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WILL THE SMOKE BLOW OVER? EMPLOYERS' CONCERNS AS STATES EXPAND PROTECTIONS FOR MEDICAL MARIJUANA USERS

INTRODUCTION

In the smog left in the wake of the legalization of medicinal marijuana, the protection of users under the scope of their employment has been a paramount concern. The adaptations that must be made to protect employees who have a legitimate medical purpose for the use of marijuana and considerations as to how they will be protected under anti-discrimination and disability laws are some of the most recent issues presented in this note.¹ As an increasing number of states have legalized marijuana for medical purposes under their state constitutions, the contrast between provisions governing its use at the state level and federal provisions declaring it an illegal Schedule I controlled substance creates serious conflicts for employers.²

¹ See Martin Berman-Gorvine, *Employer Weed Policies Won't Go Up in Smoke After Sessions Memo*, DAILY LAB. REP. (BNA), (Jan. 12, 2018, 12:22 PM), <https://news.bloomberglaw.com/daily-labor-report/employer-weed-policies-wont-go-up-in-smoke-after-sessions-memo>; see also Josefa Velasquez, *What's Next for Marijuana Legalizations in NY? Lawyers Tell Us*, LAW.COM (Feb. 5, 2018, 2:52 PM) <https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2018/03/05/whats-next-for-marijuana-legalization-in-ny-lawyers-tell-us/>.

² See, e.g., Kathleen Harvey, *Protecting Medical Marijuana Users in the Workplace*, 66 CASE W. RES. L. REV. 209, 211 (2015) ("Marijuana is illegal under federal law. But its legal status in the states is rapidly changing The change in state laws reflects the public's changing opinion on marijuana. Federal law, however, remains unchanged. The federal Controlled Substances Act (CSA) classifies marijuana as a Schedule I substance, meaning that marijuana has no medicinal value and high potential for abuse."); see also MARIJUANA POL'Y PROJECT, *State-By-State Medical Marijuana Laws, How to Remove the Threat of Arrest* 15-17 (2015 & 2016 Supp.) (discussing the different types of laws governing the medicinal use of marijuana under states' jurisdictions).

The problems span farther within both the state and federal levels, even though some guidelines have been incorporated for each.³ Federal employers (hereinafter includes both federal employers and contractors) who are under the jurisdiction of the Drug-Free Workplace Act (“DFWA”) are required to “promote” a drug-free workplace—whether that includes medical or recreational use—at the expense of possibly losing their federal grant⁴ if they fail to do so.⁵ The Department of Transportation (“DOT”), a federal department of the U.S. government, governs employees holding “safety-sensitive” positions by establishing regulations requiring urine sample drug testing.⁶ Again, as with employers under the DFWA, in order for DOT employers “to comply with federal law . . . [they] must follow certain steps for employees who test positive for marijuana, even if the marijuana was legally prescribed under state law and used outside the workplace.”⁷

This conflict created for federal employers leaves them with what is essentially a predetermined fate. If there are qualified medical marijuana users—as prescribed under state laws—working under the employ of federal employers, they are subject to these regulations, making employers unable to retain these employees for fear of the repercussions.⁸ Without specific mandated policies for handling qualified users, these employers are at a ma-

³ Harvey, *supra* note 2, at 210.

⁴ See 41 U.S.C. § 8102 (2012); see also Lindsey A. White et al., *Smoky Lines: Whether to Accommodate Employees’ Use of Medicinal Marijuana May Now Depend on State Law*, 68 LAB. L.J. 202, 203 (2017) (stating that employers with any grant or government contract valued at \$100,000 or more must provide a drug-free workplace which prohibits the use and possession of controlled substances).

⁵ See 41 U.S.C. § 8102 (2012).

⁶ White et al., *supra* note 4, at 202-203 (explaining that employers in the trucking, aviation, maritime railroad, transit, and pipeline industries are required to collect urine samples and if the employee tests positive they must be immediately removed from performing those safety-sensitive functions).

⁷ *Id.* at 203.

⁸ See Berman-Gorvine, *supra* note 1 (“[It] doesn’t stop employers from worrying. A company with a chain of assisted-living facilities in Vermont, Maine, Florida, and other East Coast states is ‘nervous about allowing medical marijuana because it might jeopardize their federal funding.’”).

job disadvantage, putting their federal funding at stake.⁹ If there is no law deeming it illegal for an employer to employ a medical marijuana user but these employers receive their funding contingent on the promotion of a drug-free workplace and disciplining violators, how are they expected to handle the divergence?

For state law provisions governing most private employers—that is, employers not federally contracted or federal organizations—the circumstances are quite different as there are no specific regulations, contingent on funding, governing the ways in which they should handle a qualified user under their respective state laws.¹⁰ Although federal regulations and policies stand in conflict with the legal medical use of the drug at the state level, there are still explicit provisions for which those federal employers are subject to, as opposed to private, state employers.¹¹

Instead, at the state level, however, the regulations put in place are mainly for the employees' protection rather than employers.¹² Where employers in the past have typically been protected by the courts for actions taken against medical marijuana using employees, the recent recognition that these actions may be a violation of the Americans With Disabilities Act ("ADA") or other anti-discrimination provisions have turned the tables on employers.¹³ Where the ADA and anti-discrimination provisions in the past served as a protection for employers under state laws, because medical marijuana using employees were not until recently, ever found to be incorporated under the state law provisions providing protections, those laws no longer serve as an umbrella of protection solely for employers.¹⁴ Instead of regulation or pro-

⁹ Berman-Gorvine, *supra* note 1.

¹⁰ White et al., *supra* note 4, at 204 (finding that Nevada is the sole state to specifically require employers to make reasonable accommodations for qualified medical marijuana users).

¹¹ See 41 U.S.C. § 8102 (2012).

¹² White et al., *supra* note 4, at 205 (explaining that there are jurisdictions that expressly prohibit employers from discriminating against a person "in hiring, termination or any other condition of employment" on the basis of their medical marijuana use).

¹³ See Harvey, *supra* note 2, at 210 ("But, in the absence of explicit statutory language granting employment protection to medical marijuana users, the courts refuse to rule in favor of the employees.").

¹⁴ *Id.*

tection, the state provisions may serve as merely guides to employers, regarding the actions they may take against such employees based on the further protections provided to them under the disability and anti-discrimination laws.¹⁵

Most employers still find it a priority to maintain a drug-free workplace.¹⁶ The stance against drugs has been “a long-standing trend” and employers don’t want employees on the job that are under the influence (medicinally or recreationally).¹⁷ However, as the laws amongst the states continue to be dynamic, while remaining stagnant within the federal sector, there are growing concerns for employers such as: compliance, human resources policies, pre-employment drug testing, random employee drug testing, types of drug testing, company by-laws and employee handbooks.¹⁸ These are all matters of concern for employers when walking the line between the conflicting federal and state laws while still trying to avoid wrongful actions against employees and navigating a way to developing their own guidelines for proper compliance.¹⁹

Part I discusses the origin of the federal regulatory scheme, the protections provided and the history of the regulation of drugs in the workplace. Part II covers the specific legislation of marijuana as an illegal substance both recreationally and medically. Part III explains the changing environment of the states as they continue to enact legislation legalizing the medical use of marijuana. Part IV discusses differences between the early states to legalize marijuana for medical purposes and the later, more recent states to do so. Subsection A discusses the earlier states and the specific

¹⁵ Harvey, *supra* note 2, at 210.

¹⁶ See Berman-Gorvine, *supra* note 1 (“Even in states like California where it’s legal to use marijuana, employers haven’t jumped to change their drug policies. ‘Most employers still want a drug-free workplace.’”).

¹⁷ *Id.* (explaining that in a survey taken by the Society for Human Resources in 2015, a third of the employers surveyed stated that they wouldn’t hire someone who used marijuana, even if it were for medical reasons).

¹⁸ Jennan A. Phillips et al., *Marijuana in the Workplace: Guidance for Occupational Health Professionals and Employers: Joint Guidance Statement of the American Association of Occupational Health Nurses and the American College of Occupational and Environmental Medicine*, 63 WORKPLACE HEALTH & SAFETY 139, 145 (2015).

¹⁹ Berman-Gorvine, *supra* note 1.

provisions they provided, while subsection B discusses the later states and how the protections have changed. Subsection C discusses the ways in which the varying provisions can be harmonized. Part V addresses the concerns that employers may have with respect to maintaining a drug-free workplace. Subsection A specifically addresses their concerns regarding anti-discrimination provisions provided for employees and subsection B discusses the physical and chemical effects that may be concerning to employers. Part VI proposes what it would mean for employers under the state and federal laws if the physical and chemical impairments of marijuana were similar to that of a prescription medication for depression or anxiety, and was governed as though there were no effects. Finally, Part VII discusses a potential solution for employers in attempting to navigate an otherwise untrodden area in how to handle state qualified medical marijuana using employees.

I. HISTORY

In an attempt to regulate the use of drugs in the workplace, employers have adopted a policy of administering drug tests, both in private and public corporations.²⁰ Although employers have adopted such policies, there are concerns regarding their authority to administer the various types of workplace drug testing under the United States Constitution, individual state constitutions, individual state statutes, employment and labor regulations, and other relevant governing statutory provisions.²¹

The United States Department of Health and Human Services established a mandatory guideline for federal employers when it enacted the DFWA²² in November of 1988 and defined

²⁰ John B. Wefing, *Employer Drug Testing: Disparate Judicial and Legislative Responses*, 63 ALB. L. REV. 799, 832 (2000).

²¹ *Id.* at 827-32.

