



ATTORNEYS AT LAW

# Medical Marijuana and Employer Drug Testing

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# Outline

- Drug testing
  - Drug testing as a subject of bargaining
  - Federal and state drug testing laws
  - Who may pay for drug testing programs?
  - Privacy considerations
- Medical marijuana
  - Overview of marijuana laws
  - Disability discrimination

# Drug Testing



# Drug Testing

- Employers implement drug testing policies to, among other things:
  - Ensure productive workers
  - Protect other employees and customers
  - Mitigate health care costs
- Whether a drug testing policy is legal is a complex question, depending on labor law, federal and state drug testing laws, and anti-discrimination laws.



## Drug Testing as a Subject of Bargaining

- An issue arises when an employer wishes to implement a new drug testing policy or change an existing policy.
- Unless the CBA already provides for the implementation or change, the employer must determine whether it is subject to bargaining.



# Drug Testing as a Subject of Bargaining

- Whether bargaining is mandatory or permissive depends to which individual the policy applies:
  - Employees
    - Mandatory- policy affects the employees' terms and conditions of employment.
  - Hiring Hall Registrants
    - Mandatory- in the construction industry, which often has intermittent employment, the NLRB may treat such individuals as employees.
  - Applicants
    - Permissive- ordinary applicants are not considered to be employees.



# Standard Form of Union Agreement

## Article XII, Section 2.

The parties are committed to maintaining a workplace that is safe, productive, and free of alcohol and illegal drugs. Therefore, they shall establish a substance abuse program which will include, as a minimum, the following components: owner mandated, reasonable suspicion, post accident, and random drug and alcohol testing. In the case of random testing, the procedures shall be established and administered in a manner so that such testing is conducted in a manner that is truly random. Any testing program shall be conducted on an industry wide basis, and in conformity with all applicable laws. The parties shall establish an appropriate means of funding such testing activities on an industry wide basis.



# Drug Testing Laws

- There are five general situations where an employer might want to subject an individual to drug testing:
  - Pre-employment
  - Post-accident
  - Random testing
  - Reasonable suspicion
  - Return to duty- Post-treatment
- There is no general federal law addressing drug testing.
  - Specific industries may be required to test employees (aviation, railroad, transportation, etc.).
- 31 states have drug testing laws.





# State Drug Testing Laws

- Of the states that have drug testing laws, there is great variation.
- Some are limited, only applying to certain types of employee (such as public employees).
- Some are broad, addressing drug testing in each of the five aforementioned situations.
- Some mandate drug testing, while others severely restrict it, depending on the type of drug test.
  - Limited random testing, for example.
- Four states (Minnesota, Maine, Rhode Island, Vermont) even go so far as to restrict the ability of an employer to terminate an employee for failing a drug test for the first time.
  - These statutes usually require the employer to first allow an employee to participate in a rehabilitation program, and allow termination if the employee refuses to participate or fails to complete the program.



# State Drug Testing Laws

- To give an idea of what a state drug testing statute might cover, Minnesota's statute addresses the following:
  - Whether drug testing is required, permissible or prohibited;
  - What types of individuals may be tested;
  - What information must be contained within the policy;
  - What notice of the policy must be given;
  - What types of tests (random, routine, etc.) are allowed;
  - What licensure or accreditation of the lab is required;
  - Whether the employer may conduct the drug testing;
  - Who must pay for the test;
  - What the chain-of-custody procedures are;
  - Whether the employee may appeal the test result;
  - Whether the employee has access to the results;
  - Whether a first-time offender may be terminated;
  - Whether the results are confidential;
  - Whether the statute affects policies implemented by a CBA.



# Factors to Consider in Drafting a Drug Testing Policy

- Which employees may be tested?
- When may testing be conducted?
- What kind of testing may be done (blood, urine, etc.)?
- What drugs may be tested for?
- What level will result in a failed test?
- Who may perform the test?
- Who may receive the results?
- What are the effects of a failed test?
- What rights does an employee have to contest a failed test?
- Does the employer have an employee assistance program for rehabilitation/counseling?



# Who May Pay for Drug Testing?

- Beyond having an employer or employee (if allowed by law) pay for the drug test, there are five other possible entities:
  - Local Health & Welfare Fund
    - CBA should provide for it
    - Could affect tax-exempt status, depending on how it is structured
  - Joint Apprenticeship and Training Fund
    - Could be politically tricky
    - Makes more sense for applicants
  - Industry Fund
    - Could affect tax-exempt status, depending on how it is structured
  - SMACNA Chapter
    - Could affect tax-exempt status, depending on how it is structured
    - May be more appropriate than Fund
  - Separate Specific Entity
    - Might be preferable so as not to jeopardize exempt status of other entities



## Privacy Considerations

- Some state drug testing laws treat the results of a drug test as confidential information and limit the ability of the employer to disclose it.
- Federal law (HIPAA) and state counterparts would likely require the employee to authorize the testing entity to disclose the results to the employer.

# Medical Marijuana



# What is Marijuana?

- Broadly speaking, marijuana is a plant, parts of which contain the psychoactive drug THC.
- Generally smoked or ingested.
- Acts as a muscle relaxant and may impair short-term memory, impair motor coordination, alter judgment, and cause paranoia and psychosis.



# What is Marijuana?

- Under federal law, marijuana is:
  - 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, sale, derivative, mixture, or preparation of such plant, its seeds, or resin.





# Testing

- How is marijuana tested for?
  - Marijuana can be detected in urine, hair, saliva, and blood.
  - The most common test is urine, but does not actually test for THC but for its metabolite: THC-COOH.
  - Hair, saliva, and blood tests test for THC itself.
  - These tests do not establish intoxication, but merely check for THC levels. The presence of THC does not always establish intoxication with much reliability.



# Federal Law

- Under federal law, marijuana is classified as a Schedule 1 substance, meaning:
  - It has a high potential for abuse
  - It has no currently accepted medical use in treatment in the United States
  - There is a lack of accepted safety for use of the drug under medical supervision
- As a result, it is illegal under federal law to possess or manufacture marijuana.
- Under the Obama administration, federal prosecutors have been instructed to exercise discretion in deciding whether or not to charge individuals possessing small amounts of medically-purposes marijuana.



