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Employers Beware: What Are Employers' Obligations and Rights Given New Marijuana Legislations?

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Cover Page Footnote

Associate Dean of International Programs and Associate Professor of Law, Nova Southeastern University, Shepard Broad College of Law. J.D., Summa Cum Laude Nova Southeastern University, Shepard Broad College of Law, 2003; B.A., Summa Cum Laude Florida International University, 1999. I am grateful to Belmont Law Review for inviting me to participate in its Labor & Employment Law Symposium and for publishing this article. Many thanks to my Research Assistants Julisa Farach, Vanessa Alvarez, and Katherine Hyunh for their outstanding assistance with this article.

EMPLOYERS BEWARE: WHAT ARE EMPLOYERS' OBLIGATIONS AND RIGHTS GIVEN NEW MARIJUANA LEGISLATIONS?

SHAHABUDEEN K. KHAN*

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INTRODUCTION

As of 2017, approximately eighty-one percent of adult Americans believe that cannabis¹ has “valid medical uses.”² Only twelve percent believe that individuals who use marijuana “should be treated like criminals.”³ According to a survey conducted by the Pew Research Center published in 2018, sixty-two percent of Americans believe marijuana should be legalized.⁴ In 2000, similar studies showed that only thirty-one percent believed marijuana should be legalized at that time.⁵

Reports show that legal marijuana businesses are growing and booming.⁶ Marijuana sales alone in 2017 in the U.S. amounted to nine billion dollars.⁷ More than nine thousand businesses have marijuana licenses.⁸ Furthermore, the legal marijuana industry provides employment for more than 121,000 individuals.⁹ Marijuana stocks are booming.¹⁰ Some compare the marijuana industry to the tech giant Apple.¹¹ Professor Adrian Ohmer posits that “[c]annabis ‘is America’s biggest [cash crop]’ and is ripe for

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1. Mary Barna Bridgeman & Daniel T. Abazia, *Medicinal Cannabis: History, Pharmacology, and Implications for the Acute Care Setting*, PHARMACY & THERAPEUTICS, 180, 180 (2017) (“Cannabis is a plant-based, or botanical, product with origins tracing back to the ancient world. Evidence suggesting its use more than 5,000 years ago in what is now Romania has been described extensively.”).

2. Jonathan Easley, *Poll Finds Support for Marijuana Legalization*, THE HILL (Aug. 02, 2017, 5:06 PM), <https://thehill.com/homenews/345028-poll-finds-support-for-marijuana-legalization>.

3. *Percentage of U.S. Adults that Agree with Select Statement Regarding Their Attitudes Towards Cannabis as of 2017*, STATISTA, <https://www.statista.com/statistics/765686/us-adult-attitudes-towards-cannabis-reform-and-usage/> (last visited Sept. 26, 2018).

4. Hannah Hartig & Abigail Geiger, *About Six-in-Ten Americans Support Marijuana Legalization*, PEW RES. CTR.: FACT TANK (Oct. 8, 2018), <http://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/>.

5. *Id.*

6. Aaron Smith, *The U.S. Legal Marijuana Industry Is Booming*, CNN: MONEY (Jan. 31, 2018, 4:03 PM), <http://money.cnn.com/2018/01/31/news/marijuana-state-of-the-union/>.

7. *Id.*

8. *Id.*

9. *Id.*

10. Nir Kaissar, *High Times for Marijuana Stocks*, BLOOMBERG: OPINION (Mar. 1, 2018, 6:30 AM), <http://www.bloomberg.com/gadfly/articles/2018-03-01/marijuana-stocks-are-already-too-strong-for-growth-investors>. (last visited Sept. 26, 2018).

11. Jana Kasperkevic, *Medical Marijuana: As Profitable as Apple Stores, but Only for High Rollers*, GUARDIAN: BUS. (Oct. 29, 2014, 8:00 AM), <http://www.theguardian.com/business/2014/oct/29/medical-marijuana-business-new-york>.

investment opportunity.”¹² Some refer to the emerging marijuana industry as the “green gold.”¹³ States are collecting tens of millions of dollars in tax revenue from the legal marijuana industry.¹⁴ Marijuana is the world’s biggest cash crop.¹⁵

The Federal Government has not legalized the use or possession of marijuana, either for medicinal or recreational purposes.¹⁶ The Controlled Substances Act (“CSA”) still criminalizes the use of marijuana and treats marijuana like any other controlled narcotic like cocaine.¹⁷ Even so, beginning with California in 1996, thirty-three states, the District of Columbia (“D.C.”), Guam, and Puerto Rico have legalized the use of medical marijuana as of 2019.¹⁸ To date the U.S. Food and Drug Administration

12. Adrian A. Ohmer, *Investing in Cannabis: Inconsistent Government Regulation and Constraints on Capital*, 3 MICH. J. PRIVATE EQUITY & VENTURE CAP. L. 97, 97 (2013); see also Jeff Desjardins, *The World’s Most Valuable Cash Crop*, VISUAL CAPITALIST (Nov. 10, 2014, 6:15 PM), <http://www.visualcapitalist.com/the-worlds-most-valuable-cash-crop/>.

13. *Green Gold: California’s New Cash Crop*, MILKEN INST. (July 13, 2017), <https://www.milkeninstitute.org/videos/view/green-gold-californias-new-cash-crop>.

14. Andrew DePietro, *Here’s How Much Money States Are Raking in from Legal Marijuana*, FORBES (May 4, 2018, 3:13 PM), <http://www.forbes.com/sites/andrewdepietro/2018/05/04/how-much-money-states-make-cannabis-sales/#6bd60894f181>.

15. Ariel Schwartz, *Marijuana Is the World’s Most Lucrative Cash Crop*, FAST CO. (Nov. 20, 2014), <https://www.fastcompany.com/3038209/marijuana-is-the-worlds-most-lucrative-cash-crop>.

16. See 21 U.S.C. §§ 841–844a (2012).

17. *Id.*; see also STATES Act, S. 18725, 115th Cong. (2018), <https://www.warren.senate.gov/imo/media/doc/2018.06.05%20-%20warren-gardner%20STATES%20Act.pdf>. See Morgan Gstalter, *Schumer Unveils Bill to Decriminalize Marijuana*, THE HILL (June 28, 2018, 7:36 AM), <http://thehill.com/homenews/senate/394562-schumer-unveils-bill-to-decriminalize-marijuana>. In June 2018, Senate Democrats, led by Senate Minority Leader Charles Schumer (D-N.Y.), introduced a bill that would remove marijuana from the list of controlled substances under the CSA and would essentially allow states to decide how to regulate marijuana possession and use. Senators Cory Gardner (R-CO) and Elizabeth Warren (D-MA) introduced a bi-partisan bill that would amend the CSA and allow states to regulate marijuana use and possession, removing the threat of federal prosecution. S. 18725. “Sen. Cory Gardner (R-Colo.) said . . . that President Trump has assured him that he will support legislation that would protect against federal interference in state marijuana laws.” Max Greenwood, *GOP Senator Says Trump Agreed to Deal on Marijuana Legalization*, THE HILL (Apr. 13, 2018, 2:49 PM), <http://thehill.com/homenews/senate/383068-gop-senator-says-trump-agreed-to-deal-on-marijuana-legalization>. However, a Department of Justice memo issued on January 4, 2018, by Attorney General Jeff Sessions rescinded prior memos on marijuana law enforcement and renewed the call to uphold the provisions of the CSA in relation to the cultivation, possession and distribution of marijuana. Memorandum from Attorney Gen. Jefferson B. Sessions to all U.S. Attorneys (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>. In March 2018, Attorney General Jeff Sessions suggested that federal prosecutors will not pursue “small marijuana cases.” *Jeff Sessions Says Prosecutors Won’t Pursue “Small Marijuana Cases”*, CBS NEWS (Mar. 10, 2018, 12:34 PM), <http://www.cbsnews.com/news/jeff-sessions-doj-prosecutors-will-not-pursue-small-marijuana-cases/>.