²² See 41 U.S.C. § 8102 (2012); see also George J. II Tichy, *The Drug-Free Workplace Act of 1988*, 34 CATH. LAW. 363, 363 (1991) (“[T]he DFWA requires that employers receiving federal funds, or those that are parties to federal contracts, certify to the federal government that they will provide drug-free workplaces . . . [and] to: publish a policy statement notifying employees that drug abuse in the workplace is prohibited, establish a drug awareness program

the standards for which federal employers are responsible in accordance with that Act.²³ The foundation for the DFWA was to provide safety and accountability providing that all federal employers agree to maintain a drug-free workplace as a condition to receiving federal funding or grants.²⁴ The DFWA does not specifically declare that drug testing must be implemented as part of their procedures nor does it require that employers terminate employees on the basis of a positive drug test.²⁵ Instead, the DFWA proposes guidelines requiring that federal contractors must at least take disciplinary action against violative employees to maintain a drug-free workplace.²⁶ But in viewing these guidelines employers must conclusively decide a second factor: the treatment of employees.²⁷ In acknowledging the sensitivities and the basic civil rights of American employees, the following federal Acts regulate certain employee protections: (1) the Americans with Disabilities Act (“ADA”) of 1990; (2) The Civil Rights Act of 1964; (3) The Family and Medical Leave Act (“FMLA”) of 1993; and, (4) The National Labor Relations Act (“NLRA”) of 1935.²⁸

The standard for drug testing administered by federal employers was mandated by President Reagan’s Executive Order, in-

to educate employees of the dangers of drug abuse, and take disciplinary action against employees who violate the drug abuse policy statement.”).

²³ *Drug-Free Workplace Guidelines and Resources*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://www.samhsa.gov/workplace/resources> (last updated May 17, 2019) [hereinafter *Drug-Free Workplace Guidelines and Resources*].

²⁴ Phillips et al., *supra* note 18, at 140.

²⁵ *Id.* (“The DFWA does not specifically require drug testing, but it does require that employers (1) publish and distribute a policy statement, (2) specify actions that will be taken against employees who violate the policy, and (3) provide education in the workplace about the dangers of drug use and available counseling and employee assistance programs.”).

²⁶ *See id.*

²⁷ *See Drug-Free Workplace Guidelines and Resources*, *supra* note 23; *see also* Philips et al. *supra* note 18, at 140 (finding that employees of federal employers or contractors testing positive for marijuana use may be subject to discipline, including termination, regardless of whether it is legal under state law).

²⁸ *See Federal Laws and Regulations*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://www.samhsa.gov/workplace/legal/federal-laws> (last updated Nov. 2, 2015) [hereinafter *Federal Laws and Regulations*].

roducing a model that “authorizes testing under four circumstances: (1) where there is reasonable suspicion of illegal drug use; (2) in conjunction with the investigation of an accident; (3) as a part of an employee's counseling or rehabilitation for drug use through an employee assistance program (EAP); and (4) to screen any job applicant for illegal drug use.”²⁹

All federal employees whose employers qualify under the DFWA, a number which exceeds 2 million, are subject to the application of the federal guidelines and model for employers in achieving a drug-free workplace, but they are also afforded the protection of their basic civil liberties by the same body of law.³⁰ In contrast, private employers are not subject to the same mandate.³¹ Although employers within the private sector may not be subject to the same mandate, subjecting them to the same predetermined provisions relative to federal employers for the purpose of achieving a drug-free workplace has resulted in the adoption of similar or the same provisions in the private sector.³²

Following President Reagan's Executive Order, the technical and scientific guidelines set forth by Department of Health and Human Services (“HHS”), continue to cause an increase in the number of employers that have adopted drug testing policies and provisions to combat the abuse of illegal substances.³³ During a period in the 1990s, following the adoption of the Drug-Free Workplace Act, the implementation of some type of drug testing almost doubled in medium to large sized firms.³⁴ The tests are

²⁹ Mark A. Rothstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 CHI. KENT L. REV. 683, 700 (1987) (citing Exec. Order No. 12,564, 51 Fed. Reg. 32,889).

³⁰ *Federal Laws and Regulations*, *supra* note 28.

³¹ *Id.*

³² Wefing, *supra* note 20, at 832.

³³ *See id.* at 816; *see also* Rothstein, *supra* note 29, at 699; *Drug-Free Workplace Guidelines and Resources*, *supra* note 23 (establishing the scientific and technical guidelines for federal workplace drug-testing programs and that the new revisions to the mandatory guidelines will become effective October 1, 2017).

³⁴ Stephen Mehay and Natalie J. Webb, *Workplace Drug Prevention Programs: Does Zero Tolerance Work?*, 39 APPLIED ECON. 2743, 2743 (2007) (citing Hartwell where a recent survey found that 50% of large US firms test current employees, and 60% test job applicants (AMA, 2001)).

administered in a variety of ways, with there being a variance in the rationales that employers adopt in administering these tests.³⁵ Employers may have a policy to test all employees or require individual employees to take tests periodically or select them at random during the course of their employment.³⁶ The differentiation of the tests can be broken into the following categories: periodic or random administration; pre-employment screening; or in some cases ‘probable cause’ administration.³⁷ Concerns raised from workplace drug testing span over a wide range of issues which include, specifically, the “differing rights of public and private employees, the conflict between federal policy (requiring or encouraging testing) and state policy (increasingly restricting testing), and the efforts to expand the reach of various statutes (such as handicap discrimination laws) and the common law to challenge drug testing.”³⁸

II. THE STEADFAST LEGISLATION OF MARIJUANA UNDER FEDERAL LAW

The Federal Controlled Substances Act, adopted in 1970, established a series of “schedules”, by which all illicit substances are identified.³⁹ As defined by federal law “[m]arijuana is currently in Schedule I, defining the substance as having a high potential for abuse and no currently accepted medical use in treatment in the United States.”⁴⁰ The Attorney General has the authority to

³⁵ Mehay & Webb, *supra* note 34, at 2743 n.2 (“The Omnibus Transportation Employee Testing Act of 1991 requires employers in the transportation industry to test all workers who hold safety-sensitive jobs.”).

³⁶ *See id.* at 2743.

³⁷ *See id.*

³⁸ Rothstein, *supra* note 29, at 684.

³⁹ MARIJUANA POL’Y PROJECT, *supra* note 2, at 5.

⁴⁰ *Id.* at 5 n.8 (citing a November 2012 CBS News poll [that] found 83% of Americans believe doctors should “be allowed to prescribe marijuana for medical use.” (Fred Backus & Stephanie Condon, *Poll: Nearly Half Support Legalization of Marijuana*, CBS NEWS (Nov. 29, 2012)); *see also Drug Scheduling*, U.S. DRUG ENFORCEMENT ADMIN., <https://www.dea.gov/druginfo/ds.shtml> (last visited Apr. 17, 2019) (“The abuse rate is a determinate factor in the scheduling of the drug; for example, Schedule I drugs have a high potential for abuse and the potential to create severe psycho-

change the status of marijuana as a Schedule I substance to a less restrictive schedule, but the Attorney General has alternatively assigned that authority to the Drug Enforcement Administration (“DEA”).⁴¹ In light of this delegation of authority “the DEA has refused to move cannabis into a less restrictive schedule . . . [and] most recently rejected a petition to reschedule marijuana on July 8, 2011.”⁴² “Its decision was upheld in federal court, and the U.S. Supreme Court rejected a request that it review the decision.”⁴³ Despite the federal government’s unwavering stance not to reschedule the drug, its position changed slightly in 2013 with the Obama Administration’s policy that relaxed the enforcement of the federal ban on marijuana.⁴⁴ However that policy did not last long within the Trump Administration with Attorney General Jeff Sessions taking an opposite stance by rescinding that policy in early 2018.⁴⁵ But the reintroduction of the Marijuana Freedom and Opportunity Act—a bill introduced to Congress to decriminalize marijuana—in May of 2019 may still present potential for change in what has, up to now, been a firm position.⁴⁶ The federal government’s interest in maintaining consistent “well-established principles” will determine whether it is willing to modify its stance that marijuana is dangerous and should remain a Schedule I substance.⁴⁷

logical and/or physical dependence . . . Schedule I drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse. Some examples of Schedule I drugs are: heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), 3,4-methylenedioxymethamphetamine (ecstasy), methaqualone, and peyote.”)

⁴¹ MARIJUANA POL’Y PROJECT, *supra* note 2, at 5.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See White et al., *supra* note 4, at 202; see also Charlie Savage & Jack Healy, *Trump Administration Takes Step That Could Threaten Marijuana Legalization Movement*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/us/politics/marijuana-legalization-justice-department-prosecutions.html>.

⁴⁵ Berman-Gorvine, *supra* note 1; see also White et al., *supra* note 4, at 202.

⁴⁶ Marijuana Freedom and Opportunity Act, S. 3174, 115th Cong. (2018).

⁴⁷ See Berman-Gorvine, *supra* note 1; see also Savage & Healy, *supra* note 44 (mentioning Attorney General Jeff Session’s comment that the federal laws “reflect Congress’s determination that marijuana is a dangerous drug”); Memorandum from Jefferson B. Sessions, Attorney Gen., to All U.S. Attorneys,

In following this policy, federal law still deems the use of marijuana a federal crime under the Controlled Substance Act (“CSA”) and has not amended or altered the criminal provisions governing the use of marijuana even in light of popular votes by states to legalize its use for medical and recreational use.⁴⁸ The CSA does not recognize the substance for its medical purposes specifically, rather it only makes mention that many of the drugs listed in the act may have a legitimate medical purpose, but that the distribution and possession of such substances work to the detriment of the health and welfare of the general public.⁴⁹

The purpose of the CSA, as expressly stated in Section 801(2) is to restrict “the illegal importation, manufacture, distribution, and possession and improper use of controlled substances” making it a federal crime to use, possess, or distribute marijuana.⁵⁰ However, it must be considered that the CSA does not make it illegal to employ a marijuana user.⁵¹ Nor does it purport to regulate employment practices in any manner.⁵² Thus, where regulation by federal law prohibits the use and possession of the substance, it fails to recognize a legitimate medical purpose that state laws have embraced.⁵³ It stands in conflict with those laws allowing or decriminalizing marijuana use for medical purposes.⁵⁴

There are no express provisions in the CSA guiding employers in handling employees who may have a legitimate medical

(Jan. 4, 2018) (“Given the Department’s well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately.”).

⁴⁸ 21 U.S.C. § 801 (2012).

