's argument that,

despite the Amendment, it still had authority to prosecute individuals and organizations acting in compliance with state medical marijuana laws. *Id.* at 1045 ("It defies language and logic for the Government to argue that it does not 'prevent' California from 'implementing' its medical marijuana laws by shutting down these same heavily-regulated medical marijuana dispensaries."). The ruling lifted an injunction against a California dispensary, which the judge found to be operating in compliance with California's Compassionate Use Act and thus immune from DOJ prosecution. DOJ withdrew its appeal of *Marin Alliance* in April 2016.

2. Relatedly, in August 2016, the Ninth Circuit Court of Appeals unanimously rejected DOJ's above interpretation of the Amendment in a case consolidating the appeals of ten medical marijuana providers in California and Washington State. *See United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016); *see also United States v. Samp*, No. 16-cr-20263 2016 U.S. Dist. LEXIS 171732 (E.D. Mich. Dec. 13, 2016) ("The language of § 542 clearly prohibits the DOJ from expending funds to prevent Michigan from implementing its own state law regarding the use, distribution, possession, and cultivation of medical marijuana.").

E. Future Federal Marijuana Law Enforcement Under President Trump.

President Donald Trump's administration appears poised to take a significantly more aggressive approach in enforcing federal marijuana laws than the Obama administration. During his January 2017 confirmation hearings, Attorney General Jeff Sessions said that if people are worried about him enforcing federal marijuana laws, they should petition Congress to change them. Indeed, in early May 2017, Mr. Sessions issued a memo directing federal prosecutors to "charge and pursue the most serious, readily provable offense," including mandatory minimum sentences. Jeff Sessions, Memorandum For All Federal Prosecutors: *Department Charging and Sentencing Policy* (2017). While Mr. Sessions went on to indicate that, in the context of drug enforcement, he planned to focus primarily on large-scale drug traffickers, the memo explicitly rescinded DOJ's more lenient drug sentencing policies under Mr. Holder, including *Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancement in Certain Drug Cases* (August 12, 2013).

These signals from the Trump administration are a setback for advocates of legal marijuana, and some states such as Arkansas have delayed implementation of approved November

2016 marijuana-related ballot initiatives. White House Press Secretary Sean Spicer has been quick to distinguish state recreational marijuana laws from medical marijuana laws: "The states where [medical marijuana] is allowed, in accordance with the appropriations rider, have set forth a process to administer and regulate that usage, versus recreational marijuana. That's a very, very different subject." Interview with Sean Spicer, White House Press Secretary, in Washington, D.C. (Feb. 23, 2017). However, Mr. Sessions seemingly rejected this distinction in a subsequent letter to Congressional leaders, imploring them to oppose the continued inclusion of the Rohrabacher-Farr Amendment on the appropriations rider. Letter from Jeff Sessions, U.S. Attorney General, to Congressional Leaders, *Re: Department of Justice Appropriations* (May 1, 2017), *available at* https://www.scribd.com/document/351079834/Sessions-Asks-Congress-To-Undo-Medical-Marijuana-Protections. According to Mr. Sessions, elimination of the rider would allow DOJ to target "drug traffickers . . . [who] cultivate and distribute marijuana inside the United States under the guise of state medical marijuana laws." *Id.*

III. FURTHER FEDERAL LAW CONSIDERATIONS

A. Americans with Disabilities Act of 1990 (ADA). 42 U.S.C. § 12101 *et seq.*

The ADA prohibits discrimination against disabled employees, which extends to protecting employees undergoing treatment for alcoholism and drug addiction (with both treated as disabilities). However, the ADA only protects recovering drug addicts who are not currently using illegal drugs, and these protections do *not* explicitly encompass medical marijuana use. The ADA defines "illegal drug use" by reference to federal law rather than state law. Specifically, this definition excludes "the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the [CSA] or other provisions of Federal law." *Id.* § 12111(6)(A). As a result, while licensed physicians can prescribe medical marijuana in some states, the ADA does not sanction these prescriptions and they remain illegal under the CSA. Consequently, courts have uniformly held that an employee's right to use medical marijuana under state law does not necessitate or require an employer to accommodate such use under the ADA.

1. In *James v. City of Costa Mesa*, 684 F.3d 825 (9th Cir. 2012), the Ninth Circuit held that "local decriminalization notwithstanding, the unambiguous *federal* prohibitions on medical marijuana use set forth in the CSA continue to apply equally in both jurisdictions, as does the ADA's illegal drug exclusion. There is no unequal treatment, and thus no equal protection violation." *Id.* at 836.

2. In *Casias v. Wal-Mart Stores*, 695 F.3d 428 (6th Cir. 2012), the Sixth Circuit found for the Defendant without reaching its argument that the CSA and ADA both preempt the Michigan Medical Marihuana Act (MMMA). *Id.* at 437 n.1 ("We need not address the issue of whether federal law preempts the MMMA based on our finding that the MMMA does not regulate private employment.").

3. In *Emerald Steel*, the Oregon Supreme Court held "the protections of the ADA do not apply to persons who are currently engaged in the illegal use of drugs, and the [CSA] prohibits the possession of marijuana without regard to whether it is used for medicinal purposes. It follows, employer reasoned, that the ADA does not apply to persons who are currently engaged in the use of medical marijuana." 230 P.3d at 521. Thus, employers may administer reasonable policies such as drug testing and are under no obligation to accommodate or engage in a case-by-case determination regarding employee medical marijuana use. *See also* OR. REV. STAT. § 659A.124(1) (state disability protections "do not apply to any job applicant or employee who is currently engaging in the illegal use of drugs if the employer takes action based on that conduct").

4. In *Ross v. RagingWire Telecomms. Inc.*, 174 P.3d 200 (Cal. 2008), the California Supreme Court held that "[i]n the particular context of accommodating an employee's physician-approved use of marijuana to treat a disabling medical condition . . . that policy must be viewed against the backdrop of both federal criminal laws, which prohibit marijuana possession without a medical use exception, and the [ADA], which excludes from its protection 'any employee or applicant who is currently engag[ed] in the illegal use of drugs, when the covered entity acts on the basis of such use.'" *Id.* at 215-16 (citing 42 U.S.C. § 12114(a)).

B. Department of Transportation Regulations. 49 U.S.C. § 31306.

1. The Omnibus Transportation Employee Testing Act of 1991, Pub. Law 102-143, 105 Stat. 952, requires random drug and alcohol testing of drivers, pilots, and others in "safety-sensitive transportation positions." In addition, a December 2012 notice from Office of Drug & Alcohol Policy & Compliance stated that the use of marijuana is "unacceptable for any safety-sensitive employee" subject to Department of Transportation drug testing.

2. The Drug and Alcohol Testing Regulations do not authorize "medical marijuana" under a state law to be a valid medical explanation for a transportation employee's positive drug test result. 49 C.F.R. § 40.151(e). Thus, Medical Review Officers will not verify a drug test as "negative" based upon information that a physician certified the medical use of marijuana, and it remains unacceptable for any safety-sensitive employee subject to drug testing under the Regulations to use marijuana.

C. The Drug-Free Workplace Act of 1988. 41 U.S.C. § 8101 *et seq.*

1. The Act requires federal contractors and grantees to provide and maintain drug-free workplaces as a precondition of receiving a contract or grant from a federal agency, even in states that permit medical marijuana use. The Act requires employers to publish "a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's workplace," *id*. §§ 8102(a)(1)(A), 8103(a)(1)(A), with an employer's failure to comply with this requirement allowing a federal agency to suspend, terminate, or debar payment under the contract or grant, *id.* §§ 8102(b)(1), 8103(b)(1). However, drug tests are not required under the Act, which instead hinges on an employee's good faith to "abide by the terms of the statement" and notify the employer of any drug-related criminal conviction. *Id*. §§ 8102(a)(1)(D), 8102(a)(1)(D).

2. In *Collings v. Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995), Plaintiff, a government contractor, was terminated due to drug-related misconduct. *Id*. at 830. The Act informed Defendant's response to Plaintiff's misconduct, and the Ninth Circuit held the Plaintiff's termination was based on this misconduct. *Id*. at 836.

IV. STATE DISABILITY DISCRIMINATION AND MARIJUANA LEGALIZATION

Plaintiff-Employee arguments of disability discrimination have not gained traction under state disability laws. For example, in *Washburn v. Columbia Forest Prods.*, 134 P.3d 161 (Or. 2006), the Oregon Supreme Court found that the Oregon Medical Marijuana Act did not require the employer to accommodate the employee's medical marijuana use because the employee could treat his qualifying medical condition with mitigation measures other than medical marijuana. Similarly, in *Curry v. MillerCoors, Inc.*, No. 12-cv-02471-JLK, 2013 U.S. Dist. LEXIS 118730 (D. Colo. Aug. 21, 2013), the District Court upheld the employer's ability to terminate Plaintiff,

finding that state discrimination laws do not shield disabled employees from employer policies against workplace misconduct, including drug use.

In almost every wrongful termination lawsuit involving medical marijuana, where Plaintiff was fired for a positive drug test despite being authorized to use medical marijuana, the court has found in favor of the employer. However, this trend may not continue: some states now prohibit discrimination against authorized marijuana users unless the employer can demonstrate the employee was "under the influence" at the time of a positive test result. For example, under the New York Compassionate Care Act, any employer with four or more employees must reasonably accommodate employees or prospective employees who are certified to use medical marijuana. *See* N.Y. PUB. HEALTH § 3360 (2014). Still, the law does *not* require an employer to accommodate an employee's medical marijuana use insofar as allowing the user to carry or use marijuana on work property. *Id.*; *see also* ARIZ. REV. STAT. § 36-2813B (employers cannot penalize employees for testing positive for marijuana unless they use or are impaired by marijuana at work).

In addition, in *EEOC v. Pines of Clarkston, Inc.*, No. 13-CV-14076, 2015 U.S. Dist. LEXIS 55926 (E.D. Mich. Apr. 29, 2015), the Equal Employment Opportunity Commission (EEOC) sued a Michigan-based assisted living center for firing a nursing administrator who, after using medical marijuana to treat her epilepsy, failed a drug test on her second day of work. The District Court denied the employer's Motion for Summary Judgment on Plaintiff's ADA claim. The Court noted that a positive test for medical marijuana constituted a legitimate, non-discriminatory reason for discharge; however, it concluded the EEOC raised a genuine issue of material fact as to whether the articulated reason was merely a pretext for disability discrimination. Although the case eventually settled, employers should recognize that a positive drug test for marijuana may not entirely insulate them from discrimination claims under the ADA.

V. STATE STATUTORY AND CASE LAW

Eight states and the District of Columbia have legalized, either in full or in part, the recreational use of marijuana: Colorado (2012), Washington State (2012), Alaska (2014), District of Columbia (2014), Oregon (2014), Washington, D.C. (2014), California (2016), Maine (2016), Massachusetts (2016), and Nevada (2016). In addition, twenty-eight states and the District of Columbia have enacted laws removing criminal sanctions for the medical use of marijuana, define eligibility for such use, and allow some means of ingestion. In each of the jurisdictions with comprehensive laws, a medical professional's recommendation or certification is required for a

patient to qualify for the program and receive a medical marijuana ID card. Each law relies on a physician, or other health practitioner with authority to prescribe drugs, to certify that the patient has a "qualifying" medical condition or symptom listed under the relevant law.

Most of the laws prohibit medical marijuana patients from using it in public or a motor vehicle. Generally, employers do not have to accommodate employee medical marijuana use, especially if doing so would cause them to violate federal law or potentially cost them a federal contract or grant. Employers can prohibit on-site marijuana use, and several laws specify they do not protect negligent conduct stemming from workplace marijuana use. In addition, the laws do not require insurance providers to cover the costs of medical marijuana.