# State Legalization

- Despite being illegal under federal law, states in recent years have been legalizing marijuana in several different ways.
  - 4 states (Alaska, Colorado, Oregon, and Washington) and the District of Columbia have legalized recreational marijuana.
  - 24 states, the District of Columbia, and Guam have comprehensive medical marijuana laws.
    - These laws allow protection from criminal penalties, and may allow individuals to grow or purchase legal medical marijuana.
  - 17 additional states have limited laws allowing the use of low THC, high cannabidiol products for medical reasons.
    - These are non-psychoactive.
    - Most, but not all, provide protection from criminal penalties.
    - Some are very restricted, only allowing a particular university to dispense the drug



# How Do Comprehensive Medical Marijuana Programs Work?

- A patient must have a qualifying health condition
- Varying significantly from state to state, only certain medical conditions qualify for medical marijuana use, potentially including: cancer, glaucoma, HIV, AIDS, Hepatitis C, Crohn's, Alzheimer's, PTSD, epilepsy, rheumatoid arthritis, multiple sclerosis, lupus, Parkinson's, Tourette's, traumatic brain injury, fibromyalgia, ALS, muscular dystrophy, anorexia.
- The patient must usually then apply to the statewide registry (with a physician certification).
- Upon approval and receipt of the registry card, the patient will be able to purchase from a clinic or dispensary, or (in around half the states) grow his or her own marijuana at home.



# How Popular is Medical Marijuana?

- According to an estimate by a pro-medical marijuana group based on registry numbers in early 2016, almost 1.5 million Americans are able to legally use medical marijuana, accounting for an average of 9 out of every 1,000 people in those respective states (plus D.C.).
- Roughly half of these users are found in California (750,000), with Colorado (107,000), Arizona (87,000), Michigan (182,000), and Oregon (77,000) having significant numbers as well.



## Disability Discrimination

- Because medical marijuana is taken to alleviate a medical condition, an employee might argue that they are: (1) entitled to an accommodation to use medical marijuana; or (2) may not be terminated or disciplined for medical marijuana use.
- These claims implicate both federal and state law.



## Disability Discrimination- Federal

- Under the federal Americans with Disabilities Act, an employer may not discriminate on the basis of disability, and must provide a reasonable accommodation for the disability unless it would impose an undue hardship.
- However, the ADA specifies that an “individual with a disability” does not include “an individual who is currently engaging the illegal use of drugs, when the [employer] acts on the basis of such use.”



## Disability Discrimination- Federal

- Even though medical marijuana is legal under many states' laws, it is still illegal under federal law.
- Several federal courts have thus concluded that medical marijuana use is an “illegal use of drugs” and therefore not protected by the ADA.
- However, an employer could still be liable for termination or rejecting an applicant if the marijuana use was a mere “pretext” for discrimination against the underlying disability.





## Disability Discrimination- Federal

- In *EEOC v. Pines of Clarkston*, 2015 U.S. Dist. LEXIS 55926 (E.D. Mich. Apr. 29, 2015), an assisted living facility refused to employ a nursing administrator after she tested positive for marijuana used to treat epilepsy.
- The employer had not made it clear to the candidate that the reason employment was refused was because of the failed drug test, and made comments about the candidate's ability to perform the job due to her epilepsy.
- The employer's comments raised the question of whether the candidate was rejected because of the positive drug test or because of the disability.
- The court denied the employer's motion for summary judgment, finding that the use of marijuana is not itself a disability, but using positive drug tests to screen out disabled job applicants violates the ADA.



# Disability Discrimination- State

- For the 24 states (plus D.C. and Guam) that have legalized medical marijuana, there are varying approaches to the extent, if any, that medical marijuana usage qualifies for anti-discrimination protection.
- There are five general categories of approaches in the statutes:
  - Prohibits discrimination and protects employees with a failed drug test, but does not protect on-site use or intoxication.
  - Prohibits discrimination, but does not protect on-site use or intoxication.
  - Prohibits discrimination on the basis of one's status as a permit holder, but allows for termination or discipline for a positive test.
  - Does not address discrimination but rejects the proposition that an employer must accommodate certain uses.
  - Does not directly address the employment issue.



## **Prohibits discrimination and protects employees with a failed drug, but does not protect on-site use or intoxication.**

- Includes Arizona, Delaware, and Minnesota
- Sample provision (Delaware):
  - “Unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal 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 upon either of the following:
    - a. The person's status as a cardholder; or
    - b. A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment.”



## **Prohibits discrimination, but does not protect on-site use or intoxication.**

- Includes Connecticut, Maine, New York, Nevada, Pennsylvania, and Rhode Island.
- While similar to the previous statutes in that they prohibit discrimination but do not protect on-site use or intoxication, these statutes do not consider what an employer may do upon a drug test failed due to medical marijuana. It is unclear if employees would be protected in the event of a failed drug test for use at home (showing up to work with non-intoxicating amounts of THC or its metabolites).
- Sample provision (Connecticut):
  - “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 under [the medical marijuana statute]. Nothing in this subdivision shall restrict an employer’s ability to prohibit the use of intoxicating substances during work or hours or restrict an employer’s ability to discipline an employee for being under the influence of intoxicating substances during work hours.”



## **Prohibits discrimination on the basis of one's status as a permit holder, but allows for termination or discipline for a positive test.**

- Includes Illinois.
- This statute is somewhat peculiar because it prohibits discrimination, but nonetheless expressly allows an employer to terminate an employee for a failed drug test.
- Sample provision (Illinois):
  - No employer may penalize a person “solely for his or her status as a registered qualifying patient or a registered designated caregiver, unless failing to do so would put the school, employer, or landlord in violation of federal law or unless failing to do so would cause it to lose a monetary or licensing-related benefit under federal law or rules. . . .
  - (b) Nothing in this Act shall prohibit an employer from enforcing a policy concerning drug testing, zero-tolerance, or a drug free workplace provided the policy is applied in a nondiscriminatory manner.”



## **Does not address discrimination but rejects the proposition that an employer must accommodate certain uses.**

- Includes Alaska, California, Colorado, Hawaii, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, Oregon, and Washington.
- These statutes do not have express anti-discrimination provisions but expressly provide that an employer need not accommodate the certain uses of marijuana.
- Some only provide that an employer need not accommodate “on-site use,” while others provide that the others need not accommodate “use” more generally.
  - Michigan: “Nothing in this act shall be construed to require . . . An employer to accommodate the ingestion of marijuana in any workplace or any employee working while under the influence of marihuana.”
  - Oregon: “Nothing in [the medical marijuana statute] requires: . . . An employer to accommodate the medical use of marijuana in the workplace.”
- While arguably the general disability discrimination law of the state could provide protection, the supreme courts of California, Colorado, Montana, and Oregon (whose statutes address accommodation more generally), as well as Washington (statute only addresses accommodations for on-site use) have held that an employer may nonetheless terminate an employee for using medical marijuana/testing positive for marijuana.