18. Nat’l Conf. State Legs., *State Medical Marijuana Laws* (Nov. 8, 2018), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

(“FDA”) has not recognized marijuana as a medicine.¹⁹ Most of the states legalized the use of marijuana for medical purposes.²⁰ As of 2018, there are approximately 2.1 million medical marijuana patients in the United States.²¹ Although the exact number varies, most studies find that a majority of physicians support medical marijuana.²² Some states permit recreational use.²³ It appears that there is a trend to continued legalization by states.²⁴

Apart from questions regarding who can cultivate, purchase, and sell marijuana products, many legal issues arise regarding the medical use of marijuana in the workplace.²⁵ For instance, how do employers with drug use and screening policies adjust to the legalization of marijuana?²⁶ Are employers required to permit the use of medical marijuana by an employee or face a disability lawsuit by the employee?²⁷ Could an employer refuse to hire a potential employee who has disclosed the use of medical marijuana?²⁸ These are some of the many legal issues facing employers today. Although it may initially appear grim, employers do have extensive protections, and could also adjust policies to keep up with the new marijuana legislations.²⁹

19. Nat'l. Inst. Drug Abuse, *Marijuana as Medicine*, NIH: DRUGFACTS (June 27, 2018), <https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine>. *But see* BERTHA K. MADRAS, UPDATE OF CANNABIS AND ITS MEDICAL USE (2015), http://www.who.int/medicines/access/controlled-substances/6_2_cannabis_update.pdf; Paul Fassa, *World Health Organization Moving Towards Recommending Cannabis for Medical Purposes*, HEALTH IMPACT NEWS (Apr. 11, 2018), <https://healthimpactnews.com/2018/world-health-organization-moving-towards-recommending-cannabis-for-medical-purposes/>. The World Health Organization is considering reclassifying marijuana and recognizes health benefits to medical marijuana use. *Id.*

20. *State Medical Marijuana Laws*, *supra* note 18.

21. *Number of Legal Medical Marijuana Patients*, PROCON.ORG (May 18, 2018, 11:28 AM), <https://medicalmarijuana.procon.org/view.resource.php?resourceID=005889>.

22. Michelle Castillo, *Survey: 76 Percent of Doctors Approve of Medical Marijuana Use*, CBS NEWS (May 31, 2013, 3:29 PM), <http://www.cbsnews.com/news/survey-76-percent-of-doctors-approve-of-medical-marijuana-use/>; R. Scott Rappold, *Legalize Marijuana, Doctors Say in Survey*, WEBMD (April 2, 2014), <https://www.webmd.com/pain-management/news/20140225/webmd-marijuana-survey-web#1>; Eve Ripley, *More Than 7 of 10 Doctors in New York Support Medical Marijuana, Study Finds*, MED. MARIJUANA, INC. NEWS (Apr. 25, 2018); <https://news.medicalmarijuanainc.com/doctors-support-medical-marijuana/>.

23. *See infra* Section III.

24. Linley Sanders, *Marijuana Legalization 2018: Which States Might Consider Cannabis Laws This Year?*, NEWSWEEK (Jan. 2, 2018, 8:00 AM), <http://www.newsweek.com/marijuana-legalization-2018-which-states-will-consider-cannabis-laws-year-755282>.

25. *See sources cited infra* note 39.

26. *See generally* Stacy Hickox, *It's Time to Rein in Employer Drug Testing*, 11 HARV. L. & POL'Y REV. 419 (2017).

27. *See* *Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37 (Mass. 2017) (holding that medical marijuana user employees may assert a claim for handicap discrimination). *See also* discussion *infra* Section II(B)(2).

28. *See* *Noffsinger v. SSC Niantic Operating Co.*, 273 F. Supp. 3d 326 (D. Conn. 2017) (holding that refusing to hire a medical marijuana user after she failed a pre-employment drug test violates state medical marijuana law). *See also* discussion *infra* Section II(B)(2).

29. *Noffsinger*, 273 F. Supp. 3d at 326.

Part I of this article provides an overview of the latest marijuana laws in the United States for both medical and recreational purposes. Part II examines some of the key medical marijuana statutes and cases to inform employers of potential legal obligations to employees who use medical marijuana. Part III of this article briefly examines an employer's obligations to employees who use recreational marijuana. Part IV recommends concrete actions and policies that employers could adopt to avoid liability to employees. And, finally, part V reviews where other industrial nations stand in relation to marijuana legalization.

I. HISTORY OF MARIJUANA LAWS IN THE U.S.

A. Federal Laws

The Marihuana Tax Act of 1937 ("Tax Act") was the first attempt by Congress to regulate marijuana in the form of taxes.³⁰ The Tax Act taxed every aspect of marijuana businesses including importation, transfer, use, possession, and cultivation.³¹ The purpose of the Tax Act was to discourage the use of marijuana.³² In 1969, the U.S. Supreme Court held that the Tax Act was unconstitutional.³³ Congress again tried to further regulate marijuana and other illicit drugs through the Boggs Act of 1952 and the Narcotics Control Act of 1956, which, for the most part, instituted mandatory sentences for illicit drug use and possession, including marijuana.³⁴

The next and latest federal law regulating and prohibiting the possession and use of marijuana was in 1970 through the Comprehensive Drug Abuse Prevention and Control Act ("Drug Control Act").³⁵ The purpose of the Drug Control Act was to protect the health and welfare of Americans by reducing and preventing the use of harmful narcotics.³⁶ The Drug Control Act included the Controlled Substances Act ("CSA").³⁷

The CSA categorized controlled substances into five schedules based on "their potential for abuse, accepted medical use, and a lack of accepted safety."³⁸ Marijuana was classified as a Schedule I narcotic, considered under the CSA to have no medical value, the highest potential for abuse, and

30. Helia Garrido Hull, *Lost in the Weeds of Pot Law: The Role of Legal Ethics in the Movement to Legalize Marijuana*, 119 PA. ST. L. REV. 333, 337 (2014) (citing Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (repealed 1970)).

31. *Id.*

32. *Id.*

33. *Leary v. United States*, 395 U.S. 6 (1969).

34. Patricia D. Smith & Andrew P. Lannon, *Local Regulation of Medical Marijuana in Florida*, FLA. B.J., 59, 59 (Nov. 2017). *See also* Narcotics Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567; Boggs Act of 1952, Pub. L. No. 82-255, 65 Stat. 767.

35. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 801 (2012)).

36. pmb., 84 Stat. at 1236.

37. *Id.* at § 100, 84 Stat. at 1242.

38. 21 U.S.C. § 812(b) (2012).

lacked accepted safety.³⁹ Marijuana shares this Schedule I classification with heroin and lysergic acid diethylamide (“LSD”), along with other dangerous drugs.⁴⁰ Schedule I drugs cannot be prescribed under federal law and the CSA “prohibits the cultivation, distribution, and possession of marijuana for any reason other than to engage in federally approved research.”⁴¹

The CSA has controlled the way the United States deals with drugs for more than forty years.⁴² In doing so, it has held marijuana hostage in its Schedule I classification.⁴³ Since its birth, the CSA has been the driving force behind the changes in the drug policy of the United States. According to marijuana law expert Professor Alex Kreit:

Since the law’s enactment, drug policy in the United States has experienced significant changes. In the 1980s and 1990s, we saw the rise of the war on drugs and the development of drug quantity-based mandatory minimum sentencing. Since the mid-1990s, the states and the federal government have battled over medical marijuana. There has been a rich and lively debate about each of these issues and many others—from the impact of drug enforcement on the Fourth Amendment to the link between race and the drug war.⁴⁴

B. State Laws

All states have legislations addressing marijuana use in their jurisdictions.⁴⁵ Currently, thirty-three states⁴⁶ and D.C. have legalized

39. 21 U.S.C. § 812(c) (2012); § 202(b)–(c), 84 Stat. at 1247–49. *See also* Jasen B. Talise, *Take the Gatekeepers to Court: How Marijuana Research Under A Biased Federal Monopoly Obstructs the Science-Based Path to Legalization*, 47 SW. L. REV. 449, 452–53 (2018) (“Professor Alex Kreit, an expert on marijuana law, offers one major critique to this categorical approach to drug legislation, namely, a resulting ‘schedule first, study later’ mentality wherein a drug with a demonstrated potential for medical value like marijuana can be placed in Schedule I without any prior opportunity to prove it does not belong there in the first place.”).

