

CANNABIS AND EMPLOYMENT LAW

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In the Weeds: Marijuana Legalization & Employment Laws

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Over the last several years, attitudes towards marijuana use have rapidly changed in the United States. According to a 2018 Pew Research Survey, 62 percent of U.S. respondents said marijuana use should be legal, compared to 31 percent who supported legalization in the year 2000.¹ As of the date of this article, thirty-three states and Washington D.C. have legalized medical marijuana use, and 11 states have legalized recreational marijuana use.²

In this rapidly changing landscape, many employers are left wondering how marijuana legalization will impact their workplaces, including (1) whether employers can deny employment to applicants or discipline employees who test positive for marijuana, even in a state where marijuana use is legal; (2) whether employers need to modify their workplace policies to address marijuana use; or (3) whether employers have a duty to accommodate medical marijuana use, either at work or outside the workplace. This article summarizes the current, confusing framework of federal statutes, state statutes, and judicial decisions addressing employers' rights and obligations relating to marijuana use, and provides practical advice for employers in states where medical or recreational marijuana use has been legalized.

¹ Hannah Hartig & Abigail Geiger, About six-in-ten Americans support marijuana legalization, Pew Research Center (October 8, 2018), available at <https://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/>.

² Lisa Nagele-Piazza, The ABCs of THC: What Employers Need to Know, SHRM.org (January 30, 2019), available at <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/what-employers-need-to-know-about-marijuana-laws--.aspx>; John O'Connor, Illinois Becomes 11th State to Allow Recreational Marijuana, AP News (June 25, 2019), available at <https://www.apnews.com/7b793d88f3c84417b83db0f770854960>.

Background on Marijuana Legalization

In 1970, Congress passed the Controlled Substances Act ("CSA"), which banned or regulated certain controlled substances.³ The CSA established five schedules of controlled substances, with Schedule I substances defined as those which have a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision.⁴ Under the CSA's classification system, cannabis remains a Schedule I drug which is illegal to possess, use, cultivate, or sell.⁵

In 1996, California became the first state to allow medical marijuana use when it passed the Compassionate Use Act.⁶ Since then, 32 more states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have passed laws allowing medical marijuana use.⁷ Medical marijuana statutes vary considerably concerning requirements for medical marijuana use, including residency requirements, whether home cultivation is permitted, registration obligations, and limits on the amounts and types of marijuana products that can be used.

In 2012, Washington and Colorado became the first two

³ 21 U.S.C. § 801, et seq.

⁴ 21 U.S.C. § 812(b)(1).

⁵ See Drug Scheduling, Drug Enforcement Agency, available at <https://www.dea.gov/drug-scheduling> (last accessed May 21, 2019).

⁶ Ca. Health and Safety Code § 11362.5.

⁷ National Conference of State Legislatures, "State Medical Marijuana Laws," (March 25, 2019) available at <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (last accessed May 21, 2019). States allowing medical marijuana use include Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Washington, and West Virginia.

states to legalize marijuana for recreational use.⁸ Since then, nine other states – including Alaska, California, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, and Vermont – and the District of Columbia have also legalized recreational marijuana use.⁹

In August 2013, amid various states' marijuana legalization efforts, the U.S. Department of Justice ("DOJ") updated its marijuana enforcement policy and announced that while marijuana remained illegal under federal law, the DOJ was "deferring its right to challenge" state marijuana legalization laws.¹⁰ The DOJ further stated that it expected states to establish "strict regulatory schemes" in alignment with eight enforcement priorities established by the DOJ, but that the DOJ would not prioritize enforcement of the federal prohibition on marijuana beyond those eight priorities.¹¹ But in 2018, the DOJ reversed course and announced a further update to its marijuana enforcement policy, including "a return to the rule of law and the rescission of previous guidance documents."¹² The DOJ's 2018 memorandum specifically stated that prosecutors would continue to enforce the federal prohibition on marijuana.¹³

Employers' Ability to Refuse to Hire An Applicant Testing Positive for Cannabis

In every state, employers remain free to create and enforce drug-free workplace policies, including potential discipline or termination when a legal or illegal drug impairs an employee's job performance or creates a safety hazard. For example, when California legalized recreational marijuana use in 2018, the statute expressly

provided that it was not intended to affect "[t]he rights and obligations of public and private employers to maintain a drug and alcohol free workplace" or to "require an employer to permit or accommodate" marijuana use in the workplace."¹⁴ Other state marijuana legalization statutes contain similar provisions.¹⁵