## **Does not directly address the discrimination/accommodation issue.**

- Includes D.C., Guam., Maryland, New Mexico, and Vermont.
- These statutes do not discuss the intersection between medical marijuana use and disability discrimination/accommodation.
- Some statutes do not address employment at all. Others provide that an employee may be subject to criminal or civil penalties for ingesting marijuana at the workplace or showing up to work intoxicated, thereby implying that an employer need not accommodate such uses.
  - Vermont: “This subchapter shall not exempt any person from arrest or prosecution for: Being under the influence of marijuana while . . . in a workplace or place of employment.”



## Conclusions

- Drug testing statutes and medical marijuana statutes vary significantly from state to state.
- It is unlikely that any state would require an employer to accommodate on-site use of medical marijuana (containing THC) or on-site intoxication.
- As to whether an employee may be discipline or terminated (or whether an applicant may be rejected) for a positive test for medical marijuana, the answer will vary from state to state. Contact local counsel for more information on your state's laws.



# Questions?

# **Medical Marijuana and Employer Drug Testing**

**Sheet Metal & Air Conditioning Contractors' National Association**

**2016 June Council of Chapter Representatives**

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## **I. DRUG TESTING**

The legality of a drug testing policy and administration thereof is a complex question depending on a large number of factors, and can be affected by labor law, federal and state drug testing laws, anti-discrimination laws, tax and benefits laws, and privacy laws.

### **A. Drug Testing as a Subject of Bargaining**

Whether an employer may unilaterally implement a drug-testing policy when dealing with union employees depends on the status of the individuals, as described in more detail below.

#### *i. Mandatory Subject: Employees*

If an employer wishes to impose a new requirement of drug testing for employees, it is a mandatory subject of bargaining. *Johnson-Bateman Co. & Int'l Ass'n of Machinists and Aerospace Workers*, 295 N.L.R.B. 180, 182 (1989). In order to waive a new drug testing policy, the waiver must be unmistakable and clear. *Id.* Said differently, to implement a new drug testing policy, it must be either provided for in the CBA or waived by the union.

#### *ii. Mandatory Subject: Hiring Hall Registrants*

Because of the unique short-term nature of employment in the construction industry, it is possible that the testing of applicants would be considered a mandatory subject of bargaining (and thus no unilateral implementation or changes could be made). This is because applicants may be treated as protected “employees” under the NLRA if referred through an exclusive hiring hall, particularly in the construction industry. *See Houston Chapter, Associated General Contractors of Am., Inc. & Construction & General Laborers Union, Local No. 18*, 143 N.L.R.B. 409 (1963) (finding that applicants referred through a hiring hall could be considered “employees” for the purpose of mandatory bargaining in part because “we are dealing with a multiemployer situation in the building and construction industry, an industry characterized by intermittent employment . . . . In this industry, employees who have been laid off by one employer are customarily desirous of employment with others in the industry, and are still employees within the meaning of the Act as they seek employment with such other employers.”).

Consistent with this, the NLRB has opined that drug testing of registrants of an exclusive hiring hall constitutes a mandatory subject of bargaining. *In re Cardi Corp.*, 2005 NLRB GCM 89, Case No. 1-CA-42494 (NLRB OGC Oct. 31, 2005). The NLRB has further opined that a non-exclusive hiring hall drug testing program may be subject to mandatory bargaining if the hiring hall is exclusive to the union. *In re Cardi Corp.*, 2005 NLRB GCM 89, Case No. 1-CA-42494 (NLRB OGC Oct. 31, 2005) (while employer was free to hire off-the-street, union was required to comply with request for employees).

#### *iii. Permissive Subject: Ordinary Applicants*

Because ordinary applicants for employment are not considered “bargaining unit employees,” and because such a test performed on applicants would not “materially or significantly affect unit

employees' terms and conditions of employment," a drug test policy regarding applicants is generally not a subject for mandatory bargaining. *Star Tribune & Newspaper Guild of the Twin Cities*, 295 N.L.R.B. 543, 547-48 (1989).

However, if certain information regarding applicants who undergo drug testing is related to a mandatory subject of bargaining—such as the elimination of actual or suspected discrimination—it must be furnished to the union upon request. *Star Tribune & Newspaper Guild of the Twin Cities*, 295 N.L.R.B. 543, 549 (1989). This duty to bargain over hiring practices “arises only when the union has made a demand and has communicated information to the employer indicating that it has an objective basis for alleging discrimination.” *NLRB v. USPS*, 18 F.3d 1089, 1100 (3d Cir. 1994).

## **B. Federal and State Drug Testing Laws**

Beyond the difficulty in successfully negotiating a drug-testing policy with a union, there are a number of legal barriers that should be considered.

### *1. Overview of Drug Testing*

There are five general situations where an employer subjects an individual to drug testing.

#### i. Pre-employment testing

Pre-employment testing occurs before an applicant begins work. This testing may allow an employer to withdraw a job offer if the applicant tests positive. It may also serve to dissuade chronic users from applying.

#### ii. Post-accident testing

Post-accident testing occurs after an employee is in an accident. Some policies have monetary limits on the damage caused by an employee before testing is required. Some statutes allow for testing after an injury gives rise to workers' compensation.

#### iii. Random testing

Random testing refers to employees working in safety-sensitive positions, which generally refers to positions where an employee, by the nature of the position held, could cause injury to himself or herself or someone else. Some statutes outline how the employees are to be selected, or how pools are created from which random employees are pulled.

#### iv. Reasonable suspicion testing

Reasonable suspicion testing allows an employer to test employees if the employer has a reasonable suspicion that the employee is under the influence of drugs and/or alcohol. Usually, the rules require an employer to make an objective determination based on required observations that the employee is under the influence of drugs and/or alcohol.

## v. Return-to-duty – Post treatment testing

Return-to-duty testing addresses testing of employees who have previously tested positive at work, and received treatment. Once an employee has complied with the requirements following a positive test, an employer is permitted to return the employee to work and conduct random testing of the employee to ensure that he or she is complying with the treatment program.

### 2. *Federal Level*

There is no overarching federal law allowing or requiring employers to engage in drug testing. Rather, there are several types of employers/employees for which drug testing is mandatory or permissible.