40. 21 U.S.C. § 812(c); § 202 (c), 84 Stat. at 1248–49.

41. Hull, *supra* note 30, at 338–39.

42. Alex Kreit, *Controlled Substances, Uncontrolled Law*, 6 ALB. GOV’T L. REV. 332, 333 (2013).

43. *Id.*

44. *Id.*

45. *See infra* notes 46 & 47.

46. As of 2019, medical marijuana states are: Alaska in 1998; Arizona in 2010; Arkansas in 2016; California in 1996; Colorado in 2000; Connecticut in 2012; Delaware in 2011; Florida in 2016; Georgia in 2016; Hawaii in 2000; Illinois in 2013; Louisiana in 2016; Maryland in 2014; Massachusetts in 2012; Michigan in 2008; Minnesota in 2014; Missouri in 2018; Montana in 2004; Nevada in 2000; New Hampshire in 2013; New Jersey in 2010; New York in 2014; North Dakota in 2016; Ohio in 2016; Oklahoma in 2018; Oregon in 1998; Pennsylvania in 2016; Rhode Island in 2006; Utah in 2018; Vermont in 2004; Washington in 1998; West Virginia in 2007; and the District of Columbia in 2010. ALASKA STAT. §§ 17.37.010 to 17.37.080 (2018); ARIZ. REV. STAT. ANN. §§ 36-2801 to 36-2819 (West

medical marijuana, and ten states and D.C. have legalized recreational marijuana.⁴⁷ This is despite federal law which still classifies marijuana as a Schedule I drug, thus making it illegal.⁴⁸ Theoretically, states should be able to do this because the Tenth Amendment prohibits the federal government from forcing states into adopting or following certain federal laws.⁴⁹ However, that argument has largely failed under the Supremacy Clause and even a Commerce Clause analysis.⁵⁰ Some courts have ruled that the CSA does not occupy the field and that it is within the states' police powers to promulgate laws to regulate marijuana.⁵¹ However, the federal government is not rendered powerless over the current situation.⁵²

2018); ARK. CONST. amend. XCVIII, § 1; CAL. HEALTH & SAFETY CODE §§ 11362.5 and 11362.7 to 11362.83 (West 2018); COLO. REV. STAT. §§ 12-43.3-101 to 12-43.3-106, 18-18-406.3, & 25-1.5-106 (2018); CONN. GEN. STAT. §§ 21a-408 to 21a-414 (2018); DEL. CODE ANN. tit. 16, §§ 4901A to 4926A (2018); FLA. STAT. § 381.986 (2018); GA. CODE ANN. § 16-12-190 (2018); HAW. REV. STAT. §§ 329-121 to 329-128 (2018); 410 ILL. COMP. STAT. 130/1 to /999 (2018); 2015 La. Acts 261; MD. CODE ANN. Health-Gen. §§ 13-3301 to 13-3316 (West 2018); MASS. GEN. LAWS ch. 94C App., § 1-1 (2018); MICH. COMP. LAWS §§ 333.26421 to 333.26430 (2018); Minn. Stat. §§ 152.22 to 152.37 (2018); Mo. CONST. art. XIV, § 1 (2018); MONT. CODE ANN. §§ 50-46-301 to 50-46-345 (2018); Nev. CONST. art. IV, § 38; N.H. REV. STAT. §§ 126-X:1 to 126-X:11 (2018); N.J. STAT. ANN. §§ 24:6I-1 to 24:6I-16 (West 2018); New Mexico in 2007: N.M. STAT. ANN. §§ 26-2B-1 to 26-2A-7 (West 2018); N.Y. PUB. HEALTH LAW §§ 3360 to 3369-E (McKinney 2018); N.D. CENT. CODE §§ 19-24.1-01 to 19-24.1-40 (2018); OHIO REV. CODE ANN. §§ 3796.01 to 3796.30 (West 2018); OKLA. STAT. tit. 63, §§ 420 to 426 (2018); OR. REV. STAT. §§ 475B.785 to 475B.949 (2018); 35 PA. CONS. STAT. § 10231.101 (2018); 21 R.I. GEN. LAWS §§ 21-28.6-1 to 21-28.6-17 (2018); Utah Medical Cannabis Act, H.B. 3001, 2018 3d. Spec. Sess. (Utah 2018); VT. STAT. ANN. tit. 18, §§ 4471-4474m (2018); WASH. REV. CODE §§ 69.51A.005 to 69.51A.900 (2018); W. VA. CODE §§ 16A-1-1 to 16A-16-1 (2018); D.C. CODE §§ 7-1671.01 to 7-1671.13 (2018).

47. As of 2019, recreational marijuana states are: Alaska in 2014; California in 2016; Colorado in 2012; District of Columbia in 2014; Maine in 2016; Massachusetts in 2016; Michigan in 2018; Nevada in 2016; Oregon in 2014; Vermont in 2018; and Washington in 2012. COLO. CONST. art. XVIII, § 16; ALASKA STAT. § 17.38.010-900 (2018); CAL. HEALTH & SAFETY CODE § 11362.1 (West 2018); D.C. CODE § 48-904.01 (2018); ME. REV. STAT. ANN. tit. 28-B, § 1501 (2018); MASS. GEN. LAWS ANN. ch. 94G, § 7 (West 2018); MICH. COMP. LAWS SERV. § 333.27952 (West 2018); NEV. REV. STAT. ANN. § 453D.110 (West 2017); OR. REV. STAT. § 475B.010 (2017); VT. STAT. ANN. tit. 18, § 4230a (2017); WASH. REV. CODE ANN. § 69.50.4013 (West 2018).

48. 21 U.S.C. § 812(c) (2012).

49. Angela Macdonald, *Alaska: North to the Future of Federal Marijuana Regulation*, 32 ALASKA L. REV. 349, 350 (2015).

50. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). See Matthew A. Melone, *Federal Marijuana Policy: Homage to Federalism in Form; Potemkin Federalism in Substance*, 63 WAYNE L. REV. 215, 223–25 (2018).

51. See *White Mountain Health Ctr., Inc. v. Maricopa Cty.*, 386 P.3d 416, 423–24 (Ariz. Ct. App. 2016); *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 536 (Mich. 2014).

52. *Raich*, 545 U.S. at 17. Melone, *supra* note 50, at 223–25.

II. EMPLOYERS' RIGHTS & OBLIGATIONS TO EMPLOYEES WHO USE MEDICAL MARIJUANA

A. Key Statutes

The majority of the states that allow medical marijuana use do not require an employer to accommodate an employee in the workplace who uses medical marijuana.⁵³ In some states, employers can take adverse action including suspension or termination of the employee for medical marijuana use or refusal to take a drug test.⁵⁴ In some states, the law permits the employers to make the determination whether to allow employees to use medical marijuana in the workplace.⁵⁵ Some states provide expanded protections to employers.⁵⁶

In nine states, although the employer does not need to accommodate the use of medical marijuana by an employee in the workplace, the employer is prohibited from discriminating against the employee or a new job applicant on the basis that the employee or job applicant is a registered medical marijuana user.⁵⁷

53. *See, e.g.*, ARK. CONST. amend. XCVIII, § 6(b)(2) (“This amendment does not require: . . . An employer to accommodate the ingestion of marijuana in a workplace or an employee working while under the influence of marijuana.”); COLO. CONST. art. XVIII, § 14(10)(b) (“Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place.”); ALASKA STAT. § 17.37.040(d)(1) (2018) (“Nothing in this chapter requires any accommodation of any medical use of marijuana . . . in any place of employment.”); CAL. HEALTH & SAFETY CODE § 11362.785(a) (West Supp. 2018) (“Nothing in this article shall require any accommodation of medicinal use of cannabis on the property or premises of a place of employment or during the hours of employment. . . .”); CONN. GEN. STAT. ANN. § 31-51y(b) (West Supp. 2018) (“Nothing in sections 31-51t to 31-51aa, inclusive, shall restrict an employer’s ability to prohibit the use of intoxicating substances during work hours or restrict an employer’s ability to discipline an employee for being under the influence of intoxicating substances during work hours.”).

54. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-493.05 (Supp. 2017) (“An employer may take adverse employment action based on a positive drug test or alcohol impairment test.”); OHIO REV. CODE ANN. § 3796.28 (West 2018) (“Nothing in this chapter . . . prohibits an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person’s use, possession, or distribution of medical marijuana.”).

55. *See, e.g.*, FLA. STAT. § 381.986(1)(j)(5)(c) (2018) (allowing Florida employers to determine and decide whether to allow employees to use medical marijuana in the workplace.).

56. *See, e.g.*, GA. CODE ANN. § 16-12-191(f) (2017) (“Nothing in this article shall require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in any form, or to affect the ability of an employer to have a written zero tolerance policy prohibiting the on-duty, and off-duty, use of marijuana, or prohibiting any employee from having a detectable amount of marijuana in such employee’s system while at work.”).

57. *See* ARK. CONST. amend. XCVIII, § 3(f)(3) (“An employer shall not discriminate against an applicant or employee in hiring, termination, or any term or condition of employment, or otherwise penalize an applicant or employee, based upon the applicant’s or employee’s past or present status as a qualifying patient or designated caregiver.”); CONN. GEN. STAT. ANN. § 21a-408p(3) (West Supp. 2018) (“No employer may refuse to hire a person

Employers should also be concerned with Maryland's medical marijuana law because it does not clearly address whether an employer is required to accommodate an employee's use and possession of medical marijuana in the workplace.⁵⁸ Based on a plain reading of the statute, it appears that employers may be required to accommodate such employees.⁵⁹ The Maryland statute in part states: a qualifying patient "may not be subject to arrest, prosecution, or any civil or administrative penalty, including a civil penalty or disciplinary action by a professional licensing board, or be denied any right or privilege, for the medical use of or possession of medical cannabis. . . ."⁶⁰

Similarly, employers should pay special attention to Nevada's medical marijuana legislation.⁶¹ Although Nevada does not require an employer to accommodate an employee's use of medical marijuana in the workplace, the law appears to require that the employer provide reasonable accommodations for an employee who is a medical marijuana patient.⁶² The Nevada statute in part states:

or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver."); 410 ILL. COMP. STAT. 130/40(a)(1) (2018) ("No school, employer, or landlord may refuse to enroll or lease to, or otherwise penalize, a person solely for his or her status as a registered qualifying patient or a registered designated caregiver. . . ."); ME. STAT. tit. 22, § 2423-E(2) (Supp. 2017) ("A school, employer or landlord may not refuse to enroll or employ or lease to or otherwise penalize a person solely for that person's status as a qualifying patient or a primary caregiver unless failing to do so would put the school, employer or landlord in violation of federal law or cause it to lose a federal contract or funding."); MINN. STAT. § 152.32(3)(c) (2017) ("Unless a failure to do so would violate federal law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based" on the employee's status as a registered medical marijuana user."); OKLA. STAT. ANN. tit. 63, § 425(A) (West 2018) ("No school or landlord may refuse to enroll or lease to and may not otherwise penalize a person solely for his status as a medical marijuana license holder, unless failing to do so would imminently cause the school or landlord to lose a monetary or licensing related benefit under federal law or regulations."); 35 PA. STAT. AND CONST. STAT. ANN. § 10231.2103(b)(1) (West 2018) ("No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana."); 21 R.I. GEN. LAWS § 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."); W. VA. CODE § 16A-15-4(b)(1) (2017) ("No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical cannabis.").

58. MD. CODE ANN., HEALTH-GEN. § 13-3313 (West 2018).

59. *Id.*

60. MD. CODE ANN., HEALTH-GEN. § 13-3313(a).

61. NEV. REV. STAT. § 453A.800(2) (2018).

62. *Id.*

[T]he employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card, provided that such reasonable accommodation would not: (a) Pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or (b) Prohibit the employee from fulfilling any and all of his or her job responsibilities.⁶³

Four states—Iowa, Tennessee, Virginia, and Wisconsin—provide very limited protection for medical marijuana use.⁶⁴ These states allow very limited use of cannabis oils or cannabidiol⁶⁵ for treatment of severe illnesses and diseases.⁶⁶ Tennessee is considering a bill to expand its medical marijuana use law and 2019 may be a telling year.⁶⁷ Iowa is considering expanding its medical marijuana laws, but it is unlikely to occur this year.⁶⁸ Although Virginia has not legalized medical marijuana, just this year, it expanded its medical marijuana “oil”⁶⁹ use.⁷⁰ Possession of medical marijuana is still prohibited in Virginia.⁷¹ In Wisconsin, although reports suggest that the majority of lawmakers are not ready to expand the use of medical marijuana, on November 6, 2018, voters in sixteen counties overwhelmingly supported a non-binding referendum on medical use.⁷²

63. *Id.* at § 453A.800(3) (2018).

64. IOWA CODE §§ 124E.1–19 (Supp. 2018); TENN. CODE ANN. § 39-17-402(16)(D-F) (2018); VA. CODE ANN. § 54.1-3408.3 (2018); WIS. STAT. ANN. § 961.31–32 (West Supp. 2017).

65. See Timothy E. Welty et al., *Cannabidiol: Promise and Pitfalls*, 14 EPILEPSY CURRENTS 250 (2014) (“Cannabidiol is the major nonpsychoactive component of *Cannabis sativa* (marijuana plant). Over the centuries, a number of medicinal preparations derived from *C. sativa* have been employed for a variety of disorders, including gout, rheumatism, malaria, pain, and fever.”).

66. See sources cited *supra* note 64.

67. See H.B. 0637, 111th Gen. Assemb. (Tenn. 2019) (assigned to the Mental Health & Substance Abuse Committee as of Feb. 13, 2019).

68. See Tony Leys & Brianne Pfannenstiel, *Medical Marijuana Expansion Seems Unlikely in Iowa This Year*, DES MOINES REG. (Apr. 3, 2018, 5:33 PM), <https://www.desmoinesregister.com/story/news/health/2018/04/03/medical-marijuana-expansion-seems-unlikely-iowa-year/482554002/>.

69. *HB 1251 CBD oil and THC-A Oil; Certification for Use, Dispensing*, VA.’S LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+HB1251> (last visited Sept. 27, 2018) (“Provides that a practitioner may issue a written certification for the use of cannabidiol (CBD) oil or THC-A oil for the treatment or to alleviate the symptoms of any diagnosed condition or disease determined by the practitioner to benefit from such use. Under current law, “a practitioner may only issue such certification for the treatment or to alleviate the symptoms of intractable epilepsy.”).

70. See *id.*

71. H.B. 1251, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

72. Kyle Jaeger, *Almost Half of Wisconsin Voters Will See Marijuana Ballot Questions in November*, MARIJUANA MOMENT: POL. (Aug. 29, 2018), <https://www.marijuanamoment.net/almost-half-of-wisconsin-voters-will-see-marijuana-ballot-questions-in-november/>;

B. Key Cases

1. In Favor of the Employer

Employers have largely been successful in defending claims from employees who were terminated or disciplined for use of medical marijuana.⁷³ *Federal preemption* has been the most effective defense raised by employers.⁷⁴ In *Coats v. Dish Network, LLC*,⁷⁵ the Supreme Court of Colorado held that employers are permitted to terminate employees for medical marijuana use because medical marijuana use is not a “lawful activity” and is still illegal under the CSA.⁷⁶ Similarly, a federal district court in New Mexico held that the CSA preempts parts of New Mexico’s medical marijuana law, and that employers do not need to accommodate medical marijuana employees.⁷⁷ Employers have been successful in defending claims of violation of the Americans with Disabilities Act⁷⁸ (“ADA”) as well.⁷⁹

Some employees argued that the CSA does not prohibit medical “use” of marijuana because it is a medical necessity.⁸⁰ However, courts have dismissed this argument as well. In a concurring opinion, Judge Kistler stated:

Doug Schneider, *Legalizing Marijuana: No Quick Action Likely in Wisconsin Despite Overwhelming Support at Polls*, GREEN BAY PRESS-GAZETTE (Nov. 7, 2018, 5:10 PM) <https://www.greenbaypressgazette.com/story/news/2018/11/07/marijuana-voters-want-pot-legal-medical-recreational-use/1888003002/>.