⁴⁹ *Id.* (“Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.”).

⁵⁰ 21 U.S.C. § 801(2) (2012).

⁵¹ Berman-Gorvine, *supra* note 1 (“It should be reassuring to employers that employing marijuana users isn’t against the law. Employers ‘aren’t committing criminal acts’ as long as they don’t allow use on their premises.”).

⁵² *See id.*

⁵³ *See* MARIJUANA POL’Y PROJECT, *supra* note 2, at 5-6.

⁵⁴ *Id.*; *see also* Laura Jacobsen, *East Coast Medical Marijuana Lessons for Nev. Employers*, LAW360 (Sept. 15, 2017), <https://www.law360.com/articles/962687/east-coast-medical-marijuana-lessons-for-nev-employers>.

purpose for their marijuana use under state law. Without explicit provisions for how employers should act, employers are left without guidance on how to adhere to conflicting state and federal laws in dealing with these employees—employees who have a legitimate use under state law but do not have a right to use or possess the substance under federal law.⁵⁵

III. THE FREQUENT SHIFTS OF STATE LEGISLATION OF MARIJUANA

State legislators have accepted the societal recognition of the health benefits of marijuana by legalizing marijuana usage for both medical and recreational purposes, with states continuously amending its provisions governing the use of marijuana for medical purposes.⁵⁶ These states recognize its legitimate purpose in its treatment of certain diseases and disorders.⁵⁷ There are thirty-four states that have legalized the use of medical marijuana, with some of the thirty-four merely decriminalizing the use and possession of the substance for medical purposes, and the others providing further protections for such individuals.⁵⁸

For instance, Connecticut has set forth multiple provisions that govern the palliative use of marijuana in various settings, in the presence of other parties, and when prosecution or penalization for its use would be necessary.⁵⁹ But Connecticut takes their provisions a step further, by providing protections to qualified palliative users and preventing penalties when serving as students, ten-

⁵⁵ MARIJUANA POL'Y PROJECT, *supra* note 2, at 5-6; *see also* Jacobsen, *supra* note 54.

⁵⁶ *State Medical Marijuana Laws*, NAT'L CONF. ST. LEGISLATURES (Mar. 5, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> ("In 1996, California voters passed Proposition 215, making the Golden State the first in the union to allow for the medical use of marijuana. Since then, 33 more states, the District of Columbia, Guam, Puerto Rico and US Virgin Islands have enacted similar laws.").

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225, 1227 (D.N.M. 2016) (making note of the fact that both the States of Connecticut and Delaware include affirmative requirements mandating that employers make accommodations for medical marijuana cardholders within their medical marijuana acts).

ants, or employees.⁶⁰ Specifically, Connecticut law prohibits discrimination against students, tenants and employees based on their qualified patient status and explicitly established with respect to qualified patients that no employer may refuse to hire, discharge, penalize or threaten them based solely on that factor.⁶¹ Further, it does not impose upon employers to excuse the use of intoxicating substances during work hours nor does it require them to pardon employees for being under the influence at work.⁶² Protections are provided in other states as well, similarly providing that employers cannot penalize or refuse to hire based on their use of marijuana for medical purposes.⁶³ For example, Rhode Island has established the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act.⁶⁴

There are states that have merely decriminalized marijuana, providing nothing more than a broad provision lacking any explicit requirements and obligations with respect to how employers must regulate “qualified users.”⁶⁵ Specifically, the state of Virginia did not pass an act explicitly setting forth the governance or the penalties for those who use marijuana for medical purposes. Instead, the state only determines that those who use marijuana for medical purposes are not subject to prosecution or penalization.⁶⁶ Unlike Connecticut, which has provided further protections for users as employees, students, and tenants, Virginia does the opposite by establishing that there shall be no prosecution for its use, except when its use is for the treatment of cancer or glaucoma.⁶⁷ Furthermore, this statute fails to permit employers to find the use of intoxicating substances during work hours inexcusable, nor does it

⁶⁰ CONN. GEN. STAT. ANN. § 21a-408a (West 2017).

⁶¹ GEN. STAT. § 21a-408p.

⁶² *Id.*

⁶³ See 21 R.I. GEN. LAWS ANN. § 21-28.6-4(d) (2017) (“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 cardholder.”).

⁶⁴ *Id.*

⁶⁵ VA. CODE ANN. § 18.2-251.1 (2017).

⁶⁶ *Id.* (“No person shall be prosecuted under § 18.2-250 or § 18.2-250.1 for the possession of marijuana or tetrahydrocannabinol when that possession occurs pursuant to a valid prescription issued by a medical doctor . . .”).

⁶⁷ *Id.* (“No person shall be prosecuted under § 18.2-250 or § 18.2-250.1 for the possession of marijuana . . . for treatment of cancer or glaucoma.”).

address that employers are mandated to either discipline or pardon employees for being under the influence at work.⁶⁸

Not only does the Virginia statute exclude any employment protections beyond their mere immunity from prosecution, but it fails again to set forth any guidelines for employers in how they should regulate these users.⁶⁹ While some state statutes grant medical marijuana users a form of protection from liability, as may be necessary for their “qualified use,” there is no consistency between the various states permitting its use.⁷⁰ The statutes that provide provisions appear to provide more guidance for employers, including the regulation of substance use during work hours, but they do not expressly provide employers with any model to follow, such as those provided in the Drug-Free Workplace Act.⁷¹

Evidently, employers have had a long-standing relationship with the Federal guidelines on this issue, both in the public and private sectors, and the differences arising between federal and state laws have created a yet unresolved conflict for employers regarding their drug testing practices and medical marijuana use.⁷²

⁶⁸ *Id.*

⁶⁹ *Id.* (showing that there is a lack of regulatory provisions for which employers must follow in recognizing the use of medical marijuana or for which they must apply when administering drug tests to current or potential future employees).

⁷⁰ Louise Esola, *Employers Caught in the Middle of Competing Marijuana Laws*, BUSINESS INSURANCE (Feb. 24, 2017, 2:18 PM), <http://www.businessinsurance.com/article/20170224/NEWS06/912312083/Employers-caught-in-the-middle-of-competing-marijuana-laws> (noting that the landscape of the area governing the drug is “ever-changing” and that a side effect of having state legalization of medical marijuana which the Federal government considers an illegal drug causes confusion for employers in managing their employee risk).

⁷¹ MARIJUANA POL’Y PROJECT, *supra* note 2, at 9 (discussing the evolving provisions to include anti-discrimination protections governing the use of medical marijuana amongst the states).

⁷² *See supra* Part III.

IV. THE PIONEERING STATE PROVISIONS AND THE SECOND TIER STATES' DIVERGENCE

There is a stark difference between the pioneer provisions set forth by the first states legalizing the use of marijuana for medical purposes and the later states to do so.⁷³ The second tier states, having distanced themselves from the initial policies, expanded upon what the founding states established in their governance of the Schedule I Substance.⁷⁴ With the founding states offering slightly more than just the decriminalization of the drug's use, the later states have recognized the advancement of society and the need to offer more security in legalizing the drug for modern times.⁷⁵

Considering that the first state to grant permission of marijuana for medical use was in 1996, as opposed to the most recent state permitting its use in 2019, there is a twenty-three year difference to consider.⁷⁶ From 1996 to 2000, a four year span, eight states legalized the use of marijuana for medical purposes and from 2013 to 2017, also a four year span, eleven states passed legislation for the drug's legalization.⁷⁷ In the early four years, similar terms traversed the states' provisions providing the removal of "state-level criminal penalties on the use, possession and cultivation of marijuana by patients who possess written documentation from their physician" affirming that he or she suffers from a debil-

⁷³ MARIJUANA POL'Y PROJECT, *supra* note 2, at 6.

⁷⁴ *Id.* at 9 ("Many of the effective state medical marijuana laws continue to evolve including by adding anti-discrimination protections, improving options for access, and expanding qualifying conditions. In addition, new states — including Nebraska and Utah — are seriously considering comprehensive medical cannabis laws").

⁷⁵ *Id.* at 7-9.

⁷⁶ *See id.* at 5 ("Unfortunately, current federal research guidelines make it nearly impossible to do sufficient research to meet the DEA and FDA's exceedingly high standard of medical efficacy for marijuana."); *see also* NAT'L CONF. ST. LEGISLATURES, *supra* note 56; 33 *Legal Medical Marijuana States and DC*, PROCON.ORG, <https://medicalmarijuana.procon.org/view.resource.php?resourceID=000881#NH> (last updated Mar. 18, 2019).

⁷⁷ MARIJUANA POL'Y PROJECT, *supra* note 2, at 7, 9.

itating condition and “advising that they ‘might benefit from the medical use of marijuana.’”⁷⁸

However, an extension of these introductory provisions has evolved in the latter four years allowing for the drug’s “therapeutic use” and establishes “a registry identification card system . . . for the registration of up to four non-profit alternative treatment centers in the state, and establishes an affirmative defense for qualified patients and designated caregivers with valid registry ID cards.”⁷⁹ While these provisions generally set forth the protections for the use of medical marijuana, states like Arizona, Delaware, Pennsylvania, and Rhode Island have taken their regulations a step further to protect employees as medical marijuana users so that they may not be discriminated against.⁸⁰ However, in supplying this security for employees based on a concern that they will be discriminated against, it is the employers who are potentially facing the discrimination.⁸¹ By leaving a blurred line and offering only a broad sense of guidance on firing or revoking a job offer based on an employee’s failed drug test due to their actual or purported medical use of marijuana, state regulations provide the employer with no protection other than that which is provided by the Federal Controlled Substances Act.⁸²

States that have provided regulations protecting employees from discrimination have extended their powers to recognize that the medical conditions for which marijuana may be used may also be recognized under the ADA.⁸³ Recent reports suggest that employees may have recourse under the ADA in circumstances where they are discriminated against for “using their medicine.”⁸⁴ But “more recent medical marijuana laws have included language

⁷⁸ PROCON.ORG, *supra* note 75 (establishing the language which resembles the language under multiple state provisions including Alaska, California, Colorado, Hawaii, Maine, Nevada, New Mexico, and Oregon).