A. Alaska

1. Alaska Marijuana Legalization. AK. STAT. § 17.38.020 *et seq.* (2016). Ballot Measure 2; approved November 4, 2014; effective February 24, 2015.

a. Legalizes recreational marijuana use for persons aged 21 years or older. The law allows individuals to possess up to one ounce of marijuana and cultivate up to six plants in their homes (no more than three mature). Not more than twelve marijuana plants, with six or fewer being mature, may be present in a single dwelling. The law also permits an individual to share or gift up to one ounce of marijuana, or up to six plants, to other persons aged 21 years or older; however public consumption of marijuana and driving while under the influence of marijuana is prohibited. Retail sales are not yet fully operational or implemented.

b. The law does not require employers "to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees." *Id.* at § 17.38.220(a).

2. Alaska Medical Marijuana Act. AK. STAT. § 17.37.010 *et seq.* (1999). Ballot Measure 8; approved November 3, 1998 (58% of voters).

a. Patients with a "debilitating medical condition," and his or her caregivers, may legally possess, cultivate, use, and transport marijuana. Patients seeking legal protection should enroll in the state patient registry and

possess a valid ID card. To get an ID card, patients must possess written documentation from a physician stating they have a qualifying and might benefit from medical marijuana use.

b. According to § 17.37.070(4), "debilitating medical condition" means cachexia or wasting syndrome; cancer; glaucoma; HIV/AIDS; severe pain or nausea; seizures (including those characteristic of epilepsy); persistent muscle spasms (including those characteristic of multiple sclerosis); or any other medical condition—or treatment for such condition—approved by the state Health Department.

c. The Act does not affect an employer's ability to have a drug-free workplace or prohibit employee use of marijuana. *Id.* § 17.37.040(d). It also does not require an employer to violate federal law to accommodate employees who qualify to use medical marijuana.

B. Arizona

1. Arizona Regulation and Taxation of Marijuana Act. 2016 Bill Text AZ V. 4. Proposition 205, rejected November 8, 2016 (52.2% of voters).

a. Sought to permit adults to legally grow up to six plants (including all the harvest from those plants) and possess up to one ounce of flower (or up to five grams of concentrates) for personal use, as well as license commercial marijuana production and retail sales. Voters rejected the measure 52 percent to 48 percent.

2. Arizona Medical Marijuana Act. ARIZ. REV. STAT. § 36-2801 *et seq.* (2010). Proposition 203; approved November 2, 2010 (50.13% of voters).

a. To qualify for an ID card, a patient must have a qualifying condition and be "likely to receive therapeutic or palliative benefit" from the medical use of marijuana.

b. Qualifying conditions include cancer; HIV/AIDS; hepatitis C; ALS; Crohn's disease; glaucoma; agitation related to Alzheimer's disease; PTSD; and conditions causing one or more of the following: severe and chronic pain, cachexia or wasting syndrome, severe nausea, seizures, or severe and persistent muscle spasms. The Department of Health Services, which

administers the ID card program, can approve additional conditions.

c. Patients with valid ID cards may possess up to two and one-half ounces of usable marijuana and cultivate up to twelve plants. Registered caregivers may possess up to two and one-half ounces for each patient they assist. Registered patients and caregivers are "not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action," for marijuana-related offenses.

d. Employers generally cannot penalize employees for testing positive for marijuana "unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations." *Id.* § 36-2813(B). In addition, the Act does not require employers to permit the ingestion of marijuana in any workplace or allow an employee to work while under the influence of marijuana. However, a registered qualifying patient cannot be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana in a positive drug test. *Id.*

C. Arkansas

1. Arkansas Medical Marijuana Amendment. 2016 Bill Text AR V. 6. Ballot Measure Issue 6; approved November 8, 2016 (53.2% of voters); implementation is currently pending before the Arkansas state legislature.

a. Permits qualified patients with a physician's recommendation to legally possess and obtain medical marijuana from state-licensed dispensaries. Qualifying patients may possess up to three ounces of usable marijuana for a fourteen-day period. The Amendment does not permit home cultivation of marijuana; instead, regulators plan to license thirty-two dispensaries and five marijuana cultivation facilities. Dispensaries will be able to grow up to fifty mature plants.

b. Because of emergency legislation enacted by lawmakers, House Bill 1026, regulators have until July 1, 2017, to begin accepting applications for those seeking a state license to grow or dispense medical marijuana. The state's Medical Marijuana Commission approved a final set of rules on how

businesses can cultivate and sell the drug on February 22, 2017. Of note, legislators removed a requirement that physicians certify "the potential benefits of the medical use of marijuana would likely outweigh the health risks for the qualifying patient."

D. California

1. Adult Use of Marijuana Act (AUMA). CAL. HEALTH & SAFETY CODE § 11357 *et seq*. (2016). Proposition 64; approved November 8, 2016 (56% of voters).

a. Permits persons aged 21 years and older who are not participating in the state's medical marijuana program to legally grow up to six plants (including the harvest from those plants) and possess up to either one ounce of flower or eight grams of concentrates. AUMA also allows licensing commercial marijuana production and retail sales (medical marijuana patients are not subject to these limits).

b. Permits on-site marijuana consumption in establishments licensed for such activity. Retail sales of marijuana by state-licensed establishments are scheduled to begin on January 1, 2018; however, AUMA restricts large-scale corporate players from becoming involved until 2023 at the earliest.

c. Prohibits localities from taking actions to infringe upon adults' ability to possess and cultivate marijuana for non-commercial purposes. AUMA does not repeal, restrict, or preempt laws relating to California's Compassionate Use Act.

d. Reduces several marijuana-related activities from felonies to misdemeanors; for example, persons under age 18 who are convicted of marijuana use or possession will now be required to attend drug education or a counseling program and complete community service. AUMA provides for resentencing consideration for those convicted under prior marijuana laws. The revised penalties took effect on November 9, 2016.

2. California Compassionate Use Act of 1996 (CUA). CAL. HEALTH & SAFETY CODE § 11362.5 *et seq*. (2003). Proposition 215; approved November 5, 1996 (56% of voters).

a. Permits qualified patients with a physician's recommendation to legally

possess and obtain medical marijuana from state-licensed dispensaries. Qualified patients my possess up to eight ounces of usable marijuana and cultivate up to twelve plants (no more than six mature).

b. Removes state-level criminal penalties on the use, possession and cultivation of marijuana by patients who possess written or oral recommendation from their primary physician that he or she "would benefit from medical marijuana."

c. The California Supreme Court has ruled employers have a right to drug test and fire patients who test positive for marijuana, regardless of their medical use. In addition, employers are not required to accommodate marijuana use on their property or during the hours of employment.

3. ***James v. City of Costa Mesa***, 684 F .3d 825 (9th Cir. 2012).

a. Plaintiffs were disabled California residents who permissibly used medical marijuana. *Id.* at 396. They acquired their marijuana through collectives located in Costa Mesa and Lake Forest, California. *Id.* On July 19, 2005, Ordinance 05-11 closed marijuana dispensing facilities, including the Costa Rica collective. *Id.* Plaintiffs alleged in District Court that "the cities' actions violate Title II of the [ADA], which prohibits discrimination in the provision of public services." *Id.*

b. After a brief discussion of the CSA and preemption, the Ninth Circuit held that, while doctor-prescribed marijuana is legal at the state level, it is illegal at the federal level. *Id.* at 405. Thus, for purposes of the ADA, "federally proscribed medical marijuana brings them under the [Act's] illegal drug exclusion." *Id.*

4. ***Ross v. RagingWire Telecomms. Inc.,*** 174 P.3d 200 (Cal. 2008).

a. Plaintiff, at his doctor's recommendation, used marijuana to treat his chronic back pain. *Id.* at 204. He also qualified as an individual with a disability and received government disability benefits. *Id.* After testing positive for marijuana, his employment was terminated. *Id.* at 205. Plaintiff sued, alleging his marijuana use did not affect the "essential functions" of his job, which he performed "satisfactorily." *Id.* He alleged

the Defendant "violated the [Fair Employment and Housing Act (FEHA)] by discharging him because of, and by failing to make reasonable accommodation for, his disability." *Id.* Plaintiff also argued Defendant violated public policy in wrongfully terminating his employment.

b. The California Supreme Court concluded that Plaintiff could not state a cause of action under FEHA based on Defendant's refusal to accommodate his use of medical marijuana. There was nothing in the text or history of the CUA that suggested it was intended to address the respective rights and duties of employers and employees. Defendant thus could take illegal drug use into consideration in making employment decisions. The Court also concluded that Plaintiff could not state a cause of action for wrongful termination in violation of public policy. The CUA did not put Defendant on notice that employers would be required under the FEHA to accommodate the use of marijuana.

E. Colorado

1. Colorado Medical Marijuana Amendment. COLO. REV. STAT. § 12-43.4-101 *et seq.* (2012). Amendment 64; approved November 6, 2012 (55.3% of voters).

a. Legalized the use of marijuana for recreational purposes for adults 21 and older, removing all legal penalties for the personal possession of up to one ounce of marijuana and for the home cultivation of up to six plants.

b. The initiative created legal marijuana establishments—retail stores, cultivation facilities, product manufacturing facilities, and testing facilities—and directed the state Department of Revenue to regulate a system of cultivation, production, and distribution. The Department would license marijuana establishments at the state level; should it fail to act, localities are permitted to issue such licenses.

c. The law does not require "an employer to permit accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees." The law sought to keep the status quo for employers and employees; namely, that Amendment

64 would not affect an employer's ability to restrict an employee's use or possession of marijuana. *See* Exec. Order No. B2012-004, *Task Force Report on the Implementation of Amendment 64* (Colo. 2013).

2. Colorado Medical Marijuana Code. COLO. REV. STAT. § 12-43.3-101 *et seq.* (2000). Amendment 20; approved November 7, 2000 (54% of voters).

a. Authorizes patients and their caregivers to possess, cultivate, and use medical marijuana. In addition, in 2010 Colorado passed a law creating a dual licensing scheme to regulate medical marijuana businesses at both the state and local level.

b. Patients must see a physician in-person to receive a recommendation. A patient issued a Medical Marijuana Registry ID Card, or that patient's primary caregiver identified on the patient's ID Card, may possess up to two ounces of usable marijuana and cultivate up to six plants (no more than three mature).

c. Qualifying conditions include cachexia or wasting syndrome; cancer; glaucoma; HIV/AIDS; severe pain or nausea; seizures (including those characteristic of epilepsy); persistent muscle spasms (including those characteristic of multiple sclerosis); or any other medical condition, or treatment for such condition, approved by the state health agency.

d. The law does not require employers to accommodate on-site medical use of marijuana or violate federal law. Also, the law does not require a health insurance provider to reimburse any person for expenses related to medical marijuana use.

3. ***Brandon Coats v. Dish Network, LLC***, 350 P.3d 849 (Colo. 2015).

a. Plaintiff had been discharged from his employer after testing positive for marijuana. *Id.* at 850. Plaintiff argued the Medical Marijuana Amendment makes his use lawful. *Id.* He also cited the Lawful Activities Act, COLO. REV. STAT. § 24-34-402.5 (2007), which provides it shall be a "discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during

nonworking hours" unless certain exceptions apply." *Id.* at 851 (citing § 24-34-402.5(1)).

b. The Colorado Supreme Court discussed the definition of the term "lawful," and found it meant "not contrary to, or forbidden." *Id.* at 852. Federal law preempts state law, and medical marijuana is "forbidden"; therefore, the "lawful activity" of the Lawful Activities Act does not include marijuana use. *Id.* The Court concluded that: (1) medical marijuana is unlawful under federal law and does not fall under protection for "lawful" activities; (2) employees who partake in medical marijuana are not protected from wrongful discharge under the Lawful Activities Act; and (3) the Supremacy Clause explicitly holds that in a conflict between state and federal law, federal law will prevail. *Id.* at 850.