Under Department of Transportation regulations, an employer must engage in drug testing of employees in industries regulated by the Federal Aviation, Railroad, Transportation, and Highway Administrations. Under 49 C.F.R. § 382.103, every individual who operates a commercial motor vehicle subject to the federal commercial driver's license regulations must comply with federal drug testing requirements.

Additionally, under the Federal Drug-Free Workplace Act of 1988, certain federal contractors must agree to provide drug-free workplaces as a precondition to receiving a contract or grant from a federal agency. The Act does not require drug testing specifically, but does require that employers take a number of steps to eliminate the effects of illegal drugs in the workplace, including:

- Publishing notice to employees regarding the drug-free workplace
- Establishing a drug-free awareness program
- Giving each employee engaged in performing the contract a copy of the drug-free notice
- Notify the contracting agency if an employee has violated the policy
- Taking disciplinary action (including requiring rehabilitation services) against such employees
- Making a good faith effort to maintain a drug-free workplace

### 3. *State Level*

Not surprisingly, states vary significantly in their drug testing laws. Approximately 31 states have drug testing statutes, the remaining do not. Of those 31, some are limited (only applying to public employees, for example) while others apply to all employees. Some statutes mandate drug testing while others severely restrict it, depending on the type of drug test (pre-employment, reasonable suspicion, etc.). Further, several states go so far as to even restrict the ability of an employer to terminate an employee for failing a drug test for the first time. *See* Minn. Stat. 181.954, subd. 10 (restricted for first offense unless employee refuses to participate in counseling or rehabilitation or fails to complete program); 26 Maine Rev. Stat. § 685 (requiring an employer to allow an employee to participate in a rehabilitation program before taking adverse action); R.I. Gen. Laws § 28-6.5-1(f)(3) (providing that the penalty for a first positive test may not exceed a

30 day suspension from work); Ver. Stat. § 513(c)(3) (providing that employee may not be terminated for positive test if employee agrees to participate in and completes the employee assistance program).

Because of the wide variation between states, you should consult with local counsel on the particulars of a state. Using Minnesota's statute as an example, here are things you should look for in a drug testing statute.

- Is drug testing required, permissible, or prohibited?
  - No legal duty to test. Minn. Stat. § 181.951, subd. 7.
- What individuals may be tested?
  - All employees and job applicants (if a job offer is made first). Minn. Stat. § 181.951, subs. 1 & 2.
- What information must be set forth in a drug testing policy?
  - Must include: the employees or applicants subject to testing; the circumstances under which testing may be requested; the right to refuse testing and the consequences of refusal; any disciplinary or adverse action that may be taken on a confirmatory test verifying a positive test result; the right to explain a positive test result; any appeal procedures. Minn. Stat. § 181.952, subd. 1.
- What notice of the policy must be given?
  - Must provide written notice to all effective employees upon adoption of the policy, for a previously nonaffected employee upon transfer to a position requiring testing, and for applicants before testing if the job offer is contingent on passing the test. Must also post the policy in an appropriate and conspicuous location. Minn. Stat. § 181.952, subd. 2.
- What types of tests are allowed?
  - Random testing
    - If employees are in safety-sensitive positions or employee as professional athletes subject to a CBA. Minn. Stat. § 181.951, subd. 4.
  - Routine testing
    - If no more than once a year and at least 2-weeks' notice. Minn. Stat. § 181.951, subd. 3.
  - Reasonable suspicion testing
    - If reasonable suspicion that employee is under the influence or has violated drug policy. Minn. Stat. § 181.951, subd. 5.
  - Work-related accident
    - If sustained or caused personal injury, or caused an accident while operating machinery, equipment, or vehicles. Minn. Stat. § 181.951, subd. 5.
  - Post-treatment testing
    - If employee previously required employee to undergo treatment or is participating in treatment, then can do without prior notice for period of up to 2 years following completion. Minn. Stat. § 181.951, subd. 6.
- What licensure or accreditation of the lab is required?

- Certified by National Institute on Drug Abuse, accredited by College of American Pathologists, or licensed under New York Department of Health. Minn. Stat. § 181.953, subd. 1.
- May employer conduct the drug testing?
  - No. Minn. Stat. § 181.953, subd. 4.
- Who must pay for the test?
  - Employer. Minn. Stat. § 181.953, subd. 4.
- What are the chain-of-custody procedures?
  - Must be traceable to the employee from time of collection until deliver to lab, must always be in possession or view of person authorized to handle sample, and must be accompanied by written record of chain-of-custody. Minn. Stat. § 181.953, subd. 5.
- May the employee appeal?
  - Yes, at the request of employee, employer must do retest of original sample. Minn. Stat. § 181.953, subd. 9.
- Does the employee have access to the results?
  - Yes. Minn. Stat. § 181.953, subd. 8.
- May a first-time offender be terminated?
  - No, unless the employee refuses treatment or fails to complete treatment. Minn. Stat. § 181.953, subd. 10(b)(2).
- Are the test results confidential?
  - Generally yes, may only be disclosed to employer and may not be used in criminal action against employee or job applicant. Minn. Stat. § 181.954.
- Does the statute address CBAs?
  - Yes. A CBA may provide greater but not lesser protection that the statute. Minn. Stat. § 181.955, subd. 2.

Regardless of whatever state's law is applicable, here are a number of factors to consider (in light of the applicable law) when constructing a drug testing policy:

- Which employees may be tested?
- When may testing be conducted?
- What kind of testing may be done (blood, urine, etc.)?
- What drugs may be tested for?
- What levels will result in a failed test?
- Who will perform the test?
- Who may receive the results?
- What are the effects of a failed test?
- What rights does an employee have to contest a failed test?
- Does the company have an employee assistance program for rehabilitation/counseling?

### **C. Who May Provide For Drug Testing Programs?**

The SFUA, at Article XII, Section 2, states that the parties are committed to maintaining a drug-free workplace, and will establish a testing program, with an appropriate means of funding. Beyond the obvious of simply having the employer or employee pay for it (if allowable under state law), there are several possibilities of funding: (1) the Health & Welfare Fund; (2) the Joint Apprenticeship and Training Fund; (3) the Industry Fund; (4) the SMACNA Chapter; and (5) a separate entity established strictly for the purpose of administering a drug testing program. The most common payers are JATCs, employers themselves and local SMACNA chapters, while sometimes the industry fund and local health and welfare funds are used. Each has pros and cons, and will be considered in turn.

