
CANNABIS AND THE WORKPLACE

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FEDERAL LAW



The **Controlled Substances Act** makes “marihuana” an illegal Schedule I controlled substance.

21 U.S.C. § 801 *et seq.*

(simple possession through manufacture/distribution)

“Marihuana” = all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, except:

- ✓ the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

Defining the Terms

Cannabis – a plant genus that contains Cannabis sativa, Cannabis indica, and Cannabis ruderalis.

Marijuana/Marihuana –

- Unknown etymology, but often used as a synonym
- Defined in the Controlled Substances Act
- Shift to use of this term over “cannabis” coincided with pot prohibitions and criminalization

Hemp – a variety of cannabis that contains 0.3% or less THC content (by dry weight).

Cannabidiol (CBD) – a hemp-derived product.



➤ **2018 Farm Bill:**

- Added exception for hemp from the definition of “marihuana” under the CSA
- Removes hemp from DEA’s jurisdiction; now governed by FDA
- Allows broad hemp cultivation + the transfer of hemp-derived products across state lines

➤ **Epidiolex:** June 2018, FDA approved first drug derived from cannabis plant, used to treat childhood epilepsy

➤ **Rohrabacher-Farr Amendment:** prohibits DOJ from spending resources that would interfere with the implementation of state medical cannabis laws.

- Has been renewed every year since 2014; next expires on Sept. 30, 2020

STATE LAWS

Recreational and medical use – 11 states + DC

AK, CA, CO, IL, MA, ME, MI, NV, OR, VT, WA & DC

- Laws regulate marijuana like alcohol, allow adults 21+ to use and possess marijuana