4. ***Curry v. MillerCoors, Inc.***, No. 12-cv-02471-JLK, 2013 U.S. Dist. LEXIS 118730 (D. Colo. Aug. 21, 2013).

a. Plaintiff, a former employee of Defendant MillerCoors, was licensed by the State of Colorado to use medical marijuana. *Id.* at *3. Defendant had a drug-free workplace policy and terminated Plaintiff's employment after he tested positive for marijuana during a routine drug test. *Id.* Plaintiff sued for disability discrimination, invasion of privacy, and violation of the Lawful Activities Statute.

b. The District Court found in favor of the employer: "[d]espite concern for Curry's medical condition, anti-discrimination law does not extend so far as to shield a disabled employee from the implementation of his employer's standard policies against employee misconduct." *Id.* at *5. The Court also indicated that, because the use of marijuana is still illegal under federal law, employees have no protection under the ADA. *Id.* at *16. Under the ADA, "for an activity to be lawful in Colorado, it must be permitted by, and not contrary to, both state and federal law." *Id.* at *7.

F. Connecticut

1. **Act Concerning the Palliative Use of Marijuana.** CONN. GEN. STAT. § 21a-408 *et seq.* (2012). Approved by House (96-51) and Senate (21-13); signed into law

May 31, 2012.

a. Qualifying patients and caregivers are not subject to arrest, prosecution, or certain other criminal or civil penalties. To qualify for an ID card, a patient must have a qualifying condition and a physician's written certification stating that the potential benefits of the palliative use of marijuana would likely outweigh the health risks. Patients may possess no more than two and one-half ounces of marijuana per month. The Act only applies to Connecticut residents who are aged 18 or older (no reciprocity for out-of-state ID cards).

b. Patients cannot ingest marijuana anywhere in public, in a workplace, in any moving vehicle, in the line of sight of a person under 18, or on any school or university grounds, including in dorm rooms. The Act does not permit home cultivation; instead, it provides for the creation of dispensaries licensed by the state Department of Consumer Protection.

c. The law prohibits employer discrimination against employees for their status as a qualifying patient or primary caregiver, unless it is required to obtain federal funding or comply with federal law. *Id.* § 21a-408p(b). Civil protections under the Act are predicated on one's status as a patient or caregiver. While the Act is silent on an employer's ability to terminate an employee due to a positive drug test, employers may prohibit the use of marijuana during work hours and discipline an employee for working while under the influence. *Id.* § 21a-408p(b)(3). Also, health insurance providers are not required to reimburse any person for expenses related to medical marijuana use. *Id.* § 21a-408o.

G. Delaware

1. Delaware Medical Marijuana Act. DEL. CODE ANN. § 4901A *et seq.* (2011). Approved by House (27-14) and Senate (17-4); signed into law May 13, 2011.

a. To qualify for an ID card, a patient must have a qualifying condition and a physician's statement that the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana. The physician must be the patient's primary care physician or the physician responsible for

treating the patient's qualifying condition. Patients may possess up to six ounces of usable marijuana.

b. Qualifying conditions include Alzheimer's disease; ALS; cancer; HIV/AIDS; decompensated cirrhosis; PTSD; and conditions causing one or more of the following: intractable nausea, seizures, severe and persistent muscle spasms, or severe and debilitating pain that has not responded to other treatments for more than three months or for which other treatments produced serious side effects.

c. Registered patients and caregivers abiding by the Act are not subject to criminal or civil liability. The Act also protects "visiting" qualifying patients, defined as individuals who (1) have been diagnosed with a debilitating medical condition; (2) possess a valid registry ID card, or its equivalent, that was issued pursuant to the laws of another state, district, territory, commonwealth, insular possession of the US or country recognized by the US that allows the person to use marijuana for medical purposes in the jurisdiction of issuance; and (3) are not residents of Delaware or have been residents for less than thirty days.

d. The Act prevents employers from discriminating against someone based on his or her status as a patient or caregiver. Specifically, an employer cannot discipline an employee for testing positive for marijuana unless the employee used, possessed, or was impaired by marijuana at work or during work hours, or if "a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations." *Id.* § 4905A(a)(3). The Act does not require an employer to allow the ingestion of marijuana in the workplace or allow an employee to work while impaired by marijuana. A registered qualifying patient is not "impaired" solely because of the presence of metabolites or components of marijuana in a positive drug test. *Id.* § 4905A(a)(3)b.

H. District of Columbia

1. Prohibition on Pre-Employment Marijuana Testing Act. D.C. CODE § 32-931 (2015).

a. Prohibits an employer from testing a prospective employee for marijuana use until after the employer has extended a conditional offer of employment. *Id.* § 32-931(a). However, the employer may test the employee after extending such offer and deny a position based on a positive test for marijuana. In addition, this restriction does not affect an employer's ability to maintain workplace drug policies, require an employer to accommodate the employee's marijuana use, or compel the employer to violate federal law. *Id.* § 32-931(b).

2. District of Columbia Controlled Substances Act (Ballot Initiative 71). D.C. CODE § 48-904.01 (2014).

a. Provides that adults aged 21 or older may legally possess up to two ounces of marijuana and cultivate, in their primary residence, up to six plants (with three or fewer mature at any one time). Individuals also may transfer without payment (but not sell) up to one ounce of marijuana to another person aged 21 or older.

b. The law does not establish a regulatory framework for the regulation of a commercial marijuana market. Members of the DC City Council are currently considering separate legislation to regulate the commercial production and sale of marijuana to adults. However, all District laws are subject to Congressional approval prior to implementation.

c. The law does not "require any District government agency or office, or any employer, to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace," nor does it prevent employers from creating and enforcing workplace policies that restrict or prohibit employee marijuana use. *Id.* § 48-904.01(a)(1C).

3. District of Columbia Use of Marijuana for Medical Treatment Act. D.C. CODE § 7-1671.01 (2010). Approved November 3, 1998 (59% of voters); amended by the Amendment Act of 2010, B18-622.

a. To qualify for an ID card, a patient must have a qualifying condition and a physician's recommendation that medical marijuana is necessary for the

patient's treatment. The physician must be licensed in DC, have a bona fide relationship with the patient, and have responsibility for the patient's ongoing treatment.

b. Qualifying conditions include any debilitating condition the physician believes will benefit from medical marijuana use, though the physician must review other approved treatments before recommending it. The Board of Medicine may audit physician recommendations and must audit recommendations for any physician who provides more than 250 recommendations in a twelve-month period.

c. Qualifying patients may possess up to two ounces of dried marijuana in a thirty-day period, which must be obtained from a District-licensed dispensary (limits on other forms to be determined). The law does not allow home cultivation. Medical marijuana can only be administered in a patient's residence or a medical facility that permits its administration. Patients may designate a caregiver as the person authorized to possess, obtain, dispense, and assist in the administration of medical marijuana. The caregiver must be aged 18 years or older, register with the Department as the patient's caregiver, and can only serve one patient at a time.

d. The Act is silent on employment-related issues dealing with medical marijuana use, but relevant District law does not relieve a qualifying patient or caregiver from criminal prosecution or civil penalties for possession, distribution, or transfer of marijuana or use of marijuana at the qualifying patient's or caregiver's place of employment. *See* D.C. MUN. REGS. tit. 22 §§ 300.5, 1001.1(2)(C) (2016).

I. Florida

1. Use of Marijuana For Debilitating Conditions. Ballot Amendment 2; approved November 8, 2016 (71.3% of voters); currently pending before the Florida Senate as S.B. 614, the Florida Medical Marijuana Act. Became part of the Florida Constitution at Article X, Section 29, replacing the Compassionate Medical Cannabis Act of 2014, FLA. STAT. ANN. § 381.986 (2014).

a. Permits qualified patients who possess written certification from a

physician to legally obtain and possess medical marijuana provided by state-licensed dispensaries. A patient may appoint a caregiver, who must be aged 21 or older. State Department of Health regulators must begin issuing patient identification cards within nine months of the law's enactment.

b. Under the law, a "debilitating medical condition" for which physicians may recommend marijuana includes cancer; epilepsy; glaucoma; HIV/AIDS; ALS; multiple sclerosis; PTSD; Crohn's disease; Parkinson's disease; or other medical conditions of the same kind or class as those enumerated and for which a physician believes "the medical use of marijuana would likely outweigh the potential health risks for a patient." The law does not permit the home cultivation of marijuana or smoking medical marijuana in any public place.

c. Under the law, "medical use" does not include the use or administration of medical marijuana "in a qualified patient's place of employment, if restricted by his or her employer." *Id.* § 381.986(1)(g). The law further specifies that it "does not require an employer to accommodate the medical use of marijuana in any workplace or any employee working under the influence of marijuana. This section does not create a cause of action against an employer for wrongful discharge or discrimination." *Id.* Also, the law does not require a health insurance provider to reimburse any person for expenses related to medical marijuana use.

J. Hawaii

1. Medical Use of Marijuana Act. HAW. REV. STAT. § 329-121 *et seq.* (2008). Approved by House (32-18) and Senate (13-12); signed into law on June 14, 2000.

a. Legalizes marijuana acquisition, possession, and use for patients with qualifying medical conditions. A patient may possess, or may jointly possess with his or her primary caregiver, up to four ounces of usable marijuana every fifteen days and may cultivate of up to seven marijuana plants (either mature or immature). Qualifying patients shall have only one primary caregiver, and a primary caregiver shall be responsible for the care

of only one qualifying patient.

b. Qualifying conditions include cachexia or wasting syndrome; cancer; chronic pain; Crohn's disease; glaucoma; HIV/AIDS; nausea; persistent muscle spasms; PTSD; and epilepsy and seizures.

c. The protections of the Act do not apply to "[t]he medical use of marijuana . . . in the workplace of one's employment." *Id.* § 329-122(c)(2)(B). The Act thus protects an employer's right to have a zero-tolerance drug policy.

K. Illinois

1. Compassionate Use of Medical Cannabis Pilot Program Act. 410 ILL. COMP. STAT. ANN. 130/1 *et seq.* (2014). Approved by House (61-57) and Senate (35-21); signed into law August 1, 2013; effective January 1, 2014; set to be repealed July 1, 2020 (limited six-year length built into Act).

a. To qualify for an ID card, a patient must have a qualifying medical condition and a statement from an Illinois-licensed physician caring for the patient's condition. The physician must certify the patient "is likely to receive therapeutic or palliative benefit" from medical marijuana. Patients cannot be active police officers, firefighters, correctional officers, probation officers, or bus drivers.

b. Qualifying conditions include HIV/AIDS; ALS; CRPS; hepatitis C; Crohn's disease; agitation of Alzheimer's disease; cachexia or wasting syndrome; muscular dystrophy; reflex sympathetic dystrophy (RSD); multiple sclerosis; severe fibromyalgia; spinal cord injury and disease; traumatic brain injury and post-concussion syndrome; neurofibromatosis; Tarlov cysts; syringomyelia; rheumatoid arthritis; Arnold Chiari malformation; spinocerebellar ataxia (SCA); Parkinson's disease; Tourette's syndrome; myoclonus; dystonia; causalgia; chronic inflammatory demyelinating polyneuropathy; Sjogren's syndrome; lupus; interstitial cystitis; myasthenia gravis; hydrocephalus; hydromyelia; nail patella syndrome; residual limb pain; or seizures. The state Public Health Department may approve additional conditions.

c. A patient or caregiver with a valid registry ID card may possess two and

one-half ounces of usable marijuana for every fourteen day period. Patients and caregivers may not cultivate marijuana, but must obtain it from a state-licensed dispensary (which may be for-profit). Caregivers may serve only one patient at any given time; they may pick up medical marijuana for very ill, homebound patients.

d. Although the law prohibits an employer from discriminating against a registered marijuana patient, it permits employers to drug test employees and enforce zero-tolerance, drug-free workplace policies, as well as discipline employees for violating those policies. However, if an employer elects to discipline an employee who is a qualifying patient, it must afford the employee a reasonable opportunity to contest the basis of the determination.

e. An employer may consider a registered qualifying patient to be impaired when he or she manifests specific, articulable symptoms while working that decrease or lessen the employee's performance of his or her duties. Symptoms include those relating to speech, physical dexterity, agility, coordination, or demeanor; irrational or unusual behavior; negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others; or involvement in an accident that results in serious damage to equipment or property, disruption of a production or manufacturing process, or any injury to the employee or others.