#### *1. The Local Health & Welfare Fund*

In short, to properly provide for drug testing under a health and welfare fund, the fund documents must provide for it and the collective bargaining agreement must not be inconsistent with the proposition that drug testing would be funded through the health and welfare fund. The best method for accomplishing this program would be to have the CBA establish the drug testing requirements and state that it would be provided through the health and welfare fund, and then have the trustees take action to accept the contributions under the CBA and establish the drug testing program as contemplated by the CBA.

It is important to point out that the Department of Labor has taken the position that a health and welfare fund, which pays for testing for applicants to the apprenticeship program, is providing benefits to non-participants, in violation of ERISA. Although this is not controlling authority, and is not the IRS', it is helpful to understand the DOL's point-of-view on the issue. This argument may be overcome if the CBA and trustee action is taken as set forth above.

#### *2. The Joint Apprenticeship and Training Fund*

A Joint Apprenticeship and Training Fund is subject to ERISA and ordinarily has obtained tax exempt status under the Internal Revenue Code. It is legally permissible for the JATC to conduct such a testing program.

One of the advantages of having the drug testing program through the JATC is that the DOL's argument about providing benefits to non-participants holds less weight since one of the purposes of a JATC is to test and accept applicants for apprenticeship in the Industry. Not all those who apply and are tested will actually enter the Industry. JATC's do not have "participants" unlike Health & Welfare Funds.

#### *3. The Industry Fund*

Industry Funds are normally tax-exempt Trade Associations under Section 501(c)(6) of the Internal Revenue Code. Under Treasury Regulations, a trade association's activities "should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons." 26 C.F.R. §



1.501(c)(6)-1. We are aware of IRS audits of Industry Funds in which the IRS has objected to conducting a drug testing program through the Industry Fund on the grounds that it was for the benefit of the employers and did not promote the Industry.

However, the IRS has also taken the position, albeit in a slightly different context, that “the prevention of drug use by [the companies’] drivers is a legitimate goal of trucking companies, and may be considered a common business interest.” IRS Private Letter Rule 9550001, at 22 (Aug. 23, 1995). In that situation, the Trade Association was actually selling drug testing services to its members. The IRS opined that such an activity could be considered within the “common business interest,” but held that the commercial activity was not tax-exempt.

Additionally, we are aware of a separate organization set up specifically to handle a drug testing program that was granted a 501(c)(6) status by the IRS. Originally, the program attempted to apply for a 501(c)(9) status as an Employee Welfare Benefit Plan. The IRS, after reviewing the application, rejected the 501(c)(9) status and sent the following statement to the applicant:

*Treasury Regulations Section 1.501(c)(6)-1 states that a business league is an association of person having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons.*

*Your organization provides drug free workplace program which is benefitting and improving the business condition of the industry. Therefore, your organization can qualify under IRC 501(c)(6) instead.*

Apparently, how the program is packaged and submitted to the IRS will determine whether or not a tax exempt status can be obtained.

#### *4. The SMACNA Chapter*

SMACNA Chapters are also Section 501(c)(6) organizations (like the Industry Funds) and the same issues would apply to the SMACNA Chapter as applies to Industry Funds. However, presumably, the Chapter has a more restrictive membership than the Industry Fund since not all Industry Fund contributors may be Chapter members. Since the Fund focuses on improving the business condition of the entire Industry, it may be viewed by the IRS that the Industry Fund would be a more appropriate vehicle to use than the Chapter.

However, note that in the DOL matter discussed above, the local Contractors’ Association was viewed by the DOL as an appropriate entity to pay for the drug testing program. Keep in mind that this was the DOL, not the IRS.

### 5. *Separate Specific Entity*

If the Health & Welfare Fund or the JATC are not candidates to conduct the drug testing program, then instead of using the Industry Fund or the SMACNA Chapter to conduct the program, it is recommended that a separate entity be established to conduct the program. The tax exemption submittal can be made to the IRS tailored to specifics of the program, that way it can be determined up front whether or not the IRS will grant a tax exempt status.

The difficulty with having an existing Chapter or Industry Fund establish the program is that it could jeopardize the tax exempt status of either the Industry Fund or the Chapter. To avoid this, the Industry Fund or Chapter would have to submit a request for a Determination Letter from the IRS based upon the revised activities of the Fund or the Chapter. That could lead to either an IRS audit of the Fund or Chapter or scrutiny of the Fund or Chapter activities.

It is far preferable to establish a separate not-for-profit corporation to handle strictly the drug testing program. If for some reason the tax exempt status could not be obtained, then the appropriate tax returns could be filed. If the expenses approximately equal the contributions, there would be very little tax consequences to the operation of such a program.

#### **D. Privacy Considerations**

As discussed previously, some states' drug testing laws include privacy provisions. For instance, in Minnesota, a lab may only disclose to the employer the test result data regarding the presence or absence of drugs, alcohol, or their metabolites in the sample tested. Minn. Stat. § 181.954, subd. 1. Further, such results are confidential and may not be disclosed by the employer to another employer or third party without the written consent of the employee/applicant. Minn. Stat. § 181.954, subd. 2.

The federal law governing medical data is HIPAA (the Health Insurance Portability and Accountability Act). Most likely, the entity conducting the examination (a nurse or clinic or the like) would be considered to be a "health care provider." The regulations define "health care" in part as services relating to the health of an individual, which includes diagnostic services "with respect to the physical or mental condition, or functional status, of an individual." 45 C.F.R. § 160.103. Thus, the employee or applicant would need to authorize the testing entity to disclose the results to the employer, unless it is the limited situation relating to a work-related injury and the employer has a duty under federal or state law (such as OSHA) to keep records of or act on such information. See U.S. Dep't of Health & Human Services, *available at* <http://www.hhs.gov/hipaa/for-professionals/faq/301/does-the-hippa-public-health-provision-permit-health-care-providers-to-disclose-information-from-pre-employment-physicals/index.html>.

## **II. MEDICAL MARIJUANA**

As if drug testing law was not complicated enough, the influx of medical marijuana laws have added yet more complexity to drug testing issues. There is great variation between the different

states that allow medical marijuana (even more so considering the variety between drug testing statutes), so it is advisable to seek legal counsel on your particular state's laws.

## **A. Overview of Marijuana Laws**

### *1. What is Marijuana?*

Broadly speaking, marijuana is a plant, parts of which contain the psychoactive drug THC (tetrahydrocannabinol). It is generally smoked or ingested. In the short term following such a use of marijuana, THC acts as a muscle relaxant that may impair short-term memory, impair motor coordination, alter judgment, and cause paranoia and psychosis.