Medical use – 23 states + Guam & PR

AR, AZ, CT, DE, FL, HI, LA, MD, MN, MO, MT, ND, NH, NJ, NM, NY, OH, OK, PA, RI, UT, VA, WV

Medical use of CBD/low-THC – 12 states

AL, GA, IA, IN, KY, MS, NC, SC, TN, TX, WI, WY

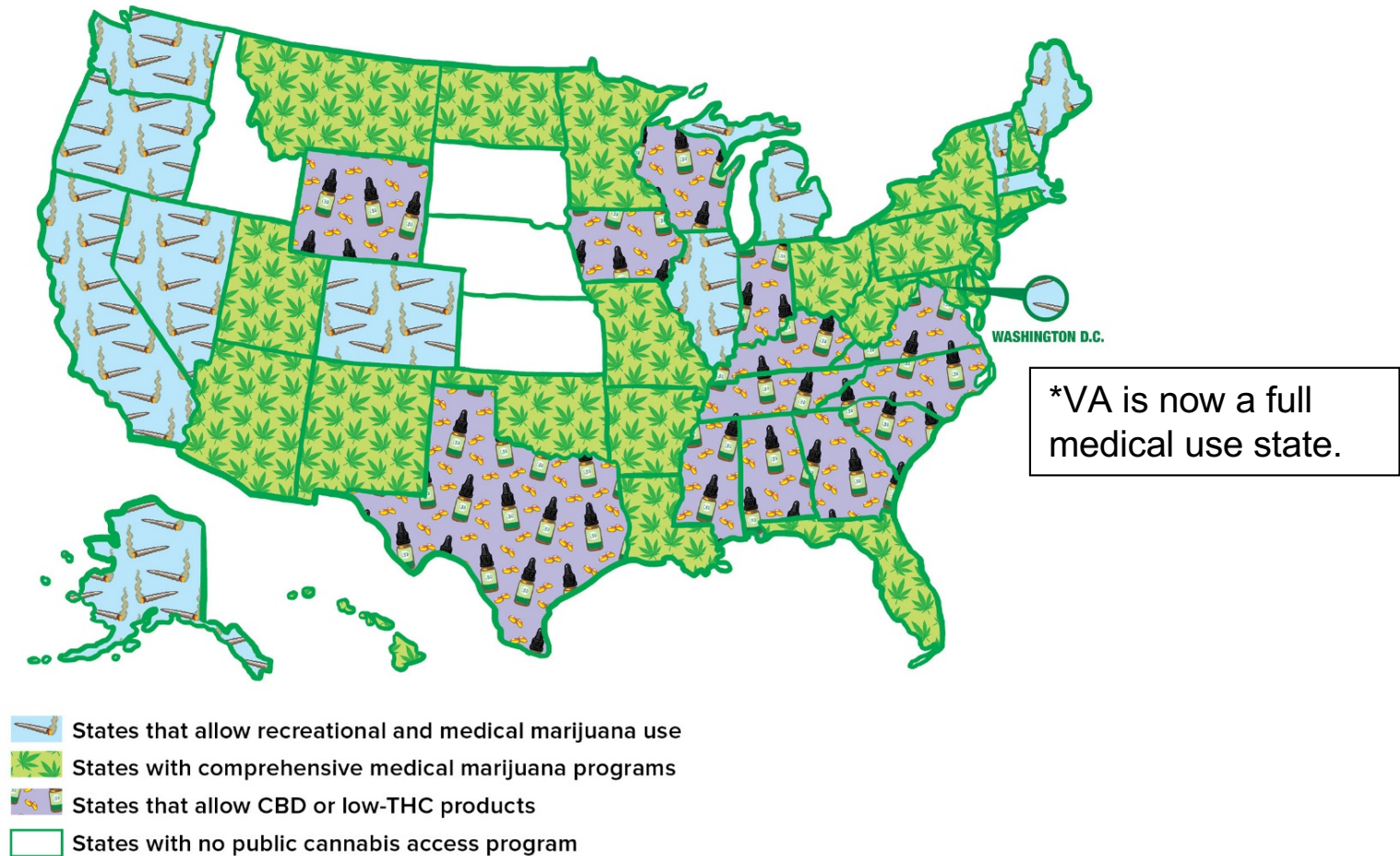
Illegal – 4 states

ID, KS, NE, SD



Cannabis Legalization Overview

MARIJUANA LAWS, STATE BY STATE



Source: National Conference of State Legislatures.

New Marijuana Laws - 2020 Ballot Initiatives

Of particular note:

- **Virginia's** legislature passed — and on May 21, 2020 Gov. Ralph Northam signed — a bill to decriminalize up to an ounce of marijuana, imposing a \$25 fine instead of possible jail time.
- In **Vermont**, the Senate and House approved different versions of S. 54, a bill to legalize and regulate marijuana sales (possession and cultivation is already legal). A conference committee was appointed to harmonize the bills. The House speaker said the legislature will continue its work on the issue in August.
- In **New York**, for the second year in a row, Gov. Andrew Cuomo proposed including legalization in the state's budget. However, the budget ultimately did not include it. It is unlikely — but possible — that legalization will be taken up this year.
- **Connecticut's** governor sponsored a legalization bill for the first time in 2020. However, the legislative session was also disrupted by virus-related precautions and has adjourned.
- **Alabama's** Senate and **Kentucky's** House of Representatives both approved medical cannabis bills, but both were derailed by the Coronavirus.
- In **Louisiana**, the state expanded its medical marijuana law to allow doctors to recommend cannabis for any patients they believe it will help, and removed several restrictions on the methods of medical marijuana use.
- There are other initiatives that were or are being considered, including in **Arkansas, Arizona, Idaho, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, Nebraska, New Mexico, Ohio, Oklahoma, South Dakota, and Tennessee.**

EMPLOYMENT ISSUES

OVERVIEW

State cannabis laws can be silent on employment-related issues, can extend explicit protections to employers, or explicit protections to users.

The trend is more protections for users, particularly in drug testing



Drug Testing

- Does your jurisdiction allow pre-employment drug screening for marijuana?
- Does your jurisdiction allow adverse action based on a positive marijuana test?
- Do you have safety-sensitive job positions?

Drug-Free Workplace Policies

- Update to reflect any changes in practice based on legalization
- Iterate in writing your policy on cannabis, despite its legality



Disability Accommodation

- Is the employee's use related to a medical condition or disability?
- Engage in the Interactive Process to determine if you can accommodate the disability

Anti-Discrimination

- Enforce policies neutrally and consistently
- Status as a user should not be the basis for any adverse action

EMPLOYMENT ISSUES – DRUG TESTING/DFWA

States/Localities with Restrictions on Marijuana Drug Testing

- Illinois law states employers cannot discriminate against an employee for marijuana use outside work.
- But, companies can still conduct “reasonable drug and alcohol testing” of both current and prospective employees, and reject applicants and discipline employees based on a positive test.
- However, there is some tension in the law—*i.e.*, if an employer decides to withdraw an offer of employment or terminate someone based on a positive marijuana test, without signs of impairment, there is potential litigation risk and an applicant/employee may file a claim alleging discrimination due to lawful use of marijuana while off duty.