⁷⁹ *Id.* (finding that some states have updated their initial provisions, but that other states have provided protections from their inception, such as Delaware, New Hampshire, New Jersey, Pennsylvania, and Washington D.C.).

⁸⁰ See White et al., *supra* note 4, at 205.

⁸¹ See *infra* Part IV.B.

⁸² See *infra* Part IV.B.

⁸³ MARIJUANA POL’Y PROJECT, *supra* note 2, at W-1.

⁸⁴ *Id.*

intended to prevent discrimination against medical marijuana patients in housing, child custody cases, organ transplants, enrollment in college, or employment, with some limitations.”⁸⁵ However, “[c]ourts in states without strong language preventing such discrimination have typically ruled against patients who challenge the discrimination.”⁸⁶

There are still states that have opposed this notion and refuse to adopt a policy protecting employees under the ADA.⁸⁷ Such policies have caused a divide, not only based on the period in which they were adopted, but both geographically and ideologically as well.⁸⁸ The split stems from the early adoption of the laws, occurring mostly in west coast states without or with lesser anti-discrimination protections for employees.⁸⁹ The split is further distinguished by the later states’ adoption of medical marijuana laws and their choice to offer protections beyond those which were established by their founding counterparts.⁹⁰ Many of these states, located on the east coast, have recently provided protections to employees that have been terminated or that have had job offers rescinded due a failed drug test resulting from their medical use of marijuana.⁹¹ Although the ideological divide was initiated in time and ultimately geographically, “an ever-growing list of states moves toward enacting new medical marijuana legislation, those with existing programs continue to expand upon them . . . The role of state legislatures in the movement to protect medical marijuana

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See generally Ashley Totorica, *Connecticut Court’s First Decision on Medical Marijuana Use Discrimination Is a Buzzkill for Employers*, NAT’L L. REV. (Sept. 1, 2017) <https://www.natlawreview.com/article/connecticut-court-s-first-decision-medical-marijuana-use-discrimination-buzzkill> (noting that an employer argued that the state laws were preempted by the American with Disabilities Act, among others, in a discrimination suit brought by a qualified user employee).

⁸⁸ See *infra* Part IV.A, IV.B.

⁸⁹ See *infra* Part IV.C.

⁹⁰ Esola, *supra* note 70 (“The question is whether the employer can take adverse action if the employee uses marijuana outside of the workplace, said Mr. Foppe. ‘Where it becomes gray is when you get this positive test result but you can’t show impairment, and states are all over the board on this.’”).

⁹¹ See *infra* Part IV.C.

patients cannot be overstated.”⁹² The split between the west and the east coast states also derives from the difference in protections, with west coast states conversely finding more protections for employers rather than employees.

A. Pioneer States:

The state of California legalized the use of medical marijuana in 1996 as the first state to grant permission by medical use under the Compassionate Use Act.⁹³ After voters passed the Compassionate Use Act, legalizing the use of marijuana for medical purposes, the Supreme Court reviewed a case which questioned whether the newly passed Act conflicted with the Federal Controlled Substances Act, which banned possession of marijuana.⁹⁴ However, the dissent argued that the conversion of the congressional authority granted by the CSA would violate the Commerce Clause in the policing of the interstate markets through the criminalization of the substance and that Congress was overreaching on its regulation of that which was to be left to the individual states.⁹⁵ Ultimately, the CSA was designed to regulate controlled substances and the fact that marijuana, included in the exhaustive list of every other controlled substance regulated by the CSA, is

⁹² MARIJUANA POL'Y PROJECT, *supra* note 2, at 18.

⁹³ Cal. Health & Safety Code § 11362.5(b)(1)(A) (West) (“The people of the state of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows: (A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician . . .”).

⁹⁴ *Gonzales v. Raich*, 545 U.S. 1, 28 (2005) (stating that the Controlled Substances Act is comprehensive in its management of the use of controlled substances for medicinal purposes and the manner in which they are to be used, but that most of the substances classified in the CSA have a legitimate medical purpose, so even if marijuana does have accepted medical uses and should be re-categorized under the CSA, it would still “impose controls beyond what is required by California law.”).

⁹⁵ *Id.* at 51 (O’Connor, J. dissenting).

used for medicinal purposes does not extricate it from the foundation of the CSA's regulatory purpose.⁹⁶

Subsequently, an Oregon court found that, following an employment discrimination claim, under the state's employment discrimination laws, the employer was not required to accommodate an employee's use of medical marijuana.⁹⁷ Oregon's disability law required that it be interpreted consistently with the Federal Americans with Disabilities Act, 42 U.S.C. § 12101 et seq..⁹⁸ The ADA provides that its protections do not apply to persons who are currently engaged in the illegal use of drugs.⁹⁹ Additionally, the Federal Controlled Substances Act prohibits the possession of marijuana without regard to whether it is used for medicinal purposes or not.¹⁰⁰ Thus, the employers and the Oregon Supreme Court reasoned that the protections of Oregon's disability law, in following the ADA which does not grant protection to persons who are currently engaged in the use of medical marijuana, would not extend to the employee.

Additionally, the state of Colorado, having adopted the legalization of medical marijuana in 2000, was another state on the forefront of the movement to legalize the substance for medical

⁹⁶ *Id.* at 27-28 (“Moreover, the CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner. . . Accordingly, the mere fact that marijuana – like virtually every other controlled substance regulated by the CSA – is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA.”).

⁹⁷ *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 543 (Or. 2010).

⁹⁸ *Id.* at 521.

⁹⁹ *Id.*

¹⁰⁰ *Id.* (“Section 12114(a) of the ADA provides that the protections of the ADA do not apply to persons who are currently engaged in the illegal use of drugs, and the federal Controlled Substances Act 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. Like the ADA, ORS 659A.124 provides that the protections of ORS 659A.112 do not apply to persons who are currently engaged in the illegal use of drugs. Employer reasoned that, if ORS 659A.112 is interpreted consistently with the ADA, then ORS 659A.112 also does not apply to persons who are currently engaged in medical marijuana use.”).

purposes.¹⁰¹ An employee may not be offered protections under state law when the same law is in direct conflict with how federal law defines “lawful activity.”¹⁰² In Colorado, an employee was terminated on the basis that he violated the company’s drug policy, after testing positive for marijuana which he used in an off-duty capacity.¹⁰³ Although the employee claimed that he was authorized under state law to use the drug for medical purposes, the defendant employer argued that the use of medical marijuana was not a “lawful” activity under Colorado’s “lawful activities statute.”¹⁰⁴

The Colorado statute specifically prohibited the termination of an employee who participated in a lawful activity outside of the workplace during off duty hours.¹⁰⁵ However, because all uses of marijuana were precluded by federal law under the CSA, as it currently remains, the court held that the employee’s off-duty medical marijuana use could not be deemed a fully protected lawful activity under Colorado’s state law provisions.¹⁰⁶ The court held that “Colorado criminal law is not coterminous with Federal criminal law. Some differences arise from powers held exclusively by the federal government.”¹⁰⁷

¹⁰¹ PROCON.ORG, *supra* note 75.

¹⁰² *Coats v. Dish Network, LLC*, 350 P.3d 849, 851 (Colo. 2015) (citing 303 P.3d 147, 151) (“[T]o be ‘lawful’ . . . activities that are governed by both state and federal law must ‘be permitted by, and not contrary to, both state and federal law.’”).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 852 (citing COLO. REV. STAT. §24-34-402.5(1)) (“‘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.”).

¹⁰⁶ *Id.* at 850; *see also Gonzales*, 545 U.S. at 29 (“The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.”); *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200, 204 (2008) (citing 21 U.S.C. §§ 812, 844(a) (“No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users.”)).

¹⁰⁷ *Coats*, 303 P.3d at 155 (Webb, J., dissenting) (citing *Arizona v. United States*, 567 U.S. 387, 399 (2012) (“States are precluded from regulating con-

Moreover, the state of New Mexico lacks any affirmative language mandating that employers make accommodations for employees who are medical marijuana cardholders under their state medical marijuana act.¹⁰⁸ In a suit resulting from an employees' termination due to his use of medical marijuana to help treat his HIV/AIDS diagnosis, the employee argued that he should be afforded protection under New Mexico's Compassionate Use Act ("CUA") and the New Mexico Human Rights Act.¹⁰⁹ The employee, Mr. Garcia, sought protections beyond that which is provided by the CUA and Human Rights Act, and sought more than "merely seek[ing] state-law immunity for his marijuana use," but "[r]ather, he [sought for] the state to affirmatively require Tractor Supply to accommodate his marijuana use."¹¹⁰

The court made a comparison to the Oregon decision in *Emerald Steel*, and considered that the question addressed is an analogous one to *Garcia*.¹¹¹ The Supreme Court of Oregon examined whether the plaintiff's use of marijuana for medical purposes could be considered an "illegal use of drugs" under the state statute which governed his claim for employment discrimination.¹¹² Given that marijuana is an illegal drug under federal law, the Oregon Court found that the discrimination laws did not require an accommodation for an employee's use of medical marijuana under the state's disability-discrimination statute.¹¹³ With federal law still defining marijuana as a Schedule I illegal substance, Judge Kistler, the author of the opinion from *Emerald Steel*, noted that "[t]he fact that the state may exempt medical marijuana users from the reach of the state criminal law does not mean that the state can

duct in a field that Congress . . . has determined must be regulated by its exclusive governance.")).

¹⁰⁸ See *Garcia*, 154 F. Supp. 3d at 1227-28 ("While some states, such as Connecticut and Delaware, have included within their medical marijuana acts affirmative requirements mandating that employers accommodate medical marijuana cardholders, New Mexico's medical marijuana act has no such affirmative language.").

¹⁰⁹ *Garcia*, 154 F. Supp. 3d at 1230.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* (citing *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010)(en banc)).