73. See generally Jay M. Zitter, Annotation, *Propriety of Employer’s Discharge of or Failure to Hire Employee Due to Employee’s Use of Medical Marijuana*, 57 A.L.R.6TH 285 (2010).

74. See generally Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 10 (2013).

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

76. *Id.* But see *Callaghan v. Darlington Fabrics Corp.*, C.A. No. PC-2014-5680, 2017 WL 2321181, at *14 (R.I. Super. Ct. May 23, 2017). In analyzing whether Rhode Island’s medical marijuana statute was preempted by the CSA, the court stated: “Ultimately, this Court finds the purpose of the CSA—the “illegal importation, manufacture, distribution, and possession and improper use of controlled substances”—to be quite distant from the realm of employment and anti-discrimination law.” *Id.*

77. *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225, 1230 (D.N.M. 2016), *appeal dismissed* (Mar. 25, 2016); see also *Bourgoin v. Twin Rivers Paper Co.*, 187 A.3d 10, 18–19 (Me. 2018) (discussing how the CSA supersedes Maine’s medical marijuana law, concluding “[c]ompliance with both is an impossibility”).

78. 42 U.S.C. § 12203 (2012).

79. See, e.g., *Lambdin v. Marriott Resorts Hosp. Corp.*, No. CV 16-00004 HG-KJM, 2017 WL 4079718, at *10 (D. Haw. Sept. 14, 2017) (“Defendant may prohibit the use of illegal drugs by its employees.”). See 42 U.S.C. § 12114(a) (“for the purposes of [the ADA], a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs”).

80. Miklos Pongratz, *Medical Marijuana and the Medical Necessity Defense in the Aftermath of United States v. Oakland Cannabis Buyers’ Cooperative*, 25 W. NEW ENG. L. REV. 147, 164 (2003).

[F]ederal law preempts the state employment discrimination statute to the extent that it requires defendant to accommodate plaintiff's medical marijuana use. The federal Controlled Substances Act prohibits possessing, manufacturing, dispensing, and distributing marijuana. . . . That prohibition applies even when a person possesses, manufactures, dispenses, or distributes marijuana for a medical use . . . (no medical necessity defense to prohibition against distributing marijuana; holding applies equally to other prohibited acts). Plaintiff cannot use marijuana without possessing it, and the federal prohibition on possession is inconsistent with the state requirement that defendant accommodate its use.⁸¹

Employers have also been successful in defending wrongful termination claims by arguing that termination or refusal to hire because of medical marijuana use does not contravene *public policy*.⁸² For instance, the Supreme Court of Washington stated: the Washington medical marijuana statute “and court decisions interpreting the statute do not support such a broad public policy that would remove all impediments to authorized medical marijuana use or forbid an employer from discharging an employee because she uses medical marijuana.”⁸³

2. In Favor of the Employee

One of the most recent decisions in the federal district court in Connecticut that ruled in favor of the employee is *Noffsinger v. SSC Niantic Operating Co. LLC*.⁸⁴ The plaintiff was diagnosed with and suffered from posttraumatic stress disorder (“PTSD”).⁸⁵ Her doctors prescribed medical marijuana to treat her PTSD. The plaintiff was a qualified medical marijuana patient and complied with all medical marijuana regulations in Connecticut.⁸⁶ She applied for a position with the defendant and failed a pre-employment

81. *Washburn v. Columbia Forest Prods., Inc.*, 134 P.3d 161, 166–67 (Or. 2006).

82. *Coles v. Harris Teeter, LLC*, 217 F. Supp. 3d 185, 188 (D.D.C. 2016); *Ross v. RagingWire Telecomm., Inc.*, 174 P.3d 200, 209 (Cal. 2008); *see also Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37, 50 (Mass. 2017) (“Because a competent employee has a cause of action for handicap discrimination where she is unfairly terminated for her use of medical marijuana to treat a debilitating medical condition, we see no need and no reason to recognize a separate cause of action for wrongful termination based on the violation of public policy arising from such handicap discrimination.”).

83. *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 257 P.3d 586, 596 (Wa. 2011); *see also Gersten v. Sun Pain Mgmt., P.L.L.C.*, 395 P.3d 310, 314 (Ariz. Ct. App. 2017), *review denied* (Sept. 12, 2017) (ruling Arizona medical marijuana statute does not provide a “private cause of action against” employers.).

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

85. *Id.* at 331.

86. *Id.*

drug screening test after it revealed cannabis in her blood. The defendant immediately reached out to the plaintiff and rescinded the job offer based on the positive pre-employment drug test.⁸⁷ Among other claims, the plaintiff sued the defendant for violating Connecticut's anti-discrimination provision in its medical marijuana law. Specifically, the plaintiff claimed the defendant employer violated the anti-discrimination provision which states: "No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver."⁸⁸

The defendant's primary argument that it did not violate Connecticut's medical marijuana anti-discrimination provision was that federal law preempted the state's marijuana legislation.⁸⁹ Specifically, the defendant claimed that the CSA, ADA, and the Food, Drug, and Cosmetic Act ("FDCA") preempts state law.⁹⁰ Focusing on the CSA preemption argument, the defendant claimed that since the CSA prohibits the use, sale, possession, distribution, and cultivation of marijuana, the Connecticut anti-discrimination law is at odds with federal law and that federal law controls.⁹¹ The court noted, however, that "the CSA . . . does not make it illegal to employ a marijuana user."⁹² The Court also stated that the CSA does not:

purport to regulate employment practices in any manner. It also contains a provision⁹³ that explicitly indicates that Congress did not intend for the CSA to preempt state law "unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."⁹⁴

The court agreed with the plaintiff's argument that because "the CSA does not regulate the employment relationship, the employment anti-discrimination provision . . . does not conflict with or stand as an obstacle to the CSA."⁹⁵ The court also similarly held that the ADA and FDCA did not preempt Connecticut's anti-discrimination medical marijuana law.⁹⁶ Most importantly, the court held that the anti-discrimination provision in Connecticut's medical marijuana statute provided "*a private cause of action*" against the employer.⁹⁷

87. *Id.* at 332.

88. CONN. GEN. STAT. ANN. § 21a-408p(b)(3) (West 2018).

89. *Noffsinger*, 273 F. Supp. 3d at 332–33.

90. *Id.*

91. *Id.* at 333.

92. *Id.* at 334.

93. 21 U.S.C. § 903 (2018).

94. *Noffsinger*, 273 F. Supp. 3d at 334.

95. *Id.* at 334.

96. *Id.* at 337–38.

97. *Id.* at 339–40 (emphasis added).

On September 5, 2018, in a slip opinion, the same Federal District Court Judge, Jeffrey Alker Meyer, held that the “plaintiff [wa]s entitled to judgment as a matter of law in her favor on her claim of employment discrimination” under Connecticut’s anti-discrimination provision in Connecticut’s medical marijuana statute.⁹⁸ The court also held that the plaintiff was entitled to compensatory damages, but not attorney’s fees or punitive damages.⁹⁹

Another important victory for the employee is *Barbuto v. Advantage Sales & Mktg., LLC*.¹⁰⁰ In *Barbuto*, the employee was terminated after a mandatory drug test by her employer came back positive for marijuana.¹⁰¹ The employee used medical marijuana to treat her Crohn’s disease. The employee did not use medical marijuana while at work; she used it at home.¹⁰² She sued her employer alleging handicap discrimination and wrongful termination.¹⁰³ Although the court held that Massachusetts’s medical marijuana statute did not provide an implied right to a private cause of action against employers, the court did hold that the employee established that she was a “qualified handicapped person” to state a claim for handicap discrimination.¹⁰⁴ The employer argued that no accommodation was necessary for the employee because use of medical marijuana is a federal crime. The court disagreed, and stated:

The fact that the employee’s possession of medical marijuana is in violation of Federal law does not make it per se unreasonable as an accommodation. The only person at risk of Federal criminal prosecution for her possession of medical marijuana is the employee. An employer would not be in joint possession of medical marijuana or aid and abet its possession simply by permitting an employee to continue his or her off-site use.¹⁰⁵

The court also reasoned that it:

[found] support in the marijuana act itself, which declares that patients shall not be denied “any right or privilege” on the basis of their medical marijuana use. . . . A handicapped employee in Massachusetts has a statutory “right or privilege” to reasonable accommodation. . . . If an

98. *Noffsinger v. SSC Niantic Operating Co.*, No. 3:16-CV-01938 (JAM), 2018 WL 4224075, at *2 (D. Conn. Sept. 5, 2018).