L. Maine

1. Marijuana Legalization Act. ME. REV. STAT. ANN. tit. 17-A § 1101 *et seq.* Question 1; approved November 8, 2016 (50.3% of voters).

a. Permits adults who are not participating in the state's medical marijuana program to possess up to two and one-half ounces of marijuana or five grams of marijuana concentrate for personal use, and to grow up to six mature plants (including the harvest from those plants). In addition, possession of a "usable amount" of marijuana with proof of a physician's recommendation is not punishable.

b. Licenses commercial marijuana production and retail sales, on which it

imposes a ten-percent tax. Under the law, localities may regulate, limit, or even prohibit the operation of marijuana businesses. The Act permits on-site consumption in establishments licensed for such activity. Public use of marijuana outside of these establishments is still prohibited.

c. The measure will become law thirty days after the Governor affirms the election result. Regulations for marijuana-related businesses are scheduled to be in place by August 8, 2017.

2. Maine Medical Use of Marijuana Act. ME. REV. STAT. ANN. tit. 22 § 2421 *et seq.* (2009). Ballot Question 2; approved November 2, 1999 (61% of voters).

a. Those abiding by the Act may not "be denied any right or privilege or be subjected to arrest, prosecution, penalty or disciplinary action" for medical marijuana-related actions. To qualify for protection, a patient must have a qualifying condition and a statement from a physician with whom the patient has a bona fide relationship. Maine also protects patients from other states allowing medical marijuana if such patients have a written certification and the required ID, and if Maine's Health Department adds the state's law to a list.

b. Qualifying conditions include cancer; HIV/AIDS; hepatitis C; amyotrophic lateral sclerosis; nail patella syndrome; glaucoma; agitation related to Alzheimer's disease; PTSD; inflammatory bowel disease; dyskinetic and spastic movement; and conditions causing one or more of the following: intractable pain, cachexia or wasting syndrome, severe nausea, seizures, or severe and persistent muscle spasms. A Health Department-created advisory panel can approve additional medical conditions and make recommendations on what an adequate supply of marijuana would be for such conditions.

c. A patient or caregiver with the required documentation and registry ID card may possess up to two and one-half ounces of usable marijuana and cultivate up to six plants (in an enclosed, locked location). The patient can choose to cultivate him- or herself or can designate a caregiver or dispensary to cultivate, as long as the total amount of plants per patient

does not exceed six mature plants.

d. An employer may not refuse to employ or otherwise penalize a person solely for his or her status as a qualifying patient, unless failure to do so would put the employer in violation of federal law or cause it to lose a federal contract or grant. However, an employer is not required to accommodate an employee's use of medical marijuana in its workplace.

M. Maryland

1. Natalie M. LaPrade Medical Cannabis Commission. MD. CODE ANN. HEALTH-GEN. § 13-3301 *et seq.* (2014). Approved by House (125-11) and Senate (44-2); signed into law April 2014; effective June 1, 2014. Later amended by 2016 Md. HB 104 (effective June 1, 2017).

a. Physicians may apply to the Natalie M. LaPrade Medical Marijuana Commission to certify patients for medical marijuana use. The application must include the qualifying conditions for which the physician will recommend marijuana, along with exclusion criteria (i.e., what types of patients would not qualify) and the physician's plans for follow-up treatment and dependence screening. The physician must submit a written certification for individual patients. Upon approval of the application and receipt of the certifications, the Commission will issue the appropriate ID cards. Registered physicians may prescribe a thirty-day supply of medical marijuana to qualifying patients, of an amount to be determined.

b. Qualifying conditions include cachexia, anorexia, or wasting syndrome; severe or chronic pain; severe nausea; seizures; or severe or persistent muscle spasms. The Commission may approve applications for "any other condition that is severe and for which other medical treatments have been ineffective if the symptoms reasonably can be expected to be relieved by the medical use of marijuana."

c. The bills do not discuss employment-related issues dealing with medical marijuana use, nor do they preclude civil, criminal, or other penalties for (1) undertaking any task under the influence of marijuana, when doing so would constitute negligence or professional malpractice; (2) operating,

navigating, or being in actual physical control of any motor vehicle, aircraft, or boat while under the influence of marijuana; or (3) smoking marijuana in any public place or in a motor vehicle.

N. Massachusetts

1. The Regulation and Taxation of Marijuana Act. MASS. ANN. LAWS ch. 334, § 1 *et seq.* (2016). Ballot initiative (Question 4); approved November 8, 2016 (53.5% of voters); effective December 15, 2016.

a. Permits adults who are not participating in the state's medical marijuana program to legally grow up to six plants (including all the harvest from those plants) and to possess up to one ounce of marijuana (or up to five grams of concentrate) for personal use. In addition, adults aged 21 or older may legally possess up to ten ounces of marijuana flower in their home.

b. Licenses commercial marijuana production and retail sales, imposing a 3.75 percent excise tax on commercial marijuana sales. Localities have the authority to regulate, limit, or prohibit the operation of marijuana-related businesses. Regulators are scheduled to begin accepting applications from marijuana-related businesses by October 1, 2017.

2. An Act for the Humanitarian Medical Use of Marijuana. 105 MASS. CODE REGS. 725.000 *et seq.* (2017). Ballot Question 3; approved November 6, 2012 (63% of voters).

a. To qualify for protection from arrest, a patient must have a state Health Department-issued registry ID card. To obtain a card, a patient must have a qualifying condition and a written statement from a physician with whom he or she has a bona fide relationship.

b. Qualifying conditions include cancer; glaucoma; HIV/AIDS; hepatitis C; ALS; Crohn's disease; Parkinson's disease; multiple sclerosis; and other debilitating conditions as determined by a patient's physician. The rules define a presumptive sixty-day supply as ten ounces, but physicians can certify that a greater amount is necessary if they submit documentation for the rationale.

c. Provides that "[a]ny person meeting the requirements under this law shall

not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions." Patients, caregivers, and dispensary agents who present their ID cards to law enforcement and possess a permissible amount of marijuana may not be subject to arrest, prosecution, or civil penalty.

d. The Act does not require employers to accommodate the medical use of marijuana in any workplace or violate federal law, and private health insurers are not required to reimburse a person for costs associated with medical marijuana use. *Id.* § 725.650(B). In addition, the Act does not limit the applicability of other law as it pertains to the rights of employers.

O. Michigan

1. Michigan Medical Marihuana Act (MMMA). MICH. COMP. LAWS §§ 333.26421, 333.26427 (2008). Ballot Proposal 1; approved November 4, 2008 (63% of voters).

a. Provides protections for the medical use of marijuana, establishing a system of registry ID cards for qualifying patients and primary caregivers. The MMMA created the Michigan Medical Marihuana Program, which imposes fees for registry applications and renewals, promulgates rules, and administers and enforces the provisions of the MMMA. Under a package of new laws that took effect on December 20, 2016, regulators must now establish rules governing the licensing of dispensary operators.

b. Qualifying conditions include ALS; Alzheimer's disease; cachexia or wasting syndrome; cancer; chronic pain; Crohn's disease; glaucoma; HIV/AIDS; hepatitis C; nail patella syndrome; nausea; PTSD; seizures; and severe and persistent muscle spasms.

c. A patient with a qualifying condition, or the patient's primary caregiver (aged 21 or older), may possess up to two and one-half ounces of usable marijuana and cultivate up to twelve plants (kept in an enclosed, locked facility). Each patient can only have one primary caregiver, and the primary caregiver may assist no more than five qualifying patients.

d. The MMMA is silent on discrimination issues and employee use of medical

marijuana in the workplace.

2. ***EEOC v. Pines of Clarkston, Inc.***, No. 13-CV-14076, 2015 U.S. Dist. LEXIS 55926 (E.D. Mich. Apr. 29, 2015).

a. The Equal Employment Opportunity Commission (EEOC) sued a Michigan-based assisted living center, alleging its termination of a nursing administrator violated the ADA. The administrator, who used medical marijuana to treat his epilepsy, failed a drug test on his second day of work.

b. The District Court of the Eastern District of Michigan denied the employer's Motion for Summary Judgment with respect to the ADA claim. Although acknowledging that a positive test for medical marijuana constituted a legitimate, non-discriminatory reason for discharge, the Court concluded that the EEOC raised a genuine issue of material fact as to whether the employer's stated reason for termination was merely a pretext for disability discrimination—the employee had been questioned about his disability during his interview and following his positive drug test, and allegedly had been given inconsistent explanations for his termination. The case subsequently settled.

3. ***Braska v. Challenge Mfg. Co.***, 861 N.W.2d 289 (Mich. Ct. App. 2014).

a. Plaintiff sustained an on-the-job injury and was required to take a drug test at his employer's medical facility. *Id.* at 292. After testing positive for marijuana, he revealed he had obtained a medical marijuana card in 2010 and regularly used marijuana for his chronic back pain. *Id*. For violating the company's drug-free workplace policy, employer terminated Plaintiff's employment. *Id.*

b. When Plaintiff applied for unemployment benefits, the Unemployment Insurance Agency (UIA) determined that while "failing a drug test would ordinarily have disqualified [him] from receiving benefits under MCL 421.29(1)(m) [Michigan Employment Security Act] . . . because [he] had a valid medical marijuana card, he was not disqualified for unemployment benefits under that provision." *Id.* The employer appealed.

c. The Michigan Court of Appeals held that unemployment compensation

claimants' lawful use of medical marijuana under the MMMA does not disqualify them from receiving unemployment benefits under MCL 421.29(1)(m). *Id.* at 303. As such, the denial of benefits constituted an improper penalty under MCL 333.26424(a). *Id.* The Court further held that the denial of benefits was "state action" and thus was prohibited regardless of whether a public or private employer was involved. *Id.* at 302-03. Finally, absent evidence that claimants had ingested marijuana in the workplace or had worked under the influence of marijuana, MCL 333.26427(c)(2) was inapplicable. *Id.* at 300-01.