¹¹³ *Garcia*, 154 F. Supp. 3d at 1230.

affirmatively require employers to accommodate what Federal law specifically prohibits.”¹¹⁴

The court in *Garcia* found that to “affirmatively require Tractor Supply to accommodate Mr. Garcia's illegal drug use would mandate Tractor Supply to permit the very conduct the CSA proscribes.”¹¹⁵ Moreover, without a mandatory provision governing the treatment of employees under New Mexico's CUA, and considering that employers were not required to make an accommodation for him, he was not protected under New Mexico Law.¹¹⁶

B. Second Tier States

In following this recognition, the Massachusetts Superior Court dismissed an employee's claim against her former employer alleging handicap discrimination and wrongful termination.¹¹⁷ The plaintiff's claim was that she was terminated in violation of the Medical Marijuana Act. She suggested that the Act entitled her to a private right of action against her employer “who terminate[d] her employment for the lawful use of medical marijuana.”¹¹⁸ The court found that when Massachusetts enacted this law two other New England states, Rhode Island and Maine, had already passed similar statutes that deliberately incorporated prohibitions against employers from retaliating or taking other adverse measures against an employee's lawful use of medical marijuana.¹¹⁹ The Massachusetts Act did not include the same language.¹²⁰ The court ultimately determined that the plaintiff did not

¹¹⁴ *Id.* (“State medical marijuana laws that provide limited state-law immunity may not conflict with the CSA.”) (citing *Washburn v. Columbia Forest Products, Inc.*, 134 P.3d 161, 167-68 (Or. 2006)).

¹¹⁵ *Garcia*, 154 F. Supp. 3d at 1230.

¹¹⁶ *Id.*

¹¹⁷ *Barbuto v. Advantage Sales and Mktg., LLC*, 78 N.E.3d 37, 50-51 (Mass. 2017).

¹¹⁸ *Id.* at 48.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 49; see also 105 MASS. CODE REGS. 725.650 (2017) (“(A) Nothing in 105 CMR 725.000 shall be construed to limit the applicability of other law as it pertains to the rights of landlords, employers, law enforcement authorities, or regulatory agencies. (B) Nothing in 105 CMR 725.000: . . . (2) Requires

have a private right of action under the Act, but instead found that she was already protected under a handicap and/or disability claim.¹²¹ In its decision the court considered multiple factors, the principal one being that a comparable cause of action may have already been enacted to prohibit handicap discrimination.¹²² If so, a distinct, implied private right of action is not required to provide patient protection from unwarranted termination for medical marijuana use, as it may cause confusion with their available remedies under an antidiscrimination claim.¹²³

As previously noted, the state of Connecticut explicitly established a set of provisions that coincides with protections for employees as other states have recently followed and recognized.¹²⁴ The August 8, 2017 *Noffsinger* decision, imposed penalties for employers who implement pre-hire drug testing requirements and policies on illegal drug use.¹²⁵ The court dealt directly with the confusion as to which actions may be taken if medical marijuana users fail employment related drug tests¹²⁶ In *Noffsinger* a nursing home rescinded a job applicant's job offer after failing a routine pre-employment drug test.¹²⁷ The plaintiff responded by filing an employment discrimination action in state court, alleging a denial of employment based on the positive pre-

any health insurance provider, or any government agency or authority, to reimburse any person for the expenses of the medical use of marijuana . . . (4) Requires any accommodation of any on-site medical use of marijuana in any place of employment, school bus or on school grounds, in any youth center, in any correctional facility, or of smoking medical marijuana in any public place; (5) Supersedes Massachusetts law prohibiting the possession, cultivation, transport, distribution, or sale of marijuana for nonmedical purposes; or (6) Requires the violation of federal law or purports to give immunity under federal law; (7) Poses an obstacle to federal enforcement of federal law.”).

¹²¹ *Barbuto*, 78 N.E.3d at 50 (“We will not imply a separate private cause of action for aggrieved employees under the medical marijuana act, where such employees are already provided a remedy under our discrimination law, and where doing so would create potential confusion.”).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ CONN. GEN. STAT. ANN. § 21a-408a (West 2017).

¹²⁵ *Noffsinger v. SSC Niantic Operating Co.*, 273 F. Supp. 3d 326, 337 (D. Conn. 2017).

¹²⁶ *Id.* at 331-36.

¹²⁷ *Id.* at 332.

employment screening result in violation of state law protections under the Palliative Use of Marijuana Act (“PUMA”).¹²⁸ The court found the employer liable under the statute. The court held that “the act of merely hiring a medical marijuana user does not itself constitute a violation of the CSA or any other federal, state, or local law, defendant is not exempt [from PUMA],” that “the ADA does not preempt PUMA's anti-discrimination employment provision”, and “[I]ike the CSA, however, the FDCA does not purport to regulate employment, and [the] focus here is limited to the validity of PUMA's anti-discrimination-in-employment provision . . . [which] neither conflicts with nor poses an obstacle to the goals of the FDCA.”¹²⁹ Further, the court also recognized that the prior cases dealing with the CSA and the preemption of state medical marijuana provisions have been in favor of employers due to the fact that those cases did not involve statutes with specific anti-discrimination provisions.¹³⁰ It is this case and the case of *Callaghan v. Darlington Fabrics Corp.* that have pivoted away from protecting employers.¹³¹

The change hinges in part on the failure of Congress to express within the text of the CSA, the purpose of preempting these protective state laws.¹³² In fact, preemption can arise where compliance with both the CSA and state law, the Hawkins-Slater Act in this case, becomes impossible for an employer.¹³³ Where there is no impossibility, there is no reason to suggest that the CSA was meant to preempt such laws.¹³⁴ Further, “[t]o read the CSA as preempting either the [state’s] Hawkins-Slater Act or RICRA [statutes] would imply that anyone who employs someone that violated federal law is thereby frustrating the purpose of that law,” which contributes to employers’ apprehension.¹³⁵

¹²⁸ *Id.* at 331.

¹²⁹ *Id.* at 337, 338, 341.

¹³⁰ *Id.* at 335.

¹³¹ *See Noffsinger* 273 F. Supp 3d at 335-36; *see also Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 WL 2321181, at *17 (R.I. Super. 2017).

¹³² *Callaghan*, 2017 WL 2321181 at *14.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

The change in position of a states' reconciliation of its statutory language may only serve to further a comprehensive change to come. Rhode Island's interpretation is that the Hawkins Slater Act does not require an employer to "accommodate the medical use of marijuana entirely" but instead restrict it from entering any workplace.¹³⁶ Contemplating that it make accommodations outside of the workplace is not the statute's intent, but in interpreting it in accordance with the DFWA, all that is required is that the employer maintain the site of the workplace as drug-free.¹³⁷

This proposition has since been advanced by the New Jersey courts in providing a similar interpretation.¹³⁸ The expanded interpretation that the accommodations requested of employers are not accommodations that are afforded to employees within the "site of an entity" but rather an accommodation that allows continued use outside of the workplace has only further clouded the landscape for employers.¹³⁹ State statutes permitting the use of medical marijuana conflict with both federal law and state discrimination laws as well, creating an extensive struggle for employers to balance.¹⁴⁰ Perhaps the recent introduction of pre-employment drug testing bans—like in New York and Nevada—will allow employers to settle some of conflicts they are facing with the dynamic medical marijuana environment.¹⁴¹ These bans

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Wild v. Carriage Funeral Holdings, Inc.*, 205 A.3d 1144, 1154 (N.J. Super Ct. App. Div., 2019).

¹³⁹ *Id.*; *Callaghan*, 2017 WL 2321181 at *14 (citing 41 U.S.C. 8101(a)(5)); *see also infra* Part V.

¹⁴⁰ *See infra* Part V.

¹⁴¹ *Glasser et al., NYC Bill Banning Pre-Employment Marijuana Drug Testing Becomes Law*, NAT'L L. REV. (May 15, 2019), <https://www.natlawreview.com/article/nyc-bill-banning-pre-employment-marijuana-drug-testing-becomes-law> (noting that the New York City Council passed Int. 1445-A on April 9, 2019); *see also* Thomas Ahearn, *Nevada Becomes First State to Prohibit Denial of Employment Due to Positive Marijuana Drug Tests*, EMP. SCREENING RESOURCES ESR NEWS BLOG (June 12, 2019), <https://www.esrcheck.com/wordpress/2019/06/12/nevada-marijuana-drug-test/> (noting the passing of Nevada's Assembly Bill 132 is not alone in the recent pre-employment drug testing laws).

will not take effect until 2020, however they do not address current employee status, whether they will similarly be protected, and do not fully resolve the conflict for employers.¹⁴²

C. Harmonizing the ADA and CSA

i. The ADA and CSA conflict with state law advancement

Both the ADA and the CSA address the illegal use of drugs, but the two have been found to be in discord when addressing which uses will be protected and which uses will be subject to prosecution.¹⁴³ In *James v. City of Costa Mesa*, the court addressed the conflict between the two laws in determining how to navigate the advancement of the utilization of illegal drugs (as prescribed by both) for the purpose of medical treatment while still protecting patients from discrimination, thus demanding an examination of their coexistence.¹⁴⁴

In *James*, numerous patients were severely disabled residents of California who received recommendations for the use of medical marijuana as treatment for their impairments.¹⁴⁵ Evincing the concern that the dispensaries operating within the state from which they obtain the marijuana were being shut down, plaintiffs brought the action alleging a violation of the Americans with Disabilities Act.¹⁴⁶ Although this case did not specifically address an employment violation of the ADA,¹⁴⁷ the court bolstered its position by finding that the “the ADA does not protect against discrimination on the basis of marijuana use, even medical marijuana use supervised by a doctor in accordance with state law, unless that use is authorized by federal law.”¹⁴⁸

Plaintiffs attempted to argue that there was an interference with their access to medical marijuana in violation of their right to

¹⁴² Glasser et al., *supra* note 141; Ahearn, *supra* note 141.

¹⁴³ See *James v. City of Costa Mesa*, 700 F.3d 394, 398 (9th Cir. 2012).

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* at 396.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* at 397.