99. *Id.*

100. *Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37 (Mass. 2017).

101. *Id.* at 41.

102. *Id.*

103. *Id.*

104. *Id.* at 43–44.

105. *Id.* at 46.

employer's tolerance of an employee's use of medical marijuana were a facially unreasonable accommodation, the employee effectively would be denied this "right or privilege" solely because of the patient's use of medical marijuana.¹⁰⁶

Like Connecticut, employers in eight other states—Arkansas, Illinois, Maine, Minnesota, Oklahoma, Pennsylvania, Rhode Island, and West Virginia—should pay close attention to the *Noffsinger*, *Barbuto* and *Callaghan*¹⁰⁷ decisions. These eight states have anti-discrimination provisions identical to Connecticut where the employer is prohibited from refusing to hire, discharge, or penalize employees solely on the basis of the employee's status as a qualified medical marijuana patient.¹⁰⁸ Further, employers should pay attention to additional cases where courts have held that an employee is entitled to unemployment compensation after being terminated for medical marijuana use.¹⁰⁹

III. EMPLOYERS' OBLIGATIONS TO EMPLOYEES WHO USE RECREATIONAL MARIJUANA

As of 2018, ten states and D.C. have legalized marijuana for recreational use.¹¹⁰ The states are Alaska, California, Colorado, Maine,

106. *Id.* at 45 (citations omitted).

107. *See Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 WL 2321181, at *1 (R.I. Super. Ct. May 23, 2017). In analyzing whether Rhode Island's medical marijuana statute was preempted by the CSA, the court stated: "Ultimately, this Court finds the purpose of the CSA—the 'illegal importation, manufacture, distribution, and possession and improper use of controlled substances'—to be quite distant from the realm of employment and anti-discrimination law." *Id.* at *14.

108. *See supra* text accompanying note 57. *See also* ARK CONST. amend. XCVIII, § 3(f)(3); CONN. GEN. STAT. ANN. § 21a-408p(3) (West Supp. 2018); 410 ILL. COMP. STAT. 130/40(a)(1) (2018); ME. STAT. tit. 22, § 2423-E(2) (Supp. 2017); MINN. STAT. § 152.32(3)(c) (2017); OKLA. STAT. ANN. tit. 63, § 425(A) (West 2018); 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103(b)(1) (West 2018); 21 R.I. GEN. LAWS § 21-28.6-4(d) (2017); W. VA. CODE § 16A-15-4(b)(1) (2017).

109. *See Braska v. Challenge Mfg. Co.*, 861 N.W.2d 289, 302–03 (Mich. Ct. App. 2014) ("Claimants tested positive for marijuana and would ordinarily have been disqualified for unemployment benefits . . . ; however, because there was no evidence to suggest that the positive drug tests were caused by anything other than claimants' use of medical marijuana in accordance with the terms of the [Michigan's medical marijuana statute], the denial of the benefits constituted an improper penalty for the medical use of marijuana under [Michigan's medical marijuana law]."); *Vialpando v. Ben's Auto. Servs.*, 331 P.3d 975, 977 (N.M. Ct. App. 2014) (Employee who was terminated for use of medical marijuana was entitled to reimbursement for medical marijuana use under New Mexico's Workers Compensation Statute).

110. Jeremy Berke, *Here's Where You Can Legally Consume Marijuana in the US in 2018*, BUS. INSIDER (Nov. 7, 2018, 12:29 PM), <https://www.businessinsider.com/where-can-you-can-legally-smoke-weed-2018-1>.

Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington.¹¹¹ These states not only allow the use of recreational marijuana, but some allow for the purchase, possession, cultivation, and transportation of certain amounts by individuals who are of certain age.¹¹² As of 2018, the good news for employers is that none of the recreational use statutes require the employer to accommodate employees who use, possess, process, or transport recreational marijuana.¹¹³ This is not expected to change unless and until the federal government legalizes marijuana.

IV. WHAT SHOULD EMPLOYERS DO

If two million plus Americans are medical marijuana patients, and that number is only growing rapidly, employers need to reconsider whether a hard-and-fast ban on these patients as potential employees is a good business decision.¹¹⁴ Employers are no doubt concerned whether employing or accommodating medical marijuana employees put them in jeopardy with federal laws.¹¹⁵ However, progressive employers could plan accordingly and

111. See COLO. CONST. art. XVIII, § 16; ALASKA STAT. § 17.38.010-900 (2018); CAL. HEALTH & SAFETY CODE § 11362.1 (West 2018); D.C. CODE § 48-904.01 (2018); ME. REV. STAT. ANN. tit. 28-B, § 1501 (2018); MASS. GEN. LAWS ANN. ch. 94G, § 7 (West 2018); MICH. COMP. LAWS SERV. § 333.27952 (West 2018); NEV. REV. STAT. ANN. § 453D.110 (West 2017); OR. REV. STAT. § 475B.010 (2017); VT. STAT. ANN. tit. 18, § 4230a (2017); WASH. REV. CODE ANN. § 69.50.4013 (West 2018).

112. See recreational marijuana statutes cited *supra* note 111.

113. See, e.g., COLO. CONST. art. XVIII, § 16(6)(a) (“Nothing in this section is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.”); ALASKA STAT. § 17.38.220(a) (2018) (“Nothing in this chapter is intended to require an employer to permit or accommodate the use, consumptions, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.”); CAL. HEALTH & SAFETY CODE § 11362.45(f) (West 2018) (The recreational use of marijuana does not affect “the rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of cannabis in the workplace, or affect the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees, or prevent employers from complying with state or federal law”); D.C. CODE § 48-904.01(B)(1C) (2018) (“Nothing in this subsection shall be construed to require any District government agency or office, or any employer, to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace or to affect the ability of any such agency, office, or employer to establish and enforce policies restricting the use of marijuana by employees.”).

114. See Lisa Nagele-Piazza, *Do Employers Need to Accommodate Medical Marijuana Users?*, SHRM (July 26, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/do-employers-need-to-accommodate-medical-marijuana-users.aspx>.

115. Matthew D. Macy, *Employment Law and Medical Marijuana-An Uncertain Relationship*, 41 COLO. LAW. 57, 59 (2012).

also accommodate medical marijuana employees.¹¹⁶ Employers may want to consider a compassionate approach and still comply with federal laws.¹¹⁷ Below are some recommendations on how employers can do this.

First, employers should have a written policy regarding drug use, consumption, and possession in the workplace.¹¹⁸ In a recent survey conducted by HireRight, a background screening company, sixty-seven percent (67%) of employers indicated that they had a medical marijuana policy.¹¹⁹ That still leaves about one-third of American employers in jeopardy. “Twenty-two percent (22%) of companies polled by HireRight, which surveyed roughly 6,000 HR officers, recruiters, and managers, cited medical marijuana use as one of their biggest compliance challenges.”¹²⁰ Some employers choose to use unwritten employment policies.¹²¹ That could be problematic and could result in arbitrary enforcement and even discrimination.¹²² Some employers choose to use or adopt general drug policies that are broad, sometimes vague, and even unsuitable for the types of business that the employers are engaged in.¹²³ A written drug policy is the better practice for employers. The drug policy should comply with the state’s marijuana laws in the state(s) in which the employer operates.¹²⁴ The drug policy should outline very clear drug test requirements including pre-employment drug screening, the use, possession, or consumption of drugs within the workplace, during working hours, and even outside of the workplace.¹²⁵ The policy should also clearly state the consequences for violating any of the drug policies including any disciplinary actions, suspension, or termination.¹²⁶ The policy should also outline whether the employee has any recourses for violating the employer’s drug policy.

116. Erica E. Flores, *Accommodating Employee Use of Medical Marijuana: Barbuto v. Advantage Sales and Marketing LLC*, 99 MASS. L. REV. 72, 73 (2018).