4. ***Casias v. Wal-Mart Stores, Inc.***, 695 F.3d 428 (6th Cir. 2012).

a. Plaintiff was terminated from Wal-Mart after testing positive for marijuana. The test was conducted pursuant to a Wal-Mart's policy requiring drug-testing after a workplace injury. *Id.* at 432. Plaintiff possessed a registry ID card under the MMMA to use medical marijuana. He admitted to using marijuana, but claimed he never ingested marijuana at his workplace or worked under the influence.

b. Plaintiff brought a claim against his supervisor and Wal-Mart, alleging wrongful discharge in violation of both public policy and the MMMA. *Id*. He argued the MMMA "prevents a business from engaging in disciplinary action against a cardholder who is a qualifying patient." *Id.* However, the District Court for the Western District of Michigan held that the "MMMA contains *no language* stating that it repeals the general rule of at-will employment in Michigan or that it otherwise limits the range of allowable private decisions by Michigan businesses." *Id.* at 436. The Court further determined that the MMMA does not regulate private employment actions. *Id.* at 432.

c. The Sixth Circuit upheld the decision, concluding the MMMA neither expressly or implicitly refers to private employment. *Id*. at 437. It also rejected Plaintiff's argument that his termination violated Michigan public policy; accepting his interpretation might prevent any company in the state from imposing discipline on an employee who uses marijuana. *Id.*

P. Minnesota

1. THC Therapeutic Research Act. MINN. STAT. §§ 152-21, 152-37 (2014). Approved by House (89-40) and Senate (46-16); signed into law May 29, 2014.

a. Provides protections for the medical use of marijuana, establishing a system of registry ID cards for qualifying patients only (*not* for primary caregivers). Patients may possess a thirty-day supply of non-smokable marijuana. The law does not allow for home cultivation; instead, patients must rely on state-licensed dispensaries, which may only distribute medical marijuana to the patient or, if he or she is under age 18, the patient's parent or legal guardian.

b. Qualifying conditions include ALS; cachexia or wasting syndrome; cancer; Crohn's disease; glaucoma; HIV/AIDS; intractable pain; seizures; severe and persistent muscle spasms; Tourette's syndrome; terminal illness; and any other medical condition or its treatment approved by the state Commissioner of Health.

c. The law created the Medical Cannabis Program and authorized the state Department of Health (MDH) to adopt rules. MDH is developing rules relating to laboratory testing requirements for medical marijuana, with a notice published in the State Register on September 7, 2016 requesting public comment.

d. Prohibits employers from discriminating against employees in hiring, termination, or any term or condition of employment on the basis of the employee's status as a patient enrolled in the registry program, "unless failing to do so would violate federal law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations." *Id.* § 152.32. The law also prohibits discrimination against "a patient's positive drug test for cannabis components or metabolites, unless the patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment." *Id.*

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Q. Montana

1. **Montana Medical Marijuana Initiative.** Ballot Initiative I-182; approved November 8, 2016 (56.3% of voters).
   - **a.** Amends the Medical Marijuana Act, *infra*, permitting licensed medical marijuana providers to serve more than three patients at one time and allowing for providers to hire employees to cultivate, dispense, and transport medical marijuana.
   - **b.** Allows a single treating physician to certify medical marijuana for a patient diagnosed with chronic pain and includes PTSD as a "debilitating medical condition" for which a physician may certify medical marijuana.
   - **c.** Repeals the requirement that physicians who provide certifications for twenty-five or more patients annually be referred to the Board of Medical Examiners. The Initiative also prohibits law enforcement officials from conducting unannounced inspections of medical marijuana facilities, instead requiring annual inspections by the state.
   - **d.** The new law takes effect on June 30, 2017. However, specific provisions, such as those specific to the re-opening of licensed dispensaries, have been ordered by courts to take immediate effect.
2. **Montana Medical Marijuana Act (MMA).** MONT. CODE ANN. § 50-46-301 *et seq.* (2015). Ballot Initiative I-148; approved in 2004 (62% of voters).
   - **a.** To qualify for an ID card, a patient must submit a written certification form completed by the patient's physician that, among other things, states the patient has a qualifying condition. Patients must be Montana residents.
   - **b.** Qualifying conditions include cancer; glaucoma; HIV/AIDS; cachexia or wasting syndrome; intractable nausea or vomiting; epilepsy or intractable seizure disorder; multiple sclerosis; Crohn's disease; painful peripheral neuropathy; a nervous system disease causing painful spasticity or spasms; conditions whose symptoms severely and adversely affect the patient's health; and severe pain that significantly interferes with daily activities, for which there is objective proof, and is verified by an independent second physician.

c. A registered patient, or the patient's registered provider, may possess up to one ounce of usable marijuana and cultivate up to four mature plants and twelve seedlings. If a patient cultivates, his or her provider may not. Those abiding by the Act may not be arrested or punished in any manner, or be denied any right or privilege, for their use of medical marijuana.

d. Employers are not required to accommodate the use of marijuana by registered cardholders and may include contractual provisions prohibiting the use of marijuana for a qualifying or otherwise debilitating medical conditions. The Act does not provide employees with a cause of action for wrongful discharge or discrimination. In addition, private health insurers are not required to reimburse a person for costs associated with medical marijuana use.

3. ***State v. Nelson***, 195 P.3d 826 (Mont. 2008).

a. Subsequent to being charged with several drug-related counts, Defendant was accepted into Montana's medical marijuana program. He appealed two of his sentencing conditions limiting his ability to use medical marijuana during his prison sentence. The Montana Supreme Court held that, in light of the relevant provisions of the MMA, the trial court "unlawfully denied [Defendant] the right and privilege to use a lawful medical treatment for relief from a debilitating condition under the MMA." *Id.* at 832.

b. The Court further held that the trial court exceeded its authority in suggesting to Defendant that his deferred sentence could be revoked based upon a violation of federal law. The Court noted that the MMA does not affect or prevent the federal government from enforcing the CSA against medical marijuana users like Defendant, if it so desires; however, "while the [trial court] may require Nelson to obey all federal laws as a condition of his deferred sentenced [sic], it must allow an exception with respect to those federal laws which would criminalize the use of medical marijuana in accordance the MMA." *Id.* at 834. The Court emphasized how one of federalism's key aspects under the Constitution is that Congress cannot

directly compel states to enact and enforce a federal regulatory program such as the CSA. *Id.* at 833.

R. Nevada

1. Regulation and Taxation of Marijuana Act. NEV. REV. STAT. ANN. § NEW [Added by 2016 Ballot Measure 2]. Approved November 8, 2016 (54.5% of voters); effective January 1, 2017.

a. Permits adults aged 21 years and older who are not participating in the state's medical marijuana program (pursuant to Nevada's Medical Marijuana Act) to legally grow up to six plants and to possess, for personal use, up to either one ounce of flower or three and one-half grams of concentrates.

b. Licenses commercial marijuana production and retail sales and imposes a fifteen percent excise tax on commercial production (much of which is earmarked to the State Distributive School Account). Home cultivation is not permitted if one's residence is within twenty-five miles of an operating marijuana retailer. Regulations governing commercial marijuana activities must be in place by January 1, 2018.

c. Does not prevent a public or private employer from maintaining, enacting, and enforcing a drug-free workplace policy that restricts or prohibits employee medical marijuana use. Also, the Act allows localities to adopt and enforce local marijuana-related zoning and land use control measures.

2. Medical Use of Marijuana Act. NEV. REV. STAT. ANN. § 453A.010 *et seq.* (2000). Part of Nevada's Uniform Controlled Substances Act. Ballot Question 9; approved November 7, 2000 (65% of voters).

a. To qualify for an ID card, a patient must have a qualifying condition and submit a statement from a Nevada attending physician stating that marijuana "may mitigate the symptoms or effects" of said condition. A minor patient only qualifies with parental consent and if the adult controls the dosage, frequency of use, and acquisition of marijuana.

b. Patients may assert their qualifying condition as an affirmative defense if a physician has advised them that marijuana may mitigate said condition,

even if they do not have an ID card. This defense may be raised by people assisting patients and to receive greater amounts of marijuana if the greater amounts are "medically necessary as determined by the person's attending physician."

c. Patients and their caregivers may collectively possess two-and-a-half ounces of marijuana, which they may obtain each fourteen-day period. Those patients, or those caregivers allowed to grow marijuana, may cultivate up to twelve plants.

d. An employer is not required to modify the job or working conditions of a person who engages in the medical use of marijuana when such conditions are based on the employer's reasonable business purposes. However, the employer must attempt to make reasonable accommodations for the medical needs of an employee who uses medical marijuana if the employee holds a valid registry ID card, provided such accommodations would not (1) pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or (2) inhibit the employee's ability to fulfill his or her job duties. Also, private health insurers are not required to reimburse a person for costs associated with medical marijuana use.

3. ***Hohenstein v. Nev. Emp't Sec. Div.***, 346 P.3d 365 (Nev. 2015).

a. The Nevada Supreme Court addressed whether an employee who pleaded guilty to possessing marijuana and was subsequently terminated from his teaching position was properly denied unemployment benefits. The decision was made in light of the Uniform Controlled Substances Act, which "affords certain first-time drug offenders the opportunity to avoid a criminal conviction if the offender pleads guilty, then successfully completes a probationary period." *Id.* at 366 (citing NRS 453.3363).

b. The Court adopted the reasoning of the Maryland Court of Special Appeals in *Tate v. Board of Education of Kent County*, 485 A.2d 688 (Md. Ct. Spec. App. 1985), holding that since the Act "forestalls a final judgment of conviction 'for purposes of employment, civil rights or any statute or regulation or license or questionnaire or for any other public or private

purpose' if the offender successfully completes probation, the guilty plea may not be used to establish misconduct-based grounds for termination for purposes of denying unemployment compensation during the probationary period." *Id.* at 368 (quoting NRS 453.3363(4)).

c. The Court remanded the case to the Employment Security Division to determine, without considering the teacher's guilty plea for "a felony conviction that did not exist," whether the school district met its burden to demonstrate the teacher had committed misconduct that would disqualify him from receiving unemployment benefits. *Id.* at 369.

S. New Hampshire

1. Use of Cannabis for Therapeutic Purposes Act. N.H. REV. STAT. ANN. § 126-X:1 *et seq.* (2013). Approved by House (284-66) and Senate (18-6); signed into law May 23, 2013.

a. To qualify for an ID card, a patient must have a qualifying condition, obtain written certification from a physician or an advanced practice registered nurse, and send the certification to the state Department of Health and Human Services (DHHS). The certifying medical provider must be primarily responsible for the patient's care relating to his or her qualifying medical condition.

b. Patients qualify if they have one of the listed medical conditions and one of the listed qualifying symptoms. On a case-by-case basis, DHHS may allow patients to register who do not have a listed medical condition if their providers certify they have a debilitating medical condition.

c. Qualifying conditions include cancer; glaucoma; HIV/AIDS; hepatitis C; ALS; muscular dystrophy; multiple sclerosis; Crohn's disease; Alzheimer's disease; chronic pancreatitis; spinal cord injury or disease; traumatic brain injury; and injuries that significantly interfere with daily activities. Qualifying symptoms must be severely debilitating or terminal, or their treatments have produced elevated intraocular pressure, chemotherapy-induced anorexia, cachexia or wasting syndrome, severe pain, or serious side effects such as severe nausea, vomiting, seizures, or

severe, persistent muscle spasms.

d. Patients may have a single caregiver who can pick up medical marijuana for them. Caregivers must be aged 21 or older and may assist no more than five patients. Patients with a registry ID card may obtain up to two ounces of usable marijuana every ten-day period. Caregivers may possess that amount for each patient they assist. Neither patients nor caregivers may cultivate marijuana. Out-of-state patients may not service New Hampshire dispensaries; however, they may legally possess medical marijuana if they have entered the state with it.

e. The Act does not "exempt any person from arrest or prosecution for . . . being under the influence of cannabis while . . . in his or her place of employment, without the written permission of the employer." *Id.* § 126-X:3(II)(a)(2). In addition, the Act does not require insurance providers to cover the costs of medical marijuana. *Id.* § 126-X:3(III)(a).

f. Effective June 10, 2016, physicians and advanced practice registered nurses licensed in the states of Maine, Massachusetts, and Vermont are permitted to issue a "Written Certification for the Therapeutic Use of Cannabis" to their patients who are residents of New Hampshire. If approved, these patients will be allowed to participate in New Hampshire's Therapeutic Cannabis Program.