¹⁴⁸ See *id.*

public services under the ADA.¹⁴⁹ However, the Ninth Circuit asserted that the federal law reigned superior in this area as “the term ‘individual with a disability’ does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use,” and “[t]his case turns on whether the plaintiffs’ medical marijuana use constitutes ‘illegal use of drugs’ under § 12210.”¹⁵⁰ This section defines the “illegal use of drugs,” while simultaneously setting forth the supervised use exception allowing for “use of a drug taken under supervision by a licensed health care professional.”¹⁵¹ The Ninth Circuit determined that although this exception exists under the “illegal use of drugs” provision, plaintiffs’ marijuana use did not fall within the exception.¹⁵²

Even though the plaintiffs’ use did not fall within the exception, they argued that congressional actions amounted to federal law bringing the use within a separate exception for drug use which the court disagreed with.¹⁵³ The congressional actions for which their argument was predicated did not “affirmatively authorize” the use of medical marijuana under federal law, “which continues unambiguously to prohibit such use.”¹⁵⁴

¹⁴⁹ *James*, 700 F.3d at 397.

¹⁵⁰ *Id.* (citing 42 U.S.C. § 12210 (2009)).

¹⁵¹ 42 U.S.C. § 12210(d)(1) (2012) (“The term ‘illegal use of drugs’ means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C.A. § 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.”).

¹⁵² *James*, 700 F.3d at 404.

¹⁵³ *Id.* (arguing that the congressional action passing the implementation of the Washington D.C. medical marijuana initiative suspended local criminal penalties for seriously ill individuals using medical marijuana with a doctor’s recommendation).

¹⁵⁴ *Id.*

ii. The trouble with James and the statutory language of the law

Doctor-recommended marijuana use permitted in the state of California is still prohibited by federal law.¹⁵⁵ Much like earlier determinations, before states began providing specific protections under their respective constitutions, the Ninth Circuit did not waver from the federal position that:

[D]octor-recommended marijuana use permitted by state law, but prohibited by federal law, is an illegal use of drugs for purposes of the ADA, and that the plaintiffs' federally proscribed medical marijuana use therefore brings them within the ADA's illegal drug exclusion. This conclusion is not altered by recent congressional actions allowing the implementation of the District of Columbia's local medical marijuana initiative.¹⁵⁶

James provides a clear indication of the conflict that exists not only between state and federal provisions that vary on medical marijuana use, but also the conflict between federal laws.¹⁵⁷ The inconsistency of these laws has created disarray to their coexistence and has left their interpretation up to the courts without further guidance.¹⁵⁸

The position of the plaintiffs in *James* was founded on the idea that although the CSA prohibited the use of marijuana—as a

¹⁵⁵ *Id.* at 405.

¹⁵⁶ *Id.*

¹⁵⁷ *See id.*; *see also* *Gonzales v. Raich*, 545 U.S. 1 (2005); *Noffsinger v. Niantic Operating Co.*, 273 F. Supp. 3d 326, 332 (D. Conn. 2017); *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225, 1226 (D.N.M. 2016); *Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37, 40 (Mass. 2017); *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 230 P.3d 518, 525 (Or. 2010); *Coats v. Dish Network, LLC*, 350 P.3d 849, 851 (Colo. 2015); *Ross v. Ringwire Telecommunications, Inc.*, 174 P.3d 200, 204 (Cal. 2008) (establishing provisions legalizing the use of medical marijuana contradicting the federal directive that it remain an illegal substance).

¹⁵⁸ *James*, 700 F.3d at 406 (Berzon, C.J., concurring in part and dissenting in part).

Schedule I substance—the exception under the ADA would still protect the use of illegal drugs under the supervision of a medical provider.¹⁵⁹ However, interpreting what the intent of both the CSA and ADA were meant to protect requires the recognition that “Congress intended the supervised medical use exception to apply to experimental use of controlled substances, including, perhaps, experimental use of marijuana. These experimental uses, however, are *authorized by federal law*, and subject to a comprehensive federal regulatory regime.”¹⁶⁰ Also, there was “nothing in the legislative history to suggest that Congress intended to extend ADA protection to state-authorized, but federally prohibited, uses of marijuana falling outside this regulatory framework.”¹⁶¹ The fact that “[t]here is not one word in the statute or in the legislative history suggesting that Congress sought to exclude from the definition of illegal drug use the use of a controlled substance that was lawful under state law but unlawful and unauthorized under federal law” has not halted states from “extend[ing] ADA protection” beyond its scope to protect medical marijuana using citizens.¹⁶²

iii. Finding cohesion between varying state and federal law provisions

There is no defining line between the explicit intent of either the CSA or ADA other than the mere statutory language that has been interpreted.¹⁶³ The question still remains for employers on how to handle qualified medical marijuana using employees with respect to federal and state laws.¹⁶⁴ Even with the Massachusetts and Connecticut Courts finding the ADA and anti-discrimination protections following the *James* case, there is still no clarification or delineating guideline for how courts should resolve these interpretations.¹⁶⁵ One suggestion, similar to the pro-

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 402.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 402.

¹⁶⁴ *James*, 700 F.3d at 402.

¹⁶⁵ See *Barbuto*, 78 N.E.3d at 50; *Noffsinger*, 273 F. Supp. 3d at 338.

posals of state laws and decisions in both Massachusetts and Connecticut, was articulated in *James* as follows:

there could be no square conflict between the CSA and the ADA were the ADA interpreted, as I suggest, to specify that a medical marijuana user could be a qualified person with a disability and so not entirely excluded from the ADA's protection. The CSA does not make it illegal, for example, to employ a medical marijuana user or to provide such a user with schooling, unemployment benefits, or other non drug-related services. Interpreting the ADA to require, in some circumstances, such employment or schooling or benefits would not conflict with the CSA.¹⁶⁶

The Massachusetts and Connecticut courts in *Barbuto* and *Noffsinger* have taken this idea and applied it to the medical marijuana users within their state, advancing the principle that the “illegal use of drugs” definition is also applicable to the ADA’s employment provisions.¹⁶⁷ However, the Circuit Judge in *James* suggested that applying the definitions for an “illegal use of drugs” to the ADA’s employment provisions

preclude[s] employers from refusing to hire otherwise qualified disabled individuals who use medical marijuana, as long as doing so did not interfere with their ability to carry out their duties safely . . . recognizing that disabled individuals who follow their doctors' advice for dealing with their disability should not be barred from the workplace simply for doing so.¹⁶⁸

¹⁶⁶ *James*, 700 F.3d at 411-12 (Berzon, C.J., concurring in part and dissenting in part).

¹⁶⁷ *See id.* at 412; *see also Barbuto*, 78 N.E.3d at 38; *Noffsinger*, 273 F. Supp. 3d at 336.

¹⁶⁸ *James*, 700 F.3d at 412-13.

The Connecticut and Massachusetts courts that have applied this principle to medical marijuana users within their states respectively but have not considered the overall safety risks and potential liability concerns for employers when it comes to the widespread effects and considerations.¹⁶⁹ Employee users, indeed, are at risk for discrimination, but an interconnected arrangement between the federal laws, the state laws, and scientific data for the permitted uses of medical marijuana needs to be developed to avoid further confusion.

V. EMPLOYERS CONCERNS IN MAINTAINING A DRUG-FREE WORKPLACE

Before the use of marijuana was legalized for medical purposes, employers had a major concern with the costs to their companies.¹⁷⁰ Studies suggested that when compared to non-drug users, adults that were employed full or part time who used an illegal drug were more likely to change jobs frequently, to be late to or absent from work, to be less productive, to be involved in a workplace accident and potentially harm others, and/or to file a workers' compensation claim.¹⁷¹

After new legislation was passed by many states legalizing the medical use of marijuana, employers can, indeed, continue to rely on federal law to police workplace substance abuse.¹⁷² How-

¹⁶⁹ *Id.*; *Barbuto*, 78 N.E.3d at 45; *Noffsinger*, 273 F. Supp. 3d at 339.

¹⁷⁰ *See Drug Testing*, NAT'L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/related-topics/drug-testing> (last updated May 2017).

¹⁷¹ *Id.*

¹⁷² *Esola*, *supra* note 70; *see also* Erin Dolly, *Recreational Marijuana Is Now Legal in California: How Does This Affect Employer Workplace Drug Policies?*, JD SUPRA (Dec. 12, 2016),

<http://www.jdsupra.com/legalnews/recreational-marijuana-is-now-legal-in-92423/>; Amy Komoroski Wiwi & Nicole P. Crifo, *The Unintended Impact of New Jersey's New Medical Marijuana Law on the Workplace*, LEXOLOGY (Jan. 22, 2010), <http://www.lexology.com/library/detail.aspx?g=d26420f1-7f49-4cd2-bba8-78da57c9b024>; Todd M. Torres, *Right to Light? Maine's New Marijuana Law Prohibits Employers from Discriminating Against Recreational Users*, OGLETREE & DEAKINS (Jan. 26, 2017), <http://ogletree.com/sharedcontent/content/blog/2017/january/maines->

ever, a variety of suggestions were made in anticipation of the ways in which they can adapt to protect themselves under the legislation should they choose to recognize its use.¹⁷³ Principally, an up to date revision of company policies and provisions regulating drug use, drug testing, and drug testing consent forms must reflect an unambiguous position as to the use of medical marijuana by job applicants and employees.¹⁷⁴ This is a consideration for all employers on the brink of exposure under new regulations.¹⁷⁵ However, there are further adjustments to be taken into consideration as well.¹⁷⁶ There are no explicit regulations mandating that employers adopt a policy accepting the use of marijuana for medical purposes and to reject federal law in favor of state laws permitting its use.¹⁷⁷ Specifically, in Maine where laws took effect in January of 2017, there was no mandate governing employers, but there was recognition that they still “may take solace in the fact that the initiative expressly exempts them from having to tolerate marijuana use, possession, transport or employees being under the influence of marijuana in the workplace.”¹⁷⁸ While there may be comfort in this portion of the law, “[e]mployers need to be aware that the law also prohibits them from refusing to employ or otherwise penalize[e] persons 21 years of age or older solely because the person uses marijuana recreationally outside the employer’s property.”¹⁷⁹

Although there is no specific language regulating this area and requiring that an employer accommodate a medical marijuana user, it should be considered whether employers choose to recognize the use of marijuana for medical purposes or not, they must

new-marijuana-law-prohibits-employers-from-discriminating-against-recreational-users.