No statute or court decision has required an employer to accommodate an employee's recreational marijuana use, and employers in all states remain free to terminate, discipline, or refuse to hire recreational marijuana users. In *Coats v. Dish Network, LLC*, the Supreme Court of Colorado analyzed whether a state statute prohibiting employers from discharging employees based on "lawful" out-of-work activities prevented employers from terminating employees for using marijuana.¹⁶ Even though the employee's marijuana use was lawful under Colorado state law, the court found that the federal prohibition on marijuana use rendered the employee's conduct unlawful and outside the gambit of the statute at issue.¹⁷ Thus, the court held that employers could lawfully terminate employees for marijuana use, even though such use was permitted under state law.

Whether Employers Are Required to Reasonably Accommodate Medical Marijuana Use

Notwithstanding the general rule that employers are free to not hire applicants (or to terminate employees) who test positive for cannabis, state law may require reasonable accommodation of employees who use medical marijuana outside of work hours due to a disability. For example, Arizona,¹⁸ Connecticut,¹⁹

⁸ Washington Initiative 502: On Marijuana Reform (Wash. Nov. 6, 2012); Colorado Amendment 64: Use and Regulation of Marijuana (Colo. Nov. 6, 2012).

⁹ Alaska Ballot Measure 2: An Act to tax and regulate the production, sale, and use of marijuana (Alaska Nov. 4, 2014); California Proposition 64: Adult Use of Marijuana Act (Cal. Nov. 8, 2016); District of Columbia Initiative 71: Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Act of 2014 (D.C. Nov. 4, 2014); Maine Question 1: An Act To Legalize Marijuana (Me. Nov. 8, 2016); Massachusetts Question 4: The Regulation and Taxation of Marijuana Act (Mass. Nov. 8, 2016); Michigan Proposal 1: Michigan Regulation and Taxation of Marijuana Act (Mich. Nov. 6, 2018); Nevada Question 2: Initiative to Regulate and Tax Marijuana (Nev. Nov. 8, 2016); Oregon Measure 91: Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act (Ore. Nov. 4, 2014); and No. 86: An act related to eliminating penalties for possession of limited amounts of marijuana by adults 21 years or older, H.511 (Vt. 2017); Cannabis Regulation and Tax Act, HB 1438 (Ill. June 25, 2019).

¹⁰ Justice Department Announces Update to Marijuana Enforcement Policy, U.S. Department of Justice (Aug. 29, 2013), available at <https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy>.

¹¹ *Id.*

¹² Justice Department Issues Memo on Marijuana Enforcement U.S. Department of Justice (Jan. 4, 2018), available at <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement>.

¹³ *Id.*

¹⁴ Ca. Health and Safety Code § 11362.45(f).

¹⁵ See, e.g., Alaska Ballot Measure 2: An Act to tax and regulate the production, sale, and use of marijuana (Alaska Nov. 4, 2014) ("not intended to require an employer to allow marijuana use, transportation, possession, sale, growth, or transfer, or prevent an employer from prohibiting these activities"); Colorado Amendment 64: Use and Regulation of Marijuana (Colo. Nov. 6, 2012) (provisions not intended to "affect the ability of an employer to restrict the use or possession of marijuana by employees").

¹⁶ 350 P. 3d 849 (2015). Though the *Coats* decision involved a medical marijuana user, the same analysis would presumably apply to a recreational marijuana user now that recreational marijuana use has been legalized in Colorado.

¹⁷ *Id.*

¹⁸ Ariz. Rev. Stat. § 36-2813 (2015) (employer may not discriminate against or refuse to hire a medical marijuana cardholder, unless failure to do so would cause the employer to lose a monetary or licensing related benefit under federal law or regulations).

¹⁹ Conn. Gen. Stat. § 21a-408p(b)(3) (2017) ("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 sections 21a-408 to 21a-408n, inclusive.").