117. *Id.*

118. Jennifer Schrack Dempsey, *The Impact of Legal Marijuana Use on the Workplace: Should Employers Hire Marijuana Users?*, 60 ADVOCATE 27, 29 (2017).

119. Amy X. Wang, *Two-Thirds of Companies Now Have a Medical Marijuana Policy*, QUARTZ (Apr. 11, 2018), <https://qz.com/work/1248966/two-thirds-of-companies-now-have-a-medical-marijuana-policy/>.

120. *Id.*

121. *Employee Handbooks: What You Need to Know*, BLR, <https://www.blr.com/HR-Employment/HR-Administration/Employee-Handbooks> (last visited Sept. 27, 2018).

122. Jessica M. Arnold, *Be Consistent When Applying Employment Policies*, N.J. EMP. L. LETTER, July 2014.

123. See generally Jeffrey D. Slanker & Michael P. Spellman, *Employee Handbooks: Valuable Guides or Ticking Time Bombs?*, TRIAL ADVOC. Q., Fall 2015, at 22.

124. See, e.g., Dena B. Calo & Jason A. Ross, *PA Medical Marijuana Statute Raises New Questions For Employers*, PA. EMP. L. LETTER, Mar. 2018 (discussing why employers in Pennsylvania need to update employment policies to comply with new medical marijuana laws.).

125. See, e.g., Peter Lowe, *Complying with Maine’s Medical Marijuana Law*, ME. EMP. L. LETTER, Jan. 2011 (discussing what employers include in their employment policies to comply with Maine’s medical marijuana laws.).

126. *Id.*

Employers should avoid creating policies without consultation with employment experts, human resources experts, and legal counsel in their jurisdiction.¹²⁷

Second, employers should consider the safety of employees and consumers by prohibiting individuals from working if they are impaired or intoxicated.¹²⁸ Businesses that require employees to perform manual labor, use and operate machinery, or operate vehicles, vessels, and the like, should establish proper policies regarding safety and prohibit impaired or intoxicated employees from working.¹²⁹ This should be the practice even if the impairment or intoxication is a result of use of any legally prescribe medication, including medical marijuana. Lacking such policy could create significant liability for employers.¹³⁰

Employers who are regulated by the Occupational Safety and Health Act of 1970 (“OSHA”)¹³¹ should be particularly concerned not to violate any of OSHA’s regulations regarding employee safety. Commonly known as OSHA’s “general duty” provision, OSHA requires each employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”¹³² The Department of Labor (“DOL”), who is charged with enforcing the OSHA regulations, similarly supports drug-free workplaces.¹³³ Similarly, employers who are regulated by the Department of Transportation (“DOT”) are required to test and screen employees for narcotics and alcohol who are in transportation related positions, or could face liability.¹³⁴

Third, consider providing accommodation for employees who use medical marijuana.¹³⁵ Employers in Nevada should verify that their drug use policy provides reasonable accommodation of employees who are medical marijuana users. Nevada’s medical marijuana law in part states:

the employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card, provided that such

127. *Id.*

128. *See, e.g.,* Robert S. Goldsmith et al., *Medical Marijuana in the Workplace: Challenges and Management Options for Occupational Physicians*, 57 J. OCCUPATIONAL & ENVTL. MED. 518, 522 (2015).

129. *See, e.g., id.* at 522–23.

130. *See* Barbara L. Johnson & Stefanee Handon, *State Employment Law Developments*, ALI CLE (Mar. 26–28, 2015).

131. 29 U.S.C. § 651 (2018).

132. 29 U.S.C. § 654(a)(1) (2018).

133. Lindsey M. Tucker, *High Stakes: How to Define “Disability” in Medical Marijuana States in Light of the Americans with Disabilities Act, Canadian Law, and the Impact on Employers*, 21 IND. INT’L & COMP. L. REV. 359, 383 (2011).

134. *See* 49 U.S.C. § 5331(b) (2018).

135. Flores, *supra* note 116, at 73.

reasonable accommodation would not: (a) Pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or (b) Prohibit the employee from fulfilling any and all of his or her job responsibilities.¹³⁶

Similarly, employers in Maryland should consider policies that would accommodate a medical marijuana user. As discussed earlier, Maryland's medical marijuana law is not clear regarding an employer's obligation to employees who are medical marijuana patients. Maryland's medical marijuana law in part states:

Any of the following persons acting in accordance with the provisions of this subtitle may not be subject to arrest, prosecution, or any civil or administrative penalty, including a civil penalty or disciplinary action by a professional licensing board, or be denied any right or privilege, for the medical use of or possession of medical cannabis. . . .¹³⁷

Additionally, given the medical marijuana trends, employers should begin to consider whether it is a good business decision to accommodate employees who are medical marijuana users.¹³⁸ It may be a better practice or would put those employers ahead of what is expected to come in future marijuana legislations.¹³⁹

Fourth, do not discriminate. As discussed earlier, employers in nine states—Arkansas, Connecticut, Illinois, Maine, Minnesota, Oklahoma, Pennsylvania, Rhode Island, and West Virginia—should review and follow the prohibition against discrimination of an employee solely based on that employee's status as a medical marijuana user.¹⁴⁰ Employers in these states

136. NEV. REV. STAT. § 453A.800(3) (2018).

137. MD. CODE ANN., HEALTH-GEN. § 13-3313(a) (West 2018).

138. Ari Lieberman & Aaron Solomon, *A Cruel Choice: Patients Forced to Decide Between Medical Marijuana and Employment*, 26 HOFSTRA LAB. & EMP. L.J. 619, 631–32 (2009).

139. See Lori A. Bowman & Jonathan S. Longino, *Taking the High Road—the Healthcare Provider's Duty to Accommodate Employees' Medical Marijuana Use*, 5 J. HEALTH & LIFE SCI. L. 34, 57–59 (2012) (Some have suggested that states that allow medical marijuana use, should amend their medical marijuana laws to prohibit employers from discriminating against medical marijuana employees and also be required to accommodate medical marijuana employees); see also Elizabeth Rodd, *Light, Smoke, and Fire: How State Law Can Provide Medical Marijuana Users Protection from Workplace Discrimination*, 55 B.C. L. REV. 1759, 1791 (2014) (“Although courts can, and should, take action to ensure that qualified patient employees who suffer adverse employment action due to their medical marijuana use can state a prima facie of disability discrimination under state law, state legislatures also ought to take action to ensure that the competing interest of employees and employers are met in the context of a medical marijuana employment discrimination claim.”).

140. See *supra* text accompanying note 57. See also ARK CONST. amend. XCVIII, § 3(f)(3); CONN. GEN. STAT. ANN. § 21a-408p(3) (West Supp. 2018); 410 ILL. COMP. STAT. 130/40(a)(1) (2018); ME. STAT. tit. 22, § 2423-E(2) (Supp. 2017); MINN. STAT. § 152.32(3)(c)

are not required to permit the use of medical marijuana in the workplace or during working hours, but could face discrimination claims as outlined earlier based on the states' medical marijuana law. It is important to note that the ADA prohibits employers from discriminating against employees because of an employees' disability.¹⁴¹ However, the ADA exempts employers from discrimination if the disabled employee is using drugs illegally.¹⁴² Federal courts have repeatedly held that use of medical marijuana is illegal drug use.¹⁴³

Fifth, employers should train employees in supervisory and managerial positions on how to deal with employees who are medical marijuana patients.¹⁴⁴ There has been longstanding stigma associated with the use of marijuana, whether for recreational or medical purposes.¹⁴⁵ Employers who choose to accommodate medical marijuana employees should ensure that these employees are treated fairly, not demonized or stigmatized.¹⁴⁶ It is purely a business judgement by employers to do this, but such a choice can provide a positive impact for medical marijuana employees, their employers and customers.¹⁴⁷

Sixth, develop a policy as to recreational marijuana use, even if it means to ban such use.¹⁴⁸ Employers still rely on the CSA which makes possession, cultivation, and distribution of marijuana a federal crime.¹⁴⁹ That is not enough. Employers need to articulate clear written policies regarding employees' use of recreational marijuana in and out of the workplace.¹⁵⁰ Such rule should be a part of any employer's drug use policy. It should dictate what is prohibited and the consequences of violating such prohibitions. Merely relying on the federal ban of marijuana should not be the only defense for employers regarding use of recreational marijuana.¹⁵¹

(2017); OKLA. STAT. ANN. tit. 63, § 425(A) (West 2018); 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103(b)(1) (West 2018); 21 R.I. GEN. LAWS § 21-28.6-4(d) (2017); W. VA. CODE § 16A-15-4(b)(1) (2017).