The Federal Controlled Substances Act defines marijuana as:

- 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.

21 U.S.C. § 802(16).

Under federal law, marijuana is NOT:

- 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

21 U.S.C. § 802(16).

Marijuana is classified as a Schedule 1 substance under the Controlled Substances Act, meaning that it has “a high potential for abuse,” “has no currently accepted medical use in treatment in the United States,” and “there is a lack of accepted safety for use of the drug or other substance under medical supervision.” 21 U.S.C. § 812(c). As a result, it is illegal under federal law to possess or manufacture marijuana. 21 U.S.C. § 844(a).

However, the Obama Administration has sent several memoranda to its federal prosecutors instructing them to exercise prosecutorial discretion when considering whether to charge an individual, establishing a situation where a prosecutor may choose not to prosecute certain individuals possessing small amounts of medically-purposed marijuana.

See <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

### *2. How Does One Test for Marijuana?*

Marijuana use can be detected in urine, hair, saliva, and blood. The most common test is for urine, but it does not actually test for cannabis, but rather for its metabolite: THC-COOH. The other three tests are for THC itself, but may have different costs or effective date ranges. In any

event, these tests identify the presence of THC or its metabolites, not whether and to what extent a person is intoxicated.

### *3. State Legalization*

States in recent years have been legalizing marijuana in several different ways, despite federal law to the contrary. States currently vary significantly in their treatment of marijuana:

- 4 states and the District of Columbia have legalized recreational marijuana
  - Alaska, Colorado, Oregon, Washington
- 24 states plus the District of Columbia and Guam have comprehensive public medical marijuana and cannabis laws
  - Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Guam, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington
  - Advocates claim that marijuana may aid in the treatment of conditions relating to pain relief, nausea, spasticity, and movement disorders. Additionally, it may act as an appetite stimulant and may protect against some types of tumors.
  - Comprehensive programs typically have, to some varying degree:
    - Protection from criminal penalties for using marijuana for a medical purpose
    - Allowance of access to marijuana through home cultivation or dispensaries
    - Allowance of a variety of strains, including more than “low THC”
    - Allowance of either smoking or vaporization of marijuana products, plant materials, or extract
  - Such programs usually list the medical conditions that must be diagnosed in order to legally possess and use medical marijuana
    - Varies significantly from state to state, but could include treating the follow conditions (and/or alleviating the symptoms thereof): Cancer, Glaucoma, HIV, AIDS, Hepatitis C, Crohn’s, Alzheimer’s, PTSD, Epilepsy, Rheumatoid arthritis, Multiple Sclerosis, Lupus, Parkinson’s, Tourette’s, Traumatic Brain Injury, Fibromyalgia, ALS, Hepatitis C, Muscular Dystrophy, Anorexia
- 17 additional states have more limited laws allowing for the use of low THC, high cannabidiol products (which are nonpsychoactive) for medical reasons
  - These programs allow products with low amounts, to a varying degree, of THC
  - Most, but not all, provide protection from criminal penalties
  - Some are incredibly restricted, only allowing a particular university to dispense the drug

### **B. Disability Discrimination**

Because medical marijuana is taken to alleviate a medical condition, an employee might argue that they are entitled to an accommodation under anti-disability discrimination laws. At issue here is whether an employee who ingests medical marijuana could be fired for failing a drug test.

Federal courts that have considered this issue have rejected any accommodation requirement. Under state law, as will be seen below, even the most protective states do not allow an employee to show up to work intoxicated or ingest marijuana on the job, but vary in other respects with how employers may treat medical marijuana users. Several expressly provide that an employer may not terminate or discipline an employee for a mere positive test for medical marijuana, several still allow an employer to do so, and for some the result is ambiguous.

### 1. Federal Law

Broadly speaking, the Americans with Disabilities Act prohibits discrimination in employment on the basis of disability. The statute specifically provides that the term “individual with a disability” does not include “an individual who is currently engaging in the illegal use of drugs, when the [employer] acts on the basis of such use.” 42 U.S.C. § 12210(a). However, this does not include: (1) an individual who has successfully completed a rehabilitation program and is no longer using illegal drugs; (2) an individual currently in such a program and no longer using illegal drugs; or (3) an individual erroneously regarding as engaging in the illegal use of drugs. 42 U.S.C. § 12210(b).

The statute defines “drugs” as a controlled substance as defined in the Controlled Substances Act. 42 U.S.C. § 12210(d). By its plain meaning, this would include marijuana. The statute further defines “illegal use of drugs” specifically as the use of drugs which is unlawful under the Controlled Substances Act (21 U.S.C. § 812), but excludes “the use of a drug taken under supervision by a licensed health care professional.” This is ambiguous as to whether the use of medical marijuana would be an “illegal use of drugs.” While allowed by state law, medical marijuana is still illegal under federal law. Several federal courts have come to the conclusion that medical marijuana use is still an “illegal use of drugs” under federal law and therefore not protected by the ADA. *See James v. City of Costa Mesa*, 684 F.3d 825, 834 (9th Cir. 2012); *Garcia v. Tractor Supply Co.*, No. 15-cv-00735, 2016 U.S. Dist. LEXIS 3494 (D. N.M. Jan. 7, 2016). However, this just means that an employer need not accommodate medical marijuana usage under federal law, and that an employee may be terminated for such use. An employer could still be liable under the ADA if it used marijuana use as a pretext to fire an employee for his or her disability. *See EEOC v. Pines of Clarkston*, 2015 U.S. Dist. LEXIS 55926 (E.D. Mich. April 29, 2015) (denying employer’s summary judgment motion because genuine issue of material fact as to whether applicant was rejected because of medical marijuana use or because of epilepsy).

### 2. State Law

Most (but not all) states have their own version of anti-disability discrimination statutes. However, the 24 states (plus D.C. and Guam) that have legalized medical marijuana vary significantly in their approach to whether medical marijuana usage qualifies for anti-discrimination protection. They can be generally lumped into the following categories: (1) the statute prohibits discrimination and protects employees with a failed drug test, but allows termination or discipline for on-site use or intoxication; (2) the statute prohibits discrimination, but allows termination or discipline for on-site use or intoxication; (3) the statute prohibits discrimination for status as a permit holder but allows termination or discipline for a positive

drug test; (4) the statute does not address discrimination but rejects the proposition that an employer must accommodate certain uses; and (5) the statute does not directly address the issue. As will be shown, some categories are clear in whether being a mere user of medical marijuana entitles an employer to terminate that employee, while others are not.

i. Statute Prohibits Discrimination Resulting From A Failed Drug Test

These statutes expressly provide that an employer must accommodate a medical marijuana user to a certain degree. While an employer could terminate or discipline an employee for ingesting marijuana on the job or showing up intoxicated, they could not do so merely for a positive test.