T. New Jersey

1. New Jersey Compassionate Use Medical Marijuana Act. N.J. STAT. ANN. § 24:6I-1 *et seq.* (2010). Approved by House (48-12) and Senate (25-13); signed into law January 11, 2010.

a. To qualify for an ID card, a patient must have a qualifying condition and a physician's certification authorizing the patient to use medical marijuana. The physician must be licensed in New Jersey and serve as the patient's primary care or hospice physician, or as the physician responsible for treating the patient's debilitating medical condition.

b. Qualifying conditions include ALS; glaucoma; HIV/AIDS; cancer; multiple sclerosis; muscular dystrophy; inflammatory bowel disease;

seizure disorders; intractable skeletal muscular spasticity; terminal illness; conditions resistant to conventional treatments; or conditions accompanied by severe pain, severe nausea, or cachexia or wasting syndrome. The state Department of Health and Senior Services administers the ID card program and can approve additional qualifying conditions. A minor patient only qualifies with parental consent and if the adult controls the dosage, frequency of use, and acquisition of marijuana.

c. A primary caregiver is a person who has agreed to assist with a registered qualifying patient's medical use of marijuana. A primary caregiver must be aged 18 years or older, a resident of New Jersey and cannot be the patient's physician. The caregiver may have only one qualifying patient at any one time.

d. The Act does not allow for home cultivation, but it does provide for state-licensed "alternative treatment centers" to produce and dispense medical marijuana to qualified patients and their caregivers. Patients may receive up to two ounces of usable marijuana every thirty days. Physicians must provide written instructions each time marijuana is dispensed, which can be for up to a ninety-day supply.

e. Patients, caregivers, and others acting in accordance with the Act are exempted from state criminal liability: they "shall not be subject to any civil or administrative penalty, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a professional licensing board, related to the medical use of marijuana."

f. Employers are not required to accommodate the medical use of marijuana in any workplace. In addition, private health insurers are not required to reimburse a person for costs associated with medical marijuana use.

U. New Mexico

1. Lynn and Erin Compassionate Use Act (LECUA). N.M. STAT. ANN. § 26-2B-1 *et seq.* (2016). Approved by House (36-31) and Senate (32-3); signed into law March 13, 2007.

a. Removes criminal penalties for the use and possession of marijuana by

patients with qualifying "debilitating medical conditions and their medical treatments." The CUA also creates a system of state-licensed medical marijuana dispensaries.

b. Qualifying conditions include ALS; anorexia, cachexia, or wasting syndrome; arthritis; cancer; cervical dystonia; chronic pain; Crohn's disease; epilepsy; glaucoma; hepatitis C; HIV/AIDS; Huntington's disease; intractable nausea or vomiting; multiple sclerosis; painful peripheral neuropathy; Parkinson's disease; PTSD; and spinal cord damage.

c. A patient or primary caregiver may possess of up to eight ounces of usable marijuana over a ninety-day period and cultivate of up to sixteen plants (four mature, twelve immature). A primary caregiver is designated by patient's physician or practitioner as necessary to take responsibility for managing the patient's well-being with respect to the use of medical marijuana. The primary caregiver must be aged 18 years or older and be a resident of New Mexico.

d. The law is largely silent with respect to employers and discrimination; however, participation in a medical use of marijuana program does not relieve the qualified patient or primary caregiver of "criminal prosecution or civil penalty for possession or use of cannabis . . . in the workplace of the qualified patient's or primary caregiver's employment." *Id.* § 26-2B-5(A)(3)(c).

2. ***Garcia v. Tractor Supply Co.***, 154 F. Supp. 3d 1225 (D.N.M 2016).

a. Plaintiff suffered from HIV/AIDS, and his physician recommended medical marijuana for treatment. *Id.* at 1226. He met the criterion to be accepted in the Medical Cannabis Program. He accepted a job with Defendant; however, after testing positive for marijuana, he was discharged. Plaintiff alleged Defendant "terminated him based on his serious medical condition and his physicians' recommendation that he use medical marijuana." *Id.* at 1227.

b. The District Court discussed whether the LECUA, combined with the New Mexico Human Rights Act, preempted the CSA. *Id.* at 1227-28. The Court

noted that the CUA does not have explicit language to accommodate employees who use medical marijuana. *Id.* at 1228.

c. The Court held Plaintiff was not fired due to his serious medical condition (HIV/AIDS); rather, he was fired for testing positive for marijuana. *Id.* Namely, he sought "the state to affirmatively require [his employer] to accommodate his marijuana use. To affirmatively require [the employer] to accommodate [Plaintiff's] illegal drug use would mandate [the employer] to permit the very conduct the CSA proscribes." *Id.* at 1230.

3. ***Vialpando v. Ben's Auto. Servs.***, 331 P.3d 975 (N.M. Ct. App. 2014).

a. Plaintiff's chronic back pain qualified for the medical marijuana program, which he started taking to ease his symptoms. *Id.* at 977. The Workers' Compensation Judge found that Plaintiff's treatment was "reasonable and necessary medical care" and ordered Defendant to reimburse him. *Id*.

b. On appeal, Defendant argued that the workers' compensation regulations "do not authorize the reimbursement of medical marijuana." *Id.* However, the New Mexico Court of Appeals found that he, as an employer, must "provide a worker reasonable and necessary health care services from a health care provider." *Id.* at 978 (citing § 52-1-49(A)). The employee's participation in the medical marijuana program constitutes "reasonable and necessary" medical care. *Id.* at 979.

c. The Court distinguished *Raich I*, finding that it "resolved a direct conflict between the CSA and state law authorizing marijuana use and cultivation for medical purposes that this case does not present." *Id.*; *see also Raich I*, 545 U.S. at 5. Here, the employer is not challenging the legality of the LECUA; rather, it "asserts that, because marijuana remains a controlled substance under federal law, the order to reimburse Worker for money spent purchasing a course of medical marijuana 'essentially requires' Employer to commit a federal crime. However, Employer does not cite to any federal statute it would be forced to violate, and we will not search for such a statute." *Id.* at 980.

d. The Court concluded that the employer was required to provide the worker

with reasonable and necessary health care services: "[t]here is no basis in the [LECUA] to declare that the definition of prescription drug is the exclusive manner to address the provision of medical marijuana to an injured worker." *Id.* at 978.

V. New York

1. Compassionate Care Act (CCA). N.Y. PUB. HEALTH § 3360 (2014). Approved by Assembly (117-13) and Senate (49-10); passed into law July 5, 2014.

a. To qualify, a patient must have written certification from his or her physician. The physician must have first registered with the state Health Department and taken a two-to-four hour course. Certification must specify the patient has a qualifying condition, is in the physician's continuing care for the condition, and is likely to receive therapeutic or palliative benefits from marijuana use.

b. Qualifying conditions include cancer; HIV/AIDS; ALS; Huntington's disease; Parkinson's disease; epilepsy; multiple sclerosis; spinal cord damage causing spasticity; inflammatory bowel disease; and neuropathies. The Health Commissioner may add (or delete) conditions.

c. A patient may designate up to two caregivers, who may pick up medical marijuana on his or her behalf. Caregivers must be aged 21 years or older and may not serve more than five patients at one time. Patients may possess a thirty-day supply of medical marijuana, of an amount determined either by the Health Commissioner during rulemaking or by the physician. They may refill their thirty-day supply seven days before it runs out.

d. Patients, caregivers, physicians, and staffers of state-legal medical marijuana organizations are not subject to arrest, prosecution, or any civil penalty for actions allowed under the CCA. In addition, for purposes of New York's anti-discrimination laws, being a medical marijuana patient is considered a disability. The CCA also includes language protecting patients from discrimination in family law or domestic relations cases.

e. An employer may prohibit an employee impaired by a controlled substance from performing his or her duties. Employees are not allowed to use

medical marijuana in places of employment. The CCA does not require a person or entity to perform any act that would put it in violation of federal law or cause it to lose a federal contract or grant.

W. North Dakota

1. North Dakota Compassionate Care Act of 2016. N.D. CENT. CODE § 19-24-01 *et seq*. (2016). Ballot Measure 5; approved November 8, 2016 (63.8% of voters).

a. Permits qualifying patients with a physician's recommendation to possess and obtain up to three ounces of medical marijuana from state-licensed dispensaries every fourteen-day period. Patients who reside forty miles or more away from an operating medical marijuana may cultivate up to eight plants at home. The Act took effect ninety days following voter approval.

b. Qualifying conditions include Alzheimer's disease; ALS; cachexia or wasting syndrome; cancer; chronic or debilitating disease; Crohn's disease; epilepsy and seizures; fibromyalgia; glaucoma; hepatitis C; HIV/AIDS; intractable nausea; multiple sclerosis; PTSD; severe and persistent muscle spasms; severe debilitating pain; and spinal stenosis.

c. While the Act is silent with respect to employers and discrimination issues, it does not relieve a qualified patient or primary caregiver from criminal prosecution or civil penalty for possession, distribution, or transfer of marijuana, or the use of marijuana, "[i]n the workplace of the qualified patient's or primary caregiver's employment." *Id.* § 19-24-09.7(a)(3).

X. Ohio

1. Medical Marijuana Control Program. OHIO REV. CODE ANN. § 3796.01 *et seq*. (2016). Approved by House (71-26) and Senate (18-15); effective September 8, 2016.

a. Patients may receive up to a ninety-day supply of medical marijuana, of an amount to be determined. The law does not permit home cultivation, but certain provisions provide limited legal protections for qualifying patients who acquire medical marijuana from out-of-state sources prior to the operation of state-licensed dispensaries. Marijuana-specific products may be dispensed as oils, tinctures, edibles, patches, or as herbal material.

b. Qualifying conditions include ALS; Alzheimer's disease; chronic traumatic encephalopathy; cancer; Crohn's disease; epilepsy or other seizure disorders; fibromyalgia; glaucoma; HIV/AIDS; hepatitis C; inflammatory bowel disease; multiple sclerosis; pain that is either (i) chronic and severe, or (ii) intractable; Parkinson's disease; PTSD; sickle cell anemia; spinal cord disease or injury; Tourette's syndrome; traumatic brain injury; and ulcerative colitis.

c. A patient's licensed caregiver may obtain medical marijuana from a dispensary on behalf of the patient and assist in its administration. A caregiver may not possess an amount of medical marijuana greater than the patient's ninety-day supply. If a caregiver provides care to more than one registered patient, the caregiver must maintain separate medical marijuana inventories for each patient.

d. "A person who is discharged from employment because of that person's use of medical marijuana shall be considered to have been discharged for just cause . . . if the person's use of medical marijuana was in violation of an employer's drug-free workplace policy, zero-tolerance policy, or other formal program or policy regulating the use of medical marijuana." *Id.* § 3796.28(B). The law does not require an employer to accommodate an employee's use of medical marijuana. An employer can take an adverse employment action against someone for their use of medical marijuana, and the law does not provide the affected person with any cause of action. *Id.* § 3796.28(A).