141. 42 U.S.C. § 12112(a) (2018).

142. 42 U.S.C. § 12114(a) (2018).

143. *James v. City of Costa Mesa*, 700 F.3d 394, 399 (9th Cir. 2012), *cert. denied*, 569 U.S. 994 (2013).

144. See Lori A. Schroth et al., *Medical Marijuana: Addressing Impairment in the Workplace*, PSJ PROF. SAFETY 36, 39 (Aug. 2018).

145. Michael Berkey, *Mary Jane's New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 417, 418 (2011).

146. See Flores, *supra* note 116, at 73–75.

147. See Berkey, *supra* note 145, at 418.

148. Hickox, *supra* note 26, at 428–29.

149. See Madison Margonlin, *Where There's Smoke, There's Fired*, THE PROGRESSIVE (Aug. 1, 2018), <https://progressive.org/magazine/where-theres-smoke-theres-fired/>.

150. Jay S. Becker & Saranne E. Weimer, *Legalization of Marijuana Raises Significant Questions and Issues for Employers*, N.J. LAW. 51, 54 (Dec. 2014).

151. See, e.g., Amy McLaughlin, *Legal Marijuana: VTAG Offers Timely Guidance to Employers*, VT. EMP. L. LETTER, July 2018 (noting how the Civil Rights Unit of the Vermont Attorney General's Office gave advice to employers on how to address Vermont's recreational marijuana use statute.).

V. MARIJUANA LAWS IN OTHER INDUSTRIAL COUNTRIES

Canada and Uruguay are the only two countries in the world that have legalized recreational marijuana use nationwide.¹⁵² Canada is the only G-7¹⁵³ nation that took this step in 2018.¹⁵⁴ The new law in Canada took effect on October 17, 2018.¹⁵⁵ Uruguay passed its law in 2013.¹⁵⁶ Reports suggest that at least ten other countries may follow Canada's recent move and legalize marijuana nationwide. These include the United States, France, Iceland, Spain, Portugal, The Netherlands, Peru, Columbia, Czech Republic, and Jamaica.¹⁵⁷ Reports also indicate that approximately thirty countries have legalized the use of medical marijuana.¹⁵⁸ There also appears to be a trend to legalization, whether for recreational or medical use among other countries.¹⁵⁹ Most recently, the World Health Organization ("WHO") has suggested that cannabis be rescheduled within the parameters of International Law.¹⁶⁰ This is an incredible change. For almost sixty years, cannabis has been labeled a narcotic drug with dangerous properties by the United Nations' Single Convention on Narcotic Drugs of 1961 ("UN Drug Convention").¹⁶¹ The WHO Expert Committee on Drug Dependence now

152. Jeremy Berke, *Canada Just Became the 2nd Country in the World to Legalize Marijuana*, BUS. INSIDER (June 20, 2018, 3:46 PM), <http://www.businessinsider.com/canada-legalizes-marijuana-first-g7-country-to-do-so-2018-6>.

153. Zachary Laub & James McBride, *The Group of Seven (G7)*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/background/group-seven-g7> (last updated May 30, 2017) ("The Group of Seven (G7) is an informal bloc of industrialized democracies—Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States—that meets annually to discuss issues such as global economic governance, international security, and energy policy.").

154. See Berke, *supra* note 152.

155. *Id.*; see Amanda Coletta, *With pot legalized, job openings surge in Canada's cannabis industry*, WASH. POST (Oct. 26, 2018), https://www.washingtonpost.com/world/2018/10/26/with-pot-legalized-job-openings-spike-canadas-cannabis-industry/?noredirect=on&utm_term=.4afa117121a8 (noting incredible growth in employment opportunities in the cannabis industry); see also Emma Hinchliffe, *Canada Nearly Runs Out of Weed After Legalization*, FORTUNE (Oct. 21, 2018), <http://fortune.com/2018/10/21/canada-runs-out-legal-weed/> (stating marijuana retailers cannot keep with demand).

156. Berke, *supra* note 152.

157. Joseph Misulonas, *10 Countries Most Likely to Legalize Marijuana After Canada*, CIVILIZED (June 8, 2018), <http://www.civilized.life/articles/countries-to-legalize-marijuana-after-canada/>.

158. Sean Williams, *These 30 Countries Have Legalized Medical Marijuana in Some Capacity*, MOTLEY FOOL (July 21, 2018, 11:41 AM), <http://www.fool.com/investing/2018/07/21/these-30-countries-have-legalized-medical-marijuan.aspx>.

159. Alice Salles, *Marijuana Legalization Quietly Goes Global*, FOUND. ECON. EDUC. (Jan. 3, 2017), <http://fee.org/articles/marijuana-legalization-quietly-goes-global/>.

160. Artistos Georgiou, *WHO Recommends Rescheduling Cannabis in International Law for First Time in History*, NEWSWEEK (Feb. 8, 2019, 12:23 PM), <https://www.newsweek.com/who-recommends-rescheduling-cannabis-international-law-first-time-history-1324613>.

161. See UNITED NATIONS, INTERNATIONAL DRUG CONTROL CONVENTIONS: SCHEDULES OF THE SINGLE CONVENTION ON NARCOTIC DRUGS OF 1961 AS AMENDED BY THE 1972 PROTOCOL 3 (May 16, 2018), <https://undocs.org/ST/CND/1/Add.1/Rev.4>.

proposes that “cannabis and cannabis resin” be removed from Schedule IV of the UN Drug Convention because of the scientific recognition of health-care therapeutic benefits of using certain cannabis products.¹⁶² It would be interesting to see if this prompts the U.S. federal government to remove cannabis from Schedule I of the CSA.

VI. CONCLUSION

It is clear that most of the states have established medical marijuana laws.¹⁶³ The majority of Americans believe that medical marijuana is a legitimate medicine, and also believe marijuana should be legalized.¹⁶⁴ That is not likely to happen until the CSA is amended to remove marijuana as a Schedule I illegal substance.¹⁶⁵ Given the current political climate such a change to the CSA is unlikely in the near future.¹⁶⁶ Medical marijuana patients are growing in numbers.¹⁶⁷ They are Americans, and they want to be employed.¹⁶⁸ Employers have been largely successful in defending claims of failure to hire, termination, or other disciplinary actions against medical marijuana users.¹⁶⁹ However, given some recent cases, and the growing number of states legalizing marijuana for medical treatment and recreational use, employers should begin to reexamine their employment policies to accommodate at least medical marijuana employees, or it may be too late.¹⁷⁰

162. See Georgiou, *supra* note 160.

163. See *supra* Section II.

164. See Hartig, *supra* note 4.

165. See sources cited *supra* note 17.

166. See Emily Birnbaum, *Warren: If Democrats Take Senate, They'll Vote on Marijuana Bill*, THE HILL (Aug. 29, 2018), <http://thehill.com/homenews/senate/404155-warren-if-democrats-take-senate-theyll-vote-on-marijuana-bill> (explaining that, although the Department of Justice and Former Attorney General Jeff Sessions appear to be more aggressive in marijuana prosecutions, Sen. Elizabeth Warren (D-Ma.) believes that the if Democrats take back the Senate in November 2018, that there would be a vote to remove marijuana from the CSA, essentially legalizing marijuana at the federal level); see also Greenwood, *supra* note 17 (“Sen. Cory Gardner (R-Colo.) said . . . that President Trump has assured him that he will support legislation that would protect against federal interference in state marijuana laws.”).

167. See PROCON.ORG, *supra* note 21.

168. See Kate Malongowski, *Can Employers Discriminate Against Certified Medical Marijuana Users?*, THE TIMES (Beaver Cty., Penn.) (Apr. 30, 2018, 3:38 PM), <http://www.timesonline.com/news/20180430/can-employers-discriminate-against-certified-medical-marijuana-users>.

169. See *supra* Section II(B)(1).

170. See *supra* Section IV.