- **Arizona:** “Unless a failure to do so would 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 imposing any term or condition of employment or otherwise penalize a person based upon either: 1. The person's status as a cardholder. 2. A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.” Ariz. Stat. § 36-2814(b). HOWEVER:
  - “Nothing in this [medical marijuana] chapter requires . . . an employer to allow the ingestion of marijuana in any workplace or any employee to work while under the influence of marijuana, except that a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.” Ariz. Stat. § 36-2814(a)(3).
- **Delaware:** “Unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal 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 upon either of the following: a. The person's status as a cardholder; or b. A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment.” 16 Del. C. § 4905A(a)(3).
- **Minnesota:** “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 upon either of the following: (1) the person’s status as a patient enrolled in the registry program under sections 152.22 to 152.37; or (2) a patient’s positive drug test for cannabis components or metabolites, unless the patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment.” Minn. Stat. § 152.32, subd. 3(c).

ii. Statute Prohibits Discrimination, But Allows Termination or Discipline for On-Site Use or Intoxication

These statutes prohibit discrimination solely on the basis of being a medical marijuana user. They generally provide, however, that an employer may still terminate or discipline an employee for on-site use or showing up intoxicated. While similar to the statutes in the above section, they do not expressly discuss the effect of drug tests (whether an employee may show up with non-intoxicating traces of medical marijuana in his or her system).

- **Connecticut:** “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 under [the medical marijuana statute]. Nothing in this subdivision shall restrict an employer’s ability to prohibit the use of intoxicating substances during work or hours or restrict an employer’s ability to discipline an employee for being under the influence of intoxicating substances during work hours.” Conn. Gen. Stat. § 21a-408p(b)(3).
- **Maine:** “A person whose conduct is authorized under this chapter may not be denied any right or privilege or be subjected to arrest, prosecution, penalty or disciplinary action, including but not limited to a civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for lawfully engaging in conduct involving the medical use of marijuana authorized under this chapter.” 22 M.R.S. § 2423-E(1). FURTHER: “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. . . . A landlord or business owner may prohibit the smoking of marijuana for medical purposes on the premises of the landlord or business if the landlord or business owner prohibits all smoking on the premises and posts notice to that effect on the premises.” 22 M.R.S. § 2423-E. HOWEVER: “this chapter may not be construed to require: . . . An employer to accommodate the ingestion of marijuana in any workplace or any employee working while under the influence of marijuana.” 22 M.R.S. § 2426(2)(B).
- **Nevada:** “The provisions of this chapter do not . . . require any employer to allow the medical use in the workplace” and do not “Require an employer to modify the job or working conditions of a person who engages in the medical use of marijuana that are based upon the reasonable business purposes of the employer but 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 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.” Nev. Rev. Stat. § 453A.800.

- **Pennsylvania:** “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.” HOWEVER: “Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment. This act shall in no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position.” Medical Marijuana Act, Act of Apr. 17, 2016, P.L. 84, No. 16 § 2103(b).
  
- **New York:** [Note: Repealed effective July 5, 2021]. “Being a certified patient shall be deemed to be having a ‘disability’ under article fifteen of the executive law (human rights law), section forty-c of the civil rights law, sections 240.00, 485.00, and 485.05 of the penal law, and section 200.50 of the criminal procedure law. This subdivision shall not bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance. This subdivision shall not require any person or entity to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding.” NY CLS Pub Health § 3369.
  
- **Rhode Island:** No employer may refuse to employ “a person solely for his or her status as a cardholder.” R.I. Gen. Laws § 21-28.6-4(c). HOWEVER: “Nothing in this chapter shall be construed to require . . . An employer to accommodate the medical use of marijuana in any workplace.” R.I. Gen. Laws § 21-28.6-7(b)(2).

iii. Statute Prohibits Discrimination For Having a Medical Marijuana Permit, But Allows Termination or Discipline For Any Use

This statute somewhat peculiar in that they prohibit discrimination against an employee for their status as a medical marijuana permit holder, but nonetheless allow the employer to terminate an employee for a failed drug test.

- **Illinois:** [Note: Scheduled to be repealed on January 1, 2018]. No employer may penalize a person “solely for his or her status as a registered qualifying patient or a registered designated caregiver, unless failing to do so would put the school, employer, or landlord in violation of federal law or unless failing to do so would cause it to lose a monetary or licensing-related benefit under federal law or rules.” 410 ILCS § 130/40. FURTHER:
  - (a) Nothing in this Act shall prohibit an employer from adopting reasonable regulations concerning the consumption, storage, or timekeeping requirements for qualifying patients related to the use of medical cannabis.
  - (b) Nothing in this Act shall prohibit an employer from enforcing a policy concerning drug testing, zero-tolerance, or a drug free workplace provided the policy is applied in a nondiscriminatory manner.



- (c) Nothing in this Act shall limit an employer from disciplining a registered qualifying patient for violating a workplace drug policy.
- (d) Nothing in this Act shall limit an employer's ability to discipline an employee for failing a drug test if failing to do so would put the employer in violation of federal law or cause it to lose a federal contract or funding.
- (e) Nothing in this Act shall be construed to create a defense for a third party who fails a drug test.
- (f) An employer may consider a registered qualifying patient to be impaired when he or she manifests specific, articulable symptoms while working that decrease or lessen his or her performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence or carelessness in operating equipment or machinery, disregard for the safety of the employee or others, or involvement in an accident that results in serious damage to equipment or property, disruption of a production or manufacturing process, or carelessness that results in any injury to the employee or others. If an employer elects to discipline a qualifying patient under this subsection, it must afford the employee a reasonable opportunity to contest the basis of the determination.
- (g) Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for: (1) actions based on the employer's good faith belief that a registered qualifying patient used or possessed cannabis while on the employer's premises or during the hours of employment; (2) actions based on the employer's good faith belief that a registered qualifying patient was impaired while working on the employer's premises during the hours of employment; (3) injury or loss to a third party if the employer neither knew nor had reason to know that the employee was impaired.
- (h) Nothing in this Act shall be construed to interfere with any federal restrictions on employment including but not limited to the United States Department of Transportation regulation 49 CFR 40.151(e).