Y. Oregon

1. Oregon Recreational Use of Cannabis Law. OR. REV. STAT. ANN. § 475B.005 *et seq.* (2014).

a. Removed penalties for adults aged 21 and older who possess, use, and grow a limited amount of marijuana. The Act also directed the Oregon Liquor Commission to establish a system of strictly regulated and registered marijuana producers, wholesalers, processors, and retailers. Marijuana remains a Schedule II substance under the Oregon Uniform Controlled

Substances Act as decided by the Oregon Board of Pharmacy.

b. As of July 1, 2015, adults aged 21 and older may possess up to an ounce of marijuana outside the home, possess up to to eight ounces of marijuana at home, and cultivate up to four marijuana plants. They also may gift up to an ounce of marijuana, sixteen ounces of marijuana products in solid form, or seventy-two ounces of marijuana products in liquid form to other adults. They cannot be compensated for these transactions.

2. Oregon Medical Marijuana Act (OMMA). OR. REV. STAT. ANN. § 475.300 *et seq.* (2007). Ballot Measure 67; approved November 3, 1998 (55% of voters).

a. Protects medical marijuana users from criminal prosecution with respect to use, production, possession, or delivery. Qualifying patients may possess up to twenty-four ounces of usable marijuana, as well as cultivate up to twenty-four plants (six mature, eighteen immature).

b. Qualifying conditions include Alzheimer's disease; cachexia or wasting syndrome; cancer; chronic pain; glaucoma; HIV/AIDS; nausea; persistent muscle spasms; PTSD; and seizures. Other conditions are subject to approval.

c. A patient may designate a primary caregiver, the person who manages the well-being of someone diagnosed with a debilitating medical condition. The caregiver must be aged 18 years or older and must not be the patient's physician. A patient may have only one primary caregiver at a time.

d. Does not specifically address whether an employee can be terminated from employment because the employee is a medical marijuana-using cardholder. In addition, OMMA does not require employers to accommodate employee use of medical marijuana in the workplace.

3. ***Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.***, 230 P.3d 518 (Or. 2010).

a. In April 2002, Plaintiff received a signed statement from a physician that said he had a "debilitating medical condition" and "[m]arijuana may mitigate the symptoms or effects of [his] condition." *Id*. at 520. Plaintiff qualified for and obtained a registry ID card under ORS § 475.302(10)

authorizing his use of medical marijuana. Plaintiff informed his employers of his card and off-site use of medical marijuana, and "[n]either employee's supervisor nor anyone else in management engaged in any other discussion with employee regarding alternative treatments for his condition. One week later, the supervisor discharged employee." *Id*. at 521.

b. The Oregon Supreme Court discussed the Supremacy Clause and preemption at length, asserting two criteria were necessary in analyzing the case: "(1) the [CSA] must authorize a licensed health care professional to prescribe or administer the controlled substance and (2) the health care professional must monitor or supervise the patient's use of the controlled substance." *Id*. at 535. Since the CSA does not allow the administration of marijuana, physicians may not prescribe it. *Id*. Furthermore, because Plaintiff's physician was not administering the substances legally to him under the CSA, he was "engaged in the illegal use of drugs and . . . employer discharged [him] for that reason." *Id*. Finally, the Court held that "to the extent that ORS 475.306(1) authorizes the use of medical marijuana, the [CSA] preempts that subsection." *Id*. at 536. However, the Court made no determination whether the OMMA subsections decriminalizing medical marijuana use were also preempted by federal law. *Id.* at 526 n.12.

4. ***Washburn v. Columbia Forest Prods.***, 134 P.3d 161 (2006).

a. Plaintiff used medical marijuana to alleviate leg spasms pain. *Id*. at 162. After testing positive for marijuana, Defendant terminated his employment. Plaintiff sued for disability discrimination in violation of state disability law. *Id*. at 163.

b. The Oregon Supreme Court held that Plaintiff did not fit the description of a disabled person under state disability law: "[P]laintiff argues that he is disabled by virtue of his leg spasms, a condition that he claims substantially limits one of his major life activities, *i.e.*, sleeping. However . . . it is undisputed that [P]laintiff is able to counteract those leg spasms and the resulting sleep problems by using prescription medication." *Id*. at 166.

Because Plaintiff could mitigate his condition through means other than medical marijuana use, the Court found he was not a "disabled person" under the relevant statutes. *Id*.

Z. Pennsylvania

1. Medical Marijuana Act. 35 PA. CONS. STAT. § 10231.101 *et seq*. (2016). Approved by House (149-46) and Senate (42-7); signed into law April 17, 2016; effective May 18, 2016

a. Establishes a state medical marijuana program, allowing patient and caregiver certification. The bill also provides for a tax on medical marijuana organization gross receipts and creates both the Medical Marijuana Program Fund and Medical Marijuana Advisory Board. The bill does allow for reciprocity, provided the patient's medical marijuana was obtained legally from another state.

b. Qualifying conditions include ALS; autism; cancer; Crohn's disease; epilepsy and intractable seizures or spasticity; glaucoma; HIV/AIDS; Huntington's disease; inflammatory bowel disease; multiple sclerosis; neuropathies; Parkinson's disease; PTSD; sickle cell anemia; severe chronic or intractable pain; and terminal illness (defined as twelve months or fewer to live).

c. The bill does not permit home cultivation, instead providing for up to twenty-five growers and processors and as many as fifty dispensaries (which could each operate in three locations). Dispensaries are not yet operational. Patients may receive up to a thirty-day supply.

d. Employers may not "discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana." *Id.* § 10231.2103(b). The bill does not require employers to accommodate an employee's use of medical marijuana on their property or premises or prevent employers from disciplining an employee for being or working under the influence of medical marijuana in the workplace

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"when the employee's conduct falls below the standard of care normally accepted for that position." *Id*. Neither does the bill "require an employer to commit any act that would put the employer or any person on its behalf in violation of Federal law." *Id.*

e. The bill is silent on discrimination with respect to employee positive drug tests. However, but it is unlawful for employees "while under the influence of medical marijuana" to work at heights or in a confined space. *Id.* § 10231.510. In addition, employers may prohibit employees from performing any life-threatening duty or duty "which could result in a public health or safety risk while under the influence of medical marijuana," with such prohibition not considered an "adverse employment decision." *Id.*

AA. Rhode Island

1. Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act ("Hawkins-Slater Act"). R.I. GEN. LAWS § 21-28.6 *et seq*. (2006). Approved by House (52-10) and Senate (33-1); House overrode Governor's veto (59-13); effective January 3, 2006.

a. Establishes a state medical marijuana program, allowing patient and caregiver certification for certain qualifying conditions. The caregiver must be aged 21 years or older and may assist no more than five qualifying patients at any time. Patients may appoint no more than one caregiver at any time. The bill allows for reciprocity, authorizing a patient with a debilitating medical condition and a registry ID card (or its equivalent) to engage in the medical use of marijuana.

b. Qualifying conditions include Alzheimer's disease; cachexia or wasting syndrome; cancer; chronic pain; Crohn's disease; epilepsy and seizures; glaucoma; hepatitis C; HIV/AIDS; nausea; persistent muscle spasms; and PTSD. Other conditions are subject to approval.

c. Patients may possess up to two and one-half ounces of usable marijuana and cultivate up to twelve plants in one location (to be stored in an indoor facility). Two or more cardholders may cooperatively cultivate marijuana in residential or non-residential locations. In non-residential locations, they

may cultivate up to ten ounces of usable marijuana and forty-eight plants; in residential locations, they may cultivate up to ten ounces of usable marijuana, and twenty-four plants.

d. Employers cannot discriminate against a qualified user of medical marijuana: "no school, employer or landlord may refuse to enroll, employ or lease to or otherwise penalize a person solely for his or her status as a registered qualifying patient or a registered primary caregiver." *Id.* § 21-28.6-4(b). However, the Act does not require "an employer to accommodate the medical use of marijuana in any workplace." *Id.* § 21-28.6-7(b)(2).

2. ***Callaghan v. Darlington Fabrics Corp.***, 2017 WL 2321181, No. PC-2014-5680 (R.I. Super. Ct. May 23, 2017).

a. In a potentially groundbreaking trial court decision, a Rhode Island Superior Court justice held that an employer could not deny employment to a job applicant licensed under the state's Hawkins-Slater Act to possess and consume medical marijuana solely because the applicant would not be able to pass a mandatory pre-employment drug test.

b. The decision granted the applicant summary judgment against the employer, recognizing an implied private right of action for qualified cardholders to sue employers, as well as schools and landlords, for discrimination with respect to their status as medical marijuana patients. *Id.* at *7 ("It is precisely in the civil rights context where courts have been most open to implying private rights of action . . . ."). In addition, the court found no preemption issue between the Hawkins-Slater Act and federal laws such as the Drug Free Workplace Act of 1988, since the Hawkins-Slater Act does not require employers to accommodate employee drug use "in" the workplace. *Id.* at *10.

c. The employer's counsel has indicated that it will appeal the court's decision to the Rhode Island Supreme Court. Depending on how the appeal proceeds, a positive drug test, specifically for marijuana, may no longer be automatic grounds for Rhode Island employers to deny a job application or

require a current employee to seek rehabilitation.

AB. Vermont

1. S.22 [Vermont Marijuana Legalization Bill]. Approved by House (79-66) and Senate (20-9); vetoed by Governor Phil Scott on May 24, 2017.

a. On May 10, 2017, Vermont's Legislature became the first in the US to approve a recreational marijuana bill. (All previous legalization efforts have been through state ballot initiatives.) The Bill would have allowed adults 21 and older to possess up to one ounce of marijuana (or five grams hashish) and cultivate up to two mature and four immature plants. The Bill seemed to be silent on employment issues.

b. However, the Bill, which was slated to take effect in July 2018, was vetoed by Governor Scott. He feared it did not do enough to protect public health and safety, though he has indicated his willingness to work with Vermont lawmakers before the summer 2017 recess to revise the bill; namely, toughening penalties for driving under the influence and providing marijuana to minors.

2. Therapeutic Use of Cannabis Act. VT. STAT. ANN. tit. 18 § 4471 *et seq*. (2003). Approved by House (82-59) and Senate (22-7); signed into law May 26, 2004.

a. Establishes a state medical marijuana program, allowing patient and caregiver certification for certain qualifying conditions. The caregiver must be aged 21 years or older and may assist no more than one qualifying patient at any time. Patients may appoint no more than one caregiver at any time.

b. Qualifying conditions include any patient receiving hospice care; cachexia or wasting syndrome; cancer; epilepsy and seizures; glaucoma; HIV/AIDS; multiple sclerosis; severe or chronic pain; and severe nausea.

c. Patients may possess up to two ounces of usable marijuana. The Act permits home cultivation of up to nine plants (no more than two may be mature); all marijuana must be cultivated in a secure indoor facility. The Act also provides for (up to four) state-licensed dispensaries, which may engage in home delivery.

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d. The Act is largely silent on employment issues, save for a clause for worker's compensation: "[t]his chapter shall not be construed to require that coverage or reimbursement for the medical use of marijuana be provided by . . . an employer . . . or for purposes of worker's compensation." *Id.* § 4472B(B).

AC. Washington

1. Washington Initiative 502. WASH. REV. CODE § 69.50.101 *et seq.* (2012). Approved November 6, 2012 (56% of voters).

a. Provides that adults aged 21 or older may legally possess up to one ounce of marijuana for personal use, as well as up to sixteen ounces of marijuana-infused product in solid form and seventy-two ounces in liquid form. The public consumption of marijuana, which includes consumption in a motor vehicle, is subject to a civil violation and fine. Retail sales of marijuana by state-licensed entities to adults aged 21 or older are regulated by the state. The law does not the home cultivation of marijuana (remains a class C felony under relevant criminal laws).