¹⁷³ Esola, *supra* note 70; *see also* Dolly, *supra* note 172; Wiwi & Crifo, *supra* note 172; Torres, *supra* note 172.

¹⁷⁴ *See* Dolly, *supra* note 172; *see also* Wiwi & Crifo, *supra* note 172; Torres, *supra* note 172; Esola, *supra* note 70.

¹⁷⁵ *See* Dolly, *supra* note 172; *see also* Wiwi & Crifo, *supra* note 172.

¹⁷⁶ *See infra* notes 178-82 and accompanying text.

¹⁷⁷ Dolly, *supra* note 172.

¹⁷⁸ Torres, *supra* note 172.

¹⁷⁹ *Id.*

adjust to the new legislation.¹⁸⁰ Further suggestions have been made to avoid any conflict, including that all human resources and drug testing personnel be aware of the company's policies with respect to medical marijuana, that all necessary measures be taken in the preservation of the confidentiality of an employees' or applicant's registry status.¹⁸¹ Other considerations to be made are that employers maintain uniformity in the enforcement of their stance on drug testing and in their response to positive test results.¹⁸² Additionally, they must take caution when a medical reason is presented as a defense to a positive test result.¹⁸³ Contacting legal counsel in this situation will be most beneficial on how to properly and appropriately handle an employee that raises such a defense.¹⁸⁴ Further, whenever such employee requests an accommodation for their medical purpose, legal counsel will help determine whether the typical application of the company's drug policy is appropriate.¹⁸⁵

A. Concerns for employers subject to anti-discrimination state provisions

Employers subject to anti-discrimination claims have major concerns on what their responsibilities may be in the wake of cases like *Barbuto* and *Noffsinger*.¹⁸⁶ In the shadows of the *Barbuto*

¹⁸⁰ See Wiwi & Crifo, *supra* note 172; see generally Dolly, *supra* note 172 (examining the affect the legalization of recreational marijuana has on drug policies in the workplace).

¹⁸¹ See Wiwi & Crifo, *supra* note 172.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See *Noffsinger*, 273 F. Supp. 3d at 331-32; *Barbuto*, 78 N.E.3d at 40; see also David S. Poppick & Nathaniel M. Glasser, *Federal Laws Do Not Preempt Connecticut Law Providing Employment Protections to Medical Marijuana Users*, NAT'L L. REV. (Sept. 18, 2017), <https://www.natlawreview.com/article/federal-laws-do-not-preempt-connecticut-law-providing-employment-protections-to> (“[S]tates may require the adjustment or relaxation of a hiring policy to accommodate a medical marijuana user.”); Phillips et al., *supra* note 18, at 143.

¹⁸⁵ See *Noffsinger*, 273 F. Supp. 3d at 336; *Barbuto*, 78 N.E.3d at 45; see also Phillips et al., *supra* note 18, at 143.

¹⁸⁶ See Poppick & Glasser, *supra* note 184.

and *Noffsinger* cases, some of the issues that employers might face and the ways in which they might remedy some of these concerns should be addressed in company policies moving forward.¹⁸⁷ Employers have been advised to consider making preparations such as reviewing their drug-testing policies to ensure that they: (a) set clear expectations of employees; (b) provide justifications for the need for drug-testing; and (c) expressly allow for adverse action (including termination or refusal to hire) as a consequence of a positive drug test.¹⁸⁸ Some other concerns also included adjusting or relaxing their hiring policies to accommodate qualified medical marijuana users and engaging in an interactive process following positive test results.¹⁸⁹

Additionally, employers must exercise their right to evaluate whether an accommodation should be provided based on whether a qualified disability exists.¹⁹⁰ If allowing the individual to use medical marijuana would promote an individual's ability to perform all necessary job functions, rather than impede those functions, such a consideration is necessary for employers in determining whether accommodations should be made moving forward.¹⁹¹ Investigating alternative medical treatments that may be as effective as marijuana in allowing employees to perform necessary job functions but, do not pose the same obstacles, is a viable option for employers that are apprehensive regarding the application of federal law.¹⁹²

Further suggestions for employers concerned with the application of federal law include an exploration of whether another "equally effective medical alternative" is available, as opposed to marijuana, in order for the individual to perform their essential job functions.¹⁹³ It must be noted, however, that states which require employers to accommodate medical marijuana using employees

¹⁸⁷ *See id.*

¹⁸⁸ *Id.*

¹⁸⁹ Nathaniel M. Glasser, *Are Zero Tolerance Drug Testing Policies About to Go Up in Smoke?*, 72 EMP. BENEFIT PLAN REV. 8, 9 (2017).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

“may be prohibited from exploring these alternatives.”¹⁹⁴ But, where such alternatives do not exist, or where none can be agreed upon to accommodate an employee’s use of lawful, off-duty medical marijuana, the employer should be prepared to demonstrate that making such an accommodation would create an undue hardship.¹⁹⁵

Any alteration to a company policy on the treatment of medical marijuana using employees, whether it be related to drug-testing policies, the refusal to hire as a consequence of a positive drug test, or whether it be related to the termination of an employee should be well documented and well-coordinated so that all expectations are communicated clearly and efficiently.¹⁹⁶ Also, all hiring managers, when considering potential employees, “should be trained not to provide assurances as to whether and how marijuana use may be accommodated.”¹⁹⁷

B. Scientific Effects that may be of Concern to Employers

Although there may be no differentiation in the chemical “high” that one would receive from the use of medical as opposed to recreational marijuana, employers still face formidable concerns.¹⁹⁸ One primary concern arises from the type of marijuana the patient uses.¹⁹⁹ The primary psychoactive substance in marijuana is most commonly known as THC.²⁰⁰ Considering the different methods for which marijuana can be administered in conjunction with the concentration levels of THC, a major concern for employers is the duration of an employee’s impairment or

¹⁹⁴ See Glasser, *supra* note 189, at 9.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See Phillips et al., *supra* note 18.

¹⁹⁹ See generally Robert S. Goldsmith et al., *Medical Marijuana in the Workplace: Challenges and Management Options for Occupational Physicians*, 57 J. OCCUPATIONAL ENVTL. MED. 518, 518 (2015) (summarizing the varying potential health effects, dosing systems, delivery systems, psychomotor effects, and pharmacokinetics with respect to employer concerns with occupational safety).

²⁰⁰ *Id.* at 518, 520 (defining THC as delta9-tetrahydrocannabinol).

“high.”²⁰¹ An employer’s concern regarding an employee’s potential impairment is considerable in weighing the potential liability at stake based on the possibility that an employee’s impairment may affect the performance of their regular job functions.²⁰²

While some effects of the drug may be deemed beneficial, especially for the purpose of treating certain conditions and disorders, some common effects include “disorientation, altered time and space perception . . . lack of concentration, impaired learning and memory, alterations in thought formation and expression, drowsiness, and sedation.”²⁰³ These effects are to be considered as potential risks to clients, patients, patrons, customers, and/or consumers of employer’s companies.²⁰⁴ The varying duration of impairment has been studied with results suggesting that—depending on the dose and route of administration—impairment can begin as early as thirty minutes after intake and continuing up to six hours before returning to a non-impaired state.²⁰⁵ Impairment levels felt as a result of marijuana use have been compared to the impairment levels and side effects of driving a car while under the influence of alcohol with studies suggesting:

[T]here is good evidence from a number of studies . . . that serum levels of an average of 3.8 (3.1 to 4.5) for oral and 3.8 (3.3 to 4.5) for smoked marijuana cause impairment approximately equivalent to a BAC of around 0.05 % . . . this cutoff may be used to establish an initial presumption of impairment.²⁰⁶

Studies have created a parallel between the similarities in the impairment effects resulting from marijuana and the impairment ef-

²⁰¹ See Phillips et al., *supra* note 18, at 142 (“The subjective ‘high’ from acute marijuana use varies with THC concentration, dose, route of administration, and users’ degree of experience with the drug.”).

²⁰² See *id.* at 144.

²⁰³ *Id.* at 142.

²⁰⁴ See generally Goldsmith et al., *supra* note 199, at 521-22 (demonstrating that depending on dosage, various cognitive, judgment, and psychomotor effects are present with use of the drug that may have safety implications).

²⁰⁵ See *id.*; see also Phillips et al., *supra* note 18, at 141-42.

²⁰⁶ Phillips et al., *supra* note 18, at 143.

fects resulting from alcohol. However, guidelines for how employers should adjust are still lacking.²⁰⁷

For federal employers the mandatory guidelines established by the Drug-Free Workplace Act has made it easier for them to regulate their employees when considering the use of marijuana.²⁰⁸ With the guidelines already set in place, federal employers don't have to adjust to the varying state provisions that create protections for employees.²⁰⁹ Specifically, the U.S. Department of Transportation ("DOT") has created specific regulations with respect to marijuana use and safety-sensitive employees.²¹⁰ The guidance issued under its Drug and Alcohol Testing Regulations states that "marijuana use remains unacceptable for any safety-sensitive employee subject to drug testing under DOT regulations. This safety-sensitive category includes pilots, bus and truck drivers, locomotive engineers, subway operators, aircraft maintenance personnel . . . among others."²¹¹ The monitoring of these "safety-sensitive" positions show the employers concerns with the safety risks and potential liability that may occur as a result of an employee's potential impairment due to the use of marijuana.²¹² This protocol set for safety-sensitive positions is not applicable to other federal departments or private employers and leaves open for consideration how employers must deal with the potential risks of impairment on the job.²¹³

All employers have a growing concern of the potential risks and consequences that may result from an employees' use of

²⁰⁷ *Id.* at 146; see Goldsmith et al., *supra* note 199, at 522, 523.

²⁰⁸ See *supra* Part I.

²⁰⁹ See *supra* Part I.