Delaware,²⁰ Illinois,²¹ Minnesota,²² Nevada,²³ New York,²⁴ and Rhode Island²⁵ have statutes expressly prohibiting employers from discriminating against employees based on their status as medical marijuana patients. Recently, employers in Connecticut and Rhode Island challenged their respective state statutes, arguing that they were preempted by federal law making marijuana use illegal. Both the federal district court in Connecticut and the Rhode Island Superior Court upheld the state statutes, finding no preemption.²⁶

Some states are considering adopting similar protections. For example, California's legislature is considering a bill which would require employers to reasonably accommodate medical marijuana use for the treatment of a known physical disability, mental disability, or medical condition.²⁷ The law would provide an exception "if hiring or failing to discharge an employee would cause the employer to lose a monetary or licensing-related benefit under federal law," and would allow employers to terminate the employment of, or take corrective action against, any employee who is impaired at work because of marijuana.²⁸

Even in states lacking a statute requiring accommodation of medical marijuana cardholders, a court may determine that such an obligation exists. For example, in *Barbuto v. Advantage Sales and Marketing, LLC*, the Supreme Court of Massachusetts found that a medical marijuana

user who was terminated for testing positive for marijuana could pursue a state-law employment discrimination claim against her employer.²⁹ The court rejected the employer's argument that allowing medical marijuana use was a "facially unreasonable" accommodation because it is illegal under federal law, instead holding that even where an employer's policies prohibit marijuana use, the employer would be obligated to engage in an interactive process to determine "whether there were equally effective medical alternatives ... whose use would not be in violation of its policy."³⁰ The court further held that an employer who wishes to deny employment based solely on an applicant or employee's use of medical marijuana bears the burden of demonstrating that the medical marijuana use would impose an undue hardship.³¹ The court based its analysis on Massachusetts's medical marijuana statute, which stated that medical marijuana patients shall not be denied "any right or privilege" on the basis of their marijuana use; although the statute did not expressly address employment, the court found that the phrase "right or privilege" encompassed the right to a reasonable accommodation.³²

Adding to the confusion, courts in other states have found that employers have no obligation to reasonably accommodate medical marijuana use. For example, in *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, the Oregon Supreme Court held that because Oregon's medical marijuana statute conflicted with the federal Controlled Substances Act, an employer need not accommodate the use of medical marijuana.³³ The court found that the state and federal statutes conflicted because the Oregon statute's affirmative authorization of medical marijuana – which the federal law prohibits – "stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act."³⁴ Based on the Supremacy Clause, the Oregon Supreme Court found that the federal law preempted the state law, and employers had no obligation to engage in an interactive process or to otherwise accommodate medical marijuana use.³⁵ Courts in other states have taken a similar approach in finding that employers need not reasonably accommodate medical marijuana use.³⁶

20 Del. Code. Ann. tit. 16 § 4905A(3) (2019) ("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 of condition of employment, or otherwise penalize a person" based on that person's status as a cardholder or a registered qualifying patient's positive drug test for marijuana, unless the patient used, possessed, or was impaired by marijuana at work or during work hours).

21 410 Ill. Comp. Stat. 130/40 ("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, 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").

22 Minn. Stat. § 152.32 (employer cannot discriminate against a person in hiring, termination, or any term or condition of employment based on medical marijuana use unless failure to do so would violate federal law or cause employer to lose a monetary or licensing-related benefit under federal law).

23 Nev. Rev. Stat. § 453A.800 ("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 pose a threat of harm or danger or undue hardship or prohibit the employee from fulfilling his or her responsibilities).

24 N.Y. Pub. Health Law § 3369 (being a certified medical marijuana user qualifies as having a disability under anti-discrimination laws).

25 21 R.I. Gen. Laws § 21-28.6-4(d) (2018) ("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.")

26 *Noffsinger v. SSC Niantic Operating Co.*, 273 F. Supp. 3d 326 (D. Conn. 2017) (denying employer's motion to dismiss and finding that "a plaintiff who uses marijuana for medicinal purposes in compliance with Connecticut law may maintain a cause of action against an employer who refuses to employ her for that reason"); *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 WL 2321181 (R.I. Super. May 23, 2017) (granting summary judgment in favor of plaintiff; finding that CSA did not preempt state law authorizing medical marijuana use, and employer's failure to hire the plaintiff based on her status as a medical marijuana user violated state law).