States/Localities with Restrictions on Marijuana Drug Testing

- DC and Nevada bar employers from taking adverse action based on a positive pre-employment test result.
- New York City does as well.
- In New Jersey (in *Wild v. Carriage Funeral Holdings*, discussed later) employers may have a duty to accommodate off duty medical marijuana use.
- Exceptions for safety-sensitive positions.

States/Localities with No Restrictions (Illustrative List)

- **California** – *Ross v. Ragingwire Telecomm.* (Cal. 2008) (California Supreme Court found Act provided no protection.)
- **Colorado** – *Coats v. Dish Network* (Colo. 2015) (employee's off-duty marijuana use not "lawful activity" protected by statute because illegal under Federal law)
- **Michigan** – *Casias v. Wal-Mart* (6th Cir. 2012) (Act did not regulate private employment)
- **Montana** – *Johnson v. Columbia Falls* (Mont. 2009) (upheld discharge of employee for positive marijuana test)
- **New Mexico** – *Garcia v. Tractor Supply Co.* (D.N.M. 2016) (no duty to accommodate medical marijuana use)
- **Oregon** – *Emerald Steel v. Bureau of Labor* (Or. 2010) (Act provided no protection to employees)
- **Washington** – *Roe v. Teletech* (Wash. 2011) (no cause of action for wrongful termination based on authorized medical marijuana use)

EMPLOYMENT ISSUES –

DISABILITY ISSUES/MEDICAL MARIJUANA



Workers are excluded from ADA coverage if they use illegal drugs.



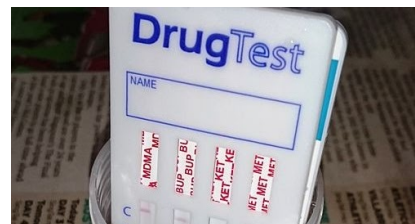
Marijuana is illegal under the Federal Controlled Substances Act.

The FCSA may pre-empt state marijuana laws.



Protections for medical marijuana use

- Some statutes provide positive drug test cannot **automatically** be grounds for refusal to hire or other adverse employment action (Arizona, Arkansas, Arizona, Delaware, Minnesota, Oklahoma, Rhode Island)
- Other states provide that employers may not discriminate against medical users based solely on their status (Connecticut, Oklahoma, Rhode Island, West Virginia)
- Still others only provide for discipline if employee falls below “normally accepted standard of care” while on the job (Arizona, Arkansas, Connecticut, Illinois, Maine, New Hampshire, North Dakota, Pennsylvania, West Virginia)



Oklahoma- One Example



Oklahoma enacted a medical marijuana initiative on June 26, 2018



Contains broad anti-discrimination provisions

Prohibits employers from discriminating based solely on the individual's status as a medical marijuana license holder

Prohibits employers from taking adverse action against license holder based solely on positive drug test



Explicitly provides for employer to take adverse action against an employee who uses or possesses marijuana while in the place of employment or during employment hours



EMPLOYMENT ISSUES – DISCRIMINATION

DFWA policies must be implemented so that all similarly situated employees are treated the same for drug testing:

- Pre-employment
- Reasonable Suspicion
- Post-accident

And, all disciplinary response is consistent.

- [Wilson v. Wilkie, 2020 BL 168171, S.D. Ohio, 2:18-cv-515, 5/5/20](#) (Employee claimed he was discharged because of his disability and not because of his positive drug test)
- [Wright v. Catelent Pharma Solutions](#) , 2020 BL 98709, W.D. Mo., 4:18-CV-00865-NKL, 3/17/20 (Employees claimed they were drug tested because of their race)
- [Jones v. Target Corp.](#) , 2019 BL 450329, 2d Cir., 18-1159, unpublished 11/22/19 (Employee claimed drug tested in retaliation for Title VII protected conduct)

EMPLOYMENT ISSUES –

CASE LAW

Barbuto v. Adv. Sales and Marketing **(Mass. Supreme Court 2017)**

➤ **Facts**

- Plaintiff engaged in medical marijuana use at home 2-3 times per week.
- Hired and worked one day before being terminated for having a positive drug test.
- Non-safety sensitive position.