2. Medical Use of Marijuana Act (MUMA). WASH. REV. CODE § 69.51A *et seq.* (2007). Ballot Initiative 692; approved November 3, 1998 (59% of voters).

a. Establishes a state medical marijuana program, allowing patient and caregiver certification for certain qualifying conditions. "Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, may benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana." *Id.* § 69.51A.005. The caregiver is a person who a patient has designated in writing to serve as his or her designated provider. The caregiver must be aged 21 years or older and possess either authorization from the qualifying patient's health care professional or has been entered into an authorized database. The caregiver must only provide medical marijuana to the expressed patient.

b. Qualifying conditions include cachexia or wasting syndrome; cancer; Crohn's disease; epilepsy and seizures; glaucoma; hepatitis C; HIV/AIDS;

intractable pain; nausea; persistent muscle spasms or spasticity; PTSD; traumatic brain injury; and any "terminal or debilitating condition."

c. Patients may possess up to eight ounces of usable marijuana, including forty-eight ounces of marijuana-infused product in solid form, 216 ounces in liquid form, or twenty-one grams of marijuana concentrates. The Act also permits home cultivation of up to six plants, with up to eight ounces of usable marijuana produced from these plants. On a recommendation of the patient's physician, the patient may grow up to fifteen plants, yielding up to sixteen ounces. The Act does not create state-licensed dispensaries, but (certain) retail providers may engage in the sale of medical marijuana.

d. MUMA does not require "accommodation of any on-site medical use of marijuana in any place of employment, in any school bus or on any school grounds, in any youth center, in any correctional facility, or smoking medical marijuana." *Id.* § 69.51A.060.

e. *See also* Cannabis Patient Protection Act, SB 5052 (2015): protects qualifying patients by clarifying medical marijuana usage, ensuring the best and most consistent supply of medical marijuana products, allowing tax breaks for patients, and providing additional protection from arrest and prosecution for patients who are recorded in the authorization database.

3. ***Swaw v. Safeway, Inc.***, No. C15-939 MJP, 2015 U.S. Dist. LEXIS 159761 (W.D. Wash. Nov. 20, 2015).

a. Plaintiff sued his employer after he was terminated for testing positive for a controlled substance, in violation of employer's drug-free workplace policy. *Id*. at *1. Plaintiff asserted he used marijuana after hours, pursuant to a valid medical marijuana prescription for his qualifying condition. *Id*.

b. The District Court held that Plaintiff failed to state a claim. *Id*. at *3. Washington law "does not require employers to accommodate the use of medical marijuana where they have a drug-free workplace, even if medical marijuana is being used off site to treat an employee's disabilities, and the use of marijuana for medical purposes remains unlawful under federal law." *Id.* at *3-4; *see also* 21 U.S.C. § 812(c); WASH. REV. CODE §

69.51A.060(6) ("Employers may establish drug-free work policies. Nothing in [MUMA] requires an accommodation for the medical use of cannabis if an employer has a drug-free work place").

4. ***Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC***, 257 P.3d 586 (Wash. 2011).

a. Plaintiff suffered from debilitating migraines that caused chronic pain. *Id*. at 588. When other painkillers did not provide her sufficient relief, her physician authorized her to use medical marijuana. *Id*. at 589. Plaintiff only used marijuana in the privacy of her home. *Id*. She subsequently was offered employment at TeleTech, contingent on a negative drug test result. *Id*. Plaintiff "acknowledged receipt of TeleTech's drug policy, informed TeleTech of her use of medical marijuana, and offered to provide the company with a copy of her Authorization. TeleTech declined. [She] took a drug test on October 5, 2006, and started training at TeleTech on October 10." *Id*. After TeleTech learned of Plaintiff's positive drug test results, they terminated her employment on October 18, 2006. *Id.* Plaintiff responded by suing TeleTech, arguing it "terminated her employment in violation of MUMA and . . . a clear public policy allowing medical marijuana use in compliance with MUMA." *Id*.

b. The Washington State Supreme Court held that MUMA does not create "a private cause of action for discharge of an employee who uses medical marijuana" and thus does not preclude an employer from firing an employee for such use. *Id*. at 588. MUMA also does not articulate a sufficient public policy to support a cause of action for wrongful termination, particularly since patients in Washington have no legal right to use medical marijuana under federal law. *Id*. at 597.

AD. West Virginia

1. **West Virginia Medical Cannabis Act.** W. VA. CODE § 16A-1-1 *et seq*. (2017). Approved by House (76-24) and Senate (28-6); signed into law April 19, 2017.

a. Beginning no sooner than July 2019, qualifying patients whose doctors have issued them a written certification for medical marijuana will be allowed to register with the West Virginia Bureau of Health to use medical

marijuana and to buy it from regulated dispensaries.

b. To certify patients, physicians must register with the health bureau, complete a four-hour course, and report to the bureau if a patient either dies or no longer needs access to medical marijuana. At the time of the certification, the physician must have treated the patient for at least six months and be providing continuing care to the patient for his or her qualifying condition. The doctor must certify the patient is "likely to receive therapeutic or palliative benefit from the use of medical cannabis, and other treatments, including treatments involving opioids, have proven ineffective or otherwise are contraindicated." *Id.* § 16A-4-3(a)(4). Physicians may specify the form of marijuana their patients must use.

c. Qualifying conditions include cancer, HIV/AIDS, ALS, Parkinson's disease, multiple sclerosis, spinal cord damage, epilepsy, neuropathies, Huntington's disease, Crohn's disease, post-traumatic stress disorder, intractable seizures, sickle cell anemia, or "severe chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or has proved ineffective as determined as part of continuing care." *Id.* § 16A-2-1(a)(31).

d. Initially, the only types of medical marijuana allowed are pills, oils, gels, creams, ointments, tinctures, liquid, and non-whole plant forms for administration through vaporization. Home cultivation is not allowed, and patients may only obtain a thirty-day supply of marijuana at a time from state-licensed dispensaries. Dispensaries cannot sell edibles, though medical marijuana products can be mixed into food or drinks by patients themselves. Vaporization (or oils) is allowed, but smoking is prohibited.

e. Employers may not discriminate against a person for their status as a registered patient, *id.* § 16A-15-4(b)(1), though they do not have to accommodate employees' on-site use, *id.* § 16A-15-4(b)(2). An employer may prohibit the employee from performing any task or duty which the employer deems life-threatening, or could result in a public health or safety risk, while the employee is "under the influence of medical cannabis. The

prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the [employee]." *Id.* § 16A-5-10(3). Nothing in the Act requires an employer to act in a manner that would violate federal law. *Id.* § 16A-15-4(b)(3).

f. These employer protections are reinforced in the state's Safe Workplace Act, W. VA. CODE § 21-3E-1 *et seq*. (2017) (effective July 7, 2017), which establishes the legality of employer drug testing programs provided they comply with the law's "accuracy and fairness safeguards." The law limits employer liability not only for actions taken based on the results of a positive drug test or an individual's refusal to submit to a test, but also for other claims such as defamation and damage to reputation. To be compliant, an employer must have a written policy and make the policy available to every current employee and prospective employees to review. Individuals also have certain rights under the law's testing procedures; for example, all positive tests must be confirmed by a second test.

VI. MEDICAL MARIJUANA AND STATE HAIR FOLLICLE DRUG TESTING

Relative to other tests, Hair Follicle Testing is more accurate, harder to cheat, and detects THC in the system up to ninety days after ingestion. However, it does not measure impairment, nor what it means to be "under the influence" of marijuana. Consequently, it is so controversial that some states prohibit its use in drug testing.

A. Hair Follicle Testing Permitted in Decriminalized States

1. **Arizona**: allows "urine, blood, breath, saliva, hair, or other substances from the person being tested." ARIZ. REV. STAT. § 23-493(10).

2. **Arkansas**: specimen means "tissue, fluid, or a product of the human body capable of revealing the presence of alcohol, drugs, or their metabolites." ARK. CODE ANN. § 11-14-102(19).

3. **Florida**: "specimen" means tissue, hair, or a product of the human body capable of revealing the presence of drugs or their metabolites. FLA. STAT. ANN. § 440.102(1)(q). However, Florida lab regulations only permit urine testing. *See* FLA. ADMIN. CODE ANN. r. 59A-24.004(2)(a) (2017).

4. **Maryland**: allows "urine, oral fluid, and blood; [and] hair for pre-employment

only." MD. CODE ANN. HEALTH-GEN. § 17-214(a)(11), (b)(3).

5. **Minnesota**: permits any body component sample. MINN. STAT. § 181.950.
6. **Rhode Island**: permits "urine, blood, or any other bodily fluid or tissue." R.I. GEN. LAWS § 28-6.5-1.
7. **Vermont**: allows urine or hair for drug testing. VT. STAT. ANN. tit. 21 §§ 511-520.

B. Hair Follicle Testing Prohibited in Decriminalized States (and Cities)

1. **Alaska**: only permits urine. AK. STAT. § 23.10.699(9).
2. **City of San Francisco**: while California does not have drug-testing legislation and has not defined which specimens are permitted, the City of San Francisco only permits urine and blood tests. S.F., Cal., Police Code Art. 33A (1993).
3. **Connecticut**: only urine testing mentioned, though other specimens not explicitly prohibited (with oral fluid permitted according to the state Department of Health). CONN. GEN. STAT. §§ 31-51T - 51AA.
4. **Hawaii**: only permits urine (and, under limited circumstances, blood). HAW. REV. STAT. §§ 329B-1-8; HAW. CODE R. § 11-113-1.
5. **Iowa**: only permits "urine, saliva . . . and blood." IOWA CODE § 730.5.
6. **Maine**: only permits urine (and, under limited circumstances, blood). ME. REV. STAT. tit. 26 § 682.
7. **Montana**: only permits urine or oral fluid. MONT. CODE ANN. § 39-2-206(12).
8. **Nebraska**: only permits body fluid specimen. NEB. REV. STAT. ANN. § 48-1903.
9. **Ohio**: only permits urine. Ohio Bureau Workers' Compensation Drug-Free Safety Program; *see* OHIO REV. CODE ANN. § 4123.34.
10. **Oregon**: only permits bodily fluids obtained from a live person. OR. REV. STAT. ANN. § 438.435; OR. ADMIN. R. §§ 333-024-0305 - 0365 (2004).

C. Many decriminalized states do not have drug testing statutes: California, Colorado, Delaware, District of Columbia, Illinois, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, and Washington. In these states, there are no requirements or restrictions on the specimens permitted for drug testing.

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VII. CONCLUSIONS AND FURTHER CONSIDERATIONS

Many of the cases outlined above highlight the unsettled state of medical marijuana laws in the realm of employment. Several state laws, like that of New Mexico, are completely silent on the issue of medical marijuana use and positive drug tests. However, not all laws are as ambiguous. Some laws, such as those of Arizona, Delaware, and Minnesota, clearly prohibit employers from discriminating against medical marijuana users in the workplace. Other states, such as New York, offer more limited protection, but also prohibit an employer from refusing to employ a person solely due to the person's status as a certified patient or caregiver. The overarching theme continues to be the relationship between state and federal law and how it affects the scope of employment: even the most accommodating state medical marijuana laws defer to federal law and the concept of preemption.

Marijuana legalization will become increasingly prevalent as more states (and voters) ratify its usage. Given the above cases, statutes, and regulations, there is growing tension between marijuana use and workplace regulations, as well as state and federal law. As courts set new precedents and legislatures ratify new laws, it is important for employment decisions to stay homogenous and for federal law to evolve with the ever-changing legal landscape.

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