27 Medicinal cannabis: employment discrimination, California Assembly Bill 2069, California Legislative Information (2017-2018), available at https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2069.

28 *Id.*

29 477 Mass. 456 (2017).

30 *Id.* at 463.

31 *Id.*

32 *Id.* at 464.

33 348 Or. 159 (2010).

34 *Id.* at 178.

35 *Id.* at 190.

36 See, e.g., *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225 (D. N.M. 2016) (New Mexico's Compassionate Use Act did not require employers to accommodate medical marijuana use because it – and New Mexico's anti-discrimination law – were both preempted by the Controlled Substances Act); *Swaw v. Safeway, Inc.*, No. C15-939 MJP, 2015 WL 7431106, at *1 (W.D. Wash. Nov. 20, 2015) ("Washington law does not require employers to accommodate the use of

Even in states where employers may be required to accommodate medical marijuana use, employers in industries subject to federal regulation can likely demonstrate that accommodating medical marijuana use would be an undue hardship. For example, transportation employers are subject to U.S. Department of Transportation (“DOT”) regulations which prohibit any safety-sensitive employee subject to drug testing under DOT regulations from using marijuana.³⁷ Moreover, federal government contractors and recipients of federal grants are obligated to comply with the federal Drug Free Workplace Act, which requires employers to make “a good faith effort ... to maintain a drug-free workplace” and prohibits employees from using controlled substances in the workplace.”³⁸

Finally, it is important to note that no legal authority has yet required an employer to accommodate medical marijuana use during work hours or while at work. Indeed, the Delaware statute requiring medical marijuana accommodation expressly excludes marijuana use during work hours.³⁹ Thus, employers in all states may continue to adopt and enforce policies prohibiting the use of marijuana while at work or during work hours.

Guidance for Employers in States Where Marijuana Use is Legal

A number of states have already passed legislation

requiring employers to accommodate medical marijuana use. Although judicial precedent in several other states suggests that employers in those states need not accommodate medical marijuana use, the change in attitudes towards marijuana and growing trend towards marijuana legalization may lead to those authorities becoming overruled, whether by statute or by further judicial decision. Thus, the following guidelines are intended for employers in any state where medical or recreational marijuana use is legal:

1. Continue to enforce workplace policies preventing the use of alcohol, marijuana, and illegal drugs at work or during work hours. Ensure that these policies expressly identify marijuana as a prohibited substance, instead of referring to “illegal drugs” since that phrase may no longer encompass marijuana.
2. Determine whether any federal statute or regulation requires your organization to maintain a drug-free workplace or decline to employ any applicant testing positive for marijuana.
3. Notify prospective employees that any pre-employment drug screen may test for cannabis, and that testing positive for cannabis may disqualify the applicant from employment.
4. If a prospective or current employee notifies you of medical marijuana use, consult with counsel to determine whether a reasonable accommodation is required or feasible.

medical marijuana where they have a drug-free workplace, even if medical marijuana is being used off site to treat an employee’s disabilities, and the use of marijuana for medical purposes remains unlawful under federal law.”); *Ross v. Ragingwire Telecommunications, Inc.*, 42 Cal. 4th 920, 930 (2008) (“[G]iven the Compassionate Use Act’s modest objectives and the manner in which it was presented to the voters for adoption, we have no reason to conclude the voters intended to speak so broadly, ... as to require employers to accommodate marijuana use.”); *Lambdin v. Marriott Resorts Hospitality Corp.*, No. 16-00004 HG-KJM, 2017 WL 4079718 (D. Haw. Sept. 14, 2017) (granting summary judgment for employer that terminated an employee who tested positive for cannabis; employer need not accommodate medical cannabis use because all cannabis use remains illegal under federal law).

³⁷ 49 CFR §§ 40.1(b), 40.11(a).

³⁸ 41 U.S.C. §§ 8102(a), 8103(a).

³⁹ See, e.g., Del. Code. Ann. tit. 16 § 4905A(3) (2019) (prohibiting discrimination based on a person’s status as a medical marijuana cardholder or a registered qualifying patient’s positive drug test for marijuana, unless the patient used, possessed, or was impaired by marijuana at work or during work hours).