410 ILCS § 130/50.

iv. Statute Does Not Address Discrimination, But More Generally Provides that No Accommodation Required for Medical Marijuana Use

These statutes are at first glance ambiguous. Some address whether an accommodation is required for "on-site use," while others address accommodations for more general uses. One interpretation is that they only apply to accommodation for the use of medical marijuana "in the workplace," meaning an employee may only be terminated for ingestion or intoxication at work. Another interpretation is that an accommodation of the use in the workplace means any accommodation, including an accommodation from the ordinary anti-drug policies, thereby allowing termination for a mere presence of marijuana. Several courts, as noted below (including Washington, which has a more protective provision), have taken this latter position.

- **Alaska:** “Nothing in this [medical marijuana] chapter requires any accommodation of any medical use of marijuana . . . . in any place of employment. Alaska Stat. § 17.37.040(d)(1).
  - For recreational: “Nothing in this [recreational marijuana] 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.” Alaska Stat. § 17.38.220(a).
  
- **California:** The medical marijuana law “shall not interfere with an employer’s rights and obligations 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 prohibiting the use of cannabis by employees and prospective employees, or prevent employers from complying with state or federal law.” Cal. Bus. & Prof. Code § 19330.
  - The California Supreme Court has held that, despite that medical marijuana law, an employer may terminate an employee for a positive drug test. *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200 (Cal. 2008).
  
- **Colorado:** “Nothing in this [medical marijuana] section shall require any employer to accommodate the medical use of marijuana in any work place.” Colo. Const. Art. XVIII, § 14(10).
  - For recreational: “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.” Colo. Const. Art. XVIII, § 16(6)(a).
  - POSSIBLE ISSUE: 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 such a restriction: (a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or (b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.”
    - *But see Coats v. Dish Network, L.L.C.*, 303 P.3d 147, 152 (Colo. Ct. App. 2013) (medical marijuana use was not “lawful activity” because it was subject to and prohibited by federal law).
  
- **Hawaii:** “The authorization for the medical use of marijuana in this section shall not apply to: . . . The medical use of marijuana: . . . In the workplace of one’s employment.” Haw. Stat. § 329-122(c)(2)(B).

- **Massachusetts:** “Nothing in this law 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.” ALM GL Pt. I, Title XV, Ch. 94C Appx. § 7.
- **Michigan:** “Nothing in this act shall be construed to require . . . An employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana.” MCLS § 333.26427(c).
- **Montana:** “Nothing in this part may be construed to require . . . an employer to accommodate the use of marijuana by a registered cardholder.” Mont. Code § 50-46-320(4)(b). Further: “Nothing in this part may be construed to: (a) prohibit an employer from including in any contract prohibiting the use of marijuana for a debilitating medical condition; or (b) permit a cause of action against an employer for wrongful discharge pursuant to 39-2-904 or discrimination pursuant to 49-1-102.” Mont. Code § 50-46-320(5).
  - The Montana Supreme Court has held that an employer may terminate an employee for using medical marijuana. *Johnson v. Columbia Falls Aluminum Co., LLC*, 2009 Mont. LEXIS 120 (Mont. Feb. 25, 2009).
- **New Hampshire:** “Nothing in this chapter shall be construed to require . . . Any accommodation of the therapeutic use of cannabis on the property or premises of any place of employment . . . . This chapter shall in no way limit an employer’s ability to discipline an employee for ingesting cannabis in the workplace or for working while under the influence of cannabis.” N.H. Rev. Stat. § 126-X:3(III)(c).
- **New Jersey:** “Nothing in this act shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace.” N.J. Stat. § 24:6I-14.
- **Oregon:** “Nothing in ORS 475B.400 to 475B.525 requires: . . . An employer to accommodate the medical use of marijuana in the workplace.” Or. Rev. Stat. § 475B.413(2).
  - The Oregon Supreme Court has held that, notwithstanding the medical marijuana statute, an employer may terminate an employee for a positive drug test. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010).
  - For recreational: “ORS 475B.010 to 475B.395 may not be construed . . . [t]o amend or affect state or federal law pertaining to employment matters.” Or. Rev. Stat. § 475B.020(2).
- **Washington:** [Note: Effective July 1, 2016]. “Nothing in this chapter requires any accommodation of any on-site medical use of marijuana in any place of employment.” Rev. Code Wash. § 69.51A.060(4).
  - The Washington Supreme Court has held (under the previous version of the statute) that an employer may discharge an employee for medical marijuana use. *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 257 P.3d 586 (Wash. 2011).

- For recreational: does not speak to employment or discrimination.

v. Statute Does Not Directly Address Issue

These statutes do not directly address the issue of whether an employer may discriminate or whether an employer must provide an accommodation to a medical marijuana user. Some imply that an employer may still be able to freely terminate such an employee because they provide that the act is criminal, while others do not address employment at all.

- **District of Columbia:** Nothing regarding employment or discrimination. D.C. Code §§ 7-1671.01-.13; C.D.C.R. ch. 22.
  - For recreational: Nothing regarding employment or discrimination. D.C. Code § 48-1201.
- **Guam:** [Note- these are proposed rules; have not yet been officially adopted]. Nothing regarding employment or discrimination. 25 Guam Admin. R. & Regs. § 14001.
- **Maryland:** “This subtitle may not be construed to authorize any individual to engage in, and does not prevent the imposition of any civil, criminal, or other penalties for, the following: . . . smoking marijuana or cannabis on a private property that [is] subject to a policy that prohibits the smoking of marijuana or cannabis on the property.” Md. Code Ann. § 13-3314(a)(5). However: “The provisions of subsection (a)(5) of this section do not apply to vaporizing cannabis.” Md. Code Ann. § 13-3314(b).
- **New Mexico:** “Participation in a medical use of cannabis program by a qualified patient or primary caregiver does not relieve the qualified patient or primary caregiver from . . . criminal prosecution or civil penalty for possession or use of cannabis . . . in the workplace of the qualified patient’s or primary caregiver’s employment.” N.M. Stat. Ann. § 26-2B-5(A)(3)(c).
- **Vermont:** “This subchapter shall not exempt any person from arrest or prosecution for: Being under the influence of marijuana while . . . in a workplace or place of employment.” Ver. Stat. § 4474c(a)(1)(C).