➤ **Holding**

- Court classified Plaintiff's GI disorder as a "handicap" under Mass. anti-discrimination statute and analyzed case under the disability discrimination framework.
- Employer had an obligation to engage in the interactive process and consider proposed accommodations.
- Employers must "determine whether there [are] equally effective medical alternatives to the prescribed medication whose use would not be in violation of [the employers' drug-free workplace] policy." If there is no "effective medical alternative," the employer must prove that employing a medical marijuana user would cause an undue hardship.

Callaghan v. Darlington Fabrics Corp. **(RI Superior Court 2017)**

➤ **Facts**

- Plaintiff sought an internship with Darlington.
- In the interview, Plaintiff disclosed that she was a medical marijuana user. Darlington told her she would have to pass a drug test to work. Plaintiff told Darlington that she was not going to stop using marijuana and was not going to be able to pass the drug test. She was not hired.

➤ **Holding**

- Plaintiff won on summary judgment – court said that refusing to hire her was a violation of the RI medical marijuana law (Hawkins Slater Act).
- But, Court held “Defendants are not required to make any accommodations for PlaintiffThey do not even need to alter their existing drug and alcohol policy, which prohibits ‘the illegal use, sale or possession of drugs or alcohol on company property. While that policy provides that all new applicants who are being considered for employment will be tested for drug or chemical use it does not state that a positive result of such test will be cause for withdrawal of the job offer.”

Noffsinger v. SCC Niantic Operating Co. **(D. Conn. Sep. 5, 2018)**

➤ **Facts**

- Connecticut medical marijuana law contains anti-discrimination provision barring employer from taking adverse action solely based on status as qualifying MM patient
- Plaintiff accepted job offer contingent on drug test, told employer she was qualifying patient to use marijuana to treat PTSD
- Drug test was positive for THC, employer rescinded offer
- Employer disqualified plaintiff based on positive test and following federal law under which marijuana is still illegal

➤ **Holding**

- Court previously held in same case that law creates private right of action
- The statute is clear that it protects “employees from discrimination based on their **use** of medical marijuana pursuant to their qualifying status...” and “the use of medical marijuana outside working hours” absent any influence during working hours.
- Summary judgment granted in favor of plaintiff

Wild v. Carriage Funeral Holdings, Inc. **(NJ Supreme Court 2020)**

➤ **Facts**

- Plaintiff, a cancer patient and medical cannabis cardholder under NJ's Compassionate Use of Medical Marijuana Act ("CUMMA") tested positive for cannabis after a car accident at work. An ER doctor examined Plaintiff just after the accident and concluded he was not impaired, but the company terminated him based upon its policy against drugs in the workplace.
- Plaintiff sued, claiming disability discrimination under the NJ Law Against Discrimination ("LAD").
- The trial court granted the employer's motion to dismiss, supporting the position that CUMMA did not require "an employer to accommodate the medical use of marijuana in any workplace."
- The appellate court reversed, noting although CUMMA did not create a right to accommodation "in any workplace," Plaintiff's complaint alleged he only sought an accommodation to allow his cannabis use "off-site" or during "off-work hours." While not specifically authorized by CUMMA, such an accommodation might be available under the LAD.

➤ **Holding**

- The Supreme Court affirmed the Appellate Division's holding without adding much additional guidance.
- The Court did, however, highlight two potential defenses for employers in future LAD cases: (1) a plaintiff's LAD claim might be "impacted" if the employer could show the accommodation requested involved use "in the workplace;" and (2) if the employee's job involved operation of a "vehicle, aircraft, railroad train, stationary heavy equipment or vessel" and there was evidence the employee did so "while under the influence of marijuana."
- The Court did not address the recently enacted Jake Honig Compassionate Use Medical Cannabis Act, which amended the Compassionate Use Act and included new statutory protections for medical cannabis patients.