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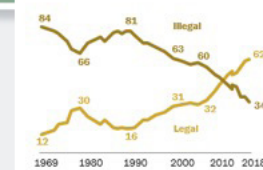


Rapidly Changing Attitudes

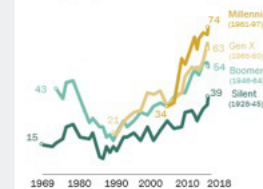
- 2000 Pew Research Study:
 - 31% believe marijuana use should be legal
- 2018 Pew Research Study:
 - 62% believe marijuana use should be legal

U.S. public opinion on legalizing marijuana, 1969-2018

Do you think the use of marijuana should be made legal, or not? (%)



% who say marijuana should be made legal



Note: Don't know responses not shown.
Source: Survey of U.S. adults conducted Sept. 18-24, 2018.

PEW RESEARCH CENTER

Rapidly Changing Laws

- 33 states and Washington D.C. have legalized medical marijuana
- 11 states have legalized recreational marijuana



Lingering Questions for Employers

- Can employers deny employment to applicants or discipline applicants who test positive for marijuana?
- Should employers modify their workplace policies to specifically address marijuana use?
- Do employers have a duty to accommodate medical marijuana use, either at work or outside the workplace?

Marijuana Legalization Background

- 1970: Controlled Substances Act; marijuana is a Schedule I substance
- 1996: California is the first state to allow medical marijuana use
- 2012: Washington and Colorado became the first two states to legalize recreational marijuana use



DOJ Reversals on Marijuana Enforcement

- August 2013: DOJ announces that it will “defer[] its right to challenge” state marijuana legalization laws and deprioritize enforcement of federal prohibition on marijuana
- January 2018: DOJ announces a “return to the rule of law and the rescission of previous guidance documents”



What's an Employer to Do?

- Employers remain free to create and enforce drug-free workplace policies, including discipline when employees are impaired at work
- No statute or court decision has required an employer to allow recreational marijuana use
- *Coats v. Dish Network, LLC*, 350 P. 3d 849 (2015): state statute prohibiting termination based on "lawful" out-of-work activities did not extend to marijuana use



Marijuana and Reasonable Accommodation

- Several states have statutes prohibiting employers from discriminating against employees based on status as medical marijuana patients
 - Arizona, Connecticut, Delaware, Illinois, Minnesota, Nevada, New York, and Rhode Island
- Employers in Connecticut and Rhode Island challenged those statutes on preemption grounds; the courts found no preemption
- California considering a similar measure



Marijuana and Reasonable Accommodation

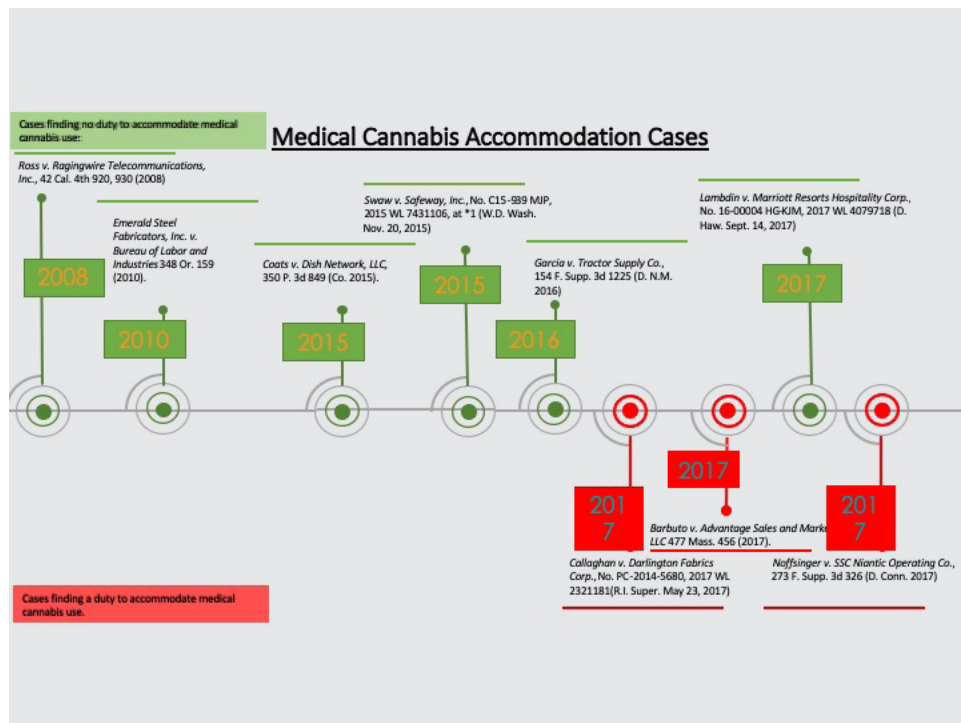
- Even in states lacking a statute requiring accommodation of medical marijuana use, a court may determine that such an obligation exists
- *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (2017): allowed medical marijuana user who was terminated for testing positive for marijuana to pursue a state-law employment discrimination claim