²¹⁰ See Phillips et al., *supra* note 18, at 140.

²¹¹ *Id.*

²¹² See *id.*; see also Phillip B. Russell, *Clearing the Smoke: Workplace Safety Issues Clouded by Medical Marijuana*, INDUS. SAFETY & HYGIENE NEWS (Aug. 12, 2018), <https://www.ishn.com/articles/109122-clearing-the-smoke-workplace-safety-issues-clouded-by-medical-marijuana>.

²¹³ See Denise Elliott, *Medical Marijuana Clouds Drug Testing for Many Workplaces*, CORP. COUNS. BUS. J. (Mar. 2, 2018), <https://cbjournal.com/articles/medical-marijuana-clouds-drug-testing-many-workplaces>.

medical marijuana both off-duty and on-duty.²¹⁴ With effects lasting as long as six hours an employee using marijuana for their condition may still be under the influence at the start of their work shift if they work a nine-to-five job and take their prescribed dosage after waking up.²¹⁵ In some cases, when the “high” only lasts on the lower range of three hours, employers may still have reason for concern.²¹⁶ Private employees, such as emergency responders, nurses, factory workers, engineers, etc. who are prescribed medical marijuana pose a concern for employers with respect to the possibility that the dosage they have been prescribed, while legal under state law, those employees may still be under the influence while they are on duty.²¹⁷

While the effects may be prolonged for some users, they can be brief for others. Nevertheless, viewing the effects of impairment at the lower range of three hours causes further concern for employers regarding how to determine whether an employee is impaired on the job.²¹⁸ Not only does the method of determining impairment cause concern, but the state laws protecting employees against discrimination based on their medical marijuana use may come into play as well when employers attempt to make a determination.²¹⁹

The duration of impairment effects are reason alone for employers to be concerned, especially when there is an increased possibility that the active ingredient THC dosage has been mislabeled by dispensaries.²²⁰ As the medical use for marijuana has increased in demand, the states that have legalized its medical use have created a procedure for which patients are to obtain it for

²¹⁴ See Russell, *supra* note 212; Goldsmith et al., *supra* note 199, at 518; Phillips et al., *supra* note 18, at 143-45 (discussing the various fields of employment where employers have exhibited concerns).

²¹⁵ See Phillips et al., *supra* note 18, at 141.

²¹⁶ *Id.*

²¹⁷ *Id.* at 146.

²¹⁸ *Id.*

²¹⁹ See *id.* at 143; Russell, *supra* note 212; Goldsmith et al., *supra* note 199; see also *supra* Part IV.

²²⁰ Ryan Vandrey et al., *Cannabinoid Dose and Label Accuracy in Edible Medical Cannabis Products*, 313 J. AM. MED. ASS'N 2491, 2491 (2015).

their “prescribed” therapeutic use.²²¹ Since federal law still defines marijuana as a Schedule I substance, it cannot be officially prescribed, but instead Schedule I substances are recognized as “recommendations” or “referrals” due to the prohibition.²²² Part of the process of then obtaining the recommended dosage has been established by states through the implementation of guidelines and patient registries.²²³ However, studies have suggested that although there is a “recommended” dose to registered patients by registered physicians, there is a flaw in the process in requiring patients to seek out dispensaries to fulfill their needs.²²⁴ Investigation into the accuracy of labels of edible cannabis products has revealed this striking flaw by showing that, “[a]n estimated 16% to 26% of patients using medical cannabis consume edible products . . . [and] difficult dose titration can result in overdosing or underdosing, highlighting the importance of accurate product labeling.”²²⁵

²²¹ NAT’L CONF. ST. LEGISLATURES, *supra* note 56.

²²² *See id.*; *see also* MARIJUANA POL’Y PROJECT, *supra* note 2, at 16 (“Federal law prohibits the distribution of marijuana and other Schedule I substances for any reason other than research. Doctors cannot ‘prescribe’ marijuana, and pharmacies cannot dispense it. Prescriptive-access laws demonstrate a state’s recognition of marijuana’s therapeutic value, but they are not effective as written without a change in federal policy.”).

²²³ *See* NAT’L CONF. ST. LEGISLATURES, *supra* note 56; MARIJUANA POL’Y PROJECT, *supra* note 2, at 16; *see, e.g.*, N.Y. ST. DEP’T OF HEALTH, *The New York State Medical Marijuana Program*, https://www.health.ny.gov/regulations/medical_marijuana/ (last visited June 22, 2019). Most states provide some information for registered users, but specifically the State of New York Department of Health Marijuana Program provides information and guidelines to potential and registered patients including: (1) what makes them eligible to obtain medical marijuana; (2) how to find a registered practitioner; (3) how to become a valid registered user; (4) what forms and dosages are allowed; and, (5) which facilities are registered. *Id.*

²²⁴ *See* Vandrey et al., *supra* note 220; Lawrence O. Gostin, James G. Hodge, Jr. & Sarah A. Wetter, *Enforcing Federal Drug Laws in States Where Medical Marijuana Is Lawful*, 319 J. AM. MED. ASS’N 1435, 1435 (2018).

²²⁵ Vandrey et al., *supra* note 220.

IV. NO CHEMICAL SIDE EFFECTS?

If marijuana for medicinal purposes does not, scientifically and/or chemically, have the same effects as the recreational version of the drug, does it change the implication of the employer's liability in terminating employees as a consequence of a failed drug test?²²⁶ An employer may have a defense after changing their drug policies, if they refuse to hire a potential employee as a consequence of a positive drug test, or after terminating an employee, if it can be proven that medicinal marijuana has the same negative effects as the recreational version of the drug.²²⁷ Conversely, however, an employer may be held to a higher standard, with a higher degree of responsibility or liability, if there is no physical or chemical effects similar to that which the recreational drug produces.²²⁸

Considering that there may be no physical impairments that would affect the employee's ability to perform all their essential job functions, employers would be at an increased risk if they choose to change their policies to accommodate employees using medical marijuana.²²⁹ Employers must consider that without a physical or chemical influence on employee performance, the prescription of marijuana for medical purposes would essentially have no difference from any other prescription medication that is used for depression, anxiety, or to regulate high blood pressure.²³⁰ The

²²⁶ See generally Esther Papaseit et al., *Cannabinoids: From Pot to Lab*, 15 INT. J. MED. SCI. 1286, 1287-88 (2018) (discussing the different forms of consumption and potency effects in various forms of recreational and medical cannabis).

²²⁷ See generally *id.* (exhibiting which types and forms of cannabis result in psychoactive effect for the individuals consuming them).

²²⁸ See MARIJUANA POL'Y PROJECT, *supra* note 2, at O-2 ("Further, a 2015 McGill University study—the "first and largest study of the long term safety of medical cannabis use by patients suffering from chronic pain"—found marijuana to have a "reasonable safety profile" with no increased risk of serious adverse effects.") (citing Mark A. Ware et al., *Cannabis for the Management of Pain: Assessment of Safety Study*, 16 J. PAIN 1233, 1233-1242 (2015)).

²²⁹ See Papaseit et al., *supra* note 226.

²³⁰ See MARIJUANA POL'Y PROJECT, *supra* note 2, at O-5 ("Different people respond differently to different medicines; the most effective drug for one

main concern for employers, again, becomes anti-discrimination claims based on whether the state law provides protections for employees against discrimination by employers for their use of medical marijuana.²³¹ It also begs for consideration that discrimination or wrongful termination claims may be brought against an employer who has refused to hire or who has terminated an employee, although there is no impairment.²³²

The Institute of Medicine has even suggested that some other forms of medication may be more effective in treating some of the medical conditions that marijuana has been used for, stating “[a]lthough some medications are more effective than marijuana for these problems, they are not equally effective in all patients” and that “[t]he critical issue is not whether marijuana or cannabinoid drugs might be superior to the new drugs, but whether some group of patients might obtain added or better relief from marijuana or cannabinoid drugs.”²³³

VII. CHANGING THE LANDSCAPE

In dealing with the dynamic culture of changing medical and recreational marijuana laws amongst the states, a uniform protection needs to be created. As states have pivoted away from the traditional approach to protect employers, instead providing further protections to employees, it leaves employers without guidance.²³⁴ The fact that each state has varying provisions makes it increasingly difficult for large businesses with locations across multiple states to stay apprised of the different laws afforded by each state.²³⁵ Although it is their obligation to keep their employment practices up to date, a uniform provision would provide employers with the consistent guidance that is needed to handle the

person might not work at all for another, or it might have more pronounced side effects. There are often a variety of drugs on the market to treat the same ailment.”).

²³¹ See Phillips et al., *supra* note 18, at 146; Russell, *supra* note 212; Goldsmith et al., *supra* note 199; see also *supra* Part IV.

²³² MARIJUANA POL’Y PROJECT, *supra* note 2, at O-6.

²³³ *Id.*

²³⁴ Harvey, *supra* note 2, at 232-33.

²³⁵ See MARIJUANA POL’Y PROJECT, *supra* note 2, at 1.

changing environment.²³⁶ The provision needs to come from a federal level. Even without a provision, formal administrative guidance to all employers would create a cooperative environment, allowing employees to know what their specific rights are with respect to what is permissible by employers, while also not infringing on their rights granted to them by the state.²³⁷ Ultimately, making available a uniform provision or guidance would facilitate an employment relationship where both employers and employees know what to expect.

As more than half the states have now legalized the use of medical marijuana and the federal government continues to push back on its enforcement as an illegal substance, it leaves employers to navigate a gray area.²³⁸ The unpredictable changes that employers face without a clear direction for management between the dormant federal laws and the ever changing state laws will continue to create conflicts between qualified medical marijuana using employees and their employers.²³⁹ A line needs to be drawn between the two giving employers a clear indication of their rights and protections, which will in turn allow for employees to recognize the same.

*Stephanie Speirs**

²³⁶ See *id.* at 18 (explaining how the environment and public sentiment towards medical marijuana has been rapidly changing).

²³⁷ See *id.*

²³⁸ *Id.* at 1-2.

²³⁹ *Id.*

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