Gordon v. Swift Transp. Servs., LLC **(W.D. Ky. Apr. 3, 2020)**

➤ **Facts**

- Under the employer's policy, it excluded from consideration all applicants who have used illegal drugs within three years of their application.
- When plaintiff disclosed he had used marijuana nine months prior, the employer denied him employment due to "his history of having been an illegal user of drugs" in accordance with its policy.
- Plaintiff sued alleging both disparate impact and disparate treatment in violation of the ADA.
- Employer filed a motion to dismiss

➤ **Holding**

- The Court granted the employer's motion to dismiss
- While the Court stated that it was not making a ruling on the reasonableness of the employer's three-year policy, it found that the timing of plaintiff's disclosed use meant that he was not a qualified individual with a disability under the ADA.

Whitmire v. Wal-Mart Stores Inc.

(D. Ariz. Feb. 7, 2019)

➤ **Facts**

- Plaintiff injured her wrist while at work. Upon reporting the injury, the employer asked her to submit to a drug test, which it requires for all on-the-job injuries.
- When the employer ordered the test it did not know that plaintiff had an Arizona-issued medical marijuana card under the Arizona Medical Marijuana Act (“AMMA”) or that she had used medical marijuana the night before as per her custom. She disclosed these facts contemporaneous with her drug screen, which she failed.
- The employer terminated plaintiff for failing the drug test, pursuant to its policy requiring termination when “any detectable amount” of illegal drugs is found in an employee's body.
- Plaintiff sued alleging the employer violated AMMA by discriminating against her due to her use of medical marijuana, and then moved for summary judgment.

➤ **Holding**

- The Court granted the plaintiff’s motion for summary judgment in large part.
- The Court found that the AMMA protects medical marijuana users who test positive for marijuana metabolites as long as they did not use or possess the drug at work and were not impaired by it while on duty.

Parrotta v. PEPCO Energy Co.

(E.D. Pa. Jan. 31, 2019)

➤ **Facts**

- Plaintiff had a foot-related medical condition and work restrictions for a short period of time before he was released to “full duty” by his medical provider.
- Soon thereafter he was selected for a random drug test and tested positive for marijuana.
- The employer put plaintiff on a FMLA leave and required him to complete an EAP program. During a fact-finding inquiry after completing EAP, plaintiff stated he had scar tissue that was not healing correctly and self-medicated with marijuana.
- The employer then decided to terminate plaintiff.
- Plaintiff sued for disability discrimination and retaliation under the FMLA, ADA, and state law, and the employer moved for summary judgment.

➤ **Holding**

- The Court granted the employer’s motion for summary judgment.
- The Court found that the employer had not shown that his foot condition was a disability and that he failed to demonstrate pretext in the employer’s decision. The Court also noted there was no causal link between his prior periods of FMLA leave or requests for light duty after foot surgery.

Horn v. Medical Marijuana, Inc., et al. **(W.D.N.Y. – Pending Trial)**

➤ **Facts**

- Plaintiff hurt his hip and shoulder in a vehicle crash, and sought to alleviate his pain through the use of CBD oil. The CBD oil was labeled as THC-free.
- Weeks later, his employer gave him a random drug test and he tested positive for marijuana. His employer then terminated his employment as a hazmat truck driver.
- Plaintiff then filed suit against the companies that produced, distributed, and sold the CBD, claiming the CBD products he used were mislabeled, caused him to lost his job, and resulting monetary and emotional distress damages.
- As part of that case a forensic toxicologist found THC in the CBD products.
- The Court granted partial summary judgment to defendants for several of plaintiff's claims, but allowed others to move forward.
- This case highlights the potential career-ending risk for CDL drivers who use mislabeled CBD products, which the DOT highlighted in a February warning.

➤ **Holding**

- This case is set for trial in October.

PRACTICAL TIPS

Cannabis Best Practices

- Evaluate and revise drug policies
- Communicate drug policies to workforce
- Consider whether zero tolerance is right for your business
- When in doubt, engage in the interactive process



- Consider identifying in policy the purpose of testing, *e.g.*:
 - because a job is safety-sensitive;
 - because of legal obligations under the Drug Free Workplace Act or Omnibus Transportation Employee Testing Act; or
 - because of other traditional health and safety reasons.
- Consider identifying in policy the potential employment ramifications of legal and illegal use of marijuana, on and off duty.
- Consider focusing testing for marijuana on workplace impairment/reasonable suspicion.



Any questions?