Marijuana and Reasonable Accommodation

- Courts in other states have found no obligation to reasonably accommodate medical marijuana use:
 - Oregon (*Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 348 Or. 159 (2010))
 - New Mexico (*Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225 (D. N.M. 2016))
 - Washington (*Swaw v. Safeway, Inc.*, No. C15-939 MJP, 2015 WL 7431106, at *1 (W.D. Wash. Nov. 20, 2015))
 - California (*Ross v. Ragingwire Telecommunications, Inc.*, 42 Cal. 4th 920, 930 (2008))
 - Hawaii (*Lambdin v. Marriott Resorts Hospitality Corp.*, No. 16-00004 HG-KJM, 2017 WL 4079718 (D. Haw. Sept. 14, 2017))





Marijuana and Reasonable Accommodation

- Importantly, no legal authority has yet required an employer to accommodate medical marijuana use during work hours or while at work



Industry-Specific Regulations

- Transportation employers: U.S. Dept. of Transportation regulations prohibit safety-sensitive employees from using marijuana
- Federal contractors and recipients of federal grants: required to make a “good faith effort ... to maintain a drug-free workplace”



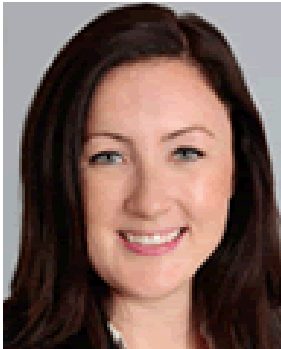
Takeaways for Employers

- Continue to enforce workplace policies preventing the use of alcohol, marijuana, and illegal drugs
- Ensure that policies expressly identify marijuana as a prohibited substance, instead of “illegal drugs”
- Determine whether any federal statute or regulation requires your organization to maintain a drug-free workplace or decline to employ applicants testing positive for marijuana



Takeaways for Employers

- Notify prospective employees that any pre-employment drug screen may test for cannabis, and testing positive may disqualify the applicant from employment
- If a current or prospective employee notifies you of medical marijuana use, consult with counsel to determine whether reasonable accommodation is required



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Rebecca Stephens counsels clients on developing and implementing sound employment policies, conducting workplace investigations, and administering separations from employment. She also represents employers in a wide range of matters in both federal and state courts, including wage and hour disputes and wrongful termination, retaliation, and discrimination cases.

Rebecca's clients range from small businesses to global corporations. She advises employers on day-to-day employment matters, including challenging issues relating to accommodations and leaves of absence. She also advises clients on practices and policies related to termination, including negotiating severance and separation agreements. Rebecca takes a practical, solutions-focused approach and understands the importance of tailoring her advice to each employer's needs, goals, and culture.

In her litigation practice, Rebecca has experience with class and representative actions and single-plaintiff cases in federal and state courts and before arbitrators. She also represents clients before administrative agencies including the DLSE, the EEOC, and the DFEH.

Rebecca served as a law clerk and attorney-advisor to the Honorable Jennifer Gee of the U.S. Department of Labor's Office of Administrative Law Judges and as a judicial extern to the Honorable Ruben Castillo of the U.S. District Court for the Northern District of Illinois.

Services

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Memberships and Affiliations

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- Board Member, Northwestern Law Alumni Club of San Francisco
- Member, Development Committee, Mission Graduates

Education

- Northwestern University School of Law (J.D., 2013) - cum laude, individual comment editor, Journal of Criminal Law and Criminology
- University of Maryland (B.A., 2007)

